FILED
OCT 25 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

196

MARION E. BERRY,

Plaintiff-Appellant,

vs.

THOMAS M. KELLY, JR.,

Defendant-Appellee.

Filed October 25, 1983

3-149
2-69073

Appeal from Scott District Court, James R. Havercamp, Judge.

Plaintiff in a legal malpractice suit appeals a summary judgment in favor of defendant-attorney. AFFIRMED.

Wallace L. Taylor of Keyes, Bennett & Kucera, Cedar Rapids, for plaintiff-appellant.

John J. Carlin of John J. Carlin, P.C., Davenport, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

PER CURIAM

The malpractice suit underlying this appeal arose out of the bitter and contentious dissolution of the marriage of plaintiff Marion Berry and his former wife, Barbara. The decree included a stipulated property settlement. The parties were unable to amicably carry out this settlement, at which time Marion's attorney, Michael Rock, withdrew. Marion engaged defendant, Thomas M. Kelly, Jr., to represent him. Marion drew up a document entitled "Joint Application for Interpretation of Decree of Dissolution of Marriage"; the parties apparently contemplated that they would jointly file it with the court in an attempt to resolve the disputes. Marion asserts that he instructed Kelly not to file this document, but Kelly did so anyway. Marion also contends that he had discharged Kelly and hired a new attorney before the document was filed.

After several other judicial proceedings, Marion filed this malpractice action against Kelly. Kelly filed a motion for summary judgment on June 28, 1982, in which he contended in part that the result in the prior action was preclusive in his favor on the question of authority to file the "joint application." The court held a hearing on the motion for summary judgment on July 7, 1982. The court orally ruled on the motion for summary judgment at that time, although expressing some qualms about the rule requiring that the motion be filed ten days before hearing. The motion was then formally set for hearing on July 20, 1982, and Marion filed a resistance to the motion for summary judgment elaborating on his contentions. It is not clear whether a separate oral hearing was held on July 20, but it appears it was not.

The court filed a written ruling granting the motion for summary judgment on July 21, 1982. The grant was based upon (1) issue preclusion; (2) the lack of a genuine issue of material fact that the prior action would have been in Marion's

favor had Kelly not been negligent, the court reasoning that the "joint application" would have been filed anyway by Barbara, with the same results; and (3) waiver, the court finding that Marion waived his right to complain about Kelly's filing the "joint application" by participating in the subsequent hearing.

Our review of the case is on assigned error.

I. Ten-day Limit

The trial court held a hearing on Kelly's motion for summary judgment only nine days after the motion was filed. Iowa Rule of Civil Procedure 237(c) requires that motions for summary judgments be filed at least ten days before the date of hearing. Marion claims that the trial court should not have granted defendant's motion for summary judgment because Kelly's motion was not timely.

Summary judgment motions should be interpreted liberally to secure a just, speedy, and inexpensive determination of every action. See Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978). The Iowa Supreme Court, in Bass v. Iowa Public Service Company, 184 N.W.2d 691 (Iowa 1971), held that motions for summary judgment must specifically set hearing for a time not less than ten days from the date of filing. Id. at 692. The purpose of the ten-day rule is to afford the plaintiff the opportunity to file counter-affidavits if he so desires. Id. In the instant case, although the trial court orally ruled on the motion only nine days after Kelly filed the motion for summary judgment, the court set formal hearing on the motion for 22 days after the motion was filed. Marion had the opportunity to, and in fact did, file a resistance to the motion for summary judgment before the formal hearing. By setting the formal hearing 22 days after the motion was filed, and by affording Marion the opportunity to present arguments to rebut the motion, the trial court fully complied with the ten-day time period requirement of Iowa Rule of Civil Procedure 237(c).

II. Genuine Issue of Material Fact

Summary judgment is properly granted only when there is no issue as to a material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); Froning & Deppe, Inc. v. South Story Bank & Trust Co., 327

N.W.2d 214, 215 (Iowa 1982); Barnhill v. Davis, 300 N.W.2d 104, 105 (Iowa 1981). On appeal from summary judgment, we view the circumstances in the light most favorable to the party against whom the motion for summary judgment was made. Haack v. Burlington Northern, Inc., 309 N.W.2d 147, 150 (Iowa Ct. App. 1981). We may determine only whether a genuine issue of material fact existed and whether law was correctly applied. Froning & Deppe, Inc., at 215.

In the present case, Marion makes several allegations that the law was incorrectly applied. He contends that: (1) the trial court should not have granted summary judgment on the basis of issue preclusion because the issue of Kelly's malpractice was not fully and fairly litigated at trial; (2) his malpractice petition adequately alleged that defendant's errors in the prior action resulted in an outcome harmful to plaintiff; (3) under the Iowa system of notice pleading, he was not required to specifically plead that the prior action would have been successful had defendant not been negligent; and (4) the trial court should not have considered defendant's renewed motion for summary judgment when an earlier motion which was virtually identical had been denied by a different judge. We do not reach the merits of his contentions, however, because we agree with the trial court that no issue of material fact was presented. Therefore, any errors committed by the trial court were harmless and do not warrant reversal.

A trial court may not grant a motion for summary judgment if reasonable minds could draw different inferences and reach different ultimate conclusions from the undisputed facts. Liska v. First Nat. Bank in Sioux City, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981). In reviewing the grant or denial of a summary judgment motion, we are guided by the same principles the trial court used in making its determination:

> The purpose of summary judgment is to enable a judgment to be obtained promptly and without the expense of a trial when there is no genuine and material fact issue present. Movant is assigned the burden of demonstrating both the absence of any such issue and that he, as the

> moving party, is entitled to judgment as a matter of law. When a trial court is confronted with such motion under rule 237, R.C.P., it is required to examine, in the light most favorable to the party opposing the motion, the entire record before it including the pleadings, admissions, depositions, answers to interrogatories and affidavits, if any, to determine for itself whether any genuine issue of a material fact is generated thereby. If, upon this examination, the court determines no such issue is present, and the movant is entitled to judgment as a matter of law, entry of summary judgment is proper.

Drainage District No. 119, Clay County v. City of Spencer, 268 N.W.2d 493, 499-500 (Iowa 1978)(citations omitted).

Reasonable minds could reach no other conclusion in the present case but that Marion was not harmed by any action made by Kelly and that therefore Marion is not entitled to any relief. Thus, whether Kelly was negligent in fact is unimportant. Marion's former wife, Barbara, could have filed the joint application, in which case the outcome would have been the same. The purpose of summary judgment is to enable a party with a just cause of action to obtain judgment without unnecessary delay and expense of trial in cases where there is no substantial or relevant factual issue to try. Davis v. Travelers Ins. Co., 196 N.W.2d 526, 529 (Iowa 1972); Northwestern Nat. Bank of Sioux City v. Steinbeck, 179 N.W.2d 471, 475 (Iowa 1970). We do not see the necessity of requiring a new trial in this case when the trial court's grant of the motion for summary judgment accomplished the purpose for which summary judgment is designed.

AFFIRMED.