

FILED

AUG 26 1980

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARY KOSS,

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Plaintiff-Appellant,

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Filed August 26, 1980

vs.

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CITY OF CEDAR RAPIDS, IOWA, et al,
and ORLIE J. WORKMAN, Sheriff of Linn
County, Iowa, KENNETH L. PERRY, JR.,
Clerk of Linn County District Court,

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Defendant-Appellees.

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0-110
2-63421

Appeal from Linn District Court - Harold D. Vietor, Judge.

Plaintiff appeals district court's order dismissing her appeal from a condemnation commission's award, alleging the district court erred in dismissing her appeal for want of prosecution pursuant to Iowa R. Civ. P. 215.1 and in refusing to grant her application for reinstatement. REVERSED AND REMANDED.

Ronald W. Wendt, Cedar Rapids, for plaintiff-appellant.

David F. McGuire, Cedar Rapids City Attorney, for defendant-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Plaintiff, Mary Koss, appeals district court's order dismissing her appeal under section 472.22, The Code 1977, from a condemnation commission's award in favor of defendant, City of Cedar Rapids. She alleges the district court erred in dismissing her appeal for want of prosecution pursuant to Iowa R. Civ. P. 215.1 and in refusing to grant her application for reinstatement of the case. We reverse and remand this matter for further proceedings in accordance with this decision.

I.

On July 19, 1974, defendant-City condemned approximately twenty-five of plaintiff's thirty-one acres of property for expansion of a city golf course. Dissatisfied with the award granted by the commission on August 30, 1974, plaintiff filed her petition in district court requesting review. After several amendments to the pleadings by the parties over the next two years, they entered into a stipulation on November 17, 1976, removing the cause from operation of Iowa R. Civ. P. 215.1. On the following day, the district court filed an order approving the stipulation removing the cause from operation of Iowa R. Civ. P. 215.1 and continuing it "over for trial or other disposition during the year of 1977."

On January 19, 1977, plaintiff filed yet another amendment to her petition and on February 4, 1977, she filed a motion for summary judgment. On October 18, 1977, the district court overruled plaintiff's motion for summary judgment. On November 17, 1977, plaintiff filed an application for permission to appeal in advance of final judgment with the Iowa Supreme Court. Plaintiff filed her brief on December 9, 1977. Counsel for defendant-City, with permission, filed a late brief on December 30, 1977.

Also on December 30, 1977, the last court day of the year, the district court clerk entered on the calendar sheet a rubber stamp dismissing plaintiff's cause of action pursuant to Iowa R. Civ. P. 215.1. Notices to counsel of record had been sent prior to August 15, 1977, informing them the case would be subject to dismissal if not tried prior to January 1, 1978. Counsel for defendant-City received this notice; counsel for plaintiff testified he did not.

On January 6, 1978, the supreme court entered an order granting plaintiff permission to perfect an interlocutory appeal. Upon receiving the supreme court order on January 10, 1978, the district court clerk crossed out the December 30, 1977, dismissal entry on the calendar sheet. Plaintiff docketed the appeal on February 16,

1978. The supreme court issued its opinion on November 22, 1978. See Koss v. City of Cedar Rapids, 271 N.W.2d 730 (Iowa 1978). Procedendo issued on December 13, 1978.

At plaintiff's request, the pretrial conference was held on December 26, 1978, at which time counsel for defendant-City argued the district court had no jurisdiction to try this case since plaintiff's case had been dismissed for want of prosecution pursuant to Iowa R. Civ. P. 215.1 at the end of 1977. Plaintiff consequently filed a contingent application for reinstatement on January 2, 1979. The district court struck the motion stating "the case had either been dismissed or it had not." Plaintiff subsequently renewed her pleas by filing an application for an order declaring the case not dismissed or, in the alternative, an application for reinstatement, both pursuant to Iowa R. Civ. P. 215.1. Based on evidence presented at two hearings, the district court found that the period for making application for reinstatement expired June 1, 1978, six months after dismissal. The district court consequently determined it had no authority to reinstate the case, denied plaintiff's applications, and ordered the case removed from the trial assignment. Plaintiff appeals from this ruling.

II.

Plaintiff argues her case should not have been dismissed because she either was actually pursuing it in 1977 or her case was pending on appeal. The central issue of plaintiff's argument is whether plaintiff's application for permission to appeal in advance of final judgment, filed on November 17, 1977, prevents dismissal of her action by operation of Iowa R. Civ. P. 215.1. We hold it does.

In order to clear the docket of dead cases and to assure the timely and diligent prosecution of those cases that should be brought to a conclusion, Iowa R. Civ. P. 215.1 mandates cases shall be assigned and tried or dismissed. Brown v. Iowa District Court for Polk County, 272 N.W.2d 457, 458 (Iowa 1978). If the case is not tried, a party can avoid dismissal only by obtaining an order continuing the action prior to the mandatory dismissal date. Gammel v. Perry, 256 Iowa 1129, 1134, 130 N.W.2d 550, 553 (1964). But see Katrulles v. Suchomel, 258 Iowa 1206, 1213, 141 N.W.2d 593, 598 (1966). Plaintiff must affirmatively request such an order, McKinney v. Hirstine, 257 Iowa 395, 398, 131 N.W.2d 823, 825 (1965); trial court has no discretion to continue a case ex parte. Talbot v. Talbot, 255 Iowa 337, 341, 122 N.W.2d 456, 458-59 (1963). Thus, unless the application for continuance is accompanied by the parties' joint stipulation, notice must be given.

