IN THE COURT OF APPEALS OF IOWA

FILED
OCT 28 1987
CLERK SUPREME COURT

JOHN SAILER,	)	
Plaintiff-Appellant,	)	
vs.	)	Filed October 28, 1987
GERALD MAGEE and WILCOX, POLKING, GERKEN AND SCHWARZKOPF, P.C.,	)	7-219 86-1131
Defendants-Appellees.	)	

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Appeal from the Iowa District Court for Greene County (No. 16323), R. K. Richardson, Judge.

Plaintiff appeals from denial of his application for reinstatement of an action that was dismissed under Iowa Rule of Civil Procedure 215.1. **REVERSED AND REMANDED.**

Gary S. Gill of Des Moines for plaintiff-appellant.

Chester C. Woodburn III of Hansen, McClintock & Riley, Des Moines, for defendants-appellees.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ. Snell, J., takes no part.

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In this appeal the plaintiff challenges the trial court's denial of his application for reinstatement under Iowa Rule of Civil Procedure 215.1. We reverse and remand.

This case began as a legal malpractice action filed on December 10, 1981, and became subject to dismissal under rule 215.1 in 1985. On December 30, 1985, a stipulated continuance was mailed to the Greene County Clerk. It was not received until January 2, 1986. The case was, therefore, dismissed by operation of law on January 1, 1986. Judge Seiser, on January 6, 1986, granted a continuance and entered a trial order. He subsequently vacated these orders on January 13, 1986, since the court lost jurisdiction over the matter pursuant to the dismissal.

Plaintiff then filed an application for reinstatement on June 26, 1986. The court, without a hearing, denied the reinstatement. The court stated: "The period for reinstatement has passed. Therefore, this court has no jurisdiction to reinstate the case." The court, therefore, did not reach the merits of the plaintiff's reinstatement claim.

Since this is an action at law, our review is for correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The trial court's interpretation of its findings becomes a question of law which is not conclusive on appeal. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972).

Before we reach the merits of plaintiff's appeal, we must address the defendant's argument regarding error preservation. The defendants argue that, since a rule 179(b) motion was not made, plaintiff did not properly preserve error for appeal. We disagree with this contention.

Rule 179 applies only when the court is "trying an issue of fact without a jury." Kagin's Numismatic Auctions v. Criswell, 284 N.W.2d 224, 226 (Iowa 1979). Such a motion is a condition precedent for preserving "skipped" issues for appellate review. Estate of Grossman v. McCreary, 373 N.W.2d 113, 114 (Iowa 1985); State Farm Mut. Auto Ins. Co. v. Pflibsen, 350 N.W.2d 202, 206 (Iowa 1984) (It is well settled that a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense or legal theory properly submitted to it for adjudication). The policy behind the rule is to give the trial court an opportunity to resolve an overlooked issue so as to avoid an appeal and possibly a second trial. McCreary, 373 N.W.2d at 114.

In this case, plaintiff is not raising any issues that were "skipped" in the trial court's ruling. Plaintiff is appealing the court's finding that the time for reinstatement had passed and the court's lack of jurisdiction. Plaintiff is not raising on appeal the substantive merits of the reinstatement. If he were, we would be precluded from ruling on them because a rule 179(b) was not made to properly preserve them. We do note that a motion to reconsider pursuant to rule 179(b) is allowable in a case such as this, but it is not required under the circumstances in this case. We, therefore, conclude that the plaintiff properly preserved his assignment of error for appeal.

We now address the merits of plaintiff's claim. The plaintiff asserts the trial court erred by finding that the reinstatement period had passed, thus, depriving the trial court of jurisdiction to rule on the reinstatement. He argues that rule 215.1 only requires the application to be filed within six months and does not require a hearing also be held within the same period.

The last portion of rule 215.1 provides:

> The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application

> for such reinstatement, setting forth the grounds therefore, shall be filed within six months from the date of dismissal.

Under this rule, the plaintiff has the burden to make a timely application for reinstatement. Koss v. City of Cedar Rapids, 300 N.W.2d 153, 157 (Iowa 1981); Werkmeister v. Kroneberger, 262 N.W.2d 295, 296 (Iowa 1978). The application for reinstatement must be filed within six months from the date of dismissal. Fankell v. Schober, 358 N.W.2d 219, 223 (Iowa App. 1984). The court has no authority to reinstate a case if the application was made after the six-month deadline. Kroneberger, 262 N.W.2d at 296. The rule, however, does not require, and the supreme court has never held, that a hearing on the reinstatement also occur within the six-month period.

The plaintiff's case was dismissed by operation of law on January 1, 1986. The plaintiff then had until July 1, 1986, to file an application for reinstatement stating the grounds for reinstatement. The application in this case was filed on June 26, 1986, five days before the deadline. The application was, therefore, timely filed and the court did not lose jurisdiction to rule on the merits of the reinstatement. We hold the trial court erred in denying plaintiff's application for reinstatement on the grounds it had no jurisdiction. We, therefore, reverse and remand the case back to the trial court for a determination of whether reinstatement under rule 215.1 is proper.

We now address the plaintiff's second assignment of error because it is likely to recur on remand. The plaintiff argues the trial court is required to hold a hearing on the application for reinstatement. He asserts that the word "showing" in rule 215.1 dictates a hearing be held.

Rule 215.1 requires the plaintiff to file a written application stating why the case should be reinstated. The court must order reinstatement if a showing of oversight, mistake or other reasonable cause is made. Iowa R. Civ. P. 215.1.

The rule, however, does not specifically require a hearing. We have previously upheld a trial court's denial of a reinstatement application made without a hearing. See Matter of Estate of Bearbower, 376 N.W.2d 922 (Iowa App. 1985) (stipulation of facts by parties). Oftentimes, the information contained in the record will be sufficient to determine the issue without a further hearing. We feel that, in the absence of a request for hearing by a party to the reinstatement action, the trial court should have the discretion to determine whether a hearing is necessary.

In remanding this case for a determination as to whether reinstatement is proper, we neither express nor intimate any opinion as to how any of the factual or legal issues in this case should be decided when they are presented to the trial court after remand.

REVERSED AND REMANDED.