FILED
DEC 18 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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BETENBENDER MFG., INC.,	)	
Plaintiff-Appellee,	)	Filed December 18, 1985
vs.	)	
RANDY J. JOHNSON, JOHN CALVIN JOHNSON, VERNA M. JOHNSON, and BETH KEENER,	)	5-511 84-1835
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Buchanan County - Thomas H. Nelson, Judge.

Defendants appeal from the district court's overruling of their motion to set aside the default judgment entered against them on plaintiff's petition for recovery of real property. **AFFIRMED.**

Peter C. Riley and Mary K. Hoefer, Cedar Rapids, for defendants-appellants

Terry L. Hinman, Independence, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

Defendants appeal from the district court's overruling of their motion to set aside the default judgment entered against them on plaintiff's petition for recovery of real property. Defendants assert that the court erred in failing to set aside the default judgment since documents on file indicate the default was a result of mistake, inadvertence, surprise, or excusable neglect and since certain documents indicate the existence of a meritorious defense to plaintiff's petition.

On June 19, 1984, plaintiff filed a petition for recovery of real property. On July 7, 1984, John Johnson met with J. R. Norris, an attorney, to discuss three legal matters: a personal injury suit, an estate matter concerning his mother's competency to contract in 1980, and the petition to recover the real property. It is disputed as to whether the Johnsons only took documents regarding the personal injury litigation or also took documents regarding the eviction proceeding. Norris claims he considered the merits of Johnson's estate suit and felt it would be a difficult claim to prevail upon. On July 11, Norris did enter an appearance in the eviction proceeding on behalf of the Johnsons and requested additional time to answer. Ten days later, Norris allegedly received a courtesy telephone call from the plaintiff's attorney who informed Norris that he was preparing to file for a default judgment on the eviction case. Norris contends he contacted Johnson immediately and set up an appointment for July 24. At the July 24 meeting, Norris contends he explained to the Johnsons that he would need a $5,000 retainer before he would take the estate case. Two attorney fee contracts were entered into that day. Norris does not dispute that he agreed to represent the Johnsons in the personal injury action, but claims the eviction litigation was based upon a condition precedent of paying a $5,000 etainer fee. Norris maintains he told Johnson a default action could occur

if he was not contacted promptly. Two more weeks passed by without any contact and Norris sent a letter to Cal reminding him of the retainer provisions.

Defendants did not appear for a hearing and on August 13, 1984, the court entered a default judgment against defendants. In its judgment the court found that plaintiff was the owner of the real estate in question by virtue of a long-term installment contract dated 1981. The court also found that a lease of the property to defendant Randy Johnson was terminated on March 1, 1984. The court held that plaintiff was entitled to immediate possession of the property and it awarded rent and attorney's fees.

On August 29, Norris sent a letter to the Johnsons indicating that it was his opinion that they no longer wanted him to represent them. On October 5, 1984, defendants filed a motion to set aside the default asserting that it occurred because of inadvertence, mistake, excusable neglect, and unavoidable casualty. The motion alleged that defendants' initial attorney refused to handle the case. The motion also claimed that the second attorney the parties contacted, J. R. Norris, agreed to take care of the case but that he did not contact the defendants until after the default judgment. The default motion was supported by several affidavits and exhibits.

One of the affidavits in support of the motion to set aside alleged that, on the basis of a family doctor's opinion, Elsie Johnson was incompetent when she contracted with plaintiff in 1981 to sell the property in question. Supporting exhibits included an attorney fee contract between two of the defendants and Norris dated July 24, 1984, and a letter from Norris to defendants discussing payment of a retainer dated August 9, 1984.

Plaintiff filed a resistance to the motion to set aside default asserting that defendants had no defense to the claim for recovery of real property and that the default was not the result of mistake, inadvertence, surprise, excusable

neglect, or unavoidable casualty. The resistance was supported by affidavits, including one from Norris.

The district court stated that upon examination of the affidavits, it believed that the default was not the result of excusable neglect or oversight. The court accordingly overruled the default motion.

The facts underlying the real property claim are as follows: John Johnson, his wife Verna, son Randy, and his son's cohabitant Beth live on a farm which was owned by John's mother, Elsie. The farm experienced financial difficulties and in the fall of 1980 the mortgage was called due. To avoid foreclosure, Elsie and John approached John's son-in-law, Max Betenbender, for financial support. A sale-lease back agreement was eventually reached whereby Max and his father, Glenn, would purchase the farm through their corporation, Betenbender Manufacturing. On March 3, 1981, an installment contract was entered into where Elsie sold the farm to Betenbender Manufacturing in exchange for monthly payments. Elsie, in turn, leased the farm back from Betenbender Manufacturing. After Elsie's death on November 10, 1982, Betenbender leased the property to Randy as tenant and John as guarantor. Pursuant to Elsie's will, all installment payments were to be paid to an executor and deposited in a spendthrift trust. Subsequently, Randy failed to make payments and John failed to honor the guarantee. Petition to recover the real property was filed by Betenbender Manufacturing on June 19, 1984, and the defendants were personally served the next day.

