FILED
APR 27 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GEORGE J. SPORER AND ANITA G. SPORER,

Plaintiffs-Appellants,

vs.

ED SPEER CONSTRUCITON, INC.; MARTI SWAN; WILLIAM WEST; BETTENDORF PARK BOARD; JOHN GILROY; GRACE DEGETTER: THE BETTENDORF COMMUNITY SCHOOL DISTRICT; AND THE CITY OF BETTENDORF, IOWA,

Defendants-Appellees.

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Appeal from Scott District Court, C. H. Pelton, Judge.

Plaintiffs appeal from a judgment for defendants in a suit to force the city to build storm sewers in a neighborhood in which plaintiffs owned rental property. Plaintiffs contend the trial court erred in dismissing plaintiffs' recast pleadings filed one day after the twenty-day deadline established by the trial court. Defendants moved to dismiss the appeal asserting the appeal was not timely filed. Plaintiffs failure to file their recast pleadings within the time period allowed finalized the trial court's judgment and their appeal of that judgment was not timely filed. APPEAL DISMISSED.

Walter Newport of Newport, Fortine and Associates, Davenport, for plaintiffs-appellants.

Donald H. Sitz and Thomas N. Kaup of Lane & Waterman, Davenport, for defendant-appellee Bettendorf School District.

John S. Gosma of Rehling, Lindberg & Gosma, Davenport, for defendant-appellee Speer.

John V. Chapman, Davenport, for defendant-appellee Gilroy.

W. Michael Shinkle of Raben, Liebbe, Shinkle & Bremer, Davenport, for defendant-appellee City of Bettendorf.

Considered by Donielson, P.J., and Snell and Carter, JJ.

PER CURIAM

Plaintiffs appeal from a judgment for defendants in a suit to force the city to build storm sewers in a neighborhood in which plaintiffs owned rental property. Plaintiffs contend the trial court erred in dismissing plaintiffs' recast pleadings filed one day after the twenty-day deadline established by the trial court. Defendants moved to dismiss the appeal asserting the appeal was not timely filed. Plaintiffs failure to file their recast pleadings within the time period allowed finalized the trial court's judgment and their appeal of that judgment was not timely filed. Accordingly, we dismiss the appeal.

On September 16, 1980, the trial court dismissed the plaintiff's petition against all defendants for failure to comply with Iowa R. Civ. P. 69. Plaintiffs were given twenty days within which to replead. On September 25, 1980, plaintiffs filed what was denominated as "motion to Amend Order Dated and Filed September 16, 1980, and to Clarify Said Order." The motion was denied on September 29, 1980. On October 7, 1980, twenty-one days after September 16, 1980, plaintiffs filed ther second recast petition. The motions of the various defendants, including the school district, to dismiss plaintiffs' second recast petition for lack of jurisdiction due to a failure to replead within twenty days of September 16, 1980, were sustained on November 13, 1980. Plaintiffs filed their notice of appeal on December 11, 1980.

The dispositive issue in this case is whether plaintiffs' failure to file their recast pleadings within the twenty-day period made the trial court's order of September 16, 1980, a final decree for appeal purposes. If the order was retroactively finalized by plaintiffs' failure to file their recast pleadings, plaintiffs would have thirty days from entry of the September 16 order to perfect an appeal. Iowa R.App. P. 5(a). Plaintiffs did not file a notice of appeal until

December 11, 1980, well, after the thirty-day period for appeal had expired. Plaintiffs claim, however, the period for appeal had been tolled by virtue of their motion, filed September 25, 1980, to amend and clarify the trial court's initial order of September 16. We disagree with plaintiffs' contention.

Iowa R. Civ. P. 86 provides:

> If a party is required or permitted to plead further by an order or ruling, the clerk shall forthwith mail or deliver notice of such order or ruling to the attorneys of record. Unless otherwise provided by order or ruling, such party shall file such further pleading within seven days after such mailing or delivery; and if such party fails to do so within such time, he therey elects to stand on the record theretofore made. On such election, the ruling shall be deemed a final adjudication in the trial court without further judgment or order; reserving only such issues, if any, which remain undisposed of by such ruling and election.

Our interpretation of Rule 86 convinces us plaintiffs' failure to file their recast pleadings within the time period allowed by the court constituted an election to stand on the record and to treat the September 16 order as a final adjudication. We are not persuaded plaintiffs' motion to clarify, filed within the twenty-day time limit, tolled the running of the period in which plaintiffs were to refile. We note plaintiffs did not request an extension of the time to recast their pleadings in their motion to clarify. Cf. Halvorsen v. City of Decorah, 257 Iowa 453, 457, 133 N.W.2d 232, 234 (Iowa 1965). We also note the trial court overruled plaintiffs' motion on September 29, 1980, four days after it was filed, and well before the expiration of the twenty-day period.

Plaintiffs argue Iowa R. Civ. P. 242, in conjunction with Iowa R. App. P. 5, gives plaintiffs twenty days from the date the trial court ruled on their motion to clarify and amend in which to file their recast pleadings. Iowa R. Civ. P. 242 defines "new trial." Iowa R. App. P. 5 states the parties have thirty days from entry of judgment ot file notice of appeal "unless a motion for new trial or judgment notwithstanding the verdict. . . or a motion as provided in R.C.P. 179'b', is filed. . ." Even if we concluded plaintiffs' motion fell within the exception to

the thirty-day period to perfect an appeal, provided by Iowa R. App. P. 5, which we decline to do, we do not believe a motion of that type would hold the running of the twenty-day period allowed plaintiffs to recast their pleadings. Iowa R. App. P. 5 limits the time in which an appeal can be filed once final judgment is rendered. We find no authority that persuades us to conclude the period plaintiffs were given to recast their pleadings was extended by their filing of a motion to clarify and amend. See Union Trust and Savings Bank v. Stanwood Feed and Grain, Inc., 158 N.W.2d 1, 2-3 (Iowa 1968); City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d 637, 641-42 (Iowa 1978).

Plaintiffs' filing of their recast pleadings, being untimely, was without effect. Consequently, the trial court's order of September 16 became a final, appealable order, retroactive to that date, by plaintiffs' failure to file their pleadings in compliance with the trial court's order. Halvorsen v. City of Decorah, 257 Iowa 453, 456, 133 N.W.2d 232, 233-34 (Iowa 1965); cf. Winneshiek Mutual Insurance Association v. Roach, 257 Iowa 354, 360, 132 N.W.2d 436, 440 (Iowa 1965). At that point, plaintiffs were allowed thirty days to appeal the final decision of the trial court. Iowa R. App. P. 5. Notice of appeal was not filed within thirty days of the trial court's judgment. Failure to file within the allotted time period is a jurisdictional defect. Union Trust and Savings Bank v. Stanwood Feed and Grain, Inc., 158 N.W.2d 1, 3 (Iowa 1968). Accordingly, plaintiffs' appeal is dismissed for lack of appellate jurisdiction.

APPEAL DISMISSED.