

IN THE COURT OF APPEALS OF IOWA

No. 3-374 / 92-1647

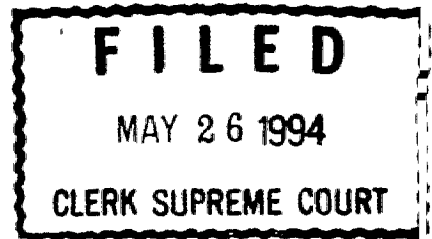
PAUL D. PALMER,

Plaintiff-Appellee,

vs.

TANDEM MANAGEMENT SERVICES, INC.,
A California Corporation;
HILLVIEW ASSOCIATES, A California
General Partnership;
WILLIAM E. CAVANAUGH, Individually
and as a General Partner of Hillview Associates,
and NORMAN I. TATCH, Individually and as a General
Partner of Hillview Associates,

Defendants-Appellants.



Appeal from the Iowa District Court for Polk County,
Gene L. Needles, Judge.

The defendants appeal a district court decision denying
their motion to vacate an order for the examination of
judgement debtor Cavanaugh. **APPEAL DISMISSED.**

William E. Cavanaugh and Norman I. Tatch, pro se,
Costa Mesa, California, for appellants.

Richard M. LaJeunesse of Dreher, Simpson, Jensen,
Sellers, Harvey, Butters, Kaiser & Abels, Des Moines, for
appellee.

Considered by Hayden, P.J., and Huitink, J., and Keefe,
S.J.*

*Senior judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

·KEEFE, S.J.

In a previous legal action plaintiff Paul D. Palmer was awarded money damages against defendants Tandem Management Services, Inc., Hillview Associates, William E. Cavanaugh and Norman I. Tatch. Judgment was entered on October 28, 1991. Defendants appealed the judgment. See Palmer v. Tandem Management Services, Inc., 505 N.W.2d 813 (Iowa 1993).

Defendants did not file a supersedeas bond, which allowed Palmer to take steps to collect the judgment while the appeal was pending. On January 14, 1992, Palmer filed an application for an order placing the judgment on the lis pendens file. Palmer claimed Cavanaugh and Tatch were general partners in Tandem/QCA Income Partners III, which owned property in Polk County, Iowa. The district court's calendar entries show the court ruled on the application January 17, 1992.

On March 23, 1992, Palmer filed an application for examination of judgment debtors. On April 23, 1992, the district court ordered defendants to appear at the Polk County Courthouse at 9:00 a.m. on May 5, 1992. A telephone deposition of Cavanaugh, who lives in California, was taken on May 5, 1992. Cavanaugh stated he had not received the court's order of April 23, but agreed to the deposition.

Cavanaugh denied any interest in property in Polk County. He stated he and Tatch had sold their interest in the property in 1988. Cavanaugh did not have all requested

information available at that time, but agreed to provide Palmer with the information at a later date.

On May 18, 1992, defendants filed a motion to vacate the order for examination of judgment debtors. They claimed Palmer had not complied with the requirements of Iowa Code chapter 630. On September 9, 1992, the district court denied the motion to vacate. Defendants appealed the district court's order.

On appeal, defendants claim that the lis pendens order did not satisfy the requirements of section 630.1 because it was filed against property not owned by defendants. They also claim that Palmer failed to show he was entitled to a debtor's examination because he did not offer proof the judgment debtors owned property which they refused to apply to the satisfaction of the judgment.

Palmer claims: (1) we lack jurisdiction to consider the appeal because a ruling on a motion to vacate a previous ruling is not appealable; (2) we lack jurisdiction to consider the appeal because the appeal was untimely; (3) defendants waived their right to appeal by complying with the examination of Cavanaugh; and (4) the district court did not abuse its discretion in ordering the examination of judgment debtor.

We first note that we are not convinced this is the type of order from which an appeal may be taken as a matter of right. We believe the district court's order granting examination of the judgment debtor is an interlocutory

order. See Lehigh Sewer Pipe & Tile Co. v. Gjellefeld, 205 Iowa 778, 782, 218 N.W. 475, 477 (1928).

Under Iowa Rule of Appellate Procedure 1(c), we may treat an appeal as an application for interlocutory appeal under rule 2. City of Masonville v. Schmitt, 477 N.W.2d 874, 875 n.1 (Iowa App. 1991). We will only grant relief under rule 1(c) when the facts are such that an interlocutory appeal is warranted. Richers v. Marsh & McClellan Group, 459 N.W.2d 478, 481 (Iowa 1990). We determine this case should be heard as an interlocutory appeal.

We next address the jurisdictional issue raised by plaintiff. Under rule 5(a), an application for interlocutory appeal must be made within thirty days from the date of the ruling or decision appealed from. McGruder v. State, 420 N.W.2d 425, 426 (Iowa 1988) (citing Eggermont v. Service Life Insurance Co., 237 Iowa 301, 303, 21 N.W.2d 761, 762 (1946)). This rule is mandatory and jurisdictional. Brooks v. Engel, 159 N.W.2d 438, 440 (Iowa 1968). An interlocutory appeal which is untimely filed must be dismissed. Id.

We find the appeal is timely because it was filed within thirty days of the district court's ruling on the motion to vacate. Because the district court's order for examination of judgment debtors was interlocutory, we find the time period for filing this appeal began to run on the

date the district court filed its ruling on the motion to vacate. Thus, we have jurisdiction to consider the appeal.

Plaintiff also claims defendants' appeal should be dismissed because defendants waived their right to appeal by complying with the district court's order for examination of judgment debtors. The party relying on the appellate waiver doctrine has the burden to demonstrate a voluntary and knowing waiver. Neylan v. Moser, 400 N.W.2d 538, 541 (Iowa 1987). Waiver is the voluntary relinquishment of a known right. Hegvedt v. Prybil, 223 N.W.2d 186, 188 (Iowa 1974).

Formerly, the appellate courts were quite strict about waiver upon payment of a judgment. Wederath v. Brant, 319 N.W.2d 306, 310 (Iowa 1982). More recently, the appellate waiver rule has been relaxed. Id.

Generally, compliance with a ruling is deemed waiver of the right to appeal. Millsap v. Cedar Rapids Civil Service Commission, 249 N.W.2d 679, 683 (Iowa 1977). In Hense v. G.D. Searle & Co., 452 N.W.2d 440, 444 (Iowa 1990), the supreme court concluded that consent, standing alone, may serve to forfeit a consenting party's right to review. An exception arises when the party's consent is not truly voluntary. Id.

We conclude plaintiff has met his burden to show defendants waived their right to appeal. At the telephone deposition of Cavanaugh on May 5, 1992, the following statements were made:

LaJeunesse (Plaintiff's attorney): Are you willing to answer the questions, Mr. Cavanaugh?

Cavanaugh: I said, yes, I am willing to answer the questions. Are you willing to ask them on this call, or are you going to call me back or what?

LaJeunesse: Mr. Cavanaugh, we are going to proceed with this. I have a court reporter here. It is my understanding you have agreed to appear telephonically?

Cavanaugh: That's correct.

Cavanaugh's statements show he consented to the district court's order of April 23, 1992, requiring his examination as a judgment debtor. We conclude he waived his right to appeal that order.

We determine defendants' appeal should be dismissed. Costs of this appeal are assessed to defendants.

APPEAL DISMISSED.