FILED
MAY 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

79

FIRST NATIONAL BANK OF MISSOURI VALLEY, Missouri Valley, Iowa, An Iowa Banking Corporation,

Plaintiff-Appellee,

vs.

CLARKSON J. WEHRLI and **ANN M. WEHRLI,** Husband and Wife,

Defendants,

OPAL WEHRLI as Personal Representative of **CLARK WEHRLI,** deceased, and **OPAL WEHRLI,** Personally,

Defendants-Appellants.

Filed May 28, 1987

7-79
86-850

Appeal from the Iowa District Court for Harrison County (No. 24121), Glen M. McGee and Paul H. Sulhoff, Judges.

Two defendants appeal from the denial of their motion to set aside a default judgment in an action seeking to have a conveyance set aside, asserting that circumstances were shown requiring that the default be set aside and that the relief awarded by the default judgment improperly exceeded the scope of plaintiff's prayer. **AFFIRMED.**

Lyle Rodenburg of Lyle A. Rodenburg, P.C., Council Bluffs, for defendants-appellants.

Jack J. White of Kellogg & Kellogg, P.C., Missouri Valley, for plaintiff-appellee.

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

PER CURIAM

On March 26, 1985, appellee First National Bank of Missouri Valley filed a petition seeking to set aside a March 5, 1985, conveyance of certain real estate to appellants, Clark and Opal Wehrli, from Clarkson and Ann Wehrli. Clarkson, Clark's son, and Ann were codefendants with Clark and Opal to the action to set aside the conveyance. Clarkson and Ann are not, however, parties to this appeal. Appellee's petition alleged that the conveyance was made without substantial consideration for the purpose of defrauding appellee, a judgment creditor of Clarkson and Ann. On April 16, 1985, the defendants filed their answer with Jack W. Peters appearing as counsel for all defendants.

Discovery began with appellee submitting an initial set of interrogatories to the defendants on June 25, 1985. Defendants failed to respond and an order compelling discovery was issued by the district court. When this order failed to affect defendants' compliance with their discovery obligations, a hearing on appellee's motion for sanctions was set for October 14, 1985. On October 9, 1985, defendants filed their answers to the initial set of interrogatories.

A second set of interrogatories and a request for production were submitted to the defendants on November 15, 1985. Defendants' intransigence as concerns this phase of discovery exceeded even that which they had displayed earlier. The district court's order to compel discovery was again ignored and the matter proceeded to a hearing on appellee's motion for sanctions. Following a March 10, 1986, hearing, which defendants' counsel elected not to attend, the district court entered a default judgment in favor of appellee and against all defendants. The district court set the challenged conveyance aside and held appellee's judgment lien against the property superior to a $172,500.00 mortgage given by Clarkson and Ann to Clark and Opal on April 6, 1984.

On April 23, 1986, appellants filed a motion to set aside the default judgment pursuant to Iowa Rule of Civil Procedure 236. The district court denied the motion after a hearing. This appeal followed.

I.

Appellants maintain the district court abused its discretion in refusing to set aside the default judgment. We note first of all that appellants' reply brief contends the district court erred earlier by imposing the default judgment as a sanction for the appellants' failure to comply with their discovery obligations. This contention is different from, and additional to, that raised by appellants' main brief. See Smiley v. Twin City Beef Company, 236 N.W.2d 356, 359-61 (Iowa 1975). Issues first asserted in an appellant's reply brief are not considered by our appellate courts. Berhow v. Kroack, 195 N.W.2d 379, 383 (Iowa 1972). Accordingly, we do not address this contention today.

Iowa Rule of Civil Procedure 236 provides, in pertinent part, that

> [o]n 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 motions are triable at law in the district court. Hastings v. Espinosa, 340 N.W.2d 603, 607 (Iowa App. 1983). The district court is vested with broad discretion in ruling on the motion. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). We will interfere with the district court's ruling on the motion only in those instances in which an abuse of discretion is demonstrated. Smiley, 236 N.W.2d at 360. Generally, an abuse of discretion will be found only where there is a lack of substantial evidence in support of the district court's ruling. Id. We view the evidence in the light most favorable to the district court's ruling and will uphold that ruling even in those cases in which the district court

failed to make findings of fact or based its ruling on a different ground. Paige, 252 N.W.2d at 437.

The task which confronts a movant under Iowa Rule of Civil Procedure 236 was summarized in Paige, 252 N.W.2d at 437, in the following manner:

> The burden is upon the movant to show good cause as to one of the grounds stated in rule 236. "Good cause" for setting aside a default judgment is a sound, effective, truthful reason, something more than an excuse, a plea, an apology, an extenuation or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence, want of ordinary care or attention, or to his carelessness or inattention. The movant must affirmatively show he intended to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. By the plain language of rule 236 good cause must be based on (1) mistake, (2) inadvertence, (3) surprise, (4) excusable neglect, or (5) unavoidable casualty.

