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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-434 / 93-1742

HAROLD SCHILLING,
Plaintiff-Appellee,

vs.

CASCADE LUMBER & MFG. COMPANY,
Defendant-Appellant,

NATIONAL STEEL CORPORATION and McELROY METAL INCORPORATED,
Defendants.

Appeal from the Iowa District Court for Clayton County, Margaret L. Lingreen, Judge.

The defendant appeals the district court's refusal to dismiss plaintiff's action under Iowa Rule of Civil Procedure 215.1. **AFFIRMED IN PART AND REVERSED IN PART.**

Dave Hughes, Cascade, for appellant.

A. John Arenz of O'Connor & Thomas, P.C., Dubuque, for appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

HUITINK, J.

In 1986 Harold Schilling entered into a contract with Cascade Lumber Company to purchase the material to build a Circle C steel building. In some documents issued by Cascade it called itself Cascade Lumber and Manufacturing Company and in other documents Cascade Lumber Company. After Schilling purchased the building material, the president of Cascade sent him a letter which stated that Hugo Oberbroeckling would be available to assist him if he should have any questions during the construction of the building.

Schilling hired a contractor to construct the building. The concrete work was finished on October 10, 1986, and then needed to cure for about a week. Cascade delivered the material to Schilling's farm on October 14, 1986. However, Cascade brought the wrong size rafters. The correct rafters were delivered on October 24, 1986.

During this period of time, the steel wall panels sat outside in their original factory wrap. The wrapping contained a notice which stated the panels should not get wet. Plaintiff testified he never saw the notices. Plaintiff previously had eight other steel buildings constructed on his farm. He testified he had not been aware of the need to keep the steel panels dry during the construction of these buildings either. Oberbroeckling visited the construction site several times but did not advise plaintiff of proper storage methods for the steel panels.

By the fall of 1988, Schilling observed rust on the exterior of the building. This rusting occurred because of improper storage conditions at the job site. The steel panels were allowed to become wet, either due to precipitation or condensation. The rust is a condition which will get worse in time.

On June 5, 1991, Schilling filed suit against Cascade Lumber and Manufacturing Company, National Steel Corporation, and McElroy Metal, Inc. The suit included four counts: (1) breach of contract; (2) breach of express warranty; (3) breach of implied warranties; and (4) negligence. National settled prior to trial. McElroy has not appealed.

On October 2, 1992, the district court ordered that the case should be removed from the operation of Iowa Rule of Civil Procedure 215.1, but the case should be reset and tried prior to July 1, 1993. In an order dated March 2, 1993, the district court entered the following ruling:

> This case is relieved from operation of Rule 215.1 at least through the conclusion of trial starting on the date set in the above-mentioned scheduling conference.

The scheduling conference was held on March 11, 1993, and trial was set for June 23, 1993.

For reasons which do not appear in the record, trial did not begin on June 23, 1993, but began on June 24, 1993. At that time, the court considered Cascade's motion for adjudication of law points and Schilling's motion for sanctions.

The motion for adjudication of law points was based on Cascade's claim it had not properly been made a party to the suit because its legal name was Cascade Lumber Company, not Cascade Lumber and Manufacturing Company. The district court permitted plaintiff to file a motion to amend and ruled the amendment related back to the filing of the original petition.

The motion for sanctions was based on Cascade's failure to respond to plaintiff's request for production of documents. Plaintiff served Cascade with this request three times. Cascade argued plaintiff already had the requested documents, so it did not answer the request. The court ordered Cascade to pay plaintiff's fees and expenses for the motion for sanctions, which were $84.55.

The case was tried to the court. The parties did not complete the trial within one day as they expected. The trial was recessed at the end of the day on June 24, 1993. Because of prior commitments of the trial court judge, the case did not resume until July 1, 1993. On that day, Cascade alleged the court was without jurisdiction to continue the trial because the case had been dismissed by operation of rule 215.1. The district court declined to dismiss the case. The court found that the trial had commenced prior to July 1, 1993, and unusual circumstances did not permit the trial to conclude before that date.

Plaintiff orally moved to reinstate the suit in the event it was determined to be dismissed. In the alternative, the court ruled the case should be reinstated. The trial then proceeded where it had ended on June 24, 1993.