This case involves a misunderstanding between client and attorney. The defendants felt Norris would represent them and Norris felt the Johnsons knew he would not represent them until a $5,000 retainer was paid.

The issue is whether a misunderstanding, regarding a $5,000 payment which was allegedly a condition precedent for legal representation in a real estate matter, is sufficient to meet the standards of Iowa Rule of Civil

Procedure 236. Iowa Rule of Civil Procedure 236 provides for setting aside defaults as follows:

> 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. [emphasis added]

This court has stated:

> 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; disregard 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 130, 131 N.W.2d at 776.

> 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.

Sher v. Burche, 353 N.W.2d 859, 862-63 (Iowa Ct. App. 1984).

Iowa law provides that "if the client intended to defend the action but because of a good faith mistake was unable to, then the default judgment may be set aside. Easton v. Crystal River Resources, Inc., 360 N.W.2d 138, 140 (Iowa Ct. App. 1984). In Gordon v. Gordon, 200 N.W.2d 527 (Iowa 1972), the trial court set aside a default judgment and was affirmed on appeal where the record showed the defendant intended to defend but failed to appear because of a mix-up in dates. A court is less likely to set aside a judgment when the failure to appear is attributable solely to the litigant's error. Easton, 360 N.W.2d at 140; (citing Haines v. Runoff, 261 Iowa 1279, 157 N.W.2d 914 (1968)).

Further guidance is provided in Newell v. Tweed, 241 Iowa 90, 95, 40 N.W.2d 20, 23 (1949), where the court held:

> The setting aside of a default by a trial court and the granting of a new trial will not ordinarily be disturbed on appeal when it is shown that the defendant apparently had a good defense, had honestly intended to present it and had justification for supposing that he had arranged for its presentation.

In Newell, the court sustained the trial court's decision to set aside the default based on excusable neglect where the defendant entered into an attorney-client relationship but the file was mislaid at the firm when the partner delegated it to an associate. The court found no blame was attributable to the defendant.

Claeys v. Madenschardt, 260 Iowa 36, 148 N.W.2d 479 (1967), is a case which involved an examination of a similar factual setting, but was litigated under the unavoidable casualty provision of Iowa Rule of Civil Procedure 252. In Claeys, the defendant was personally served but did not file an appearance.

Subsequently a default judgment was granted. Defendant moved to set aside the judgment, however the trial court held that defendant's misunderstanding with her attorney as to employment of the latter did not constitute unavoidable casualty. The facts were as follows:

> The defendant, on being served with original notice, went to see Attorney Kelly. He agreed to represent her, conditioned upon payment of a fee in advance. No appearance, motion or pleading was filed by him on behalf of defendant. About July 8, 1963, after receiving the notice of hearing to be held August 7, 1963, he sent a letter to defendant stating in substance a communication had been sent her May 8, 1963, relative to actions pending, and asked that she advise him as to her intentions, cautioning time had run out and plaintiff's attorney could take default judgment.
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> At this point there is some conflict in the evidence.
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> Defendant testified to the effect she borrowed $500 and paid Kelly $250, offering no receipt to support this claim. She did produce a statement from the loan company showing this sum had been borrowed. According to her testimony Kelly agreed to go ahead with the case and she first learned of the default November 9, 1964, when served with papers at her home. This is disputed.
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> Attorney Kelly stated he represented defendant in an annulment action. He had conferred with plaintiff's attorney several times but did not file any appearance, motion or pleading because defendant paid him nothing, and he could not determine from their conversations whether she did or did not want to contest plaintiff's case.
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> The trial court found no money had ever been paid by defendant to Kelly in connection with the action commenced by plaintiff, he was not negligent, and defendant could have avoided default by paying the fee requested.

Id. at 483.

An examination of the record in this leads us to believe that the trial court's decision should be left intact. While the attorney fee contract, the July 11th appearance, and the August 9th letter could lead a layman to believe that an attorney had been retained, the defendant's failure to participate at

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trial was not entirely attributable to excusable neglect. This case is distinguishable from Newell, where no negligence whatsoever was attributable to defendant's behavior. The defendants could have paid the retainer, but did not do so; and they could have taken more prompt action pursuant to Norris's letter, but did not do so. While this is a close question, we find that the trial court did not abuse its discretion.

AFFIRMED.