IN THE COURT OF APPEALS OF IOWA

No. 9-170 / 98-0489
Filed April 30, 1999

MARY SCHULTZ, Individually and as Administrator of the Estate of STEVEN R. SCHULTZ, Deceased,

Plaintiff-Appellant,

vs.

KENNETH OPSTEIN, PENN CORP. SOFTBALL PARK, INC., and PENN CORP. SOFTBALL TEAM,

Defendants-Appellees.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Plaintiff appeals the district court's order refusing to reinstate her wrongful death action after it was dismissed pursuant to Iowa Rule of Civil Procedure 215.1.

AFFIRMED.

Robert W. Green, Sioux City, for appellant.

Paul D. Lundberg of Cosgrove, Hellige, Lundberg, Meis & Hindman, Sioux City, for appellees.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

SACKETT, C.J.

Plaintiff-appellant Mary Schultz, individually and as Administrator of the Estate of Steven R. Schultz, appeals from the dismissal of her action against defendants-appellees Kenneth Opstein, Penn Corp. Softball Park, Inc., and Penn Corp. Softball Team. The action was dismissed pursuant to Iowa Rule of Civil Procedure 215.1,[1] and the district court refused to reinstate it. We affirm.

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[1] Iowa Rule of Civil Procedure 215.1 provides:

It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.

All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be for trial at any time prior to January 1 of the next succeeding year. The clerk shall prior to August 15 of each year give notice to counsel of record as provided in R.C.P. 106 of the docket number, the names of parties, counsel appearing, and date of filing petition. The notice shall state that such ease will be for trial and subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. All such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte. This rule shall not apply to cases (a) pending on appeal from a court of record to a higher court or under order of submission to the court; (b) in which proceedings subsequent to judgment or decree are pending; (c) which have been stayed pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 [50 U.S.C. app. § 501]; (d) where a party is paying a claim pursuant to written stipulation on file or court order; and (e) awaiting the action of a referee, master or other court appointed officer; provided, however, that a finding as to (a) through (e) is made and entered of record. The case shall not be dismissed if there is a timely showing that the original notice and petition have not been served and that the party resisting dismissal has used due diligence in attempting to cause process to be served.

No continuance under this rule shall be by stipulation of parties alone but must be by order of court. Where appropriate the order of continuance shall be to a date certain.

We review for corrections of errors at law. *O'Brien v. Mullapudi*, 405 N.W.2d 815, 817 (Iowa 1987); Iowa R. App. P. 4. The findings of fact of the district court are binding on this court if supported by substantial evidence. *Blunt, Ellis & Loewi, Inc. v. Igram*, 319 N.W.2d 189, 192 (Iowa 1982); Iowa R. App. P. 14(f)(1).

The issue on appeal is whether the district court erred in ruling plaintiff was not entitled to mandatory or discretionary reinstatement of this action filed October 9, 1992. On November 11, 1993, defendant Kenneth Opstein filed a petition for Chapter 11 bankruptcy and the case was stayed by the federal filing until lifted on November 22, 1994. On December 12, 1994, defendant Opstein filed a motion for partial summary judgment. Plaintiff resisted the motion and filed a motion for additional time to conduct discovery. On December 28, 1994, the parties stipulated to a continuance and an order was entered continuing the automatic dismissal date to June 30, 1995. Pending motions were then set for hearing on August 28, 1995. On June 20, 1995, the parties filed a second stipulation for continuance under rule 215.1 and the automatic dismissal date was continued to December 31, 1995. On August 16, 1995, plaintiff took defendant Opstein's deposition for the case and a second case. Plaintiff filed a motion for continuance of the August 28, 1995 hearing, which motion was overruled. On September 19, 1995, the district court overruled

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> The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefor, shall be filed within six months from the date of dismissal.

Iowa R. Civ. P. 215.1.

defendant Opstein's motion for partial summary judgment. On December 12, 1995, a third stipulation to continue under rule 215.1 was filed and an order was entered continuing the date to June 30, 1996. On June 27, 1996, a fourth request for continuance was made on a stipulated motion and the automatic dismissal date was continued to December 31, 1996. In December 1996, a fifth rule 215.1 continuance was requested on the parties' stipulation and on December 31, 1996, the automatic dismissal date was continued to June 30, 1997.

On January 16, 1997, defendant Opstein's attorney sent a letter to plaintiff's attorney advising defendants would not agree to further continuances under rule 215.1 and agreeing to have the case set for trial in April, May, or June of 1997. On June 11, 1997, plaintiffs filed a trial certificate. On June 27, 1997, plaintiff filed a motion for continuance and on July 2, 1997, defendant Opstein resisted the motion. On September 8, 1997, the district court overruled the motion for continuance finding the case had been dismissed on June 30, 1997, and the court had no jurisdiction to rule.

