FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

138

KAREN A. POLKING and THOMAS W. POLKING,

Plaintiffs,

vs

HARRY PERKINS, JR., Judge of the District Court of Polk County,

Defendant.

Filed February 25, 1987

6-474
86-112

Appeal from the Iowa District Court for Polk County (No. CL 56-32999) - Harry Perkins, Jr., Judge.

Plaintiffs challenge via certiorari an order removing a civil action from automatic dismissal pursuant to Iowa R. Civ. P. 215.1, asserting that the order was illegally entered without application, notice, or hearing. **AFFIRMED.**

Thomas W. Polking of Wilcox, Polking, Gerken, Schwarzkopf & Hoyt, P.C., Jefferson, for plaintiffs.

Curt L. Sytsma, Des Moines, for plaintiff in underlying civil action.

Considered by Oxberger, C.J., and Donielson and Snell, JJ.

The plaintiffs, Karen and Thomas Polking, challenge via certiorari an order removing a civil action from automatic dismissal pursuant to Iowa Rule of Civil Procedure 215.1, asserting that the order was illegally entered without application, notice, or hearing. We affirm.

On May 10, 1984, Alfred Miller filed a petition at law against the Polkings whereby he sought judgment based upon an alleged contract for architectural services. The Polkings counterclaimed, alleging overpayment of fees in violation of contract by Miller. On August 9, 1985, the clerk of district court sent notice to the parties that the case would be dismissed pursuant to Iowa Rule of Civil Procedure 215.1 if not tried prior to January 1, 1986. Plaintiff Miller filed a certificate of readiness for trial on November 5, 1985. Without further application, notice, or hearing, the court entered an order on December 31, 1985, setting the case for trial on April 9, 1986, and stating that it would not be subject to dismissal under rule 215.1 prior to that date. The Polkings' petition seeking certiorari review was granted on March 6, 1986.

Because a writ of certiorari was granted, our scope of review of the district court's action is limited to a determination of whether the district court exceeded its jurisdiction or otherwise acted illegally. Coonrad v. Van Metre, 362 N.W.2d 197, 199 (Iowa 1985); Farley v. Glanton, 280 N.W.2d 411, 414 (Iowa 1979). On a petition for certiorari, the petitioner has the burden to show that the district court exceeded its jurisdiction or otherwise acted illegally. Gibb v. Hansen, 286 N.W.2d 180, 184 (Iowa 1979).

Pursuant to Iowa Rule of Civil Procedure 215.1 provides that except under unusual circumstances, all civil cases shall be tried within one year from the date they are filed. Where a case has been on file for more than one year prior to July 15 of any year, the clerk of court shall send notice to the parties that

such case will be subject to dismissal if not tried prior to January 1 of the next succeeding year. Iowa R. Civ. P. 215.1. The purpose of rule 215.1 is to "clear our court dockets of dead wood and trial assignments of stale cases acting as barnacles to good procedure." Kutrules v. Suchomel, 258 Iowa 1206, 1212, 141 N W.2d 593, 597 (1966).

Under rule 215.1, it is the duty of the party desiring the court to retain jurisdiction of his or her matter at the end of the try or dismiss term to file a timely application and secure a court order continuing the case to a future term or date. Baty v. City of West Des Moines, 259 Iowa 1017, 1023, 147 N.W.2d 204, 209 (1966). There must therefore be a timely application setting forth the reasons for the granting of a continuance, notice, a hearing and order before an entry of dismissal. Kutrules, 258 Iowa at 1212-13, 14 N.W.2d at 597. The Iowa Supreme Court, however, has opined that the filing of an application for continuance is not the sole vehicle for securing a valid rule 215.1 continuance order. Gold Crown Properties v. Iowa Dist. Court, 375 N.W.2d 692, 697 (Iowa 1985).

In Kutrules v. Suchomel, 258 Iowa 1206, 141 N.W.2d 593 (1966), the Iowa Supreme Court considered the question of whether the trial court's granting of a continuance without a hearing was contrary to the dictates of rule 215.1. In Kutrules, both parties received a rule 215.1 notice. 258 Iowa at 1209, 141 N.W.2d at 595. On October 1, 1964, the plaintiff filed a certificate of readiness for trial. Id. On October 20, the plaintiff filed a motion to remove the case from the dismissal list and stated reasons why the case should not be dismissed. Id. On November 24, the trial court granted plaintiff's motion to remove the case from the dismissal list and continued the case to the January term. Id. The plaintiff filed another certificate of readiness in March of 1965, but the case did not come to trial during that term. Id. On the first day of the April

term, the case was assigned a June trial date. Id. at 1210, 141 N.W.2d at 596. That same day the defendants filed a motion to dismiss. Id. The trial court sustained the motion to dismiss. Id.

In reversing the trial court's dismissal of plaintiff's case, the court in Kutrules first noted that the defendants had received copies of the plaintiff's motion to remove the case from the dismissal list. Id. at 1211, 141 N.W.2d at 596. Therefore the ruling on that motion was not ex parte for purposes of rule 215.1. Id. In holding that the trial court did not err in setting the date for trial upon the convening of the April term, the court stated that "[w]e have never said that a case should be dismissed for lack of prosecution while on active trial assignment, assigned for trial on a date certain and before the arrival of the trial date. Such a ruling would be arbitrary and beyond the realm of sound discretion." Id. at 1213, 141 N.W.2d at 598. The court further held that "[r]ule 215.1 was never intended nor does it require dismissal of cases that are at issue, ready for trial, and while plaintiff is affirmatively asking for trial." Id at 1214, 141 N.W.2d at 598.

We find the facts of Kutrules analogous to the facts in the present case. In the present case, the parties received notice on August 9, 1985, that the case would be subject to dismissal if not tried by January 1, 1986. On November 5, 1985, the plaintiff filed a certificate of readiness. The plaintiff stated in the certificate of readiness that he had completed all discovery, though the defendants had not completed discovery even though the case had been filed on May 11, 1984, and that assignment for trial was requested. For whatever reason, the present case evidently could not be scheduled for trial before January 1, 1986, so the trial court, on December 31, 1985, granted a continuance and set a trial date for April 9, 1986.

We believe that Miller's certificate of readiness was similar to that of the plaintiff's in Kutrules motion to remove the case from the dismissal list. First we note that the Polkings made no objections to Miller's certificate of readiness, despite the fact that they received a copy of such certificate and even though they had not yet completed their discovery. The Polkings have not made any showing that the delay in getting the case to trial was attributable to Miller. See Baty, 259 Iowa at 1026, 147 N.W.2d at 210. Miller, in his certificate, affirmatively sought a date for trial. The trial court, apparently faced with a crowded court docket, filed an order continuing the case and assigning a trial date of April 9, 1986.

Faced with these facts, we do not believe the trial court erred in granting a continuance of the case without a hearing. Rule 215.1 was intended to be a shield, not a sword. Baty, 259 Iowa at 1026, 147 N.W.2d at 210. Where no delay in proceeding to trial can be attributable to the plaintiff, particularly where a certificate of readiness has been filed but the case is not set for trial due to an overcrowded schedule, we believe that the trial court may in such circumstances grant a continuance of the case without a full hearing on the merits of a continuance, especially where the defendants have received notice of the plaintiff's readiness for trial.

AFFIRMED.