FILED
MAY 30 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

VICKI MILLER,

Plaintiff-Appellee,

vs.

ROBERT JOHNSON,

Defendant-Appellant.

Filed May 30, 1980

0-124
2-03830

Appeal from Polk District Court - J. P. Denato, Judge.

Defendant appeals from trial court order refusing to set aside a $50,000 default judgment against him in an action for willful battery. AFFIRMED on condition and REMANDED with directions.

Marvin V. Colton of Albia, Iowa, for defendant-appellant.

James McKeon of Des Moines, Iowa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

The defendant appeals from trial court order refusing to set aside a $50,000 default judgment against him in an action for willful battery upon the plaintiff.

The defendant does not directly challenge the amount of damages awarded following an evidentiary hearing held subsequent to the entry of default.[1] Nor does the defendant challenge the notice procedures involved with respect to the hearing on damages on the basis of rights recognized in Williamson v. Casey, 220 N.W.2d 638, 640 (Iowa 1974). His only contention on appeal is that the order of default should have been set aside on his motion.

The basis for the order of default in the present case was the failure of defendant or his counsel to appear in court on the date the case was supposedly set for jury trial. Defendant's arguments on appeal can be divided into two categories: (a) those asserting that if notice of trial was given in accordance with law, the defendant's counsel failed to receive such notice; and (b) those asserting that the notice procedures required by the rules of civil procedure were not followed in the present case.

I. Defendant's claims that he or his counsel received no actual notice of trial involved hotly disputed issues of fact. The trial court resolved these issues adversely to defendant based on directly conflicting testimony. It is well settled that an appellate court in situations such as these must view the evidence in the light most favorable to the trial court's ruling on a motion to set aside default. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). Application of this standard of review to the present case requires that we accept the trial court's finding of fact that "defendant had several actual notices of the May 7 trial date." Such finding leaves no room to accept defendant's arguments based on the premise that he or his counsel received no actual notice.

II. We next consider defendant's claims based upon the premise that formal notice requirements of Iowa R. Civ. P. 181.2 (as existing prior to 1979 amendments) and Rules of Practice, Fifth Judicial District (March 1978 Revision), were not followed in the present case. At the outset, we consider certain principles which we deem applicable. The first of these is our belief that in addition to urging the grounds specified in Iowa R. Civ. P. 236, a party seeking to remove the chains of default may

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[1] Default was entered against defendant on May 7, 1979 for failure to present himself personally or through counsel at the trial scheduled on that date. On May 18, 1979 the court heard evidence of plaintiff's damages, and on May 21, 1979, entered judgment against defendant.

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show that the party was not, in fact, in default. See Thews v. Miller, 255 Iowa 175, 121 N.W.2d 518 (1963). Secondly, we conclude that in order to be in default for failure to appear at the trial under Iowa R. Civ. P. 230, it must be shown that formal assignment procedures under rule 181.2 and appropriate local rules have been followed. There must be some formal act of the court in accordance with established procedures setting the case for trial at the time and place where the defaulting party failed to appear.[2] Such action by the court is not supplied by hand-delivered messages between counsel or telephone calls between counsel.

Defendant urges that the required action in assigning a case for trial under rule 181.2 is not satisfied by published notice in the manner prescribed in rule 28 of the Rules of Practice, Fifth Judicial District (March 1978 Revision). We disagree. This type of notice is specifically authorized by sections 618.13 and 624.8, The Code. We further find that local rule 28 fully satisfies and expands upon the applicable requirements of rule 181.2. Accordingly, if notice was given in compliance with local rule 28, defendant's default was properly entered and no grounds have been established which require that it be set aside.

We are unable to determine from the record before us that publication was in fact made in accordance with local rule 28.[3] Nor can we find that the trial court resolved this issue so as to satisfactorily defeat the challenges defendant makes. Proof of publication of notice under local rule 28 is to be made under section 622.93, The Code. We believe the trial court may properly take judicial notice of such filings. See, e.g., Britven v. Britven, 259 Iowa 650, 659, 145 N.W.2d 450, 456 (1966). We accordingly adopt a procedure of conditional affirmance of the trial court's order.[4] We remand the case to the trial court with directions to review the filings of proof of publication under section 622.93 of those notices required to be given in this action under local rule 28. In the alternative, the trial court may satisfy itself by other record evidence that said required publications were made. If such review by the trial court reveals a failure to

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[2] We do not suggest that the court may not act through a court administrator as provided in Rules of Practice, Fifth Judicial District.

[3] We do not consider that affidavits filed in resistance to a motion for new trial may be considered on this issue. In any event, such affidavits are not sufficiently specific to establish compliance with local rule 28.

[4] Such procedure is approved in State v. Hall, 235 N.W.2d 702, 731 (Iowa 1975), and cases discussed therein.

comply with local rule 28 in notifying defendant of the date of trial, it should enter an order setting aside the default and judgment. If not, the order and judgment shall stand affirmed.

III. Issues raised by defendant in his motion for new trial are not before us for review. Such issues were abandoned by appealing prior to the time the trial court ruled on the motion.

IV. We also decline to consider defendant's claim that his counterclaim is still viable. The trial court record is ambiguous as to whether the order of default adjudicated such claim against defendant. If it did, no final judgment was ever entered on the counterclaim.

AFFIRMED on condition and REMANDED with instructions.