

IN THE COURT OF APPEALS OF IOWA

No. 4-026 / 93-539

FILED

APR 26 1994

CLERK SUPREME COURT

JEFF ENGLAND,

Appellant-Cross-Appellee,

vs.

TERRY COUNTS,

Appellee,

and

FARON YOUNG,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Davis County,
Robert Bates, Judge.

Jeff England appeals, and Faron Young cross-appeals, a district court order setting aside a default judgment in favor of England. **AFFIRMED.**

Vern M. Ball of Ball & Lynch, Bloomfield, and Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Richard C. Bauerle of Keith, Orsborn, Bauerle, Milani & Neary, Ottumwa, for appellee Young.

Heard by Donielson, P.J., Sackett, J., and Critelli, S.J.,* but decided by Donielson, C.J., and Hayden, Sackett, Habhab, Cady, and Huitink, JJ.

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

Jeff England organized a country music stage show in Davis County in June 1991. England used a booking agent in Tennessee, Terry Counts, to book Faron Young as the star performer. After Young signed the contract in Tennessee, Counts sent it to Iowa for England's signature. England sent an initial \$450 deposit to Counts and a subsequent check for \$1800 pursuant to the contract. A balance of \$2250 was to be paid at the time of the performance. Counts asked Young if she could keep the \$450 as part payment for her commission and Young agreed.

When Young did not receive the \$1800, he contacted Counts who told him the check had been damaged in the mail and England was sending another. Young contacted Counts again before the concert date and was told the money had not arrived. Since he had not received the payments as agreed, Young did not appear at the show on the evening scheduled. As a result, England incurred expenses, including refunding \$8000 to at least 1000 members of the audience. England filed suit against Counts and Young in Davis County. Both defendants were personally served, Young on January 29, 1992.

Counts did not respond. Young's Tennessee attorney (Smith) called England's attorney (Ball) on February 26, 1992. Smith told Ball that Counts had been arrested on bad check charges and had filed bankruptcy. Ball allegedly told Smith he would not take a default if no answer was

filed until Counts' situation was resolved. The two attorneys allegedly argued over whether Counts was Young's agent.

Sometime during late winter or early spring 1992, England was advised by Judge Rielly, who had come across the file, to re-serve the defendants because the present return of service did not satisfy Iowa Code section 617.3 (1991). England then filed suit process with the secretary of state which included an original notice granting an appearance time of sixty days after receipt of service. England filed an affidavit with the district court stating he personally mailed notice to Young in Tennessee on April 22, 1992. There was no response from Young, so England filed for default claiming service was made on January 29, 1992. Judgment was granted against Young in the amount of \$116,967.26 and court costs of \$125.

Young moved to set aside the default judgment pursuant to Iowa Rule of Civil Procedure 236. At the hearing, Ball denied Smith's allegation he had granted additional time within which he would not take a default until Counts' situation was resolved.

The district court ruled Young had not demonstrated mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty as required by rule 236. However, the court concluded England had invoked Iowa Code section 617.3 for the initial service, but had not complied with the

correct procedure. Therefore the default judgment was set aside. England filed a motion for reconsideration.

In its ruling on England's motion, the district court stated it had not considered the impact of Iowa Rule of Civil Procedure 56(2) and cases involving minimum contacts. The court concluded the minimum contacts test was satisfied because the concert was to be performed in Iowa. See Iowa Code § 617.3. Therefore, the court held that alternative personal service pursuant to rule 56(2) was satisfactory. However, the court stated that Young had indeed shown: (1) mistake and excusable neglect, and (2) the existence of facts presenting a defense. Young's motion to set aside default pursuant to rule 236 was granted.

England filed an application for this interlocutory appeal. The request was granted by the supreme court.

England argues the district court erred in determining Young raised a meritorious defense because the facts clearly show Counts was Young's agent, thus Young is responsible for the incurred loss. England contends Young had to show he had a valid defense, not just an intention to present a defense.

