

IN THE COURT OF APPEALS OF IOWA

No. 7-571 / 96-1704

Filed May 29, 1998

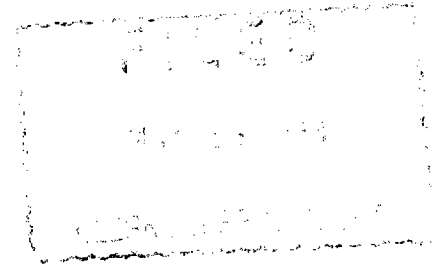
SCOTT KNAACK,

Plaintiff-Defendant to Counterclaim/Appellee,

vs.

NANCY MATHERS, d/b/a M & M CAFE,

Defendant-Counterclaimant/Appellant.



Appeal from the Iowa District Court for Woodbury County, Patrick G. McCormick, District Associate Judge.

Nancy Mathers appeals the district court's ruling entering judgment in favor of plaintiff, Scott Knaack, in his action against her for nonpayment of an invoice.

AFFIRMED.

Irene A. Schrunk of the Al Sturgeon Law Firm, Sioux City, for appellant.

Scott Knaack, Correctionville, pro se, appellee.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

PER CURIAM.

Mathers appeals from the court's dismissal of her claim against cross-defendants Sam Page and Iowa Water Systems, the adequacy of the damage verdict, and the court's evidentiary rulings. Because the court did not have personal jurisdiction over the cross-defendants, the court did not err in dismissing Mathers' claim against them. The damage award was supported by sufficient evidence on the record and achieved substantial justice.

I. Background Facts & Proceedings.

Nancy Mathers is the owner of the M & M Cafe in Correctionville, Iowa. In the summer of 1995, Mathers spoke to Scott Knaack about purchasing a heating and cooling system for her cafe. Knaack suggested Command Aire geothermal heat pump systems supplied to Knaack by Iowa Water Systems (IWS). Sam Page of IWS assured Mathers the system would heat and cool her cafe for an average utility cost of \$70 a month. Mathers purchased the system. The parties agreed the cost of the system and installation would be \$10,500. Knaack installed the system. Mathers paid all but \$1000 of the cost.

In April 1996, Knaack brought an action in small claims court against Mathers to recover the unpaid amount. Mathers filed a misrepresentation cross-claim against Page and Iowa Water Systems for \$5000 and a misrepresentation counter-claim against Knaack for \$5000. Page and IWS were out-of-state defendants.

The case was transferred to the associate district court. Page and IWS did not appear at trial. At trial it was realized by the court and the parties, Page and IWS were not given proper notice. Mathers alleged the clerk of court informed her on two occasions Page and IWS had been given proper notice. Over Mathers' objection, the court heard the plaintiff's claim against Mathers and Mathers' counterclaim. The court rendered an \$800 verdict for the plaintiff. The cross-claim against Page and IWS was dismissed without prejudice. Mathers appealed. Neither Page nor IWS were served with notice of the appeal.

II. Denial of Mathers' Motion for Continuance and Dismissal of Her Claim Against Page & IWS.

Mathers filed a timely cross-claim against Page and IWS. Page and IWS were not properly served with original notice of the claims against them. Mathers sought to have the matter continued until Page and IWS were served. The court denied the motion. After the evidence was presented, the court dismissed Mathers' cross-claim against Page and IWS without prejudice.

The denial of a motion for continuance is reviewed for abuse of discretion. *In re C.W.*, 554 N.W.2d 279, 281 (Iowa App. 1996). The decision will be reversed only if injustice will result to the party desiring the continuance or the denial of the motion was unreasonable under the circumstances. *Id.* To deny the continuance was not unreasonable under these circumstances. The plaintiff was ready to present his claim against Mathers. It would have inconvenienced him to come back to court. No

injustice resulted to Mathers from the denial of the continuance. The plaintiff's claim against Mathers was unaffected by Mathers' claim against Page and IWS and Mathers' defense against the plaintiff's claims was not limited by Page's and IWS's absence. The court did not abuse its discretion.

