

IN THE COURT OF APPEALS OF IOWA

No. 9-531 / 89-79

FILED

NOV 27 1989

CLERK SUPREME COURT

411

JOHN SMITH,

Plaintiff-Appellant,

vs.

RICHARD SMITH and GAYLA SMITH,

Defendants-Appellees.

Appeal from the Iowa District Court for Plymouth
County, Edwin L. Mitchell, Judge.

Plaintiff appeals from a district court order
dismissing his case under Iowa Rule of Civil Procedure
215.1. **AFFIRMED.**

Donald W. Sylvester, Sioux City, for the appellant.

Robert L. Sikma, Sioux City, for the appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden,
JJ.

PER CURIAM

412

On January 8, 1988, plaintiff's action was dismissed for failure to prosecute pursuant to Iowa Rule of Civil Procedure 215.1. On February 3, 1988, the case was reinstated upon plaintiff's oral application. The February 3 order noted a default judgment would be entered within a week. The default judgment was entered. On February 8, defendants moved to set aside the default judgment. On April 13, 1988, the court entered an order setting it aside. The April 13 order also stated "this cause is now a pending reinstated cause and shall be subject to trial."

Later this case was set for trial on October 25, 1988. Plaintiff's attorney was permitted to withdraw as counsel on October 10, 1988. Plaintiff was directed by the court to obtain new counsel by October 20, 1988. Plaintiff failed to do this. Trial was not held on October 25, 1988. Plaintiff obtained new counsel on November 15, 1988. On November 21, plaintiff's new attorney moved for a continuance. Defendants resisted and requested this case be dismissed under Iowa Rule of Civil Procedure 215.1. Defendant's reason for dismissal was plaintiff had not filed a written application for reinstatement within six months of date of dismissal.

The district court denied plaintiff a continuance and granted defendants' motion to dismiss this case under rule 215.1. Plaintiff has appealed.

Plaintiff contends dismissal under rule 215.1 was improper because this case had already been validly reinstated under that rule. Plaintiff argues the April 13, 1988, order was tantamount to a reinstatement under rule 215.1. Plaintiff also argues the April 13 order was effective to reinstate the case, even though there had been no written application for reinstatement, because both parties had notice of the hearing, were present before the court, and mentioned the 215.1 issue in briefs. Plaintiff finally contends the district court abused its discretion by denying plaintiff a continuance.

There is no question this case was effectively dismissed on January 1, 1988, pursuant to Iowa Rule of Civil Procedure 215.1. The next question is: was this case effectively reinstated for trial?

An oral application for reinstatement apparently was made to the court by plaintiff's counsel. This is reflected in Judge Arnold's order dated February 1 and filed in Plymouth County Clerk's Office on February 3, 1988. There is nothing in this record revealing opposing counsel or parties were given notice of the oral application. No hearing was had for all parties to present their respective reasons and arguments in support of or in resistance to this application. Defendants' attorney steadfastly claims he or his clients had no notice of this oral application for reinstatement.

There is no showing or indication from the record defendants were ever given notice of plaintiff's application for reinstatement of this case for trial. There is, however, every indication and showing plaintiff's oral application was ruled upon by the judge exparte. There is no transcript of a hearing. There are no court reporter notes or judges notations any hearing was had on the application. There are no reasons given by the judge or upon what grounds, if any, this case was attempted to be reinstated. We have nothing to rely upon to uphold the order of Judge Arnold dated February 1, 1988.

In Doland v. Boone County, 376 N.W.2d 870, 874 (Iowa 1985), our supreme court set forth the reasons for requiring a motion to reinstate a case after a 215.1 dismissal. These are: 1) to provide a party with notice; and 2) to have a record of what occurred in the proceeding. In Doland, these two conditions were met and our supreme court held the oral application for reinstatement under Iowa Rule of Civil Procedure 215.1 was valid. In the case before us, these two conditions have not been met. Even if we were to assume notice was given to defendants, there was no record made of the proceeding. In fact, it appears to us on appeal the order attempting to reinstate this case for trial was signed and executed exparte.

In Zimmerman v. Purex Corporation, Ltd., 256 Iowa 191, 193, 125 N.W.2d 822, 824 (1964), our supreme court held the words "on motion and notice" have no other significance than saying that no action shall be taken thereon exparte. The supreme court in Zimmerman also held motions need not be in writing if made during trial and if made in presence of counsel, no further notice is needed. Id. There is no indication here this application was made in presence of opposing counsel and it was not made during trial. Therefore, a notice of the application and proceedings thereon was required and none was given.

Plaintiff's argument the trial court's ruling of April 13, 1988, was tantamount to a reinstatement under rule 215.1 is without merit. In that ruling Judge Arnold set aside a default judgment. Judge Arnold specifically stated in his ruling "[t]he motion to set aside default does not address the reinstatement under Rule 215.1, and accordingly, no ruling is made as to reinstatement."

We hold this case has not been effectively reinstated for trial under Iowa Rule of Civil Procedure 215.1 and the applicable case law.

Judge Mitchell's order dismissing this case under Iowa Rule of Civil Procedure 215.1 and denying its reinstatement is affirmed.

Because we have affirmed the dismissal of this case under rule 215.1, we need not and do not address

plaintiff's claim of abuse of discretion by the trial court for refusing a continuance of this cause.

AFFIRMED.