IN THE COURT OF APPEALS OF IOWA

FILED
JUN 4 - 1986
CLERK SUPREME COURT

157

PHILIP KRAFT, as Representative of the Membership of IRONWORKERS LOCAL UNION NO. 89 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS,

Plaintiff-Appellants,

vs.

EL VIEW CONSTRUCTION, INC.

Defendant-Appellee,

And DON SAWYER, Sheriff of Linn County, Iowa

Defendant.

Filed June 4, 1986

5-710
85-570

Appeal from the Iowa District Court for Linn County (No. 10999) - L. Vern Robinson, Judge.

Plaintiff appeals from the district court ruling on the ground the court did not have personal jurisdiction. **AFFIRMED.**

Robert F. Wilson, Cedar Rapids, Iowa, for plaintiff-appellant.

Minor Barnes and Matthew G. Novak of Pickens, Barnes & Abernathy, Cedar Rapids, Iowa, for defendant-appellee.

Heard by Oxberger, C.J., and Hayden, and Sackett, JJ.

SACKETT, J.

Plaintiff Philip Kraft, as representative of the membership of Ironworkers Local Union No. 89 of the International Association of Bridge, Structural and Ornamental Ironworkers (Ironworkers), appeals the district court ruling against the Ironworkers' petition to set aside an earlier default judgment entered by the Linn County District Court in a third-party indemnity action by Defendant El View Construction Co., Inc. The Ironworkers contend the district court erred in ruling that the court had personal jurisdiction in the earlier case and that the earlier default judgment was res judicata as to the instant case. The Ironworkers also contend: (1) a voluntary unincorporated labor union cannot be sued in its own name in Iowa, but rather must be sued as a class action; and (2) a default judgment cannot be taken against a labor union without appointment of an attorney to represent members of the union as a class under the Iowa R. Civ. P. 47 in effect in 1980. The Ironworkers assert the judgment entered in the earlier case is thereby void. We affirm the trial court.

I.

This appeal involves two separate cases. The facts and proceedings of the first case are the basis for the second case. The facts of each case are set forth separately:

1. El View Construction Co., Inc. v. Ironworkers Local Union No. 89, of the International Association of Bridge, Structural and Ornamental Ironworkers - LA 4914.

On September 14, 1978, Donovan Tharp, an employee of Interstate Erectors, Inc., filed a law suit against El View for injuries he received in a construction site accident where El View was one of several subcontractors.

On January 11, 1980, El View filed a cross-petition against Tharp, the Ironworkers in the instant case, seeking indemnity on the ground the Ironworkers had supplied a person incapable of performing ironworker duties. Original notice of the cross-petition was served on Philip Kraft, the business agent of the Ironworkers. The Ironworkers did not appear specially, move or plead in response to the cross-petition.

On October 20, 1980, more than nine months after service of original notice, El View filed a motion for default. The district court found the Ironworkers in default the same date. According to court records, El View's motion and the entry of default were sent to counsel of record including Robert Wilson, attorney for Tharp and subsequently for the Ironworkers.

On February 17, 1981, a judgment entry was granted awarding El View judgment upon its cross-petition against the Ironworkers for any portion of Tharp's damages paid by El View. A copy of the judgment entry was sent to Wilson.

On December 1, 1981, El View filed a motion for assessment of damages and judgment entry. The district court granted the motion and assessed the Ironworkers $172,436.71 in damages plus interest.

On December 23, 1981, Ironworkers entered a motion to set aside the default judgment and assessment of damages on the grounds of lack of personal jurisdiction, notice and hearing plus failure of El View to follow class action service and certification rules.

On March 30, 1982, after a hearing on the Ironworkers' motion, the district court overruled the motion holding that the Ironworkers were precluded from a judgment on the merits of their motion because it had not been timely filed under either Iowa R. Civ. P. 236 or 262.

The court did consider the merits, however, in construing the Ironworkers' motion as an impermissible collateral attack. The court held that Iowa R. Civ. P 47, prohibiting default judgments in class actions prior to appointment of a class attorney, was repealed prior to entry of default on February 17, 1981. The court also ruled that El View's original notice of cross-petition was served prior to the July 1, 1980, enactment of Iowa R. Civ. P. 42.1 and 42.2 governing class actions. Therefore, the rule 42.2 certification requirement did not apply to El View. As such, the court held service of original notice on the Ironworkers' business agent was consistent with Iowa R. Civ. P. 56.1(f) and the court had both personal and subject matter jurisdiction. The court concluded a judgment was not subject to collateral attack where the court had both personal and subject matter jurisdiction. Ironworkers did not appeal the court's ruling.

2. Philip Kraft, as representative of the membership of Ironworkers Local Union No., 89 of the International Association of Bridge, Structural and Ornamental Ironworkers v. El View Construction Co., Inc. - LA 10999.