The court dismissed the plaintiff's cross-claim against Page and IWS for lack of personal jurisdiction. When reviewing a motion to dismiss for lack of personal jurisdiction over a defendant, the well-established standard of review is:

[To] accept as true the allegations of the petition and the contents of uncontroverted affidavits. The plaintiff has the burden to sustain the requisite jurisdiction, but when he [or she] establishes a prima facie case the defendant has the burden of producing evidence to rebut that showing. The trial court's findings of fact have the effect of a jury verdict and are subject to challenge only if not supported by substantial evidence in the record; we are not bound, however, by the trial court's application of legal principles or its conclusions of law.

Percival v. Bankers Trust Co., 450 N.W.2d 860, 861 (Iowa 1990). It is elemental in our legal system that a court must have personal jurisdiction over the parties. A court does not have personal jurisdiction over the parties if they were not served proper notice of the action. See *Holmes v. Polk City Savings Bank*, 278 N.W.2d 32, 34 (Iowa 1979); *City of Oelwein v. Dvorsky*, 380 N.W.2d 739, 741 (Iowa App. 1985). The trial court found Page and IWS were not properly served notice and, thus, were not legally required to appear.¹ The court dismissed the action because it lacked personal

¹ Mathers argues the clerk of court misrepresented that Page and IWS had been served proper notice. Regardless of whose error resulted in Page and IWS not receiving proper notice of Mathers' cross claim, the fact remains they did not receive notice and did

jurisdiction over the parties. The court did not err in doing so. Mathers is free to bring a subsequent action against Page and IWS. She has not been prejudiced by the dismissal.

III. Adequacy of Damage Verdict.

Mathers claims the district court erred in not awarding her the full amount of damage she requested in her counter-claim against Knaack. The court found Mathers had failed to pay \$1000 owed to Knaack, but installation problems had caused damage to Mathers' ceiling tile in the amount of \$200. The court entered judgment in favor of Knaack for \$800. Mathers' motion for new trial was denied.

We review the denial of a motion for new trial for correction of errors at law. Iowa R. App. P. 4. However, when the motion is based on a discretionary ground we review for an abuse of discretion. *Id.* A ruling on a motion for new trial based on the adequacy of a damage award is reviewed for an abuse of discretion. *See Smith v. Air Feeds, Inc.* 556 N.W.2d 160, 165 (Iowa App. 1996).

If an award is not supported by sufficient evidence and substantial justice was not accomplished by the verdict, a new trial may be granted. *See Delaney v. Sand*, 1997 WL 442690, at *3 (Iowa App. 1997).

The damage award is supported by sufficient evidence on the record. It is undisputed Mathers owed Knaack \$1000 for the installation of the heating and cooling system. The court found Knaack's improper installation of the system had

not appear. Thus, the court did not have personal jurisdiction over them.

caused Mathers damages of \$200. A greater amount of damages against Knaack is not supported by the evidence in the record. The award accomplished substantial justice between Mathers and Knaack. Unable to find an abuse of discretion, we affirm the trial court's denial of a new trial.

IV. Failure to Serve Page and IWS with Notice of Appeal.

Mathers' remaining claims attempt to impose liability upon IWS for alleged misrepresentations made by their agents about the heating and cooling systems. Mathers contends Knaack was an agent of IWS. The district court refused to allow her to present evidence on these issues. Mathers did not serve IWS, the party who would be most adversely affected by a reversal of the district court's judgment, with notice of this appeal.

Co-parties must be served with notice of appeal if they would be prejudiced by a change in the judgment below. *In re Shumaker's Estate*, 12 N.W.2d 207, 209 (Iowa 1943). The burden rests upon an appellant to show that parties not served with notice of appeal would not be adversely affected by a reversal or modification of the judgment. *Id.* Non-residence or absence of a party does not dispense with the necessity of serving him with notice of appeal. *Id.* Mathers has made no attempt to show IWS and Page would not be adversely affected by a modification or reversal of the district court's judgment. Such an argument would be futile. If Mathers were allowed to present evidence of Knaack's agency to IWS and Knaack's and Page's alleged misrepresentations, liability could be imposed upon IWS if Mathers proved

her claims. Because Mathers did not give IWS notice of this appeal, and IWS would be prejudiced by a reversal of the district court's judgment, Mathers' remaining claims against IWS are dismissed. *See id.*

AFFIRMED.