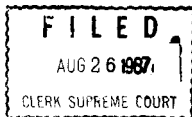


IN THE COURT OF APPEALS OF IOWA



BETHANY TRUST COMPANY,)

Plaintiff-Appellee,)

vs.)

REX STOLL and JANET STOLL,)

Defendants-Appellants,)

SMALL BUSINESS ADMINISTRATION,)

an agency of the United States,)

Defendant,)

THE BANK OF COFFEY,)

Defendant-Appellee,)

and the FIRST BANK OF)

PATTONSBURG,)

Defendant.)

Filed August 26, 1987

12

7-112
86-566

Appeal from the Iowa District Court for Decatur County (No. CE 1406),
Darrell J. Goodhue, Judge.

Defendants appeal from orders overruling motions to vacate two separate
judgments, asserting that a right to relief was established. **AFFIRMED.**

Alfredo G. Parrish and Max Exline of Parrish & Kruidenier, Des Moines,
for defendants-appellants.

Gary G. Kimes and John D. Lloyd of Reynoldson, Van Werden, Kimes,
Reynoldson, Lloyd & Wieck, Osceola, for plaintiff-appellee.

David L. Christensen and Ronald D. Bonnett of Wilson, Bonnett & Christen-
sen, Lenox, for defendant-appellee.

Robert C Dopf, Assistant U S Attorney, for defendant Small Business
Administration

Sherman W Phipps of Phipps & Rolfe, Lamoni, for defendant First Bank
of Pattonsburg

Heard by Snell, P J , and Schlegel and Sackett, JJ

PER CURIAM

The case at bar is a consolidated appeal of two dismissed petitions to vacate judgments entered against appellants Rex and Janet Stoll. The judgment in Bethany Trust Company v. Stoll was entered following the grant of plaintiff-appellee's summary judgment motion. A subsequent, and seemingly misplaced, motion to set aside a default judgment was denied by the district court. In Bank v. Coffey v. Stoll, a default judgment was entered against the Stolls. Petitions to vacate judgment were filed in both cases and were jointly considered by the district court. Both petitions were denied and appeal was taken in both cases. The appeals were consolidated pursuant to order of the Iowa Supreme Court. Our review is limited to the correction of errors at law. Mishler v. Stouwie, 301 N.W.2d 744, 747 (Iowa 1981).

I.

Appellants contend the district court erred in dismissing their petition to vacate the judgment entered against them in Bethany Trust Company v. Stoll. The petition was filed pursuant to Iowa Rule of Civil Procedure 252 which provides, in pertinent part, that

[u]pon timely petition and notice under Rule 235 the Court may correct, vacate or modify a final judgment or order, or grant a new trial on any of the following grounds:

* * *

- (e) Unavoidable casualty or misfortune preventing the party from prosecuting or defending.

Our cases have delineated the ambits of rule 252(e) in the following manner:

[U]navoidable casualty or misfortune means some casualty or misfortune growing out of conditions or circumstances that prevented the party or his attorney from doing something that, except therefor would have been done, and does not include mistakes or errors of judgment growing out of misconstruction or misunderstanding of the law, or the failure of parties or counsel through mistake to avail themselves of remedies, which if resorted to would have prevented the casualty or misfortune.

Mishler, 301 N.W.2d at 748 (quoting Claeys v. Moldenshardt, 260 Iowa 36, 43, 148 N.W.2d 479, 483-84 (1967)). Appellants maintain they demonstrated "unavoidable misfortune" in support of their petition and contend the district court erred in finding to the contrary. It is well settled that our appellate courts accord the district courts considerable discretion in determining whether to grant relief when vacation of a judgment is sought. Mishler, 301 N.W.2d at 747. The district court's fact findings have the effect of a jury verdict and are binding on us if supported by substantial evidence. Id.; Lemke v. Lemke, 206 N.W.2d 895, 897 (Iowa 1973).

Appellants maintain the record reflects their demonstrations of inattention or neglect on the part of their attorney and of miscommunication between themselves and their attorney. Appellants cite Thoreson v. Central States Elec. Co., 225 Iowa 1406, 1409, 283 N.W. 253, 255 (1939), and Clarke v. Smith, 195 Iowa 1299, 1301, 192 N.W. 136, 137 (1923), in support of the proposition that such misunderstandings constitute unavoidable misfortune and justify the vacation of judgment. These cases are, however, no longer accepted as valid interpretations of our law governing the vacation of judgments. They both antedate adoption of our Rules of Civil Procedure and, as stated with express reference to Clarke in Claeys v. Moldenshardt, 260 Iowa 36, 43, 148 N.W.2d 479, 483 (1967), "are of little or no value in the interpretation and application of rules 252 and 253," See also Windus v. Great Plains Gas, 255 Iowa 587, 601, 122 N.W.2d 901, 909 (1963) (questioning the continuing validity of Thoreson). Moreover, Claeys also stands for the proposition that a client's misunderstanding with his or her attorney as to the attorney's employment vel non does not constitute unavoidable casualty or misfortune within the meaning of rule 252. 260 Iowa at 43, 148 N.W.2d at 483-84. Neither do we find merit, or sufficient record support, for the present appellants' claim of an "unavoidable casualty of miscom-

munications with their attorney." Also without record support are appellants' claims of their attorney's inattention and neglect.