Young argues rule 236 only requires a prima facie showing of a meritorious defense be made. Young argues the question of agency is one of fact and should be submitted on the merits to the fact finder. He claims Counts has

never been his agent and she made it clear she was acting as agent for England.

Young cross-appeals on the jurisdictional issue. First, he argues he had no contacts with Iowa because he resides in Tennessee, the contract was negotiated and entered into in Tennessee, he did not perform in Iowa, and all his contacts were with Counts in Tennessee. On the other hand, he claims, England had all his contacts in Tennessee. Second, Young argues the first original notice was improper under rule 53, and the second original notice did not comply with section 617.3. Therefore he contends the court lacks personal jurisdiction over him.

We address the jurisdictional issue first since its resolution determines whether we need review the court's decision to set aside the default judgment. Service was attempted twice: once in January 1992 pursuant to Iowa Code section 617.3, and once in April 1992. The second service was attempted after England was informed by Judge Reilly the first service was not perfected properly.

England first argues Young cannot argue jurisdictional issues in seeking to have a default judgment set aside under Iowa Rule of Civil Procedure 236. We disagree. We have twice assumed "a jurisdiction defect, such as an alleged failure to serve properly, could serve as the catalyst for defendant's mistake, inadvertence, or excusable neglect" and could be raised under rule 236. Newton Mfg. Co. v. Biogenetics, Ltd., 461 N.W.2d 472, 474

(Iowa App. 1990) (citing Life v. Best Refrigerated Express, Inc., 443 N.W.2d 334, 337 (Iowa App. 1989)).

The district court correctly determined service under Iowa Code section 617.3 was invalid because the requirements of the long-arm statute were not properly followed. Iowa Code section 617.3 states in part:

Service of such process or original notice shall be made (1) by filing duplicate copies of said process or original notice with said secretary of state, . . . and (2) by mailing to the defendant . . . a notification of said filing with the secretary of state.

Id. (third unnumbered paragraph). In this case England did not file his initial service with the secretary of state, but served Counts and Young personally in Tennessee. This service was not valid under section 617.3.

England argues the service was valid under Iowa Rule of Civil Procedure 56.2. This rule is broader in scope than section 617.3 and "expands Iowa's jurisdictional reach to the widest due process parameters of the federal constitution." Larsen v. Scholl, 296 N.W.2d 785, 788 (Iowa 1980). Service under rule 56.2 is an alternate method to the statutory method prescribed in section 617.3 so long as the entity served has the necessary minimum contacts. Iowa R. Civ. P. 56.2 (second and third unnumbered paragraphs). Rule 56.2 allows service to be made:

(a) as provided in R.C.P. 56.1 within or without the state, or (b) . . . in any manner consistent with due process of law prescribed by order of the court in which the action is brought. . . .[This

rule does not affect the right to serve a party] in any manner now or hereafter permitted by statute or rule.

Id. Rule 56.1 provides in part:

Original notices are "served" by delivering a copy to the proper person. Personal service may be made as follows:

(a) Upon any individual . . . either by taking the individual's signed, dated acknowledgment of service endorsed on the notice; or by serving the individual personally; . . .

Id. Therefore, the personal service upon Young was valid if he had "the necessary minimum contact with the state of Iowa." Iowa R. Civ. P. 56.2.

In our examination of jurisdiction we apply a two-step analysis: does a statute authorize assumption of jurisdiction, and does the nonresident have the necessary minimum contacts with Iowa. Martin v. Ju-Li Corp., 332 N.W.2d 871, 874 (Iowa 1983). Iowa Code section 617.3 (1991) satisfies the first step of our analysis by authorizing personal jurisdiction over a nonresident defendant who has entered into a contract "to be performed in whole or in part by either party in Iowa." Id. The contract between England and Young provided for England to give Young top billing, provide lights and sound for the show, and make certain payments before the performance, all of which would be done by England in Iowa. Young was to travel to Iowa and perform a concert.

