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IN THE COURT OF APPEALS OF IOWA

No. 6-524 / 95-1602

MORRIS C. HURD,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR IDA COUNTY,

Defendant.

FILED
AUG 22 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Ida County, James D. Scott, Judge.

Morris Hurd appeals the district court order dismissing with prejudice his motion to expunge orders filed in a child support recovery case and assessing him $628.80 in attorney fees and costs. **AFFIRMED. SINCE WE TREAT THIS AS AN APPLICATION FOR THE ISSUANCE OF A WRIT OF CERTIORARI, IT FOLLOWS THAT THE WRIT IS ANNULLED.**

Morris C. Hurd, Red Oak, pro se.

Thomas J. Miller, Attorney General, Diane Stahle, Assistant Attorney General, and Robert R. Huibregtse, Assistant Attorney General, for defendant.

Considered by Habhab, C.J., and Sackett and Cady, JJ.

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HABHAB, C.J.

Morris and Linda Hurd were divorced in April 1990. Pursuant to their divorce decree, Mr. Hurd was ordered to pay Linda $400 per month child support for their two daughters, Maureen, born June 9, 1971, and Heather, born October 29, 1974. In February 1993, Linda obtained the services of the Child Support Recovery Unit (CSRU) after Mr. Hurd fell behind on his child support payments. CSRU brought an action against Mr. Hurd to collect back child support in the amount of $15,570.

Mr. Hurd filed a series of motions connected with the collection efforts. On August 25, 1993, Mr. Hurd filed motions to stay all proceedings and to vacate all court orders entered after February 14, 1993. In October 1993, Mr. Hurd moved for a $10,376.72 credit to his child support arrearage for monies he had allegedly expended on behalf of his daughters. He subsequently filed a motion to amend and correct all orders for income withholding previously entered. On November 19, 1993, he withdrew his motion and requested it be dismissed without prejudice. In April 1994, Mr. Hurd moved for a credit of $5728.04 against his child support arrearage, but dismissed the petition one month later without prejudice.

On June 9, 1995, Mr. Hurd filed a motion to expunge two orders filed by the district court regarding income withholding. On the day the matter was set to be heard, Mr. Hurd filed a motion to dismiss the motion to expunge. The district court noted Mr. Hurd had a history of filing motions, obtaining a hearing date, and then

seeking to withdraw the motions at the last minute. The court instructed him to wait outside the chambers while the court considered his request. Mr. Hurd elected not to do so and left the courthouse. The court took evidence and permitted the withdrawal and dismissal of the motion to expunge, but with prejudice, and assessed attorney fees and costs totaling $628.80.

Mr. Hurd filed a rule 179(b) motion claiming he had been denied due process as the court did not advise him of the possible ramifications of not being present for the hearing. The district court denied the motion. In his application for issuance of writ of certiorari,[1] Mr. Hurd maintains he was denied due process and alleges he was told by the sheriff to leave the courthouse when he was waiting for the court to consider his motion. He argues the district court erred in assessing costs and attorney fees against him.

The State argues the district court did not err in ordering Mr. Hurd to pay costs and attorney fees. The State insists Mr. Hurd's numerous applications and motions are merely attempts to harass the State in its collection efforts. The State further claims pursuant to Iowa Rule of Civil Procedure 215 the latest dismissal,

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[1] Although this action was erroneously filed by Mr. Hurd as an appeal of the district court's order instead of an application for issuance of writ of certiorari, we shall proceed as though the proper form of review had been sought. *See* Iowa R. App. P. 304.; *Alden v. Iowa District Court*, 479 N.W.2d 318, 319 (Iowa 1992) (review from a trial court's imposition of sanctions is obtained by application for issuance of writ of certiorari).

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coupled with the numerous other dismissals regarding identical issues, constitutes a double dismissal and acts as a bar to relitigation of the same issues.

I.

We review a certiorari action for correction of errors at law; however, to the extent constitutional issues are involved, we employ a de novo review of the evidence bearing on that claim. *See Lewis v. Iowa District Court*, 555 N.W.2d 216, 218 (Iowa 1996). After a careful review of the record, we find the district court did not err when it permitted the withdrawal and dismissal of the motion to expunge with prejudice and in assessing mileage costs and attorney fees to Mr. Hurd. Additionally, in our de novo review we find no violation of Mr. Hurd's constitutional right to due process.