On December 30, 1997, plaintiff filed a motion to reinstate under rule 215.1. On January 6, 1998, defendant Opstein filed a resistance to the motion. A hearing was held on February 9, 1998, after which the district court overruled plaintiff's motion for reinstatement finding plaintiff did not prove oversight, mistake, or reasonable cause, nor did plaintiff show reasonable diligence in pursuing the case for trial.

Iowa Rule of Civil Procedure 215.1 provides two grounds under which a court may reinstate an action dismissed under the rule: mandatory reinstatement and discretionary reinstatement. *O'Brien*, 405 N.W.2d at 816-17; Iowa R. Civ. P. 215.1. Mandatory reinstatement is necessary if proof shows the dismissal was the result of oversight, mistake, or other reasonable cause. *Wharff v. Iowa Methodist Hosp.*, 219 N.W.2d 18, 22 (Iowa 1974); Iowa R. Civ. P. 215.1. Reinstatement of a dismissed case also may occur if the trial court in its discretion reinstates the case. *Mermigis v. Servicemaster Indus., Inc.*, 437 N.W.2d 242, 249 (Iowa 1989); Iowa R. Civ. P. 215.1. For a case to be reinstated under either ground, there must be proof that reasonable diligence was exercised in both preparing the case for trial and seeking to have it set for trial. *See Berkley Int'l Co. v. Devine*, 423 N.W.2d 9, 12 (Iowa 1988). The movant, plaintiff here, bears the burden of showing adequate reasons for reinstating the case. *See id.*

Plaintiff first contends she is entitled to mandatory reinstatement because of oversights and mistakes. She advances (1) she took depositions to prepare for trial; (2) an issue in this case was the same as an issue in a pending case on appeal; and (3) the bankruptcy of one defendant delayed the case.

A factor to be considered in determining whether reinstatement is mandatory is "whether the plaintiff was seeking a trial assignment or merely a continuance when the case was dismissed." *Holland Bros. Constr. Co. v. Iowa Dep't of Transp.*, 434 N.W.2d 902, 904 (Iowa App. 1988).

Our review of the history of this case convinces us the district court's finding plaintiff has not used due diligence is amply supported by the record. The district court did not err in not reinstating the case under the mandatory provisions of rule 215.1. Furthermore, plaintiff failed to show the dismissal was the result of oversight, mistake, or other reasonable cause. *See Wharff*, 219 N.W.2d at 22. We affirm on this issue.

Plaintiff next advances the district court abused its discretion in not continuing the action. As a prerequisite to discretionary reinstatement, plaintiff must prove the exercise of due diligence in moving the case to trial. *Tiffany v. Brenton State Bank*, 508 N.W.2d 87, 90 (Iowa App. 1993). We agree with the district court's finding plaintiff has failed to prove she did so. We also affirm on this issue.

AFFIRMED.

SUMMARY OF DECISIONS, IOWA COURT OF APPEALS

APRIL 30, 1999

Pursuant to Iowa Supreme Court Rule 10(f), as amended March 3, 1981, an unpublished opinion of the Iowa Court of Appeals may not be cited by a court or by a party in any other action or proceeding except when the opinion establishes the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

NOTE: Copies of these opinions may be obtained from the Clerk of the Supreme Court, State Capitol, Des Moines, IA, 50319, for a fee of forty cents per page.

No. 98-0489. [9-170] SCHULTZ v. OPSTEIN

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel and Zimmer, JJ. Opinion by Sackett, C.J. (6 pages $2.40)

Plaintiff Mary Schultz, individually and as Administrator of the Estate of Steven R. Schultz, appeals from the dismissal of her action against defendants-appellees Kenneth Opstein, Penn Corp. Softball Park, Inc., and Penn Corp. Softball Team. The action was dismissed pursuant to Iowa Rule of Civil Procedure 215.1, and the district court refused to reinstate it. We affirm. The issue on appeal is whether the district court erred in ruling plaintiff was not entitled to mandatory or discretionary reinstatement of this action filed October 9, 1992. Iowa Rule of Civil Procedure 215.1 provides two grounds under which a court may reinstate an action dismissed under the rule: mandatory reinstatement and discretionary reinstatement. A factor to be considered in determining whether reinstatement is mandatory is whether the plaintiff was seeking a trial assignment or merely a continuance when the case was dismissed. Our review of the history of this case convinces us the district court's finding plaintiff has not used due diligence is amply supported by the record. The district court did not err in not reinstating the case under the mandatory provisions of rule 215.1. Furthermore, plaintiff failed to show the dismissal was the result of oversight, mistake, or other reasonable cause. We affirm on this issue. Plaintiff next advances the district court abused its discretion in not continuing the action. As a prerequisite to discretionary reinstatement, plaintiff must prove the exercise of due diligence in moving the case to trial. We agree with the district court's finding plaintiff has failed to prove she did so. We also affirm on this issue.