The district court found Cascade was negligent in its failure to timely deliver the correct-sized rafters. This failure resulted in a delay in the commencement in the building's construction of about ten days. During this time the steel panels sat outside. The court also noted Oberbroeckling never advised plaintiff of proper storage methods. The court determined plaintiff's total damages were $9664. The court found thirty percent of the fault should be attributed to Cascade, and it was ordered to pay damages of $2899. Cascade appealed.

I. Cascade contends the district court erred in allowing plaintiff to amend his petition on the first day of trial to show Cascade Lumber Company as the defendant instead of Cascade Lumber and Manufacturing Company. It claims plaintiff failed to ever bring it properly before the court.

The trial court has considerable discretion in granting or denying a motion for leave to amend; we will reverse only when a clear abuse of discretion is shown. Porter v. Good Eavespouting, 505 N.W.2d 178, 180 (Iowa 1993). Amendments that change the party against whom a claim is

asserted are subject to the requirements of Iowa Rule of Civil Procedure 89. Id. In pertinent part, rule 89 provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original petition.

Relation back under rule 89 does not occur unless the new party has received notice of the institution of the action within the period provided by law for commencing the action against him. Grant v. Cedar Falls Oil Co., 480 N.W.2d 862, 865 (Iowa 1992). A plaintiff has the burden of proof to establish the right to amend the petition and to satisfy the relation back requirements of rule 89. Porter, 505 N.W.2d at 181-182.

Here, the basic claim against Cascade Lumber Company and Cascade Lumber and Manufacturing Company are the same. Cascade received notice of the suit soon after it was filed on June 5, 1991. The company participated in discovery and was not prejudiced in maintaining its defense. Cascade knew that, but for a mistake concerning identity, the suit would have been brought against it. Cascade contributed to the mistake by calling itself Cascade Lumber and Manufacturing Company on some documents. Furthermore, Cascade received notice within the prescribed limitations period.

We conclude the district court did not abuse its discretion in allowing plaintiff to amend its petition to name the proper defendant, Cascade Lumber Company. We conclude this amendment relates back to the filing of the original petition.

II. Cascade contends the district court erred by issuing discovery sanctions against it. It claims plaintiff already had the documents requested and plaintiff was not prejudiced by its failure to respond to the request to produce documents.

The legal standards by which we review a trial court's exercise of its discretion in imposing sanctions are well established. Eaton v. Meester, 464 N.W.2d 691, 693 (Iowa App. 1990). We have long recognized discovery sanctions by a trial court are discretionary and will not be reversed unless there has been an abuse of discretion. Id. We accord this discretion because discovery rules are, by their nature, liberally construed to effectuate the disclosure of relevant information to the parties. Hense v. G.D. Searle & Co., 452 N.W.2d 440, 445 (Iowa 1990) (citing Ashmead v. Harris, 336 N.W.2d 197, 199 (Iowa 1983)).

We find no abuse of discretion in the present case. Cascade admits it did not respond to the request for production of documents. Also, Cascade responded to the written interrogatories past the discovery deadline. Furthermore, Cascade did not attend the pretrial conference

held on June 8, 1993. Based on these facts, we find the district court acted well within its discretion in ordering Cascade to pay the attorney fees and expenses associated with the preparation of the motion for sanctions, which were $84.55.

III. Cascade claims the case was automatically dismissed when it was not tried prior to July 1, 1993. It believes the order of March 2, 1993, had no effect on the present proceedings because the trial was not commenced on June 23, 1993, the date set in the scheduling conference.

We agree with Cascade the March 2 order would have continued the case through the conclusion of the trial only if trial commenced on the date set in the scheduling conference. This is because the effect of a continuance is merely to hold the dismissal in suspension on certain conditions. Allied Gas & Chem. Co., Inc. v. Federated Mut. Ins. Co., 365 N.W.2d 26, 31 (Iowa 1985). When those conditions are not met, the dismissal is automatic. Id. Here, the trial did not begin until June 24, 1993, and thus, the conditions of the continuance were not met. We determine the earlier order of the case, on October 2, 1992, then took effect and the case was automatically dismissed if not tried prior to July 1, 1993.

The district court found the case should not be dismissed because trial had commenced prior to July 1, 1993. When a case is pending, but has not yet been heard or submitted, rule 215.1 does apply. Brown v. Iowa Dist.

