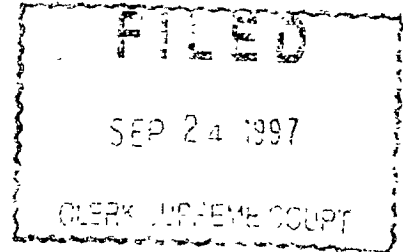


IN THE COURT OF APPEALS OF IOWA

000279

No. 7-356 / 96-1188
Filed September 24, 1997



**IN RE THE MARRIAGE OF JON D. ROBINSON
AND DEBRA ANN LINSEY-ROBINSON**

Upon the Petition of
JON D. ROBINSON,
Appellant,

And Concerning
DEBRA ANN LINSEY-ROBINSON.
Appellee.

Appeal from the Iowa District Court for Polk County, George W. Bergeson,
Judge.

Petitioner appeals the district court's rulings denying his motion to dismiss respondent's petition to vacate and vacating the dissolution decree he obtained by default. **AFFIRMED.**

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for
appellant.

Francis C. Hoyt, Jr., West Des Moines, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Petitioner, Jon Robinson, appeals from the district court's vacating a default dissolution. Jon argues the court's rulings were erroneous because the respondent, Debra Linsey-Robinson, submitted no evidence as to why she could not discover her grounds for relief in time to proceed under Iowa Rules of Civil Procedure 236 or 244. Jon further argues Debra did not prove the default was procured by extrinsic fraud, as required by Iowa Rule of Civil Procedure 252.

I. Facts and Background.

Jon and Debra married in May 1989 and separated in 1993. After the separation, Debra moved to Illinois with the children. Jon remained in Des Moines. Debra began dissolution proceedings in Illinois in 1993. Both parties were represented by counsel in the Illinois action. On November 17, 1995, the Illinois dissolution proceedings were dismissed for want of prosecution.¹ Three days later Jon filed for divorce in Iowa. Jon's petition stated no other separate action for dissolution had been commenced by Debra or was pending. Debra was properly served with the original notice and petition and a return of service was filed. Debra did not respond to the Iowa proceeding.. On December 19, 1995 Jon filed a financial affidavit which did not list his IPERS account. The account was worth over \$90,000.

¹ On December 18, 1995 the Illinois court vacated the dismissal of Debra's petition and reinstated the case.

On March 4, 1996, the Polk County District Court entered a default decree against Debra and disposed of the parties' assets, but did not rule regarding the custody or support of the children because of the pending Illinois action. Jon was awarded all his personal bank and investment accounts, including his IPERS account.

Debra filed a petition to vacate the default decree on April 3, 1996, claiming Jon had obtained it through the use of irregularity and fraud. Jon filed a motion to dismiss the petition to vacate. The district court concluded Jon obtained the default decree through fraud and irregularity and did not provide for an equitable division of the assets of the parties. Jon appeals.

II. Standard of Review.

An appellate court's review of a district court's ruling on a motion to dismiss is for correction of errors of law. *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996). The decision to overrule a motion to dismiss must rest on legal grounds. *Id.*

An appellate court's review of an order issued on a rule 252(b) petition to vacate is at law. *Svoboda v. Svoboda*, 245 Iowa 111, 122, 60 N.W.2d 859, 865 (1953); *In re Marriage of Kinnard*, 512 N.W.2d 821, 823 (Iowa App.1993) (stating review of proceeding for vacation of judgment in dissolution proceeding is at law).

The district court has wide discretion in deciding whether to vacate an order under rule 252. *Kreft v. Fisher Aviation, Inc.*, 264 N.W.2d 297, 303 (Iowa 1978). An appellate court will not reverse the trial court's decision on this question unless an

abuse of discretion has been shown. *Windus v. Great Plains Gas*, 255 Iowa 587, 594, 122 N.W.2d 901, 905 (1963).

The court's exercise of discretion must have some support in the record. *Windus*, 255 Iowa at 594, 122 N.W.2d at 905. If the trial court's factual findings are supported by substantial evidence, they are given the force of a jury verdict and binding on appeal. *Mishler v. Stouwie*, 301 N.W.2d 744, 747 (Iowa 1981).

