IN THE COURT OF APPEALS OF IOWA

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1756-95
85-1439

LOUIS LIRA,

Plaintiff-Appellee,

vs

GENE HORTON, INDIVIDUALLY, AND GENE'S TRANSMISSION PRODUCTS, INC., An Iowa Corporation,

Defendants-Appellants.

Appeal from the Iowa District Court for Appanoose County (No. CE1666-0185) - Richard J. Vogel, Judge.

Defendant appeals from trial court's refusal to set aside a default judgment rendered against him. **REVERSED AND REMANDED.**

Bradley J Harris, Albia, for defendants-appellants.

Allan C Orsborn, of Dull, Keith, Beaver & Orsborn, Ottumwa, for plaintiff-appellee

Considered by Snell, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J. 176

Defendant Gene Horton appeals from the trial court order refusing to set aside a default judgment for $16,735.46 entered against him. Defendant Gene's Transmission Products, Inc., is not a party to this appeal.

On January 29, 1985, Plaintiff Louis Lira filed a petition in equity naming Gene Horton and Gene's Transmission Products, Inc., as defendants. The petition was cast in five divisions captioned: General Allegations; Cause of Action for Receiver; Cause of Action for Accounting; Cause of Action for Return of Corporate Properties; and Cause of Action for Dissolution of Corporation and Liquidation. Defendant Gene Horton was served with an original notice with a copy of said petition attached on February 6, 1985. Horton did not appear or answer.

On May 28, 1985, a receiver was appointed by the trial court. The receiver collected corporate funds and paid bills.

On July 15, 1985, a default judgment was entered by the trial court, Judge James D. Jenkins. The judgment entry found both defendants to be in default and ordered: (1) the receiver discharged; (2) Horton to make an accounting of his doings as officer and director; (3) Horton to return certain property to plaintiff; (4) the corporation be dissolved, all corporate property be awarded to plaintiff, and personal judgment be entered against Horton in the amount of $16,735.46 with interest and costs.

On July 25, 1985, Horton filed a motion to set aside the default judgment pursuant to Iowa R. Civ. P. 236. Plaintiff resisted the motion. A hearing was held at which Horton appeared and presented evidence by affidavit. Plaintiff presented no evidence. The trial court, Judge Richard J. Vogel, overruled Horton's motion. Horton appeals this ruling.[1]

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[1] This ruling from which Defendant Horton has appealed was not included in the appendix. RAP 15(a) provides: "Appellant shall prepare and file an appendix to the briefs which shall contain: . . . (3) the judgment, order or decision in question. . . ." Defendant's counsel shall comply with said rule in all further appeals to this court.

We said in Sher v. Burche, 353 N.W.2d 859, 862-63 (Iowa App. 1984):

> A proceeding under rule 236 is at law. Flexsteel Industries, Inc. v. Morbern Industries Ltd., 239 N.W.2d 593, 596 (Iowa 1976). A trial court has wide discretion in making its ruling. The burden is on the movant to plead and prove good cause to set aside the default or judgment thereon. Good cause is shown only if one of the grounds in the rule is proved. We are bound by trial court findings of fact if supported by substantial evidence. We view the evidence in its light most favorable to the court's ruling. Id. We will not interfere with its order in the absence of a showing of abuse of such discretion. Also, we are more reluctant to interfere with the grant of such a motion than with its denial. Insurance Co. of North America v. Sperry & Hutchison Co., 168 N.W.2d 753, 756 (Iowa 1969).
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> A "good cause" is a sound, effective, and truthful reason. It is something more than an excuse, a plea, apology, extenuation, or some justification, for the resulting effect. It also requires "at least a claimed defense asserted in good faith." Hobbs v. Martin Marietta Co., 257 Iowa 124, 128, 131 N.W.2d 772, 775 (1964); Svoboda v. Svoboda, 245 Iowa 111, 118, 60 N.W.2d 859, 863 (1953).
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> Neglect as used in rule 236 has been defined as "omission of proper attention; disegard of duty, from indifference or willfulness; failure to do, use, or heed anything; negligence." Booth v. Central States Mutual Insurance Association, 235 Iowa 5, 9, 15 N.W.2d 893, 895 (1944).
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> While it is true if different inferences may be drawn from fact findings of the trial court, the findings are binding on this court; however, if there is no factual issue, the question is one of law and the appellate court is not bound by the determination of the trial court. Hobbs v. Martin Marietta Co., 257 Iowa at 130, 131 N.W.2d at 776.
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> Finally, precedents are of little aid in proceedings of this kind in the determination of a particular appeal as there is much difference in the facts in the various cases. The facts in each case must rule its decision. Svoboda v. Svoboda, 245 Iowa at 118, 60 N.W.2d at 863.

Horton complains the petition served on him did not apprise him of the fact that plaintiff was seeking personal judgment against him. While not disputing

the fact the petition did not ask for personal judgment from defendant, plaintiff responds that under Iowa notice pleading the petition need only apprise the opposing party of the incident giving rise to the claim and of the general nature of the claim.

We recognize under notice pleading, Iowa R. Civ. P. 69, the pleader is not required to set out specific theories of recovery. Tigges v. City of Ames, 356 N.W.2d 503, 507 (Iowa 1984). The petition need only apprise the opposing party of the incident giving rise to the claim and of the general nature of the action. Id. However, this does not mean that a party may not be limited to a specific theory of recovery when he limits his pleadings to certain exclusive theories. Id.

While a pleading might be sufficient to place a defendant on notice as to the nature and extent of liability plaintiff intends to impose upon him, when we are dealing with a default situation the issue may be cast into an entirely different light. Kardux Transfer, Inc. v. McGrew, 350 N.W.2d 223, 226 (Iowa App. 1984). The general rule for a motion for default judgment is that relief granted in a judgment by default not only must be within the fair scope of the allegations of the complaint, but also must be within the fair scope of the prayer thereof. Id. (citing 47 Am. Jur. 2d Judgments § 1176 at 199). A judgment entered in a default should not contain an award of damages in excess of that demanded in the pleadings of the plaintiff. Id.

We determine, therefore, the trial court abused its discretion in refusing to set aside the default judgment entered against Horton.

REVERSED AND REMANDED.