

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1987

CLERK SUPREME COURT

HOME-CREST CORPORATION,)

Plaintiff-Appellant,)

vs.)

BOBBY J. ALBRIGHT, BONNIE J.)

ALBRIGHT, and ALBRIGHT KITCHEN)

CORPORATION,)

Defendants-Appellees.)

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7-19
86-445

Appeal from the Iowa District Court for Polk County (No. CL 32957) --
Luther T. Glanton, Judge.

Plaintiff appeals from judgment in an action to recover on defendants' open account and a jury verdict for defendants on their counterclaim for damages due to breach of contract, fraud and detrimental reliance. **APPEAL DISMISSED.**

Steven H. Shindler and Roger J. Hudson, of Wimer, Hudson, Flynn & Neugent, P.C., Des Moines, and Alan A. Anderson, Polk City, for plaintiff--appellant.

Donald G. Beattie and J. Kirk Norris, of Skinner, Beattie & Wilson, P.C., Altoona, for defendants-appellees.

Heard by Donielson, P.J., and Snell, and Sackett, JJ.

SACKETT, J.

Plaintiff Home-Crest Corporation appeals from judgment, following a jury trial, in an action to recover on defendants' open account and a jury verdict for Defendants Bobby Albright, Bonnie Albright and Albright Kitchen Corporation on their counterclaim for breach of contract, fraud and detrimental reliance. We determine this court is without jurisdiction and accordingly dismiss Home-Crest's appeal.

The jury verdict was rendered on September 27, 1985. Home-Crest filed a motion on October 16, 1985, to enlarge the findings of the jury and, in the alternative, to set aside the verdict and order a new trial. A hearing was held on Home-Crest's motion on November 27, 1985. The trial court requested briefs from both parties. On January 31, 1986, the trial court entered an order overruling Home-Crest's motion. The clerk of court never sent Home-Crest a copy of the order. Home-Crest did not learn its motion had been overruled until March 5, 1986, more than 30 days after the trial court ruled its post-trial motions.

On March 11, 1986, Home-Crest filed a motion with the trial court to enlarge the time for filing a notice of appeal. Following a hearing on Home-Crest's motion, on March 26, 1986, the trial court granted Home-Crest an additional 10 days in which to file a notice of appeal. Home-Crest filed a notice of appeal that day. On March 27, 1986, Home-Crest filed a motion with the Iowa Supreme Court for an extension of time in which to file its notice of appeal. On April 8, 1986, the supreme court granted Home-Crest's application pursuant to Iowa R. App. P. 20(b) and gave Home-Crest 10 days to file its notice of appeal. Home-Crest did not file a second notice of appeal.

We must first determine whether we have jurisdiction to entertain this appeal. Untimely appeals present questions of subject matter jurisdiction.

Uchtorff v. Dahlen, 363 N.W.2d 264, 267 (Iowa 1985). A timely appeal is jurisdictional and cannot be conferred by consent. Robco Transportation, Inc. v. Ritter, 356 N.W.2d 497, 498 (Iowa 1984). It is the duty of this court to refuse, on its own motion, to entertain an appeal not authorized by rule. Id.; State v. Iowa Department of Social Services, 328 N.W.2d 912, 913 (Iowa 1983).

Iowa Rule of Appellate Procedure 5(a) establishes a time limit for taking an appeal:

Except as provided by rule 20(b), rules of appellate procedure, appeals to the supreme court must be taken within, and not after, thirty days from the entry of the order, judgment or decree, unless a motion for new trial or judgment notwithstanding the verdict as provided in R.C.P. 247, or a motion as provided in R.C.P. 179(b), is filed and then within thirty days after the entry of the ruling on such motion. . . .

After transfer of this case to the Iowa Court of Appeals, we raised the question of whether Home-Crest's notice of appeal had been timely filed and requested both parties file additional briefs on the following jurisdictional issues:

- (1) Whether the trial court had jurisdiction to extend the time for filing a notice of appeal after the appeal time had run.
- (2) Whether a notice of appeal filed more than 30 days after a final judgment but before the entry by the Iowa Supreme Court of the order under Iowa R. App. P. 20(b), enlarging time to file an appeal, confers jurisdiction on the Iowa Supreme Court to entertain the appeal.

Home-Crest addressed the issues contending that even though the 30-day time limit for taking an appeal had passed, the district court had the authority to extend the time for filing a notice of appeal under Iowa R. Civ. P. 83. Home-Crest did not address the issue of whether the notice of appeal it filed before the supreme court's order extending time conferred jurisdiction.

We consider whether the district court had jurisdiction to extend the appeal time. Home-Crest argues Iowa R. Civ. P. 83(a) controls. Iowa R. Civ. P. 83(a) provides:

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under R.C.P. 241, 243 and 244 except to the extent and under the conditions stated in them. (Emphasis added.)

Home-Crest contends the district court properly exercised its discretionary power under Iowa R. Civ. P. 83(a) because Home-Crest's failure to timely file its notice of appeal was not due to any error or neglect on its part. As such, Home-Crest argues since the trial court properly extended the time for appeal pursuant to Iowa R. Civ. P. 83(a) and since Home-Crest did file its notice of appeal within the period provided by the district court that this court has jurisdiction to entertain the appeal.

However, we find Iowa R. Civ. P. 82(f) directly controls the instant case. Iowa R. Civ. P. 82(f) specifically disallows the district court from enlarging the time in which a party may take an appeal.

Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in this rule upon each party except a party against whom a default has been entered and shall make a note in the docket of the mailing. In the event a case involves an appeal or review relating to an administrative agency, officer, commissioner, board, administrator, or judge, the clerk shall mail without cost to the applicable administrative agency, officer, commissioner, board, administrator, or judge a copy of any remand order, final judgment or decision in the case and a copy of any procedendo from the supreme court.

Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in this rule for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the district court to relieve a party for failure to appeal within the time allowed. (Emphasis added.)

Iowa R. Civ. P. 82(f) makes it clear the district court may not relieve a party who files an untimely appeal, even when failure is wholly due to the fault of another. See Uchtorff, 363 N.W.2d at 267 (dicta).

In cases where a party has not timely appealed due to the clerk of court's failure to notify appellant of entry of post-trial motions, Iowa R. App. P. 20(b) provides the sole method for resurrecting the timeliness of an appeal:

The supreme court or a justice thereof may extend the time for filing of a notice of appeal if the supreme court or justice determines that a failure to file a timely notice of appeal was due to the failure of the clerk of the trial court to notify the prospective appellant of the entry of the appealable final judgment or decision. Any motion for such an extension of time must be filed with the clerk of the supreme court and served not later than sixty days after the expiration of the time prescribed by rule 5"a", rules of appellate procedure, for taking an appeal. The motion and any resistance thereto may be supported by copies of relevant portions of the record and by affidavits which shall be the only form of evidence received. An information copy of any such motion shall be filed by the moving party with the clerk of district court. No such extension shall exceed sixty days past the time prescribed in rule 5"a", rules of appellate procedure, or ten days from the date of entry of the order granting the motion, whichever occurs later.

(Emphasis added.) See Uchtorff, 363 N.W.2d at 267 ("Though [Iowa Supreme Court] may enlarge or shorten the time prescribed by the rules of appellate procedure, [the Iowa Supreme Court is] prohibited from enlarging the time for appeal except for the limited power provided by Iowa Rule of Appellate Procedure 20(b)").

We determine the district court did not have the power to extend the appeal time. The district court's order of March 26, 1986, granting additional time and the notice of appeal Home-Crest filed pursuant to the district court's order do not grant us jurisdiction to hear the appeal.

We disagree with Home-Crest's contention in its brief that the supreme court's order of April 8, 1986, is moot. On that date the supreme court, pursuant to its authority under Iowa R. App. P. 20(b), granted Home-Crest's application

for an extension to file a notice of appeal and ordered Home-Crest to file a notice of appeal within 10 days. Thereafter, Home-Crest failed to file a second notice of appeal pursuant to the supreme court's order. Home-Crest does not argue nor can we determine Home-Crest's notice of appeal of March 26, 1986, filed pursuant to the district court's enlargement order, complied with the directive of the supreme court's order. As such, the supreme court's order was the only proper grant extending the time for taking an appeal. Where procedure is prescribed for review, it must be strictly followed in order to confer jurisdiction. Lau v. City of Oelwein, 336 N.W.2d 202, 203 (Iowa 1983) (citing Barnes Beauty College v. McCoy, 279 N.W.2d 258, 260 (Iowa 1979)). Since authority to grant an extension of time for taking appeal rests solely with the supreme court, Home-Crest's notice of appeal had to comply with the supreme court's order rather than the trial court's order.

We dismiss Home-Crest's appeal for want of jurisdiction.

APPEAL DISMISSED.

Donielson, P.J., and Sackett, J., concur, Snell, J. dissents.

SNELL, J. (dissenting)

The case at bar presents this court with a situation in which the appellant missed the initial deadline for appeal because of a district court clerk's error, received extensions of time to file an appeal from both the district court and our supreme court, and in fact has a notice of appeal on file. Nevertheless, *this court dismisses his appeal*. As I believe this result unnecessarily exalts procedure over substance, I dissent.

An order granting an extension of time for the purpose of perfecting an appeal must be interpreted in light of the petition on which it is based. 4A C.J.S. Appeal and Error § 458(a)(1) at 146 (1957). In this case, Justice Harris's order states that "[p]laintiff is given ten (10) days from the date of this order in which to file notice of appeal." A review of plaintiff's application for extension of time reveals that it contains no reference to the notice of appeal which had already been filed. The majority opinion, in effect, interprets Justice Harris's order as stating a requirement that plaintiff re-file his notice of appeal. I cannot concur in that interpretation. Requiring the plaintiff to re-file his notice is simply an exercise in hoop-jumping. I would read Justice Harris's order as establishing a deadline, April 18, before which plaintiff's notice of appeal was required to be filed. I would then hold that plaintiff's March 26 filing of that notice, obviously, met that deadline.

Our supreme court dealt with an analogous issue many years ago. In Burns v. Keas, 20 Iowa 16 (1865), the parties were operating under markedly different requirements for appealing a case into the supreme court. There, potential appellants were required to apply for an appeal, prosecute the application and, if successful, were allowed by the district court to take their appeal. See Burns, 20 Iowa at 18. The governing statute provided a one-year limit within which appeals could be allowed. Id. The potential appellant in Burns filed his applica-

tion in a timely manner but due to a "litigious adverse party," the district court's allowance of the appeal came after the one-year deadline. Our supreme court held that the governing statute "must have a reasonable and consistent construction" to provide for such situations. Id. The court concluded that

where the party applies for the appeal within the year, and is without fault, either in making his application or prosecuting the same, he is not to be concluded, if the order allowing the same is not made until after that time.

Id.

I realize we operate today under different rules and procedures. I am persuaded, however, that our sense of fairness and reason should lead to the same result.

I would entertain plaintiff's appeal.