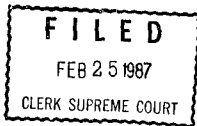


IN THE COURT OF APPEALS OF IOWA



CAROL E. GREEN,)

Plaintiff-Appellant,)

vs.)

RON K. YOUNG and WELCHMAN)
& YOUNG, INC.,)

Defendants-Appellees.)

Filed February 25, 1987

39

6-497
86-477

Appeal from the Iowa District Court for Scott County (69827) - Margaret S. Briles, Judge.

Plaintiff has appealed with permission from the district court order setting aside the default judgment as to the amount of damages. **REVERSED.**

Arthur L. Buzzell and Richard Vesole, Davenport, Iowa, for plaintiff-appellant.

G. David Binegar, Davenport, Iowa, for defendants-appellees.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

The plaintiff was formerly employed at a tavern owned by the defendant, Welchman and Young, Inc., a corporation whose officers were Ronald Welchman and Ronald Young. The plaintiff's employment contract provided that the plaintiff would be guaranteed a job for three and one-half years, the period remaining on the corporation's lease of the real estate housing the tavern.

Before the lease period expired, Welchman & Young, Inc., sold the tavern business and discharged the plaintiff. The plaintiff then filed the present suit for breach of the employment contract. The suit named as defendants both Welchman & Young, Inc., and Ronald Young individually.

The defendants never filed an answer to the plaintiff's petition. Eventually the district court entered a default judgment against the defendant Young in the amount of \$18,240. Young then filed a motion to set aside the default judgment. The district court refused to set aside the default as to Young's liability, but it did set aside the default judgment as to the amount of damages. The district court found that Young had received adequate notice of the suit and therefore was not entitled to avoid the default as to liability. However, the district court stated it did not believe Young would have allowed the case to go to default if he had had any idea the amount of the judgment would be so high. The district court characterized the amount of the judgment as a surprise which Young would not have been expected to anticipate. The court therefore awarded Young a new trial as to the amount of damages, although not as to liability.

The plaintiff has sought and received permission for an interlocutory appeal from the district court order setting aside the default judgment against Young as to the amount of damages. The plaintiff contends the evidence did not support setting aside the default as to damages. The plaintiff argues there is no basis

for the district court's distinction between the default as to liability and the default as to the amount of damages; the plaintiff asserts that the defendant's obligation to appear in order to avoid a default did not vary according to the amount of damages sought.

A proceeding on a motion to set aside default is at law. Flexsteel Industries, Inc. v. Morbern Industries, Ltd., 239 N.W.2d 593, 596 (Iowa 1976); Sher v. Burche, 353 N.W.2d 859, 862 (Iowa Ct. App. 1984). The trial court is vested with broad discretion in ruling on such a motion and will be reversed on appeal only where discretion has been abused. Generally abuse will be found where the trial court's ruling is not supported by substantial evidence. Paige v. City of Chariton, 252 N.W.2d 422, 427 (Iowa 1977). Even in the situation where the trial court makes no findings of fact, we will uphold the ruling if any proper ground appears in the record. Hastings v. Espinosa, 340 N.W.2d 703, 608 (Iowa Ct. App. 1983).

The burden is on the movant to plead and prove good cause to set aside the default or judgment thereon. Williamson v. Casey, 220 N.W.2d 638, 639 (Iowa 1974). Iowa Rule of Civil Procedure provides in pertinent part:

On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty.

Good cause is more than an excuse, plea, apology, extenuation, or some justification for the resulting effect. Sher, 353 N.W.2d at 862. It does not exist without a claimed defense asserted in good faith or at least prima facie showing of meritorious defense. Flexsteel, 239 N.W.2d at 601. Movant must show his failure to defend was not due to his negligence, failure to exercise ordinary care, carelessness or inattention. The movant must affirmatively show he intended to defend and took steps to do so, but the intention was not fulfilled because of

some misunderstanding, accident, mistake, or excusable neglect. Paige, 252 N.W.2d at 437.

