

FILED

AUG 25 1981

CLERK SUPREME COURT

68

IN THE COURT OF APPEALS OF IOWA

ROY E. HAUSER and HAIG, INC.,)
Plaintiffs-Appellees,)
vs.)
E. A. HASLEY and LEONE M. HASLEY,)
Defendants-Appellants,)
E. A. HASLEY and LEONE M. HASLEY,)
Third-Party Plaintiffs,)
vs.)
RAMCO, INC.,)
Third-Party Defendant.)

Filed August 25, 1981

1-68
2-65244

Appeal from Linn District Court - Clinton E. Shaeffer and Robert Osmundson,
Judges.

Defendants, E. A. Hasley and Leone M. Hasley, appeal from the trial court's entry
of default judgment against them and the award of \$12,000 in actual damages and
\$10,000 in punitive damages to the plaintiffs, Roy E. Hauser and Haig, Inc. AFFIRMED
IN PART; REVERSED IN PART; AND REMANDED FOR NEW TRIAL ON ISSUE OF
ACTUAL DAMAGES.

Donald G. Ribble and John C. Monroe of Lynch, Dallas, Smith & Harman, Cedar
Rapids, for defendants-appellants.

Gerard J. Glaza, Cedar Rapids, for plaintiffs-appellees.

Richard D. Raymon, Cedar Rapids, for third-party defendant.

Heard by Oxberger, C.J., and Doniclson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendants, E. A. Hasley and Leone M. Hasley, appeal from the trial court's entry of default judgment against them and the award of \$12,000 in actual damages and \$10,000 in punitive damages to the plaintiffs, Roy E. Hauser and Haig, Inc. Defendants contend that : (1) the trial court erred by refusing to set aside the default judgment; (2) there was not substantial evidence to support the trial court's award of \$12,000 in actual damages to the plaintiffs; (3) there was not substantial evidence of fraud by defendants to justify the trial court's award of punitive damages to plaintiffs; and (4) the trial court erred in dismissing defendants' counterclaim for unpaid rent. Our scope of review in this matter is limited to correction of errors at law. Iowa R. App. P. 4. We affirm in part, reverse in part, and remand for a new trial on the issue of actual damages.

I.

In April, 1978 the plaintiffs leased a building suitable for operating a bar from the defendants for a term of five years. In addition, the plaintiffs paid the defendants \$12,000 for the contents of the building which were necessary to operate the premises as a bar. In early December, 1978, plaintiffs encountered financial difficulties and told defendants they could no longer make rent payments. On December 11, 1978 the plaintiffs, defendants, and their respective attorneys had a meeting at which plaintiffs turned over the keys to the building to defendants. The parties agreed that plaintiffs' security deposit would be used to pay the rent due through January, 1979. Plaintiffs further allege that defendants agreed at this time to terminate the lease. Defendants deny this allegation. Defendants did agree to allow the plaintiffs to sell the contents of the bar (i.e. the \$12,000 of miscellaneous bar contents that plaintiffs purchased from defendants) in order to satisfy plaintiffs' debt to another secured creditor, Ramco, Inc., who later became a third-party defendant. The sale was held on the leased premises on February 8, 1979. Defendants appeared at the sale and refused to allow the sale of at least four of the forty-one items listed on the bill of sale: two hoods with fire extinguishers, a twenty foot bar, and the frames of nine booths. Defendants claimed these items were attached to the real estate and were fixtures, thus their removal would damage the defendants' property. Plaintiffs argue these forty-one items were purchased from defendants in April, 1978 and that they should have been allowed to sell them. Plaintiffs also assert that they had to refund some purchasers' money because defendants refused to allow purchasers to pick up the items they had purchased.

On March 1, 1979 plaintiffs filed suit alleging that in April of 1978 defendants fraudulently sold certain items of personal property (i.e. the bar contents) to plaintiffs in that the defendants misrepresented that they were transferring items to the plaintiffs which they did not in fact intend to sell. Plaintiffs requested \$12,000 in actual and \$25,000 in punitive damages. Defendants were served with notice on March 17, 1979. Plaintiffs' attorney repeatedly urged defendants' attorney to file a responsive pleading during the three month period after defendants had received notice. Finally on June 25, 1979 plaintiffs' attorney requested the Clerk of Court to enter a default judgment against the defendants. A hearing was set for August 3, 1979 to determine damages. Defendants finally answered three weeks after the default judgment was entered and counter-claimed for lost rent. Plaintiffs filed a motion to strike both the answer and counterclaim. Defendants filed a motion to set aside the default judgment. The trial court struck defendants' answer, refused to set aside the default judgment, and allowed defendants' counterclaim to go to trial. The trial court found that: (1) the defendants defrauded the plaintiffs in the sale of the bar contents, (2) the defendants wound up with most of the property in question (i.e. the bar contents), (3) the plaintiffs should receive \$12,000 in actual and \$10,000 in punitive damages, and (4) the defendants' counterclaim should be dismissed on the grounds that defendants had agreed to terminate the lease. Defendants then filed this appeal.

II.