The second part of the analysis has five subparts: (1) the quantity of contacts, (2) the quality and nature of contacts, (3) the relationship between the cause of action

0000-00

and the contacts, (4) the interest of the forum state, and (5) the convenience of the parties. Omnilingua, Inc. v. Great Golf Resorts of the World, Inc., 500 N.W.2d 721, 723 (Iowa App. 1993) (citing Larsen, 296 N.W.2d at 788).

The "constitutional touchstone" in determining jurisdiction over a nonresident defendant is whether defendant has purposefully established minimum contacts in a forum state, and defendant's connection is such that defendant reasonably should have anticipated being haled into court in a forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 566, 62 L. Ed. 2d 490, 501 (1980); Bankers Trust Co. v. Fidata Trust Co., 452 N.W.2d 411, 413 (Iowa 1990); Robert Half of Iowa, Inc. v. Citizens Bank of Newburg, 453 N.W.2d at 238 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528, 542 (1985)). Unilateral activity by a resident plaintiff with a nonresident defendant does not satisfy the requirement of contact with a forum state. Robert Half, Inc., 453 N.W.2d at 238. There must be some act by which a defendant purposefully avails itself of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of its laws. Hager v. Doubletree, 440 N.W.2d 603, 607 (Iowa), cert. denied, 493 U.S. 934 (1989) (citing Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239, 2 L. Ed. 2d 1283, 1298 (1958)). We "can look to future activities contemplated in the contract for the purpose of

determining defendant's contacts with the forum state." Douglas Mach. & Eng'g. v. Hyflow Blanking Press, 229 N.W.2d 784, 790 (Iowa 1975) (citing Sporecam, Inc. v. Greenman Bros., Inc., 340 F. Supp. 1168, 1177 (S.D. Iowa 1972)).

The quantity of Young's contacts with Iowa in this case is small. His only contact, other than signing the contract, is his scheduled performance at the concert in Bloomfield. The quality of contacts is greater because the "activities contemplated in the contract" were coming into Iowa and performing a concert here. The failure to come to Iowa and to perform a concert in Bloomfield directly relates to the claim for damages. All of the parties directly or indirectly harmed by Young's nonperformance appear to be in Iowa, except if Counts is considered to be "harmed" by Young's nonperformance. The majority of the evidence pertaining to the claim for damages is in Iowa. Iowa has a greater interest in this action than does Tennessee. It would be more convenient for Young to defend the case in Iowa than for England to try the case and provide for Iowa witnesses in Tennessee. We conclude from our analysis of the five subparts Young had sufficient minimum contacts with Iowa so that the exercise of jurisdiction meets the requirements of due process. We therefore affirm the determination of the district court it had jurisdiction over the parties and service was properly perfected.

000042

Having determined jurisdiction properly can be exercised by Iowa courts, we review the decision of the district court setting aside the default judgment against Young. The district court has broad discretion to set aside default judgments. Iowa R. Civ. P. 236, 252; Newton Mfg., 461 N.W.2d at 473. We review the district court's decision for an abuse of discretion. Ward v. Pohren, 436 N.W.2d 380, 381 (Iowa App. 1988). We set aside such decisions only upon a showing of abuse of discretion. Whitehorn v. Lovik, 398 N.W.2d 851, 853 (Iowa 1987). The trial court's findings of fact have the force of a jury verdict and will be disturbed only if unsupported by substantial evidence. Dealers Warehouse Co. v. Wahl & Assocs., 216 N.W.2d 391, 394 (Iowa 1974).

Iowa Rule of Civil Procedure 236 provides for setting aside default judgments under certain conditions:

On motion and for good cause shown, . . . the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty.

Id. Our courts have interpreted "good cause" to mean a showing of a meritorious defense.

As stated in volume 2 of Cook's revised edition of "Iowa Rules of Civil Procedure", page 667, the "good cause" of Rule 236 requires "at least a claimed defense asserted in good faith. It ought to imply that default is not to be set aside as a mere futile gesture; which it would be if defendant claims no meritorious defense. The Rule aims to give a party his day in court to present a meritorious defense; not merely to postpone the day of reckoning when no claim of meritorious defense exists."