II.

Iowa Rule of Civil Procedure 215 [2] provides, in part:

> A party may, without order of court, dismiss that party's own petition . . . at any time up until ten days before the trial is scheduled to begin. *Thereafter a party may dismiss an action or that party's claim therein only by consent of the court which may impose such terms or conditions as it deems proper.* . . . A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, *such dismissal shall operate as an adjudication against that party on the merits,* unless otherwise ordered by the court, in the interests of justice.

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[2] We note this is the rule relied upon by Mr. Hurd in his 179(b) motion and in his brief before us. We form no opinion as to whether any of the other rules of civil procedure may have some application in this controversy.

(Emphasis added.) Moreover, the 1990 Committee Comment to rule 215 provides, in relevant part:

> The committee recommended allowing the plaintiff to voluntarily dismiss an action at any time up until ten days before the trial is scheduled to begin. Thereafter the plaintiff would have to have the approval of the court and the dismissal could be on such terms and conditions as the court might impose, *such as the payment of costs and/or attorney fees which might be occasioned by a late dismissal.*

(Emphasis added.)

The record reflects Mr. Hurd went to the courthouse on the day set for the hearing and requested his petition be dismissed. The court instructed him to wait outside the chambers while it considered his request. However, Mr. Hurd elected to leave the courthouse instead of waiting as the court ordered.[3] CSRU resisted the dismissal and presented undisputed evidence of attorney fees and travel expenses incurred.

Mr. Hurd could have dismissed his action at any time up until ten days before it was scheduled for hearing. He knew under rule 215 that since he failed to timely dismiss his action that he could only do so by consent of the court. The rule is clear in that respect. In addition, the rule is equally clear that the court could impose such terms or conditions as it deemed proper.

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[3] Mr. Hurd now claims for the first time on appeal that the sheriff told him to leave the courthouse. His previous experience as a member of the legal profession should tell him that the court's directive would prevail. In either event, when the court attempted to learn his whereabouts, the sheriff testified that he did not know. In addition, opposing counsel stated he had searched the perimeter of the courthouse and was unable to locate him.

We recognize under most circumstances that sanctions will not be imposed upon a person who is not at least on notice that sanctions are under consideration. *K. Carr v. Hovick*, 451 N.W.2d 815, 818 (Iowa 1990). But here Mr. Hurd, by proceeding under rule 215, was put on notice that the court, in considering whether to consent to the dismissal motion, could impose "such terms or conditions as it deems proper."

In summary, from our reading of the record, the date fixed for hearing on Mr. Hurd's action was a date that he specifically requested. Rather obviously he had notice of that hearing date, for he presented himself along with his motion to dismiss. We believe that by proceeding under rule 215 with the added admonition of the court to remain, this was more than sufficient notice to Mr. Hurd that the court not only was going to act on his motion but was also going to impose those terms and conditions it deemed proper. This is precisely what the rule states and one of the reasons for its adoption.

From our de novo review of the record, we find Mr. Hurd's allegation that his constitutional right to due process was violated is without merit. The procedure employed to ensure due process depends to a considerable extent upon the circumstances of each individual situation. Having voluntarily chosen not to remain for the hearing, he cannot now complain that he is entitled to additional process.

As Mr. Hurd has previously dismissed petitions alleging issues identical to those contained in the petition at hand, we find the court properly dismissed his claim with prejudice. *See* Iowa R. Civ. P. 215.

We have considered Mr. Hurd's remaining contentions and find they are without merit.[4]

AFFIRMED. SINCE WE TREAT THIS AS AN APPLICATION FOR THE ISSUANCE OF A WRIT OF CERTIORARI, IT FOLLOWS THAT THE WRIT IS ANNULLED.

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[4] The reasonableness of the amounts is not challenged on appeal. Thus, we have not considered that question. However, it is clear two attorneys traveled from Sioux City to Ida Grove prepared to go to trial on Mr. Hurd's claim. This all could have been avoided if the motion to dismiss had been filed on an earlier date. Rule 215 was adopted with the thought of avoiding the very circumstances now before us.