Granting of an order continuing the case does not remove it from operation of the rule, but merely changes the date of trial. Brown, 272 N.W.2d at 458. "In all other respects the rule remains operative." Id. (citing McKinney, 257 Iowa at 398, 131 N.W.2d at 825). No additional "try or dismiss" notice is required if a court-granted continuance extends into the following year's July 15 to August 15 notice period. Rhiner v. Arends, 292 N.W.2d 399, 401 (Iowa 1980). A case is dismissed automatically when the dismissal date arrives even though neither the court nor the clerk has taken formal action. Brown, 272, N.W.2d at 459; Werkmeister v. Kroneberger, 262 N.W.2d 295, 296 (Iowa 1978); Baty v. City of West Des Moines, 259 Iowa 1017, 1023-24, 147 N.W.2d 204, 208 (1966).

It is well settled that pending or undisposed of motions or other matters do not remove the duty of a party to obtain a continuance to prevent dismissal under Iowa R. Civ. P. 215.1. However, the cases holding this deal only with motions and matters pending before a district court; there has been no case dealing with the effect of an appeal to the supreme court on the operation of Iowa R. Civ. P. 215.1. Brown, 272 N.W.2d at 458-59 (Iowa 1978) (motion for summary judgment pending); McKinney, 257 Iowa at 398-99, 131 N.W.2d at 825 (undisposed of motions); Talbot, 255 Iowa at 339, 122 N.W.2d at 457 (motion for production of books and records pending); Windus v. Great Plains Gas, 254 Iowa 114, 129-29, 116 N.W.2d 416, 418-19 (1962) (new parties added). Deciding that question requires an examination of the effect of taking an appeal on the jurisdiction of the district court.

It is equally well settled that when a timely notice of appeal is filed, sole jurisdiction of the matter is placed in the appellate court. In re Estate of Tollefsrud, 275 N.W.2d 412, 417 (Iowa 1979); Jones v. Jones, 255 Iowa 103, 109, 121 N.W.2d 668, 672 (1963); McCauley v. Municipal Court of Des Moines, 254 Iowa 1345, 1346, 121 N.W.2d 96, 96-97 (1963). Thus, plaintiff's application for permission to appeal in advance of final judgment may reasonably be found to have transferred jurisdiction of the matter to the supreme court when it was filed on November 17, 1977. See Iowa R. App. P. 2. Although the supreme court did not grant permission to plaintiff until January 6, 1978, plaintiff had completed all the required steps to appeal this matter and for the purposes of this case we hold the supreme court possessed jurisdiction over this action.

Accordingly, we hold the Iowa R. Civ. P. 215.1 did not operate automatically to dismiss this action since the district court lacked jurisdiction of the matter. This

holding is consistent with the purpose of Iowa R. Civ. P. 215.1: clearing the docket of dead cases and assuring the timely and diligent prosecution of those cases that should be brought to a conclusion. Brown, 272 N.W.2d at 458. This action was clearly not dead and was being prosecuted by plaintiff in a timely, diligent fashion.

III.

Under this resolution of the dismissal issue, it is unnecessary to address the reinstatement issue. The district court was without jurisdiction to dismiss this case and it was thus never dismissed. Reinstatement is, therefore, unnecessary. We reverse the order of dismissal and remand this matter for trial.

REVERSED AND REMANDED.

All judges concur except Johnson, J., and Carter, J., who dissent.

I must dissent from the majority's conclusion that trial court lost jurisdiction of this case on November 17, 1977, when plaintiff filed her application to appeal in advance of final judgment. Iowa R. App. P. 2(b) states that "[t]he order granting . . . [an appeal in advance of final judgment] . . . shall stay further proceedings below" (emphasis added). Rule 6(b) provides: "An interlocutory appeal under rule 2 . . . shall be deemed taken and perfected when the order allowing it is filed with the clerk of the supreme court." (emphasis added).

In this case the supreme court's order granting plaintiff permission to perfect an interlocutory appeal was filed January 6, 1978. Until that date trial court retained jurisdiction of the proceeding. Since a case pending in trial court is automatically dismissed when the dismissal date arrives unless a continuance has been granted, Brown, 272 N.W.2d at 459, plaintiff's case was dismissed as of January 1, 1978.

I also conclude trial court properly denied plaintiff's application for reinstatement. While our general policy is to allow trial on the merits, and a liberal approach is followed with respect to reinstatement of actions dismissed for delay of trial, Rhiner v. Arends, 292 N.W.2d at 400; Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18, 21 (Iowa 1974), rule 215.1 allows reinstatement in response to an application filed within six months of the effective dismissal date. Brown, 272 N.W.2d at 459; Werkmeister, 262 N.W.2d at 296; Psotka v. Blockney, 260 N.W.2d 413, 414 (Iowa 1977). Plaintiff's application of January 22, 1979, thus was not timely. Further, plaintiff has alleged no irregularity or fraud in the dismissal that would warrant allowing her to file for reinstatement more than six months after dismissal. See Psotka, 260 N.W.2d at 414. When plaintiff made her application for reinstatement "the only power or jurisdiction the trial court then had with reference to this case was to dismiss it without prejudice." Gammel, 256 Iowa at 1134, 130 N.W.2d at 553. It is unfortunate that this action was allowed to proceed through the prior interlocutory appeal before it was discovered that the court lacked subject matter jurisdiction. But it is clear from the holding in Wederath v. Brant, 287 N.W.2d 591, 594 (Iowa 1980), that such a circumstance does not create jurisdiction where it is otherwise lacking.

Due to the foregoing considerations, judgment of trial court dismissing plaintiff's cause of action and denying reinstatement should be affirmed.

Carter, J., joins in this dissent.