FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-014 / 92-101

DONALD H. MOLSTAD, Trustee in the Irvin L. Stehr and Beverly M. Stehr Bankruptcy Estate,

Appellant,

vs.

DAN CONNELL, DAVID P. JENNETT, DUANE K. ROHDE, and **MIKE PETRICCA**,

Appellees.

Appeal from the Iowa District Court for Sac County, Newt Draheim, Judge.

The Stehrs' trustee in bankruptcy appeals from the district court's refusal to reinstate the Stehrs' action for legal malpractice and tort suit after it was dismissed for want of prosecution under Iowa Rule of Civil Procedure 215.1. **AFFIRMED.**

Warren L. Bush, of Bush Law Office, Wall Lake, for appellant.

Dan Connell, of Connell & Duffy, P.C., Storm Lake; Colin McCullough, of McCullough Law Firm, P.C., Sac City; and Steve Hamilton, of Hamilton Law Firm, P.C., Storm Lake, for appellees.

Heard by Hayden, P.J., and Sackett and Habhab, JJ. Decided by Hayden, P.J., and Donielson and Habhab, JJ. Sackett, J., takes no part.

PER CURIAM

This appeal arises from the dismissal of plaintiff's case pursuant to Iowa Rule of Civil Procedure 215.1. The court denied plaintiff's application to reinstate the case. Plaintiff Molstad, who is the bankruptcy trustee for Irvin and Beverly Stehr, appeals.

On April 8, 1988, Irvin and Beverly Stehr filed an action for legal malpractice against defendant Connell and an action for invasion of privacy and defamation against defendants Rohde and Petricca, who were law enforcement officials, and defendant Jennett, who was the Sac County attorney. The Stehrs' action was based, in part, on a tort alleged to have occurred on April 18, 1986.

On August 17, 1988, the district court for Sac County dismissed the action because the Stehrs were in bankruptcy at the time they filed the lawsuit and thus not the real party in interest. On October 5, 1989, this court reversed, ordering Donald H. Molstad, the bankruptcy trustee, be substituted as party plaintiff. This court issued a procedendo for the case on December 6, 1989.

Lon R. Tullar was the Stehrs' attorney during these proceedings. On April 6, 1990, notice was filed of the suspension of Tullar's law license. The Stehrs allege on or about June 15, 1990, Ray Sullins accepted a retainer to serve as replacement counsel. Sullins did not file an appearance as replacement counsel until December 26, 1990. Thus, when the Sac County clerk issued Iowa Rule of Civil

Procedure 215.1 "try or dismiss" notices on August 13, 1990, they were mailed to Tullar and Molstad. Sullins did not receive notice because he was not the attorney of record at that time.

On December 26, 1990, Sullins filed "on behalf of the Stehrs" a request for a continuance and for a hearing in January of 1991 to set a trial date. Apparently, Sullins did not realize the matter would be dismissed automatically on January 1, 1991, by the self-executing provision of rule 215.1.

On June 25, 1991, the district court overruled the Stehrs' application to avoid dismissal on the ground they were not a party to the suit. Sullins did not file an application for reinstatement on behalf of Molstad until July 1, 1991.

On December 16, 1991, the district court overruled Molstad's application for reinstatement. The court found plaintiff had not exercised reasonable diligence in preparing and processing the case for trial, and the suspension of the Stehrs' counsel did not qualify for mandatory reinstatement.

On appeal, Molstad contends the matter was vigorously prosecuted by attorney Tullar and he expected the same from Sullins. Molstad contends mandatory reinstatement applies because Sullins' failure to protect the cause of action was not Molstad's fault. Appellees argue Sullins has never undertaken discovery or prepared the case for trial.

Rule 215.1 provides two grounds on which to reinstate a case dismissed under the rule: mandatory reinstatement and discretionary reinstatement. Iowa R. Civ. P. 215.1; O'Brien v. Mullapudi, 405 N.W.2d 815, 816 (Iowa 1987). Mandatory reinstatement is necessary if proof shows the dismissal was the result of oversight, mistake, or other reasonable cause. Iowa R. Civ. P. 215.1; Wharff v. Iowa Methodist Hosp., 219 N.W.2d 18, 22 (Iowa 1974) (citing Rath v. Sholty, 199 N.W.2d 333, 335-36 (Iowa 1972)). Reinstatement of a dismissed case may also occur if the trial court in its discretion reinstates the case. Iowa R. Civ. P. 215.1. Both types of reinstatement require proof counsel exercised reasonable diligence in preparing and pursuing the case for trial. O'Brien, 405 N.W.2d at 817 (citing Sladek v. G & M Midwest Flooring Cleaning Inc., 403 N.W.2d 774, 777 (Iowa 1987)). The movant bears the burden of proving an adequate reason for reinstatement. Id. (citing Wharff, 219 N.W.2d at 22).

I. Mandatory Reinstatement. Our standard of review of a mandatory reinstatement determination is "'not de novo, as in equity, but as in a law proceeding.'" O'Brien, 405 N.W.2d at 817 (quoting Rath, 199 N.W.2d at 336). The district court's findings of fact are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The ultimate determination of whether the factual situation constitutes oversight, mistake, or other reasonable cause presents a question of law. Rath, 199 N.W.2d at 336.

The district court found there was not sufficient evidence the dismissal was the result of oversight, mistake, or other reasonable cause and the plaintiff had not exercised diligence in preparing and pursuing the case for trial. The record shows no affidavits were filed to support mandatory reinstatement. See O'Brien, 405 N.W.2d at 819. There was no evidence to show there had been diligent preparation for and pursuit of the case by plaintiff.

The district court concluded the circumstances surrounding the suspension of the Stehrs' first attorney did not require the application of mandatory reinstatement. We agree.

We conclude reinstatement was not mandatory under rule 215.1 on the basis of oversight, mistake, or other reasonable cause. We affirm the district court on the issue of mandatory reinstatement.

II. Discretionary Reinstatement. If a dismissal was not a result of oversight, mistake, or other reasonable cause, the district court in its discretion may allow reinstatement of a plaintiff's action. Sladek, 403 N.W.2d at 778. We will not overturn the district court's action absent an abuse of discretion. O'Brien, 405 N.W.2d at 817 (citing Wharff, 219 N.W.2d at 25).

In its order denying reinstatement, the district court emphasized plaintiff's lack of reasonable diligence in preparing and pursuing this case for trial. Evidence shows there had been a lack of activity on plaintiff's part in

regard to the case. The record indicates Sullins took no action until December 26, 1990, at which time he filed an application for continuance on behalf of the wrong party. An application for discretionary reinstatement must be filed within six months of the date of dismissal. Iowa R. Civ. P. 215.1. Dismissal of a case pursuant to rule 215.1 is automatic and needs no order of dismissal. Greene v. Tri-County Community School Dist., 315 N.W.2d 779, 781 (Iowa 1982). This case was dismissed automatically on January 1, 1991, but Sullins did not file an application for reinstatement in the proper name until July 1, 1991. Plaintiff's lack of activity supports the district court's denial of discretionary reinstatement. See Wharff, 219 N.W.2d at 25. Plaintiff has failed to present evidence to indicate counsel had been diligently pursuing and preparing the case for trial but simply overlooked the rule 215.1 deadline.

We find the district court exercised sound discretion in denying plaintiff's application for reinstatement.

AFFIRMED.