On February 4, 1983, two years after entry of default in the first case, Plaintiff Philip Kraft as representative of the Ironworkers filed the instant action against El View. In Count I, the Ironworkers alleged that the court in the first case lacked jurisdiction because El View had not sued Ironworkers in a class action, therefore, the default judgment entry was void for want of class certification. In the remaining counts Ironworkers also sought damages and an injunction against Linn County Sheriff for levying under a writ of execution.

In its answer El View asserted the court lacked subject matter jurisdiction because Ironworkers had not initiated proceedings to vacate the earlier judgment within one year after its entry.

In a ruling filed March 11, 1985, the district court held there was personal jurisdiction in the first case since there had been personal service on an appropriate representative of the Ironworkers pursuant to rule 56.1(f). Therefore, the district court held the earlier judgment had been valid. The district court also ruled that the earlier valid judgment had preclusive effect and was res judicata. Ironworkers have appealed.

II.

The issue which is dispositive in the instant case is whether the district court in the first case had jurisdiction. If the district court had jurisdiction then the default judgment was valid and has preclusive effect as to Ironworkers' petition in the instant case to set aside that default judgment.

Proceedings to set aside a default are triable at law. Hastings v. Espinosa, 340 N.W.2d 603 (Iowa App. 1983). This court is bound by the district court's findings supported by substantial evidence. Sher v. Burche, 353 N.W.2d 859, 86 (Iowa App. 1984). Evidence must be viewed in the light most favorable to district court's ruling. We will not interfere with the district court order in absence of a showing of abuse of discretion by the trial court. Id.

The Ironworkers contend the default judgment entered against it was void for lack of personal jurisdiction and thus open to collateral attack. Iowa R. Civ. P. 66 and 104 require that lack of personal jurisdiction must be raised by special appearance:

> 66. A defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only before taking any part in a hearing or trial of the case, personally or by attorney, or filing a motion, written appearance, or pleading. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error. (emphasis added).

> 104. Exceptions. Every defense in law or fact must be asserted in the pleading responsive thereto, if one is required, or if none is required, then at trial, except that:
>
> (a) Want of jurisdiction of the person, or in sufficiency of original notice, or its service must be raised by special appearance before any other appearance, motion or pleading is filed . . . . (emphasis added).

See Eichacker v. Spelty, 344 N.W.2d 571 (Iowa App. 1983); Boye v. Mellerrup, 229 N.W.2d 719 (Iowa 1975).

A defendant may not file a special appearance after making general appearance. In Engelson v. Mallea, 150 N.W.2d 127, 130 (Iowa 1970), the court held that a general appearance by defendant waives defects in personal jurisdiction or service.

In Boyer v. Iowa High School Athletic Association, 138 N.W.2d 914, 915 (Iowa 1967), an unincorporated association was incorrectly sued by common name rather than by class action. The court held, however, that the association had "unequivocally submitted itself to the jurisdiction of the court" because the association had failed to file a special appearance to challenge personal jurisdiction. Id. at 916. Instead, the association's attorneys had filed a general appearance pursuant to Iowa R. Civ. P. 87 and later had challenged jurisdiction in its responsive pleading which constituted a general appearance pursuant to Iowa R. Civ. P. 65. Id. at 915-16.

The instant case is similar to Boyer. When served with El View's cross-petition in the first case, Ironworkers did not file a special appearance to challenge jurisdiction. After the default judgment was entered against them, Ironworkers made their first appearance in the case in a motion to set aside the default judgment and assessment of damages. Ironworkers contended they had not defended the action because the court had failed to hold a hearing to

determine whether the action was to be maintained as a class action. Having not filed a special appearance and appearing generally in the first case, Ironworkers waived their objections to personal jurisdiction and cannot now challenge jurisdiction over their person in a collateral attack.

Even if Ironworkers would have filed a special appearance, we find the district court had personal jurisdiction over the union.

Ironworkers assert that as a voluntary, unincorporated labor union it is not a legal entity apart from its members and could not be sued in its own name. Ironworkers is correct but the trend of modern decisions is to permit suit against an association where the case demands existence of the equitable doctrine of representation of parties or where waiver estoppel exists. Boyer v. Iowa High School Athletic Association, 138 N.W.2d 914, 915 (Iowa 1965); 3 B Moore's Federal Practice § 232.02

> Personal service. Original Notices are 'served' by delivering a copy to the proper person. Personal service may be made as follows: . . .
>
> (f) Upon a partnership, or an association suable under a common name, . . . by serving any present or acting or last known officer thereof, or any general or managing agent, or any agent or person now authorized by appointment or by law to receive service of original notice . . . . (emphasis added).