In the present case the trial court set aside only the damage portion of the default judgment and allowed the default, as it related to liability, to stand. "A judgment by default is to be distinguished from the mere entry of default; the entry of a default does not constitute a judgment, but rather an order precluding the defaulting party from making any further defense in the case as far as his liability is concerned." 47 Am. Jur. 2d Judgments § 1153 at 185. In other words, the trial court set aside the default judgment and allowed the default to stand. We believe the language from Rule 236, which provides: "the court may set aside a default or the judgment thereon," supports the trial court's remedy. However, to warrant the setting aside of a default entry or a default judgment the mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty standard still must apply.

In its order the trial court provided the following:

The Court cannot find any basis to set aside the default in this case, except the Court believes that the defendant would under no circumstances have allowed the matter to go to default if he had any idea that the plaintiff would not give him credit for the \$5.00 an hour she has been earning at the same kind of job since the 1st of April, 1985, and that he would not be entitled to credit against the remaining portion for the amount that the plaintiff would be earning at alternate employment. This failure to defend the amount of damage is clearly excusable, and the judgment which ensued was a surprise that the Court would not expect the defendant to anticipate.

After careful consideration of this portion of the order, we conclude that the trial court set aside the default judgment because defendant was surprised by the amount of damages in the judgment. Surprise, sufficient to set aside a default judgment, has most often been found where counsel agree to not bring a default action and then breach the agreement, thereby surprising the other

party as to the existence of the default. In the present case defendant was not surprised by the existence of the default; the trial court concluded that it was incomprehensible that the defendant had not received notice of the action. Defendant had the burden of showing he intended to defend but the intention was defeated due to some surprise. There is no evidence in the record to support any intention by defendant to defend this cause of action. Further, any surprise as to the amount of damage was the logical result of defendant's inaction, we refuse to sanction a setting aside because the defendant in default failed to accurately predict the amount awarded by the trial court.

It could have been argued that Iowa Rule of Civil Procedure 235 limited plaintiff's recovery. That rule provides:

The judgment may award any relief consistent with the petition and embraced in its issues; but unless the defaulting party has appeared, it cannot exceed what is demanded against him in the petition as limited by the original notice.

The relief provided in a judgment by default must be consistent with the case made by the petition. Heyer v. Peterson, 307 N.W.2d 1, 4 (Iowa 1981). As the court in Rayburn v. Maher, 227 Iowa 274, 288 N.W. 136 (1939), explained:

It is true, that when a defendant defaults, the plaintiff becomes entitled to certain advantages. But such failure by the defendant does not enlarge his claim nor broaden his rights under the allegations of his petition. His right of recovery and the amount and nature thereof is still limited by those averments. Though a defendant may default, he is still within the pale of the law and is entitled to just treatment. He has a right to expect and to demand that plaintiff's recovery shall be confined, and responsive, to his pleaded demand.

227 Iowa at 285, 288 N.W. at 141. The general rule for a motion for default judgment is that relief granted in a judgment by default not only must be within the fair scope of the allegations of the complaint, but also must be within the fair scope of the prayer thereof. Id. (citing 47 Am. Jur.2d Judgments § 1176

at 199). A judgment entered in a default should not contain an award of damages in excess of that demanded in the pleadings of the plaintiff. Id. In the present case, plaintiff in both her original and amended petition, requested damages in excess of \$2,000.

The original court did not err because the defendant made a special appearance in April of 1985. The trial court recognized this as actually a general appearance. Defendant's appearance for any purpose makes it incumbent on that party thereafter to see that the relief granted does not exceed the facts, and there is no longer any protection from the petition. 3 Iowa Rules of Civ. Proc. Ann., rule 235 (West 1970) (comment on rule 235). Therefore defendant, in this case, could not avail himself of the protections afforded in Rule 235.

There is no question that defendant had sufficient notice of the default hearing and that at this hearing damages would be determined. Beyond a special appearance, defendant took no action to defend this cause. The trial court found that the damages awarded were a surprise which defendant would not have anticipated. Defendant's surprise at the amount of damages, after the fact, is not a "good cause" sufficient to justify the setting aside of a default judgment. We find that the trial court abused its discretion in setting aside the default judgment. This abuse of discretion is based on the lack of substantial evidence to support the court's ruling. We reverse the trial court's order setting aside the default judgment and affirm the original default entry and judgment amount.

REVERSED.