Svoboda v. Svoboda, 245 Iowa 111, 118, 60 N.W.2d 859, 863 (1953) (citations omitted). The moving party is required at least "to assert in good faith a claimed defense to plaintiff's action or as some courts state at least a prima facie showing of a meritorious defense." Flexsteel Indus., Inc. v. Morbern Indus. Ltd., 239 N.W.2d 593, 599 (Iowa 1976). The court in Flexsteel continued:

The court's duty in a proceeding for relief under this rule is to ascertain from the evidence whether facts exist which, if established on a trial on the merits, would prima facie constitute a defense.

Id. (citing Handy v. Handy, 250 Iowa 879, 884, 96 N.W.2d 922, 925 (1959)). There need be no guarantee the defense would prevail at trial. See Kirby v. Holman, 238 Iowa 355, 375, 25 N.W.2d 664, 675 (1947).

We are aided in our interpretation of rule 236 because it is patterned after Federal Rule of Civil Procedure 56. When this is the case, interpretations of the federal rule are persuasive. Swisher & Cohrt v. Yardarm, Inc., 236 N.W.2d 297, 298 (Iowa 1975). Wright & Miller's Federal Practice and Procedure states:

Just as there are few guideposts as to what constitutes excusable neglect or inadvertence in any given case, there is no universally accepted standard among courts as to what satisfies the requirement that a party show a meritorious defense. Roughly the cases fall into three categories. Some courts have insisted upon a specific recitation of facts in the motion, answer or affidavit which, if proven, would constitute a meritorious defense. . . . Another approach to the problem is that group of cases which accepts allegations, conclusions and even denials in the moving party's motion or supporting

2003-24
affidavit. . . . Finally, the courts have treated oral statements, affidavits or the court's own assumption as sufficient indication of the existence of a meritorious defense. . . . In a few instances, courts merely have looked for some indication of a meritorious defense, even to the extent of simply recognizing that the nature of the case was such that it suggested the possible existence of a defense.

Flexsteel, 239 N.W.2d at 599-600 (quoting excerpts from 10 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 2697 at 344-45).

In the instant case, the district court first determined Young raised the issue as to a meritorious defense in citing the booking agent's defalcation. There is a clear dispute between the parties concerning the agency of Counts. We agree with the conclusion of the district court Young made a sufficient showing of a meritorious defense so as to satisfy rule 236. The phone conversation between attorneys Ball and Smith clearly raised that defense.

The district court then concluded Young did not meet the requirement of showing mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty. After England's motion for reconsideration, however, the court modified its judgment, deeming the notice of service in January 1992 valid, determining the notice in April 1992 was invalid but unnecessary, and determining Young showed mistake and excusable neglect.

There is substantial evidence in the record to support the judgment of the district court. Contradictory

affidavits concerning the February 1992 phone conversation were offered by both sides in this controversy. Young and Smith allege Ball agreed not to pursue the claim until Counts' status was clearer. Smith apparently did file an answer after Counts' bankruptcy was dismissed. Ball and his secretary deny any agreement not to pursue the claim, but agree Smith was to inform England and Ball about changes in Counts' situation. The district court did not abuse its discretion in determining Young demonstrated mistake and excusable neglect. This case should proceed to trial on the merits.

Iowa law favors trial on the merits. Johnson v. Gib's W. Kitchen, Inc., 338 N.W.2d 872, 874 (Iowa 1983) (citing Severson v. Sueppel, 260 Iowa 1169, 1177, 152 N.W.2d 281, 286 (1967)). A liberal approach to granting relief from default judgments is to be taken. First Nat'l Bank in Lenox v. Claisher, 308 N.W.2d 1, 3 (Iowa 1981); Wharff v. Iowa Methodist Hosp., 219 N.W.2d 18, 21-22 (Iowa 1974). "[T]he rights of a litigant should not be denied proper hearing by strict application of legal formalities." In re Millers' Estate, 159 N.W.2d 441, 447 (Iowa 1968); Hobbs v. Martin Marietta Co., 257 Iowa 124, 129, 131 N.W.2d 772, 775 (1964). The record in this interlocutory appeal reveals numerous disputes. A trial on the merits will promote just resolution of the disputes.

