

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 23 1982

CLERK SUPREME COURT

**FISCHER & CO., INC., FISCHER INVEST-)
MENT COMPANY, PLASTIC CENTER,)
INC., and FISCHER, INC.,)**

426

Plaintiffs-Appellants,)

Filed May 23, 1982

vs.)

**BOARD OF REVIEW OF THE CITY OF)
DUBUQUE, IOWA,)**

**1-445
2-66651**

Defendants-Appellees.)

Appeal from Dubuque District Court - L. John Degnan, Judge.

**Plaintiffs appeal from the trial court's judgment dismissing their appeals
from defendant board of review's valuation of their properties. AFFIRMED.**

D. P. Ernst of Ernst & Cody, Dubuque, Iowa, for plaintiff-appellant.

R. N. Russo and Allan J. Carew, Dubuque, Iowa, for defendant-appellee.

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

Plaintiffs appeal from the trial court's judgment dismissing their appeals from defendant board of review's valuation of their properties. They argue that the trial court was in error in not granting their motion for a continuance, in dismissing their cases for failure to prosecute, and in violating their rights to due process by dismissing their appeals without a trial on the merits.

The assessments which were appealed to the district court originally involved ten properties. After protesting the 1978 valuations of these properties to the board of review, plaintiffs filed their petition of appeal in district court September 20, 1978. A trial certificate and request for pretrial conference was filed by plaintiffs on February 19, 1980. On July 29, 1980, the clerk of court sent notice pursuant to Iowa R. Civ. P. 215.1 that the cases had to be tried prior to January 1, 1981, or be dismissed. Thereafter, trial was set for October 30, 1980, but on October 16, 1980, defendant requested a continuance which was granted and the trial was rescheduled for March 9, 1981. By separate order filed December 15, 1980, the cases were removed from operation and effect of Iowa R. Civ. P. 215.1.

During the pendency of these actions, some discovery was undertaken. The disposition of Louis Pfohl, one of the plaintiffs' chief officers, was taken in October 1980, and defendant was attempting to discover income tax records for the cold storage plant for the years 1977 and 1978, a move strenuously resisted by the plaintiffs. On February 10, the defendant filed a formal request for copies of plaintiffs' income and expense statements for 1975 through 1978 and copies of plaintiffs' income tax returns for the same years. Plaintiffs agreed to furnish all information except the income figures, but nothing was actually done. On March 4 the defendant filed a motion to continue; plaintiffs resisted on March 5 and also moved to consolidate these appeals with appeals since taken from 1980 assessments on the same properties. A hearing on these motions was held

March 5, and, on March 6, the court denied the motion to continue and ordered consolidation of the two sets of appeals.

On March 9, the first day of trial, defendant again moved for a continuance because of the court's consolidation of the 1978 and 1980 appeals and because of not having received all of the discovery material for the 1978 cases. The plaintiffs resisted these motions and said they were prepared for trial. By this time the assessments relating to two of the ten properties had been settled by agreement of the parties. The trial court, in ruling on defendant's motions, severed the 1980 cases, ordered plaintiffs to turn over part of the information on the remaining eight 1978 assessments which defendants sought, and denied defendant's request as to the balance. Plaintiffs complied with this order and produced the information as directed.

On March 10, the second day of trial, plaintiffs requested a continuance. As grounds therefore, they asserted that only that morning they had discovered that one of their expert witnesses was unable to testify as to the value of the cold storage plant, an issue affecting two of the eight cases on appeal.

The defendant resisted the motion for continuance and made an oral motion to dismiss based on plaintiffs' failure to proceed further with the trial. After hearing the arguments of the parties and receiving some evidence on the issue, including the statement of the expert witness in question, the trial court found that it was plaintiffs' own fault that they were not ready to proceed and dismissed the remaining 1978 appeals.

L. Continuance. Plaintiffs' position on the denial of their motion for continuance is essentially that the trial court's ruling was an abuse of discretion because the inability of one of their expected experts to testify constituted good cause for delay. They also argue that the defendant had obtained a prior continuance in the case and had asked for a second continuance only a few days prior to the commencement of the trial. On the latter issue, we believe that

plaintiffs' right to a continuance must be determined on the merits of their own application and is not affected by action taken on applications for continuance by their adversary. See In re Cooper's Estate, 196 Iowa 116, 194 N.W. 218 (1923).

On the issue of good cause, the trial court heard testimony from the expert witness who had informed plaintiffs the morning of March 10 that he would be unable to testify as the plaintiffs had expected. The record reveals that this witness had been brought to Dubuque to testify as to the value of one of plaintiffs' other properties as to which the assessment dispute was settled just prior to trial. This witness had not been retained to testify as to any of the valuations still at issue when the trial commenced. When this witness testified in support of the motion for continuance he told the court that he had not been asked to give opinion testimony on the value of any of the remaining properties until March 8th, the date before the trial was to start.

