

IN THE COURT OF APPEALS OF IOWA

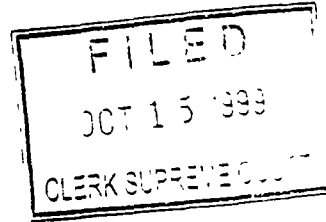
No. 1999-132 (9-348) / 98-1536

Filed October 15, 1999

ALAN SMITH,
Plaintiff-Appellee,

vs.

GRAIN MILLERS (IOWA), INC.,
Defendant-Appellant.



Appeal from the Iowa District Court for Mitchell County, John S. Mackey,
Judge.

Defendant appeals from the district court orders granting plaintiff a default judgment on his personal injury claim and awarding damages. Defendant contends the court erred by entering a default judgment and by overruling defendant's motion to set aside the default. Defendant also contends the court awarded an excessive amount of damages. **REVERSED AND REMANDED.**

Rustin T. Davenport of De Vries, Price & Davenport, Mason City, and Gregory P. Bulinski of Bassford, Lockhart, Truesdell & Briggs, P.A., Minneapolis, Minnesota, for appellant.

William Kvas of Hunegs, Stone, Koenig, Leneave, & Kvas, P.A., Minneapolis, Minnesota, and Arvid D. Oliver of Olson, Oliver & Wheeler, Des Moines, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Plaintiff-Appellee Alan Smith sued Defendant-Appellant Grain Millers (Iowa) Inc. for injuries plaintiff received on defendant's premises. The district court entered a default when defendant failed to file an answer and awarded plaintiff \$89,378.04 in damages. Defendant appeals contending (1) the district court should not have entered a default judgment, (2) its motion to set aside the default should have been sustained and (3) that the damages awarded by the district court were excessive. We set aside the default and reverse and remand to the district court.

Plaintiff filed this suit on May 29, 1997. Defendant was served with an original notice with a copy of the petition attached on June 5, 1997. On June 26, 1997, Gregory P. Bulinski of a Minneapolis, Minnesota law firm wrote a letter to plaintiff's attorney William Kvas of a St. Paul, Minnesota, law firm confirming a telephone conference the two men had concerning this case. According to the letter Kvas had agreed to give defendant "until July 3, 1997 to answer or otherwise respond to the Complaint". In the same letter Bulinski advised that defendant was associated with attorney Kirke Quinn of Boone, Iowa. A copy of the letter was shown as going to both Quinn and Arvid D. Oliver of Des Moines, Iowa, named as a second attorney by plaintiff on his petition.

On August 8, 1997, an attorney with Kvas in St. Paul wrote Bulinski reciting that on August 4, 1997, he left a message with his office regarding "your overdue answer to our complaint and discovery.". The letter recited that an extension had been

granted until July 3, 1997, to respond and he had not heard from Bulinski. There is no indication that a copy of the letter went to Quinn.

On September 11, 1997, Kvas and Oliver filed a motion for default judgment. The affidavit of service shows the motion was mailed by Pamela R. Kerkvliet of Eagen, Minnesota to Attorney Gregory Bulinski, Bassford, Lockhard, Truesdel & Briggs, P.A. of Minneapolis, Minnesota, on September 12, 1997. Bulinski denied receiving the motion. The motion was shown as being mailed to Quinn on September 16, 1997.

Plaintiff's motion stated that plaintiff's counsel granted defendant an extension to answer or plead until July 3, 1997; that on August 8, 1997 plaintiff's counsel sent a letter to defendant requesting an answer and reciting that the July 3, 1997 extension time had expired. The motion further advanced that plaintiff's counsel extended the time for defendant to respond until August 18, 1997.

On October 22, 1997, C. Bradley Price of Mason City, joined by Gregory Bulinski, served an appearance and an answer in defendant's behalf. Defendant also filed a resistance to the motion for default contending that plaintiff's motion sought default because of the lack of a responsive pleading and because an appropriate response pleading has been filed rendering plaintiff's motion moot. The defendant also alleged the delay in filing the answer was occasioned by excusable neglect as defined in Rule 236 of the Iowa Rule of Civil Procedure. In the accompanying affidavit of Bulinski stated the August 11, 1997 telephone call from Kvas was with his secretary as he was on vacation. He related that Kvas told his secretary that he

was not concerned about the absence of an answer but wanted to speak with Bulinski on his return. Bulinski further alleged he spoke with Kvas at length on August 21, 1997, telling him in part he wanted to get the file from Grain Millers who were moving from Washington to Minnesota. He related Kvas was not concerned about the answer but wanted to learn defendant's position on liability and damages after Bulinski evaluated the file. Bulinski said he further recited he would visit Iowa in several weeks to interview his clients and then answer the petition and interrogatories. Bulinski went on to relate his wife developed a serious health problem the first week of September 1997.

