FILED
JAN 28 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD CLAAR, et al,
Appellants,
v.
IOWA POWER AND LIGHT CO.,
Appellee.

Filed January 28, 1977

26
2-57784

Appeal from Pottawattamie District Court - Paul Sulhoff and Bennett Cullison, Judges

Appeal from an order setting aside a default decree placing plaintiffs-appellants in possession in an action for forcible entry or detention of real property. Reversed and remanded.

Peters, Campbell & Pearson, of Council Bluffs for appellants.

Johnson, Stuart, Tinley, Peters & Thorn, of Council Bluffs for appellee.

Submitted to Allbee, C.J., and Donielson, Oxberger and Carter, JJ. Snell, J., takes no part.

CARTER, J.

The sole issue on this appeal is whether the trial court erred in granting defendant's motion to set aside a default decree for possession of real property entered in favor of plaintiffs in a forcible entry action, under chapter 648, The Code. Following the order setting aside the default, the case was tried on the merits resulting in a judgment in favor of defendant. We reverse.

The events leading up to the entry of the default were as follows: The petition was filed on June 19, 1973, and the original notice was served upon defendant on June 20. On July 10, defendant entered a general appearance through counsel. On August 9, no motion or answer having been filed, plaintiffs sought and obtained an order in the trial court directing defendant to file an answer within ten days. By August 24 there was still no motion or pleading on file and plaintiffs on that date sought and obtained a default decree entered by Judge H. J. Kittleman. This decree provided for the immediate termination of a written 31 year lease between the parties and the immediate removal of the defendant from the leased premises.

On August 28, 1973, a motion was filed by defendant to set aside the default decree. This motion recited that the failure to plead was "based upon the inadvertance and neglect of *** the attorney for the defendant." It was further recited that the defendant "has a defense to present." The motion was not verified or supported by affidavit. Later on August 28, an order was entered by Judge Bennett Cullison reciting that a hearing had been held on the motion that date and that "for good cause shown" the default decree should be set aside. The hearing to which reference was made in this order was not reported and there is no record of what if anything took place at that time. Subsequently

the action was tried on the merits before Judge Paul H. Sulhoff, who entered judgment in favor of defendants in October, 1974.

I. Initially we consider defendant's claim that its success at the trial on the merits now precludes any reinstatement of the prior default decree against it. If we were to so hold we would be denying plaintiffs any right to seek redress from an action of the trial court, which, if erroneous, completely reversed the result of the litigation. The order setting aside default was not a final judgment from which appeal could have been taken at that time. Rule 331(a), Rules of Civil Procedure. We reject the contention that the trial on the merits precludes our review of the issue before us.

II. We believe that our consideration of the present appeal is governed by Williamson v. Casey, 220 N.W.2d 638, 640 (Iowa 1974) There it was held that a mere explanation for failure to comply with the rules of civil procedure set forth in a motion to set aside a default and not supported by affidavits or testimony is an insufficient showing in the record to justify setting aside a default. We find no more satisfactory showing in the present case than that which was rejected as insufficient in Williamson. We therefore reluctantly conclude that Judge Cullison abused his discretion in setting aside the default. This error requires reversal.

III. Although not urged to do so by either party, we deem it appropriate to raise the question of whether the entry of default justified the relief which was granted plaintiffs in the decree. A defendant who defaults is still protected by the law. Notwithstanding such default plaintiffs should be awarded no greater relief than that to which they appear entitled under the well-pleaded averments of the petition. See Rayburn v. Maher,

227 Iowa 274, 288 N.W. 136 (1939); Neilan v. Lytle Investment Co., 223 Iowa 987, 274 N.W. 103 (1937); Skvor v. Weis, 153 Iowa 720, 134 N.W. 85 (1912).

In applying these considerations to the present petition for forcible entry, we are mindful that ordinarily a landlord has no right of re-entry for breach of a covenant in the lease unless there is a stipulation in the lease that the breach shall work a termination of the tenant's interest. See, e.g., Denecke v. Miller and Son, 142 Iowa 486, 496-97, 119 N.W. 380 (1909); 52A C.J.S. Landlord & Tenant § 718(a). This issue is not now before us and we do not decide it. We do, however, direct that at this time only the default be reinstated. We do not mandate re-entry of the default decree. Instead we remand the matter to the trial court for a determination by that court of the relief, if any, to which plaintiffs are entitled as a result of defendant's default.

Defendant having appeared prior to the entry of default, is entitled to be heard and participate on the issue of the relief to be awarded. Williamson v. Casey, supra, 220 N.W.2d at 640. This should not be construed as altering defendant's status. Defendant is in default and as a result the well-pleaded factual allegations of the petition stand admitted. Claeys v. Moldenschardt, 260 Iowa 36, 44, 148 N.W.2d 479, 484 (1967). Defendant should not be permitted to vary these factual allegations. But defendant has a right to be heard on the legal sufficiency of the petition to support a decree putting plaintiffs in possession of the property. If the trial court determines that plaintiffs are entitled to such relief by default it should be ordered. If it is determined that plaintiffs are not entitled to such relief by default the action should be dismissed as there

has already been a trial on the merits.

For further proceedings consistent herewith the case is reversed and remanded.

REVERSED AND REMANDED.