(citations omitted). The burden is on the movant to plead and prove such good cause as will not only permit but require a finding of mistake, inadvertence, surprise, excusable neglect, unavoidable casualty. Hastings, 340 N.W.2d at 608. In addition, "good cause" requires "at least a claimed defense [to the underlying action] asserted in good faith." Svoboda v. Svoboda, 245 Iowa 111, 118, 60 N.W.2d 859, 863 (1953); Hastings, 340 N.W.2d at 609.

Appellants argue they demonstrated good cause in the district court. Appellants contend their failure to comply with their discovery obligations was a result both of their failing health and of the fact that their son Clarkson had neglected to keep them apprised of the status of the legal action and, consequently, of their discovery obligations. The testimony given at the hearing on the motion to set aside the default judgment does establish that Clark was in failing health during the pendancy of this action. Opal, during this time period, was a virtual recluse who, according to Clarkson's testimony, had been outside of her home on only three occasions during the last five years. Both appellants were served, however, with notice of the action in which they were listed as

defendants. They were aware that the lawsuit was pending and were consulted by Clarkson during the preparation of answers to the first set of interrogatories. They received correspondence concerning the suit at their home and, although they never opened the correspondence themselves, they inquired of Clarkson about the contents of the correspondence and about other aspects of the suit. As Clarkson stated in his testimony, appellants did not have "a total working knowledge of [the lawsuit], because they felt it was more [Clarkson's] situation than theirs." We think the record shows that the appellants allowed Clarkson to handle the case because they found it traumatic and personally uncomfortable to them. We do not find personal discomfort listed as "good cause" within rule 236; nor do we think it implicit in those listed. The legal situation present in the case at bar may have been in fact difficult for appellants to deal with. Our system of law demands, however, that they at least make the effort. This they did not do. As a result, they suffered a default judgment against them. We cannot say the district court abused its discretion in refusing to set it aside.

II.

Appellants contend the district court awarded improper relief to appellee following entry of the default judgment. This error, appellants argue, occurred when the district court set aside a $172,500.00 mortgage given on April 6, 1984, from Clarkson and Ann to Clark and Opal. Appellants contend that because appellee did not seek this relief in its petition, the district court exceeded its authority in granting it.

Iowa Rule of Civil Procedure 235 governs the relief award in cases such as the present one and provides as follows:

> The judgment may award any relief consistent with the petition and embraced in its issues; but unless the defaulting party has appeared, it cannot exceed what is demanded against him in the petition as limited by the original notice.

In the present case, count one of appellee's petition requested that their earlier judgment against Clarkson "be confirmed as a lien on the property . . . above, senior and superior to the rights of all defendants; . . . ." In its judgment decree, the district court established appellee's judgment lien

> to be superior, first and paramount to the claims, rights and interests, legal or equitable, of the defendants . . . including the interests, claims and rights of said defendants in a certain real estate mortgage from Clarkson J. Wehrli and Ann M. Wehrli . . . in the sum of $172,500.00, said mortgage . . . now being ineffective and held for naught as against [appellee], and the interests of the defendants . . . being inferior and secondary to the rights of [appellee] by virtue of its judgment lien . . . . (emphasis added)

In its findings of fact the district court stated that the mortgage "is properly set aside and held for naught." The decretal portion of the judgment quoted immediately above makes it clear, however, that the court was simply ordering the respective priority rights of the parties' interests in the real estate. We look to the decretal portions of the judgment, and not to the findings of fact, in order to determine the nature of the district court's adjudication. Peters v. Peters, 214 N.W.2d 151, 154 (Iowa 1974); Wolf v. Murrane, 199 N.W.2d 90, 95 (Iowa 1972). We think the relief award by the district court's default judgment was precisely that requested by appellee's petition.

Even were we to harbor the opinion that the district court awarded relief beyond that demanded by the petition, we would not be inclined to reverse. Rule 235 expressly provides that the relief awarded cannot exceed what is demanded against the defaulting party in the petition "unless the defaulting party has appeared." In the present case, the appellants filed an answer to appellee's petition. Such a filing constitutes an appearance. Lonning v. Lonning, 199 N.W.2d 60, 62 (Iowa 1972). A complete setting aside of the mortgage, even assuming that was the relief granted by the district court, would be both "consistent with the petition and embraced in its issues."

The district court is affirmed

AFFIRMED