On October 27, 1997, the district court entered default of defendant finding:

"... defendant made no appearance or answer to plaintiff's petition at law for approximately five months. Plaintiff's counsel granted defense counsel the courtesy of extending the time period within which to file an appearance or answer to specific dates on three successive occasions. Thereafter, both Iowa and Minnesota defense counsel were notified of plaintiff's intent to take a default by serving plaintiff's motion for default judgment. Additionally, defendant itself was given notice by the District Court Administrator that trial was set in a default position on Monday, October 27, 1997, at 10:00 o'clock a.m. That notice was provided to the Defendant on September 23, 1997. More than one month elapsed before defendant or anyone on its behalf contacted plaintiff's counsel. Under these circumstances, the court believes that plaintiff is entitled to entry of default judgment by the Clerk of Court for defendant's failure to appear pursuant to IRCP 230 and 231.

On November 17, 1997, attorneys Price and Bulinski filed a motion to set aside default on behalf of defendant alleging that defendant (1) had always intended to

defend, (2) the resulting default was simply the result of a mistake or misunderstanding, and (3) as soon as Bulinski learned of the motion for default on October 22, 1997, he took appropriate action to correct the situation.

Then in refusing to set aside the default the district court found:

“Mr. Bulinski was vacationing from August 11th through August 19th and during the first part of September his wife was in the hospital with the onset of sudden brain dysfunction. It is evident from Mr. Bulinski’s communications between himself and plaintiff’s attorney that he intended to defend. However, while his personal circumstances are certainly understandable and could possibly even excuse his failure to respond by answer on behalf of defendant, such good cause cannot be imputed to his Iowa co-counsel, Mr. Quinn. Despite having been served with a copy of the motion for default on September 16, 1997, no response was made to plaintiff’s counsel or the court. It is quite evident that had Mr. Quinn contacted plaintiff’s counsel an extension would have been granted judging from the past communication history between Mr. Kvas and Mr. Bulinski.” ...

... “To set aside the default entered herein would be to excuse Mr. Quinn’s inattention to legal notices and while Mr. Bulinski’s inattention would be excusable under his personal circumstances, the court concludes such inattention on behalf of Mr. Quinn was neither unavoidable or excusable.”

Defendant contends the district court should not have entered a default judgment and if entered, it should have been set aside.

The policy of the law is to allow trial of actions on their merits. *Severson v. Sueppel*, 260 Iowa 169, 1177, 152 N.W.2d 281, 286 (1967).

The question of allowing a default is largely within the discretion of the trial court. *Avery v. Peterson*, 243 N.W.2d 630, 631-32 (Iowa 1976), *Severson v. Sueppel*,

260 Iowa 169, 152 N.W.2d 281, 286. The district court is vested with broad discretion in ruling on a motion to set aside a default, and the appellate courts will reverse such a ruling only if that discretion has been abused. *Millington v. Kuba*, 532 N.W.2d 787 (Iowa 1995). Generally, we find such an abuse only when there is a lack of substantial evidence to support the district court's ruling.

We first address defendant's assertion the district court abused its discretion in setting aside its default on the basis of mistake and excusable neglect.

Iowa Rule of Civil Procedure 236 provides that:

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.

A proceeding under this rule is at law. *Central Nat'l Ins. Co. Of Omaha v. INA*, 513 N.W.2d 750, 753 (Iowa 1994). No judgment had been entered when defendant filed its motion. Therefore it was timely. *See Davenport Bank & Trust Co. v. City of Davenport*, 318 N.W.2d 451, 453 (Iowa 1982).

The district court found Bulinski's circumstances excusable, but the court relying on Quinn's neglect refused to set aside the default.

Defendant alleges among other things that Quinn was not representing it at times material to the entry of the default. He had no contact with plaintiff's attorney. We agree. Quinn has never appeared nor filed a responsive pleading. While an early

letter to plaintiff's counsel on June 26, 1997 recites, "So I advised you, we are associated with Attorney Kirke C. Quinn of Boone, Iowa, in this matter. "

Bulinski testified:

"Mr. Quinn advised me at the end of August that he was not interested in participating as a lawyer in this case because he had assumed that the file would be turned over to him for handling. That was my last communication from Mr. Quinn."

There is nothing to show Quinn was defendant's attorney at the time the motion for default was filed. There is no evidence to support the district court's conclusion that Quinn was inattentive to the legal notice. The district court erred in relying on this finding to support its holding.

The district court found Bulinski's conduct excusable and further found defendant intended to defend. There are facts to support both of these findings. The motion to set aside was timely.

We set aside the default and resulting judgment and remand to the district court for further proceeding.

REVERSED AND REMANDED.