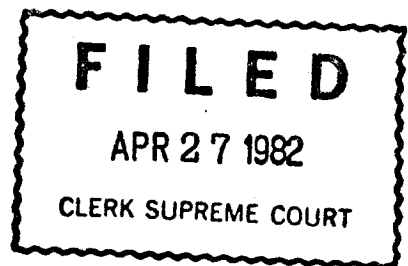


IN THE COURT OF APPEALS OF IOWA



VILLAGER RESTAURANTS, INC.,

)

Plaintiff-Appellee,

)

Filed April 27, 1982 233

vs.

)

2-48

ORLAN LUX and DUANE M. JOHNSON,

)

2-66123

Defendants-Appellants.

Appeal from Emmit District Court, Charles H. Barlow, Judge.

Defendant appeals from the trial court order granting plaintiff's motion to reinstate their action under Iowa R. Civ. P. 215.1 and plaintiff's motion to reconsider the dismissal of four divisions of their petition. Defendant claims the trial court erred in concluding the failure to set the case for trial, or rule on the pending motions in the case, was due to the oversight of the court or court personnel and the trial court abused its discretion in allowing the prosecution of a case which was nine years old. AFFIRMED.

Leo E. Fitzgibbons and Richard Meyer of Fitzgibbons Brothers, Estherville,
for defendants-appellants.

Michael Sellers of Mountain, Sellers, Wetsch, McGee & Kaiser, Des Moines,
for plaintiff appellee.

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

Defendants appeal from the trial court order granting plaintiff's motion to reinstate their action under Iowa R. Civ. P. 215.1 and plaintiff's motion to reconsider the dismissal of four divisions of their petition. Defendants claim the trial court erred in concluding the failure to set the case for trial, or to rule on the pending motions in the case, was due to the oversight of the court or court personnel and the trial court abused its discretion in allowing the prosecution of a case which was nine years old. We affirm the trial court's order which sustains plaintiff's application for reinstatement of the case.

The dispute between the parties involved a 1969 restaurant franchise agreement which has an unexpired 15-year period of operation. Plaintiff's claim involves a breach of the franchise agreement in regard to the failure to pay restaurant royalties.

The plaintiff filed a petition in regard to the dispute on July 14, 1971. After one dismissal pursuant to Iowa R. Civ. P. 215.1 and subsequent reinstatement, the case was again dismissed on February 13, 1976 under the rule after the court denied plaintiff's motion for continuance. Apparently only the defendants had taken a discovery deposition in the case.

On February 13, 1977, the plaintiff commenced the present suit against the defendants. The action was similar to the dismissed suit.

On August 30, 1977, the defendants filed a motion to adjudicate law points. On January 9, 1978, the trial court entered an order dismissing a portion of the second action. The court determined that divisions I, II, III, and V of the second action involved the same issues raised in the first action while division IV was distinct from the previous action. The court determined that the dismissal of the previous action under rule 215.1 was an adjudication on the merits as to divisions I,

II, III and V of the present petition and that the plaintiff was precluded from raising the issues again. The court also concluded that the plaintiff did not diligently prosecute the issues in the previous case. The court determined that the delay in the prosecution of this case was unreasonable and ordered dismissal of divisions I, II, III and V of this case with prejudice, sua sponte under the inherent authority of the court.

On February 7, 1978, the plaintiff filed a notice of appeal from this ruling. On November 20, 1978, the plaintiff filed a motion for continuance on the remaining division. On December 11, 1978, the trial court entered an order continuing the case until the appeal had been decided.

On March 21, 1979, plaintiff's appeal was dismissed by the supreme court for lack of jurisdiction due to its interlocutory nature. See No. 61635, Villager Restaurants, Inc. v. Lux.

On December 26, 1979, the plaintiff filed a motion for continuance and an application for the trial court to reconsider its ruling dismissing a portion of the case, asserting that it was based on an erroneous conclusion that the dismissal of the prior case under rule 215.1 was an adjudication on the merits.

On January 30, 1980, the plaintiff filed a motion to reinstate case, asserting in part that the case was not subject to dismissal under rule 215.1 since a motion for continuance had been filed in regard to the rule.

In an order filed on December 15, 1980, the trial court sustained plaintiff's application for reconsideration. The court concluded that the previous dismissal order of the prior case under rule 215.1 did not bar prosecution of the same issues

in this case and the court's prior decision to the contrary was in error. The court also concluded that it should not have considered plaintiff's failure to be diligent in the prosecution of the prior case, noting that plaintiff had been reasonably diligent in the present case. The court also stated: "Further, the Court concludes that RCP 215, 215.1, 216 and 217 regarding dismissals, provide adequate authority and guidelines for the Court's control of dockets, leaving no necessity for sua sponte dismissal under these circumstances and said rule may well be a dispositive definition of what the Court's inherent authority is in these areas which should not be further expanded by a Trial Court without a showing of clear, satisfactory and convincing evidence of reasonable necessity to do so and there is not such showing thereof in this matter."

On that basis the court concluded that its prior sua sponte dismissal of this case was without an adequate support and was in error.

The court also sustained the plaintiff's application for reinstatement. The court concluded that the continuance order of December 11, 1978, would have induced counsel to believe that the trial court would take further action in the setting of a trial date and that the matter was not reached for trial in 1979 due to oversight and reasonable cause. The court also concluded the "attorney's attempts to prosecute this matter in combination with the oversight of the Court or Court personnel to assign this matter created the confusion and the inability to reach trial in this matter."

Iowa R. Civ. P. 215.1 states a "trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed." Iowa R. Civ. P. 215.1 differentiates between situations where reinstatement is committed to the sound discretion of the court and those instances where the court is required to

reinstate the case upon a proper showing of "oversight, mistake or other reasonable cause." Cf. Rhiner v. Arends, 292 N.W.2d 399, 400 (Iowa 1980)(which referred to the different standard of review when a plaintiff directs an application for reinstatement of a dismissed case to the court's discretionary powers rather than to its duty of mandatory reinstatement). Plaintiff directed the application for reinstatement to the court's discretionary powers under Iowa R. Civ. P. 215.1. As such, we will reverse a trial court's discretionary order only when there is a clear showing of an abuse of that discretion. Madison Silos, Division of Martin Marietta Corp. v. Wessom, 215 N.W.2d 494, 497 (Iowa 1974). Generally, an abuse of discretion will be found only where there is no support for the decision in the evidence. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972). Furthermore, we are more reluctant to interfere with a grant of reinstatement than with its denial. See id.

We find support for the trial court's reinstatement of the dismissed case. The court found there had been some confusion with court personnel regarding the trial assignment, which combined with plaintiff's less than tenacious diligence, to cause the problem. We agree with the trial court and affirm reinstatement of the case.

AFFIRMED.