IN THE COURT OF APPEALS OF IOWA

No. 9-328 / 88-1249

FILED
DEC 21 1989
CLERK SUPREME COURT

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**RICHARD P. OLSON,**

Appellant,

vs.

**SHEILA M. BERNARDO** and **WILLIAM H. BERNARDO,**

Appellees.

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Appeal from the Iowa District Court for Kossuth County, Tom Hamilton, Judge.

Appellant appeals the district court's denial of his "petition to correct, vacate, or modify judgment and/or grant new trial" pursuant to Iowa Rules of Civil Procedure 252 and 253. **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark S. Soldat, Algona, for the plaintiff-appellant.

Paul R. Doster and John C. Heinicke of Lynch, Lynch, Fenchel & Doster, Algona, for the defendants-appellees.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

**PER CURIAM**

Appellant Richard Olson appeals the district court's denial of his "petition to correct, vacate, or modify judgment and/or grant new trial" pursuant to Iowa Rules of Civil Procedure 252 and 253. We reverse and remand.

In April of 1987 appellant obtained a judgment against appellees for injuries he suffered in an automobile accident. Almost a year later, in April of 1988, appellant filed a petition to correct, vacate, or modify judgment and/or grant new trial. He based his petition upon alleged newly-discovered evidence concerning the extent and severity of a jaw injury. Appellees responded to the petition by filing a motion to dismiss.

On June 6, 1988, appellees' motion to dismiss was submitted to the trial court. On July 25, 1988, the district court entered a ruling denying appellant's petition to vacate and/or grant a new trial. In so doing, the district court addressed itself to the merits of appellant's petition.

The appellant raises two questions on appeal which he asks in the form that follows: (1) did the trial court err by sua sponte making a preliminary determination of a rule 253 petition, even though a rule 104 motion had been submitted to it, and (2) did the trial court err by denying a motion to extend the time for pleading over?

The appellant essentially argues that the only matter submitted to the court for its determination was the appellees' motion to dismiss. To support this contention, we are directed to the following calendar entry made by the trial court:

> The court conferred with Mark Soldat, attorney for plaintiff, and Paul Doster, attorney for defendant, concerning pending matters in the above-captioned matter, said conference was held on June 6, 1988. The court will take under submission the defendant's pending motion to dismiss plaintiff's petition of April 6, 1988, to correct, vacate or modify judgment and/or grant new trial. Counsel had requested time to submit briefs. Defendant's brief in support of motion to dismiss will be filed by June 20, 1988. Plaintiff's response thereto will be filed by June 30, 1988. Defendant's reply brief will be filed by July 8, 1988.

Subsequent to this calendar entry (1) the appellees asked and were granted permission to amend their motion to dismiss (2) the appellees filed their brief in support of their motion to dismiss and (3) appellant filed a resistance thereto.

Our scope of review is on assigned error. Iowa R. App. P. 4.

As it relates to the motion to dismiss, we concur with the appellees that it is an appropriate vehicle by which to assail a petition to vacate. Giltner v. Slark, 252 N.W.2d 743, 745 (Iowa 1977). But issues of fact are not raised by a motion to dismiss. City of Ankeny v. Armstrong, 353 N.W.2d 864, 868 (Iowa App. 1984); Kanau v. Miller, 328 N.W.2d 529, 530 (Iowa 1983). Whether to grant or deny "a

motion to dismiss is not discretionary but must be determined upon sound legal grounds." Giltner, 252 N.W.2d at 744; see Weber v. Madison, 251 N.W.2d 523, 525 (Iowa 1977). As the Iowa Supreme Court noted in Berger v. General United Group, Inc., 268 N.W.2d 630 (Iowa 1978):

> Like the old demurrer, a motion to dismiss admits the well-pleaded facts in the pleading assailed for the purpose of testing their legal sufficiency. The motion may not sustain itself by its own allegations of fact not appearing in the challenged pleading. We have said such averments are no proper part of the motion and must be ignored. The motion to dismiss can neither rely on facts not alleged in the petition (except those of which judicial notice may be taken) nor be aided by an evidentiary hearing.

Id. at 634 (citations omitted).

What we have here is an order of court directing the parties that it will take under submission appellees' motion to dismiss. In its ruling, however, the court determined the merits of the appellant's petition. Degressing for a moment and as it relates to appellant's petition, the record reveals the appellant, in resisting appellees' motion to dismiss, acknowledged that the court had the discretionary right under the rules to make a preliminary determination as to the validity of the grounds of appellant's petition separate from a trial itself. When making this concession, the appellant stated that the evidence he would make in support of his petition would be the same as he would present in resistance to the motion to dismiss. He then asked that the petition to vacate and the motion to dismiss be submitted at the same time.

The appellees resisted that request of the appellant. In resisting the request, appellees argued that the "evidence the appellant intends to present should not be heard in connection with the motion to dismiss, rather, if it is heard at all, it should be heard in connection with a 'preliminary determination' hearing pursuant to Iowa Rule of Civil Procedure 253(d)."

We think the circumstances here are somewhat (although not directly) akin to those in In re Marriage of Short, 263 N.W.2d 720 (Iowa 1978). In Short the petitioner requested that a time be set for hearing and a preliminary determination on the validity of the grounds to vacate as provided by Iowa Rules of Civil Procedure 253(d) be held. At the scheduled hearing, the trial court refused to take sworn testimony relative to petitioner's petition to vacate. The supreme court, in reversing the trial judge, stated:

> Respondent alleged and by his affidavit claimed petitioner did just that [engaged in fraud justifying a judgment vacation]. Whether he could so prove we do not know. No evidence was taken. The assigned hearing was not held. After an in-chambers unreported pretrial discussion with counsel, the court summarily dismissed the petition to vacate the December 4, 1975 decree. Respondent was thereby denied his right to present evidence and make a record. The trial court thus committed reversible error.

Id. at 723.

Thus, in the case before us, the appellant asked that he be permitted to present evidence in support of his

petition. The appellees resisted this request and urged the court to hear their motion to dismiss for "Whether the Court grants or denies Defendant's Motion to Dismiss will be based on the content of appellant's Petition." The appellees then asserted in their resistance that the appellant's petition failed to state a cause of action on which any relief may be granted.

As previously stated, the court determined the factual merits of appellant's petition and concluded that it should be denied. Under the circumstances here, we reverse and remand for further proceedings consistent with this opinion. In doing so, we have not considered the merits of appellant's petition; nor do we suggest what the final decision of the trial court should be. However, if the court is to make a preliminary determination under rule 253(d), like in Short, the appellant should be afforded the opportunity to make his record. We, of course, form no opinion as to the merits of appellees' motion to dismiss.

In light of our holding, we need not pass on appellant's other claims for reversal. Costs on appeal are taxed to the appellees.

**REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**