



IN THE COURT OF APPEALS OF IOWA SUPREME COURT

TRUSTEES OF GENERAL GROWTH)
PROPERTIES, A Real Estate Investment)
Trust,)

Plaintiff-Appellee,) Filed February 5, 1980

vs.)

H. LEE GENDLER,)

337
2-63281

Defendant-Appellant.)

Appeal from Pottawattamie District Court - Leroy H. Johnson, Judge.

Defendant appeals trial court order overruling his motion to set aside default judgment against him. Affirmed.

John D. Sens of Stuart, Tinley, Peters, Thorn, Smits & Sens, Council Bluffs, and John A. Garvey of McGrath, North, O'Malley & Kratz, P.C., Omaha, Nebraska, for defendant-appellant.

Eugene R. Commander, Council Bluffs, and David W. Belin, Dennis W. Johnson, and Roger T. Stetson of Belin, Harris, Helmick & Lovrien, Des Moines, for plaintiff-appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant appeals overruling of his motion to set aside default judgment entered against him. On appeal, defendant claims good cause was shown to set aside the default judgment and the trial court abused its discretion by refusing to grant the motion. We affirm.

I.

This action arose from plaintiff's declaratory judgment action, which was brought to interpret a provision in a contract between the parties. Defendant failed to file an appearance within the required time period, § 617.3, The Code 1979; Iowa R. Civ. P. 53. The trial court granted plaintiff's motion for default judgment and, subsequently, denied defendant's motion to set aside the default judgment. Defendant appeals.

In attempting to serve defendant pursuant to section 617.3, The Code 1979, plaintiff filed copies of the original notice with the Secretary of State and sent defendant notice by certified mail. The notice was forwarded from defendant's previous address to his new one where his secretary, Deborah L. Hoden, received it and signed the certified mail return receipt on defendant's behalf. Defendant admitted "D. Hoden" signed the receipt, but denied receiving notice from her or anyone. Plaintiff presented evidence defendant had actual knowledge of this action during the period he was required to appear under section 617.3, The Code 1979. Based on this record, the trial court found defendant "had failed to show that he intended to defend, that he took steps to do so, and that his failure to appear within the time provided by law was due to some misunderstanding, accident, mistake, inadvertence, surprise or excusable neglect." The trial court denied defendant's motion, finding he failed to show good cause to set aside the default judgment.

II.

Defendant contends the trial court erred in overruling his motion under Iowa R. Civ. P. 236¹ to set aside the default judgment. This rule favors trials on the merits, but

¹ Iowa R. Civ. P. 236 provides:

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. Such motion must be filed promptly after discovery of the grounds thereof, but not more than sixty days after entry of the judgment. Its filing shall not affect the finality of the judgment or impair its operation.

- 2 -

the burden is on the movant to plead and prove good cause to have a default judgment set aside. Dealers Warehouse Co. v. Wahl & Associates, 216 N.W.2d 391, 394 (Iowa 1974). Trial court fact-findings in such a case have the force of a jury verdict, and, under those facts, the trial court is vested with wide discretion in ruling on the motion. Id. Generally, abuse of discretion will be found only where no substantial evidence supports the trial court's ruling. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). Viewing the evidence in its light most favorable to the ruling, we must decide whether the trial court abused its discretion in overruling defendant's motion.

A proceeding to set aside a default judgment is at law and based on good cause. Gateway Transportation Co. v. Phillips & Phillips Co., 261 N.W.2d 175, 177 (Iowa 1978). Good cause may consist of mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty. Id.; Hobbs v. Martin Marietta Co., 257 Iowa 124, 130, 131 N.W.2d 773, 775-76 (1964). It must be a sound, effective, and truthful reason, not merely an excuse, plea, apology, extenuation, or some justification for the resulting effect. Paige, 252 N.W.2d at 437. The movant must affirmatively show he intended to defend, took steps to do so, but due to some misunderstanding, accident, mistake, or excusable neglect did not. Id.; Flexsteel Industries Inc. v. Morbern Industries Ltd., 239 N.W.2d 593, 596 (Iowa 1976); Dealers Warehouse Co., 216 N.W.2d at 394-95.

We believe substantial evidence in the record supports the trial court's conclusion defendant had not sustained his burden of showing good cause for his failure to appear and answer within the time provided by law. The record supports finding notice was served on defendant's secretary and defendant likely received the notice from her. Further, defendant actually knew of the action prior to the appearance date in this action, as shown by defendant's filing of a memorandum brief in the federal court action, pending in Omaha, Nebraska, in which defendant specifically noted the filing of plaintiff's state court action. We reject defendant's assertion his federal court action indicates an intent and readiness to defend in this action. See Haynes v. Ruhoff, 157 N.W.2d 914, 918 (Iowa 1968). We also note defendant's motion to set aside the default judgment was not filed until fifty-seven days after entry of the default judgment as indicating the absence of good cause. See Paige, 252 N.W.2d at 437. Substantial evidence supported the finding defendant failed to establish good cause. See Gordon v.

- 3 -

Gordon, 200 N.W.2d 527, 528 (Iowa 1972); Hobbs, 257 Iowa at 132, 131 N.W.2d at 777.

We affirm the trial court's overruling of defendant's motion to set aside the default judgment.

AFFIRMED.