We note in closing this appeal would not have been necessary had notice of intent to seek a default judgment

0000-6

been given. Our supreme court recently ruled on a particularly egregious example of "blind siding" opposing counsel. Vlotho v. Hardin County, 509 N.W.2d 350, 352-53 (Iowa 1993). We do not suggest the actions in this case rise to that level, but the principles of civility in the practice of law apply in every situation. Taking a default judgment in this case, as seen in hindsight, was counterproductive advocacy. The Seventh Federal Judicial Circuit has proposed the following standard for professional conduct:

We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

Id. at 553 (quoting Marvin E. Aspen, The Judiciary--New Issues and New Visions, 40 Fed. B. News & J. 496, 499 (1993)). We encourage such notice in Iowa.

After considering all the issues presented, we determine any issues not addressed specifically in this opinion are either covered by this opinion or are without merit. For the reasons discussed we affirm the district court's judgment in all respects.

AFFIRMED.

Sackett, Cady, Hayden, Habhab, and Huitink, JJ., specially concur.

SACKETT, J. (concurring)

00000000

I concur with the majority opinion. I write specially because while I subscribe to the premise that generally justice is better served where there is trust between and cooperation among lawyers, I cannot share Judge Cady's ardent belief that a lawyer give notice to a known opposing counsel before seeking a default. I recognize there are many situations where to do so, as Judge Cady suggests, is the better course, both because it promotes civility and because frequently to do so is in a client's best interest. I am a strong advocate for courtesy and civility among lawyers representing competing interests, but there are times when a client's best interest may override the courtesy of alerting opposing counsel of the delinquency in his or her duties.

A practicing lawyer operates under a myriad of demands from competing interests including clients, opposing counsel, and judges. An attorney must consciously weigh each situation within the bounds of the law. It is not my place, nor do I have the wisdom, to prejudge how a lawyer should resolve such situations.

CADY, J. (specially concurring)

I concur specially only to express my ardent belief that a lawyer should give notice to a known opposing counsel before seeking a default.

Many of the current problems and concerns faced by our profession are self-made. They exist, in large part, because of the deep underlying attitude that the professional conduct of a lawyer is governed solely by the established rules of the practice. It is this allegiance that allows, among other things, a lawyer to take a default against a party represented by a known fellow lawyer without notice. The conduct understandably occurs because the rules of practice provide for it to be done. It is legal under the rules. Consequently, no thought is given to whether it is right under the circumstances. The important question has become, almost imperceptibly, lost over time. The resulting attitude has helped fuel growing tension and disenchantment within the profession and expanding disrespect and criticism outside the profession. A heavy toll looms ahead if a new course is not charted.

The rules of practice establish only the minimum framework for professional conduct. These rules are not comprehensive and do not define a single method of practice. Lawyers have the latitude to function and

interact with others in the profession in the same manner they do with those outside the profession, without compromising their professional obligation to their client. A lawyer is required to represent his or her client zealously within the bounds of the law, but courtesy and civility between opposing lawyers is specifically recognized and encouraged. See Iowa Code of Professional Responsibility for Lawyers EC 7-38 and DR 7-101. A lawyer does not deviate from the professional standards of care by contacting an opposing counsel to inquire into the failure to timely respond to a lawsuit before moving for default. Legal malpractice is not predicated on discretionary action of a lawyer based on common courtesy and compatible with the overall goal of justice. See Ruggiero v. Attore, 366 N.E.2d 470, 474-75 (Ill. App. 1977); Cook v. Aurora Motors, Inc., 503 P.2d 1046, 1049 (Alaska 1972), note 6.

Many adverse consequences could have been avoided in this case if a different attitude had prevailed. The same is true in our profession.

Hayden, J., and Habhab, and Huitink, JJ. join this special concurrence.