

FILED

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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

RICHARD CLAR and OMA JEAN
CLAR,

Appellees,

vs.

IOWA POWER AND LIGHT COMPANY,

Appellant.

Filed March 29, 1978

449
2-60864

Appeal from Pottawattamie District Court - Paul H. Sulhoff, Judge.

Defendant-lessee appeals the trial court's decree ordering the lessee removed from the premises and the property restored to the possession of the plaintiffs-lessors, pursuant to chapter 648, The Code 1971. AFFIRMED.

James E. Thorn and John D. Sens, of Johnson, Stuart, Tinley, Peters & Thorn, of Council Bluffs, counsel for appellant.

Roderic A. Pearson, of Peters, Campbell & Pearson, of Council Bluffs, counsel for appellees.

Heard by Allbee, C. J., Donielson, Oxberger and Carter, JJ; Snell, J., takes no part.

DONIELSON, J.

Defendant-lessee, Iowa Power and Light Company, appeals the trial court's decree ordering the lessee removed from the premises and the property restored to the possession of the plaintiffs-lessors, Richard and Oma Jean Claar, pursuant to chapter 648, The Code 1971.

On May 29, 1973, plaintiffs served upon defendant a notice to quit for holding contrary to the terms of a lease covering a tract of real estate which was entered into by the parties on February 10, 1969. On June 19, 1973, plaintiffs commenced an action against defendant in district court for forcible entry and detainer. Defendant filed an appearance on July 10, 1973, but it did not answer the petition. On August 9, the court, upon plaintiffs' motion, issued an order directing defendant to file an answer within ten days. On August 24, the court, upon plaintiffs' motion, entered a default judgment against defendant for failure to answer within the ten-day period. The lease was thus terminated and possession of the premises was restored to plaintiffs.

On August 28, 1973, defendant filed a motion to set aside the default judgment on grounds of inadvertence of counsel which was granted by the court. The case was subsequently tried on the merits and judgment was entered for defendant. Plaintiffs appealed the ruling of the trial court and on January 28, 1977, this court filed its opinion which held that the trial court had abused its discretion in granting defendant's motion to set aside the default judgment. Consequently, we reversed the judgment of the district court, reinstated the default but not the default decree, and remanded the case with instructions that the trial court determine what relief, if any, to which plaintiffs were entitled as a result of defendant's default. On remand, the trial court granted summary relief for plaintiffs and ordered defendant to vacate the premises.

On appeal, defendant initially contends that the trial court was without subject matter jurisdiction to enter the default judgment on August 24, 1973, because of the failure of plaintiffs and the court to comply with the notice requirements of § 648.5, The Code 1971. That section, which was in effect until June 30, 1973, provides:

"Jurisdiction—transfer—appeal. The district, municipal, and superior courts within the county, and justices of the peace within the township where the subject matter of the action is situated, shall have concurrent jurisdiction of actions for the forcible entry or detention of real property, and the court first acquiring jurisdiction of an action therefor shall retain the same until judgment, unless it is transferred as hereinafter provided. Where an action is brought in

the district, superior, or municipal court it shall be tried as an equitable action, and upon presentation of the petition to the court or judge after the same has been filed, the court or judge shall make an order fixing the time and place for hearing upon said petition and shall prescribe that notice of the hearing be personally served upon the defendant or defendants, which service shall be at least five days prior to the date set for hearing. . . ."

Defendant argues that under § 648.5, The Code 1971, upon presentation of the petition to the court or judge, the court was required to fix the time and place for hearing on the petition and prescribe that notice of the hearing be personally served upon defendant at least five days prior to the date set for hearing. In the instant case, there is nothing in the record to indicate that plaintiffs presented their petition to a court or judge, that the court entered an order fixing the time and place of hearing, or that notice of a hearing was ever given to defendant. Consequently, defendant argues that the failure of the court to comply with the notice requirements of § 648.5 served to deprive it of subject matter jurisdiction.

Initially, we note that defendant made no objection to the failure to comply with the notice requirements below, nor did it file a special appearance to challenge the jurisdiction of the court. See rules 66 and 104(a), Rules of Civil Procedure. However, Iowa Power contends that it may raise this issue on appeal because subject matter jurisdiction of the court may be raised at any time, *State v. Wiese*, 201 N.W.2d 734, 736 (Iowa 1972); *Bowen v. Story County Board of Supervisors*, 209 N.W.2d 569, 572 (Iowa 1973); *Stuart v. State ex rel. Jennings*, 253 N.W.2d 910, 914 (Iowa 1977), and, unlike jurisdiction of the person, it cannot be waived or vested by consent. See *State ex rel. Iowa St. Highway Commission v. Read*, 228 N.W.2d 199, 202 (Iowa 1975); *Green v. Sherman*, 173 N.W.2d 843, 846 (Iowa 1970).