III. Procedural Requirements of 252(b).

Jon claims the court erred in denying his motion to dismiss because Debra did not set forth the reasons she could not proceed under rules 236 or 244 in her petition to vacate as required by Rule 253.² In support of his argument Jon cites *Stoner v. Kolen*, 528 N.W.2d 648, 650 (Iowa App. 1995). In *Stoner* the court held one who seeks to vacate a judgment under rule 252 must proceed under rule 236 when they seek a new trial. *Stoner*, 528 N.W.2d at 650.³

Debra did not need to set forth the reasons she could not proceed under rules 236 or 244 in her petition to vacate because she did not seek a new trial. She sought only to vacate the judgment by the Iowa court. Jon argues it “goes without saying”

² Rule 253 states that a petition to vacate the judgment “shall state the grounds for relief, and, *if it seeks a new trial*, show that they could not have been discovered in time to proceed under R.C.P. 236 or 244, and were discovered afterwards.” (Emphasis added).

³ Jon argues *Stoner* stands for the proposition that anyone who seeks to vacate pursuant to rule 252 must first proceed under rules 236 or 244. However, the court in *Stoner* held the plaintiff “did not proceed under rule 236 *and has sought a new trial, so she was required to make a showing* in her petition why her grounds for relief could not have been discovered within the rule 236 time frame.” *Stoner*, 528 N.W.2d at 650.

Debra seeks a new trial. Nowhere in Debra's petition to vacate, affidavit in support of her petition, or appellate brief did she request a new trial. Further, Debra does not desire a new trial in an Iowa court. The same issues may be decided in the Illinois court where the dissolution is already pending, depending on jurisdiction issues, etc. The trial court correctly denied Jon's motion to dismiss Debra's petition to vacate.

IV. Vacation of Judgment Under 252(b).

A. Extrinsic Fraud Required. Jon contends the trial court erred in vacating the divorce decree because Debra did not prove the decree was obtained by extrinsic fraud. Rule 252(b) permits the court to vacate a judgment if "fraud was practiced in obtaining" it. Fraud is of two types: extrinsic and intrinsic. Extrinsic fraud "is some act or conduct of the prevailing party which has prevented a fair submission of the controversy." *Stearns v. Stearns*, 187 N.W.2d 733, 735 (Iowa 1971). It "includes lulling a party into a false sense of security or preventing the party from making a defense." *Costello v. McFadden*, 553 N.W.2d 607, 612 (Iowa 1996). In contrast, intrinsic fraud inheres in the judgment itself, for example, it includes false testimony and fraudulent exhibits. *Cook v. Cook*, 259 Iowa 825, 830, 146 N.W.2d 273, 276 (1966). Fraud sufficient to vacate a judgment under rule 252(b) must be extrinsic to the judgment. *Costello*, 553 N.W.2d at 612.

B. Proof of Extrinsic Fraud. The fraud claimed by Debra rests on an omission and a false statement made by Jon to the court: (1) Jon's failure to list his IPERS pension plan as an asset on his financial affidavit; and (2) Jon's statement in

his petition that no other action for dissolution had been brought or was pending in any other court.

The trial court's finding of irregularity and fraud is supported by substantial evidence. In Jon's petition for dissolution of marriage filed November 26, 1995, Jon stated: "That a separate action for dissolution of marriage has not been commenced by the Respondent, and such action is not pending in any court in this state or elsewhere." This statement was not true. Debra commenced an action for dissolution of marriage in 1993. Debra was under the impression the petition for dissolution had been taken care of by her Illinois attorney. She did nothing more to defend the action. Jon traveled to Debra's home to discuss pending matters on March 2, 1996. Although he knew the matter had not been resolved at that time and Debra was in default, he did not inform Debra of either of these facts. Jon obtained a default on March 4, 1996. Jon's conduct lulled Debra into believing the Iowa matter had been resolved and prevented her from defending the matter.

Because Debra did not know an Iowa district court was ruling on her divorce, she had no input to the division of property made by the court. The division of property made by the court was based on the information appearing in Jon's financial affidavit. He swore the information was true and correct. The information was incomplete. Jon argues Debra cannot prove injury from the omission of his IPERS account from his affidavit. The point is Jon's omission prevented the court from having all the information it needed to divide the property equitably. Pension

benefits, as a general rule, are treated as marital property and subject to equitable division. *In re Marriage of ImHoff*, 461 N.W.2d 343, 344 (Iowa 1990). Regardless of what portion of the IPERS account Debra was entitled to--substantial or minimal--the trial court needed this information to make an equitable division of the property.

The evidence supports the trial court's finding of irregularity and extrinsic fraud sufficient to justify vacation of the dissolution decree. Accordingly, the trial court did not err.

AFFIRMED.