Court, 272 N.W.2d 457, 458 (Iowa 1978). However, where a case has been tried and submitted to the court, it will not be dismissed by operation of rule 215.1. Mortvedt v. Bethany Manor, Inc., 458 N.W.2d 2, 4 (Iowa 1990) (citing Humboldt Livestock Auction, Inc. v. B & H Cattle Co., 261 Iowa 419, 426, 155 N.W.2d 478, 483 (1967)).

Here, the case was in the process of being heard on the date of the dismissal deadline. We determine this is sufficient to keep the case from being dismissed due to the operation of rule 215.1. The case was started before the deadline, and it was due to court scheduling difficulties, not delays by the plaintiff, that the case was not completed prior to July 1, 1993. We conclude the case was not dismissed by operation of rule 215.1.

IV. Cascade contends the district court erred by awarding plaintiff damages on a theory of tort. Cascade claims plaintiff was entitled to only recovery on a contract, not recovery based on a tort. It believes plaintiff's damages should have been limited to the value of the steel panels, which was $2652, instead of diminution in value of the building, which the court found was $9664.

We have recognized that under some circumstances, breach of a contractual duty may give rise to an independent action in tort. Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l Life Ins. Co., 452 N.W.2d 389, 397 (Iowa 1990). The supreme court has rejected the suggestion that every breach of contract gives rise to an action in tort.

Id. Only where a duty recognized by law exists between the plaintiff and defendant distinct from a duty imposed by the contract will a tort action lie for conduct in breach of the contract. Id.

In the recent case of Oliver v. Menards, Inc., --- N.W.2d ---, --- (Iowa 1995), the supreme court held that where the essential purpose of a transaction is the sale of goods, the proper theory of recovery is in contract, but where the essential purpose is a service, recovery may be had on a theory of tort. In Oliver, the plaintiff ordered trusses of a special size from defendant. Id. at ---. The court found service was the predominant factor in the transaction because the plaintiff could have obtained trusses from numerous suppliers. Id. at ---. However, he purchased his trusses from defendant because of its expertise and professionalism in helping him select the proper size. Id. at ---.

The supreme court determined an independent duty arose from the plaintiff's order of special trusses from defendant. Id. at ---. The court determined this independent duty arose from defendant's service in providing help and securing special orders for do-it-yourself builders. Id. at ---. The court concluded the service of selecting and procuring the odd-sized item was something quite independent of the trusses themselves. Id. at ---. Because there was an independent duty between the parties, a tort remedy was appropriate. Id. at ---.

We find the situation in this case is distinguishable from that presented in Oliver. There was no evidence plaintiff purchased his material from defendant because he sought advice or expertise from the company. Plaintiff testified the sales literature and warranty information formed a part of his decision to purchase material from Cascade. Furthermore, plaintiff had no need of additional services from Cascade. While he owned his farm, eight steel buildings had been constructed upon it. Also, plaintiff hired a contractor to construct the building and did not rely on Cascade to help him do it himself.

We note Cascade had informed plaintiff Oberbroeckling would be available to assist him if he had any questions during the construction of the building. However, there was no evidence plaintiff asked him any questions or relied on him for advice. Plaintiff stated only he relied on Oberbroeckling to be knowledgeable about the appropriate time to deliver the materials. We find Cascade's responsibility under this agreement was limited to the delivery of the material needed for building.

We determine the essential purpose of the parties' agreement was the sale of goods, with labor (delivery) incidentally involved. Where the predominant factor of a contract is the sale of goods, a plaintiff's recovery must come within the terms of the Uniform Commercial Code. Semler v. Knowling, 325 N.W.2d 395, 398 (Iowa 1982). We

conclude a tort remedy was not appropriate for this case. Therefore, we reverse the award of damages to plaintiff based on Cascade's negligence.

While we have found plaintiff should be limited to a contract remedy, the district court specifically found no breach of contract by Cascade. Plaintiff has not appealed this ruling. Therefore, plaintiff is precluded from recovery under a theory of contract.

In summary, we have affirmed the district court's action in allowing the plaintiff to amend its petition to name the proper party defendant, Cascade Lumber Company. We affirm the imposition of discovery sanctions against Cascade. We affirm the finding the case was not dismissed by operation of Iowa Rule of Civil Procedure 215.1. We reverse the award of damages to plaintiff based on a theory of tort. Costs of this appeal are assessed one-half to plaintiff and one-half to Cascade Lumber Company.

AFFIRMED IN PART AND REVERSED IN PART.