The defendants argue that the trial court erred by refusing to set aside the default judgment because they had shown good cause to set aside the default under Iowa R. Civ. P. 236 when they alleged the default was caused by their attorney's excusable neglect due to overwork and by their attorney's reliance on a "local custom" that a default is not sought unless it is preceded by written notice to opposing counsel that a default will be sought if there is no answer by a specific date. The trial court was correct when it found the defendants had offered an explanation for their failure to appear but had not shown good cause to set aside the default judgment. The defendants had the burden under rule 236 to show a sound, effective, truthful reason, which requires showing something more than an excuse, a plea, an apology, an extenuation or some justification for the default. The language of rule 236 requires good cause to be based on mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). Defendants in this case

merely offered an excuse which failed to show good cause in light of the repeated requests for an answer made by plaintiffs' attorney. "Defaults will not be vacated where movant has ignored plain mandates in the rules with ample opportunity to abide by them." Flexsteel Ind., Inc. v. Morbern Ind. Ltd., 239 N.W.2d 593, 598 (Iowa 1976). Iowa R. Civ. P. 53 required defendants to answer within twenty days after service of original notice and petition upon defendants. It is impossible to say defendants were not allowed ample opportunity to abide by the rule in this case. In addition, even if the "local custom" relied upon by defendants' attorney is the practice in Linn County, this court cannot and will not rewrite the rules of civil procedure to comply with "local custom". The trial court's refusal to set aside the default judgment against the defendants is affirmed.

III.

The defendants allege that the trial court erred in its award to plaintiffs of \$12,000 in actual damages and \$10,000 in punitive damages because the award was contrary to Iowa law and not supported by substantial evidence. Damages should be measured by giving plaintiffs the fair and reasonable value of the items actually converted by the defendants at the time and place of the taking. Ontario Live Stock Comm. Co. v. Flynn, 256 Iowa 116, 126, 126 N.W.2d 362, 368 (1964). In this case defendants' alleged fraudulent sale of certain items to the plaintiffs culminated in a conversion by defendants of the items which were either not allowed to be sold or not allowed to be picked up by the purchasers. The record in this case is unclear as to how many of the forty-one items were actually converted by defendants. This finding of fact is necessary in order to properly measure plaintiffs' actual damages. Thus we reverse the trial court's award of actual damages and remand for a new hearing to determine plaintiffs' actual damages with respect to only those items which were either not sold at the February 8, 1979 sale or items on which plaintiffs had to refund purchasers' money because defendants refused to allow purchasers to pick up the purchased items.

It seems clear in this case that plaintiffs have suffered some amount of actual damages, but the amount awarded was improperly calculated. Once actual damages are shown, punitive damages are up to the fact finder's discretion. Rowen v. LeMars Mut. Ins. Co. of Iowa, 282 N.W.2d 639, 661 (Iowa 1979); Young v. City of Des Moines, 262 N.W.2d 612, 620 (Iowa 1978). Although there is no set mathematical ratio between

actual and punitive damages, the amount allowed must generally be proportionate to actual damages granted. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973); Claude v. Weaver Construction Co., 158 N.W.2d 139, 145 (Iowa 1968). Thus we remand to the trial court for determination of plaintiff's damages, if any.

Defendants also assert that the trial court's order dismissing defendants' counter-claim was error. We affirm the trial court's finding that defendants released plaintiffs' further liability on the lease when they took the keys to the premises and used the plaintiffs' deposit to pay rent through January, 1979.

The costs of this appeal are to be assessed seventy-five percent to the defendants and twenty-five percent to the plaintiffs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL TO DETERMINE PLAINTIFFS' ACTUAL DAMAGES.

All judges concur, except Carter, J., who concurs in part and dissents in part.

CARTER, J. (concurring in part; dissenting in part)

I concur only in that portion of the decision of the court which holds (a) that the trial court did not err in refusing to set aside the default, and (b) that the law-tryed issue of cancellation of the lease presents a situation where on the present record the trial court's judgment for plaintiff on defendants' counterclaim should not be disturbed. On the issues of both actual and exemplary damages on plaintiff's claim, I would reverse and hold plaintiff is entitled to no damages whatsoever.

The present case presents a situation wherein the proof adduced at the hearing on damages rather conclusively establishes that the elements of liability supposedly admitted by the act of default are in fact nonexistent. Plaintiff's pleaded theory of liability is that at the time of the sale of certain furniture, fixtures and inventory of a bar business, defendants falsely represented that all of the property was personal property when it was their actual intent that some of the items would remain part of the realty to which they held title. As a result of the evidence produced at the hearing held on the issue of damages, I have substantial doubts that this was ever the intention of defendant, but, for reasons hereinafter stated, this is without legal significance.

Assuming that defendants' contentions were as alleged by plaintiff, this undisclosed intention by one of the parties would not alter the legal effect of the transaction or deny plaintiff title to that property which he had bought and paid for. Plaintiff got title to all of the property. The case is thus not one involving fraudulent misrepresentations at the inception of the transaction¹ but rather, at best, a case of alleged unauthorized interference by defendants with the disposition of plaintiff's property at a later date. The evidence on this issue shows that regardless of any representations made at the time of sale, defendants had a legal right to interfere to the extent which they did in plaintiff's disposal of certain of the items covered by the bill of sale. In this regard, defendants never questioned plaintiff's title to the fixtures in question. Rather, they were asserting that these fixtures were of such a nature that defendants might demand security for the cost of repairing damages caused by removal of the property. This right is given defendants under section 554.9313(8), The Code,

¹ Any claimed fraudulent misrepresentation in the present case would be relevant only if plaintiff were now claiming a right to rescind in whole or in part, but he gave up any right to rescind by not restoring or offering to restore the status quo.

because the goods in question were being removed to satisfy the security interests of a third party (Ramco). This was the basis for defendants' refusal to allow removal of the property and given the nature of the equipment not permitted to be sold, such refusal was legally justified. I would affirm the judgment for plaintiff on defendants' counterclaim and reverse the judgment for plaintiff on his claim with directions to deny recovery thereon.