However, defendant misinterprets § 648.5. The first sentence of that section clearly confers subject matter jurisdiction on the district courts. The notice provisions contained in the second sentence only pertain to the manner in which jurisdiction of the person is to be obtained. As such, defendant waived any objections he may have had to personal jurisdiction because of noncompliance with notice requirements. Not only did defendant fail to make his objections known at trial, it appeared, moved to set aside the default judgment, answered and eventually tried the case to its conclusion on the merits. The law is settled that a general appearance is a waiver of notice and if a party appears in person or by his attorney he submits himself to the jurisdiction of the court.

Lonning v. Lonning, 199 N.W.2d 60, 62 (Iowa 1972); Thorp Credit, Inc. v. Barr, 200 N.W.2d 535, 536 (Iowa 1972); Cullinan v. Cullinan, 226 N.W.2d 33, 35 (Iowa 1975). Consequently, any objection which defendant may have had to jurisdiction of the person based upon improper notice has long since been waived by its own actions.

Finally, defendant argues that the trial court erred in holding that plaintiffs' petition was legally sufficient to support a decree restoring possession of the property in dispute to plaintiffs. In ordering that plaintiffs be put into possession of the property, the trial court found:

"... that defendant breached its agreement with plaintiffs in failing to remove the existing building and tower from the premises and that defendant by maintaining more than one tower thereon held said premises contrary to the terms of its lease..."

Defendant contends that the lease contains no reference to the second tower and building and that, as a result, it was not holding contrary to the terms of the lease by maintaining the second tower and building. Plaintiffs admit that the lease contains no mention of the building and second tower. However, the lease, which was attached to plaintiffs' petition as an exhibit, states in pertinent part:

" '(1) Second parties do hereby grant to first party the right to locate on said parcel of ground above described for use during the period of this lease a steel tower approximately 175 feet high having three legs . . . " (emphasis added)"

As part of the leasehold, plaintiffs also granted defendant an easement across adjoining land "for the purpose of construction, operation and maintenance of a steel tower . . . " (emphasis added).

In their petition, plaintiffs made the following allegation with regard to the lease:

" '(3) . . . That there was existing on the said premises at said time a second tower and related service building which was to be torn down by the defendants and only the one tower maintained under the terms of the lease to which all parties agreed. That the agreement to take down the second tower and reserve the related building was an inducement to lessors to enter the said lease lessors in reliance upon said agreement entered the lease hereto attached.' " (emphasis added)."

Plaintiffs argue that the lease expressly gave defendant the restricted right to locate only one tower and that the language of the lease operates as a restriction on the use to which the premises may be put by the lessee.

It is perfectly legitimate for a lessor to control the use of his property and he may place whatever restrictions on its use as he deems appropriate, the breach of which by

the lessee will operate to terminate the lessee's right to possession. *Denecke v. Miller and Son*, 142 Iowa 486, 498, 199 N.W. 380 (1909). Because the lease specifies that defendant may only locate "a steel tower" on the premises, we conclude, as did the trial court, that by virtue of maintaining the second tower and building, defendant is a tenant holding contrary to the terms of the lease.

Nonetheless, defendant asserts that plaintiffs are not entitled to relief because no forfeiture of a lease can be declared unless there is a reservation of right to declare such a forfeiture contained in the lease. *Id.* at 494; see *Heiple v. Reinhart*, 100 Iowa 525, 528, 69 N.W. 871 (1897). The record clearly reflects that there was no such reservation in the lease in the instant case.

However, in *Denecke*, the court did not resolve the precise question posed here, because in that case, in which a forfeiture was approved, a statute (the predecessor to § 648.1, The Code) authorized forfeiture for holding contrary to the terms of the lease and the lease provided for forfeiture. *Denecke v. Miller and Son*, supra, at 494. Although we are aware of no Iowa case resolving this specific issue, in 49 Am.Jur.2d Landlord and Tenant § 1020 at p. 391 (1970), it is stated:

"A forfeiture of the leasehold may result by virtue of the common law, as in the case of forfeiture for disclaimer of title, by virtue of a statutory provision, or by virtue of some clause in the lease providing for forfeiture in case of breach of covenant or condition." (emphasis added).

See 51C C.J.S. Landlord and Tenant § 112 at pp. 355-356 (1968); 49 Am.Jur.2d Landlord and Tenant, supra, § 1023. Clearly, § 648.1, The Code, provides a summary remedy for forcible entry or detention of real property where the lessee holds contrary to the terms of the lease.

Our review in this matter is *de novo*. Section 648.5, The Code 1971; rule 4, Rules of Appellate Procedure; *Parris-West Maytag H. Corp. v. Continental Amuse. Co.*, 168 N.W.2d 735, 736 (Iowa 1969). Every fact pleaded and not denied in a subsequent pleading is to be deemed admitted except in certain instances not applicable in the instant case. Rule 102, R.C.P. Obviously, this rule applies with equal force in cases of default. *Hallett Constr. Co. v. Iowa State Highway Commission*, 261 Iowa 290, 294-295, 154 N.W.2d 71 (1967).

Consequently, according to the terms of the lease and the allegations of plaintiffs'

petition which are deemed admitted, defendant held contrary to the terms of the lease by maintaining two towers and a building on the premises. Plaintiffs were entitled to the remedy authorized by § 648J, The Code. We affirm the district court.

AFFIRMED.