Rule 56.1 does not per se confer personal jurisdiction or subject an unincorporated association to suit by common name, but rule 42 and 56.1(f) do mean an association may be sued by its common name with the joinder as defendants of one or more of those identified with the association who are representative of the class of members. Boyer, 138 N.W.2d at 915. If El View had joined Philip Kraft or the Ironworkers' local president as parties defendant that Ironworkers would have had no basis for complaint. Alternatively, if Ironworkers were an incorporated legal entity they would have been suable by common name.

In Coughlin v. Iowa High School Athletic Association, 150 N.W.2d 660, 662-63 (Iowa 1967), the court held, in overruling a special appearance, that judicial notice may be taken of the realities of an association's operations. There the association which had been sued in its own name exercised the rights and powers of a legal entity, thus the court held the association should be held to assume the corresponding duties and obligations:

> [D]efendant, being an identifiable entity, is amenable to process as provided in rule 56. . .
> * * * *
> It logically follows where as here there has been statutory service of notice on the officers of defendant association, it constitutes lawful and effective notice. . . .

Coughlin, 150 N.W.2d at 663.

In the first case, Ironworkers' business manager Philip Kraft was served notice of the cross-petition. Ironworkers had an office where Kraft was located and was served. Ironworkers holds itself out as an identifiable association and is listed in the telephone directory. Ironworkers maintain a separate office, checking account and telephone and employ clerical workers and other assistants. I find, therefore, that Ironworkers, being an identifiable entity, was amenable to process provided in rule 56.1(f). See Walles v. International Brotherhood of Electrical Workers, 252 N.W.2d 201 (1977)(Trial court had personal jurisdiction over union sued in its own name but sustained special appearance for lack of subject matter jurisdiction.)

Kraft and the Ironworkers were not prejudiced by original notice they received. Even though Kraft was not named in the action, he was served in his representative capacity with Ironworkers and therefore had actual notice. Under current practice any defendant who is given notice which is actually sufficient to apprise of matters before the court involving him, and who is not prejudiced or misled by any technical flaws in the notice form, has nothing

to gain and much to lose by challenging it. Jontz v. Mahedy, 293 N.W.2d 1, 4 (Iowa 1980). We find Ironworkers was not prejudiced by the technical flaw in El View's original notice of cross-petition.

III.

Ironworkers claim the district court erred in ruling the default judgment and denial of Ironworkers' motion to set aside the judgment was issue preclusion as to the instant case.

Issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981). Four prerequisites are required before the doctrine of issue preclusion can properly be applied in any given case: (1) the issue concluded must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior action, and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Matter of Estate of Bruene, 350 N.W.2d 209, 213 (Iowa App. 1984); Hunter, 300 N.W.2d at 123.

In the instant case the issues are identical, i.e., personal jurisdiction over Ironworkers. Ironworkers raised and litigated this issue in the first case in its motion to set aside the default judgment for failure of El View to bring its cross-petition as a class action. The district court determined it had personal jurisdiction in the first case, a determination which was material and relevant to the ultimate disposition of the action. The personal jurisdiction issue was also necessary and essential to the district court's ruling, holding that because the court had personal jurisdiction to enter the default judgment "it is not void

but voidable at best." Therefore, we affirm the district court's ruling in the instant case that the disposition of the first case was res judicata as to the personal jurisdiction collateral attack in Ironworkers' petition to set aside the default judgment.

IV.

El View asserts Ironworkers' challenge of personal jurisdiction is precluded by the statutes of limitations governing actions to set aside default judgments. We agree.

This case presents a classic example why original notices and statutes of limitations should not be ignored. If El View's failure to serve Kraft, as representative of Ironworkers, was a voidable service of process defect, Ironworkers should have raised the issue by special appearance and motion to quash service filed within 20 days of being served on January 18, 1980. See Iowa R. Civ. P. 53, 66 and 104(a). Ironworkers, however, neither filed a special appearance nor appeared generally until almost two years later on December 23, 1981, after the default judgment against them.

After the default judgment was entered by the district court on February 17, 1981, Ironworkers should have moved to have the default set aside within 60 days pursuant to Iowa R. Civ. P. 236. The record shows Ironworkers was sent a copy of the judgment entry. Ironworkers, however, did not file its motion to set aside the default judgment until December 23, 1981, over 9 months later.

Under Iowa R. Civ. P. 252 and 253(a), Ironworkers could even have filed an action to set aside the default judgment within one year of the judgment on February 17, 1981. Ironworkers did not file its petition to set aside the default judgment for almost two years on February 4, 1983. Ironworkers did not meet

the one-year time limitation even as to judgment entry on assessment of damages on December 1, 1981. In addition, Ironworkers did not meet the general one-year time limitation for actions to modify or vacate judgments under Iowa Code § 683.1 (1985).