Appellants contend their attorney lacked the authority necessary to consent to the summary judgment. While an attorney is presumed to act with authority, this presumption is not conclusive and may be rebutted. Dillon v. City of Davenport, 366 N.W.2d 918, 923 (Iowa 1985). An attorney cannot settle or compromise a case without authority. Id. at 924. Our courts have adopted the following principles from the law of agency to guide our inquiry as to the extent of an attorney's authority:

A fundamental principle of agency law is that whatever an agent does, within the scope of his actual authority, binds his principal. Actual authority to act is created when a principal intentionally confers authority on the agent either by writing or through other conduct which, reasonably interpreted, allows the agent to believe that he has the power to act. Actual authority includes both express and implied authority. Express authority is derived from specific instructions by the principal in setting out duties, while implied authority is actual authority circumstantially proved.

Id. (citations omitted).

The record reflects that appellants had a number of conversations concerning this case with their attorney, Howard Strand, prior to and following the summary judgment motion. Appellants were aware the summary judgment motion was pending. Appellant Rex Stoll was shown the judgment entry and acknowledged same as to form prior to its presentation to the court. The appellants' attorney denied any misunderstanding had occurred. He testified that the appellants' central concern was to stall the case and that, after the case had been delayed approximately one year, he had discussed with them the necessity of taking further action if they desired to continue the case. He testified that he had discussed the consent judgment with appellant Rex Stoll, whose only reservation, according to Strand, concerned an interest rate. We think Strand operated within his authority when he signed the judgment entry.

II.

Appellants maintain they demonstrated unavoidable casualty or misfortune in connection with Bank of Coffey v. Stoll and that the district court erred in not vacating, on that basis, the default judgment entered against them. The district court held that no such showing had been made and that, in addition, appellants had failed to comply with Iowa Rule of Civil Procedure 253(a). That rule provides as follows:

(a) **Petition.** A petition for relief under Rule 252 must be filed in the original action within one year after the rendition of the judgment or order involved. It shall state the grounds for relief, and, if it seeks a new trial, show that they could not have been discovered in time to proceed under Rule 236 or 244, and were discovered afterwards. Unless the pleadings in the original action alleged a meritorious action or defense the petition shall do so. It shall be supported by affidavit as provided in Rule 80(b).

The district court found that appellants did not comply with that part of rule 253(a) which requires a petitioner to show that the grounds for relief "could not have been discovered in time to proceed under Rule 236 . . . , and were discovered afterwards." Appellants argue (1) this showing need not be made because they were not seeking a "new" trial; (2) they should be excused from this showing, even if required, because they were misadvised by counsel as to the amount of time they had to file; and (3) the demonstration of unavoidable casualty has been made with respect to the underlying default judgment.

We do not feel compelled to decide whether the district court correctly applied rule 253(a). We are convinced that appellants have failed to demonstrate grounds sufficient to vacate the judgment, even assuming, arguendo, that the requirements of rule 253 have been satisfied. Appellants claim in brief that unavoidable casualty or misfortune prevented them both from proceeding under rule 236 and from defending the underlying action. Even a generous reading of their brief, however, finds it devoid of any argument in support of such a

claim with respect to the underlying default judgment. Appellants do not point to any set of facts allegedly amounting to an unavoidable casualty or misfortune which prevented them from defending the underlying suit. The most that can be gleaned from appellants' brief is their claim that the district court "failed to take into account substantial evidence in the record which established the existence of misunderstandings between attorney and client which resulted in unavoidable casualty or misfortune." We are not told what this evidence consists of; nor are we told how this mythical evidence tends to show the existence of unavoidable casualty or misfortune. Although in their brief's statement of facts appellants contend attorney Strand "mistakenly believed that the filing of an appearance alone would prevent the entry of a default judgment" in the Coffey case, our law clearly holds that errors growing out of a misunderstanding of the law do not constitute unavoidable casualty or misfortune. Mishler, 301 N.W.2d at 748. We cannot say, based upon the record and arguments presented to us, that the district court abused its judgment in dismissing appellants' petition. See Claeys, 260 Iowa at 41-43, 148 N.W.2d at 483-84; see also Windus, 255 Iowa at 594-602, 122 N.W.2d at 904-910.

AFFIRMED.