It further appears that plaintiffs did have another expert witness available and ready to testify concerning the valuation of the same properties. Their desire apparently was to have two experts testify so that the burden of proof as to the value of the cold storage facility would pass from them to the defendant board. See § 441.21(3), The Code. However, as pointed out by defendant, inability to shift the burden of proof does not constitute impossibility of going forward with evidence, particularly when six of the eight remaining cases were unaffected by the expert's refusal to testify.

The granting or not of a continuance is given over to the sound discretion of the court. Crouch v. Randolph, 213 N.W.2d 673, 678 (Iowa 1973). Iowa R. Civ. P. 183(a) has room to allow the granting of a continuance because of the absence of an expert witness, but courts are accorded broad discretion, and absent a clearly shown abuse of that discretion, we will not interfere. Madison Silos, Division of Martin Marietta Corp. v. Wassom, 215 N.W.2d 494, 498 (Iowa 1974). We think the trial court did not abuse its discretion in refusing to grant plaintiffs' motion for a

continuance after finding that it was plaintiffs' failure to be prepared that caused plaintiffs' refusal to go forward with evidence.

II. Dismissal. Plaintiffs, on appeal, argue that the trial court's dismissal order was based on Iowa R. Civ. P. 216 and that that rule does not give the court such authority. We disagree. Rule 216 provides:

Involuntary dismissal. A party may move for dismissal of any action or claim against him or for any appropriate order of court, if the party asserting it fails to comply with these rules or any order of court. After the plaintiff has completed his evidence, a defendant may move for dismissal because plaintiff has shown no right to relief, under the law or facts, without waiving his right to offer evidence thereafter.

The present facts come close to presenting a situation wherein the trial court had inherent power to dismiss these actions sua sponte as a result of plaintiffs' failure to diligently prosecute them. See Rush v. Sioux City, 240 N.W.2d 431, 438-39 (Iowa 1976). We need not decide that issue here, however. The trial court's dismissal order was not sua sponte; defendant had moved for dismissal. Nor is the order of dismissal dependent upon inherent power. Rule 216 recognizes the power of the court to invoke the stringent remedy of involuntary dismissal against the party who fails to comply with the rules of civil procedure or an order of court. We believe that when an order has been entered assigning a case for trial and the trial has commenced, a plaintiff who thereafter declines to proceed with an offer of evidence is in fact guilty of either a failure to comply with the rules of civil procedure or an order of the court. As stated in 24 Am. Jur. 2d Dismissal, Discontinuance and Nonsuit § 57 at 48; [D]ismissal may be proper where plaintiff fails to comply with the court's order to proceed with the action at a particular time." See also cases collected in Annot. 4 A.L.R. 2d 348, 384 (1949) and supplements thereto.

Plaintiffs seem to suggest that the record is insufficient to show that they refused to proceed further towards an offer of evidence. Again, we disagree. Had

plaintiffs been willing to proceed with the trial in the absence of the expert witness who declined to testify, they had ample opportunity to inform the trial court of that decision at the time the record was being made on defendant's oral motion to dismiss. Having not requested a right to continue the trial after the trial court's denial of their request for continuance, plaintiffs cannot now assert that they were ready to proceed. The trial court did not act beyond its power or abuse its discretion in dismissing the remaining eight appeals from the 1978 valuations.

III. Due Process. Plaintiffs argue that failure to grant their motion for a continuance and the resulting dismissal deprived them of a hearing on the merits and therefore deprived them of their property in violation of their due process rights including the right to a hearing. We agree that plaintiffs had the right for an opportunity to be heard, one to which they availed themselves in originally protesting their tax assessment and in appealing that decision to district court. However, we find no case law to support the idea that an opportunity to be heard must be granted despite delay and failure to be prepared by the very plaintiffs who now claim that right.

We have considered all of plaintiffs' arguments and find no reason to interfere with the trial court's resolution of these issues.

AFFIRMED.

Snell and Johnson, JJ., concur; Oxberger, C.J., and Donielson, J., dissent.

DONIELSON, J. (dissenting)

I dissent.

My review of the record in this case clearly indicates that the long delay in bringing this case to trial can be equally attributed to both parties. Considering the fact that the appellee had also requested a continuance on March 9, the day before the appellant requested a continuance, it appears that both parties would have benefited had the trial court decided to grant a short continuance. Under the circumstances presented here, I believe that dismissal was too harsh a sanction. Richman v. General Motors Corporation, 437 F.2d 196, 199 (U.S. Ct. of App. 1st Cir. 1971). I would reverse and remand this case for a disposition on the merits.

Oxberger, C.J., joins this dissent.