A party may seek to have a judgment vacated at any time if it is void, however, the privilege for tardy application does not extend to set aside a voidable judgment. Holmes v. Polk City Savings Bank, 278 N.W.2d 32, 35 (Iowa 1979); Rosenberg v. Jackson, 247 N.W.2d 216, 218 (Iowa 1976). The district court's ruling in the first case on March 30, 1982 denying Ironworkers' motion to set aside the default judgment held the court had personal and subject matter jurisdiction over Ironworkers. The district court held, therefore, that the default judgment was not void and voidable at best. As such, Ironworkers was bound by the statute of limitations governing actions to set aside defaults. Those time limitations not having been met, Ironworkers are now barred from recovery by the statutes of limitations.

V.

We now consider the matter of Ironworkers' petition to set aside the default judgment. Ironworkers asserts the district court erred in denying its petition to set aside the default judgment in the first case.

In granting or denying a motion to set aside a default judgment, the district court is vested with wide discretion. H & S Ltd. v. Andreola, 363 N.W.2d 592, 595 (Iowa App. 1984). Its findings on the facts are entitled to the same weight as a jury verdict. Id. The evidence required to support an application to set aside a default judgment under Iowa R. Civ. P. 252 is greater than that required to set aside a default judgment under Iowa R. Civ. P. 236. Id. Davis v. Glade,

257 Iowa 540, 546, 133 N.W.2d 683, 687 (1965). Even where no findings of fact were made, the trial court decision will be upheld if any proper ground appears in the record. H & S Ltd., 363 N.W.2d at 595; Williamson v. Casey, 220 N.W.2d 638, 639 (Iowa 1974).

Iowa R. Civ. P. 230(c) provides that "[a] party shall be in default whenever he fails to present himself for trial." Iowa R. Civ. P. 236 provides for setting aside defaults as follows:

> 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 the 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. (emphasis added).

A "good cause" is a sound, effective, and truthful reason. Sher, 353 N.W.2d at 862. It is something more than an excuse, a plea, apology, extenuation or some justification for the resulting effect. Id.; Hobbs v. Martin Marietta Co., 257 Iowa 124, 128, 131 N.W.2d 772, 775 (1964). Good cause also requires "at least a claimed defense asserted in good faith." Sher, 353 N.W.2d at 862. Burden is on movant to plead and prove good cause. Hansman v. Gute, 215 N.W.2d 339, 342 (Iowa 1974).

We first determine whether the district court erred in entering a default judgment based on Ironworkers' failure to appear. Nothing in the record suggests the district court proceeded with undue haste or without notice to Ironworkers. El View served its cross-petition on Ironworkers on January 18, 1980. El View did not move immediately for a default when Ironworkers failed to answer within 20 days. More than nine months elapsed before El View filed a motion for default

on October 30, 1980. Another four months passed before judgment was entered on February 17, 1981. El View did not file a motion seeking assessment of damages and judgment entry until December 1, 1981, another nine-month lapse. Ironworkers asserts it did not receive notice of the motion for default and judgment entry. However, the record clearly shows Ironworkers was sent copies of all motions and rulings. Other than that bare assertion, Ironworkers has not offered any evidence that it was surprised by the entry of default. In addition, Ironworkers has not offered evidence that its failure to meet time limitations was the result of inadvertence, excusable neglect or unavoidable casualty.

Ironworkers rests its entire justification for failure to appear and defend in the action on the fact its attorney said the cross-petition was not a class action, therefore, "not to worry about it." When Ironworkers did appear via a motion to set aside the default judgment, Ironworkers asserted that it had not defended the action because the district court had failed to hold a hearing to determine whether the action against it should be maintained as a class action pursuant to Iowa R. Civ. P. 42.1 and 42.2(a) and had failed to hold a hearing to certify the class action pursuant to Iowa R. Civ. P. 42.2. Ironworkers also claimed that no default could have been taken against it without the appointment of an attorney to appear and defend it as required by Iowa R. Civ. P. 47.

The excuse Ironworkers offers does not amount to good cause. When El View served its cross-petition on Ironworkers on January 18, 1980, rules 42.1 and 42.2 were not yet in effect. Those rules came into effect July 1, 1980. Therefore, the certification hearing required by 42.2 did not apply to El View at the time El View commenced its suit.

In addition, rule 47 ceased to be effective after July 1, 1980. Thus, it was not in existence at the time the default judgment was entered against Ironworkers on February 17, 1981. Even if Ironworkers was mistaken about the applicable class action law at the time the cross-petition was filed or the default judgment entered, the record shows Ironworkers made no attempt to timely cure its mistaken beliefs. Therefore, Ironworkers' failure to appear did not amount to good cause and the district court was correct in ruling Ironworkers was not entitled to any relief.

We affirm the district court on all counts.

AFFIRMED.

Hayden and Sackett, JJ., concur; Oxberger, C.J., concurs in result only.