FILED
JAN 29 1985
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BETTY JO LESTER, a Minor, by BETTY BIRD (formerly BETTY LESTER) Her Mother and Next Friend, and BETTY BIRD (formerly BETTY LESTER) and DON BIRD,

Plaintiffs-Appellees,

vs.

TOWN (NOW CITY) OF WHAT CHEER, IOWA,

Defendant-Appellant.

Filed January 29, 1985

4-480
84-405

Appeal from the Iowa District Court for Keokuk County - Richard J. Vogel, Judge.

Defendant, the City of What Cheer, Iowa, appeals from an order of the trial court refusing to set aside an entry of default against it. REVERSED AND REMANDED.

James Q. Blomgren and Jeanne K. Johnson of Clements, Blomgren, & Pothoven, Oskaloosa, for defendants-appellants.

John E. Billingsley, of Salisbury, Larson & Billingsley, Newton, for plaintiffs-appellees.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Defendant, the City of What Cheer, Iowa, appeals from an order of the trial court refusing to set aside an entry of default against it.

Facts

Plaintiffs commenced an action against defendant city by filing on December 6, 1983, a petition at law. On December 8, 1983, an original notice with a copy of this petition attached was served on the defendant city. On December 29, 1983, the plaintiffs filed a request and application for entry of default by the clerk. The clerk did on December 29, 1983, sign and file a default entry.

On January 3, 1984, the defendant served and on January 5, 1984, filed an answer to the petition denying it in its entirety and setting forth as an affirmative defense the issue of the negligence of the plaintiffs.

Plaintiffs on January 5, 1984, served a motion to strike the answer. And, on January 19, 1984, defendant filed a motion to set aside the default in which it alleged that the defendant's attorney was advised that service on the defendant was made on December 13, 1983, and that its answer was served within 20 days of the December 13, date. Plaintiff resisted the motion to set aside the default and a hearing was held. At said hearing defendant's attorney, Mr. Blomgren, made a professional statement that the city had forwarded the suit papers to its insurance carrier who had in turn contacted attorney Blomgren. During the course of the conversation with the insurance company representative, Blomgren noted the service date to be December 13, 1983; that he, Blomgren, timely filed an answer based on the service date that he noted. After the answer was served he learned of the default and promptly filed his motion.

The trial court refused to set aside the default, finding there was no affidavit or sworn testimony presented to show how the belief on the part of

defendant's counsel that the notice was served December 13, 1983 came about. The trial judge determined that bare assertions are insufficient to establish grounds under R.Civ.P. 236 to set aside a default and overruled defendant's motion. The trial court also determined in said order that in order to obtain relief from default defendant must show unavoidable casualty or misfortune.

Defendant then filed a motion to amend or modify the ruling and attached thereto the affidavit of Blomgren and his secretary and a copy of notes he made at transmittal time. The trial court overruled the motion to amend or modify. Defendant filed an application for permission to file an interlocutory appeal and the supreme court granted the application.

I.

Defendant first contends that the trial court erred in applying the evidentiary standard of R.Civ.P. 252 to his R.Civ.P. 236 motion. This is a default entered by the clerk on the record pursuant to R.Civ.P. 231. A bare order of default standing alone does not attain the stature of a judgment. Such an order is not a final adjudication. The 60-day limitation period set forth in Rule 236, Rules of Civil Procedure does not apply to a mere order of default. Cogley v. HyVee Food Stores, Inc., 257 Iowa 1381, 1385 137 N.W.2d 310. This motion was timely filed under R.Civ. P. 236 and is considered as a Rule 236 motion.

We said in Hastings v. Espenosa, 340 N.W.2d 603, 608 (Ia. Ct. App. 1983):

> "Iowa R.Civ.P. 236 provides in relevant part that 'on motion and for good cause shown, . . ., the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty.' The burden is upon defendant - movant - to plead and prove such good cause as will not only permit but require a finding of mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. The requisite 'good cause' is a sound, effective and truth reason - something more than an excuse, plea, apology, extenuation or some justification for the resulting effect. (emphasis added).

In Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18, 22 (Iowa 1974) the Iowa Supreme Court said:

> "Appeals in Rule 236 situations proceed on a case-by-case method due to great variety in factual circumstances. Certain rules, however, are established. It is movant's burden to show good cause for setting aside a default judgment under Rule 236. A defendant's ignoring a notice under circumstances showing no more than excuse, plea, apology, extenuation, or explanation for failure to timely appear is not sufficient to overturn a default. Accident or excusable neglect where the defendant has a good faith intent to defend will justify setting aside a default. The fact a meritoreous defense is disclosed and that defendant had honestly intended to present it and had justification for supposing he had made arrangements for its presentation is a circumstance in favor of good faith." (Emphasis added.)

The trial court determined in its ruling that for the defendant to obtain relief it must show unavoidable casualty or misfortune. While a motion under Rule 252 requires a showing of unavoidable casualty or misfortune, a motion under Rule 236 can include mistake, inadvertence, surprise and excusable neglect.

We agree with the defendant that the trial court applied the wrong law in ruling on his motion.

II.

Defendant next contends there was sufficient evidence in the record to support a finding under R.Civ.P. 236. Because trial on the merits is favored a liberal approach is to be taken in granting relief from defaults. First National Bank in Lenox v. Claiser, 308 N.W.2d 1, 3 (Iowa 1981). We view the evidence in its light most favorable to the court's ruling. Even if the trial court makes no finding of fact or bases its ruling on a different ground, we will uphold tne ruling if any proper ground appears in the record. Williamson v. Casey, 220 N.W.2d 638, 639 (Iowa 1974). Applying the correct standard, we determine contrary to the trial court's finding, that there is evidence in the record of mistake or inadvertence. Blomgren made a professional statement that after talking with the defendant's insurance company he made notes of the conversation and his notes indicated the service date was December 13, 1983. The term "professional statement" as here employed means a statement of fact presented to the court by an attorney in connection with a matter then before such court, verified in effect by the oath of

such attorney, and designed or calculated to aid or influence the court in the determination of a given cause or issue. When an attorney makes such a statement he stands in the shoes of an affiant and subjects himself to cross-examination as to matters of fact inherent in his statement. See Cogley v. HyVee Food Stores, Inc., 257 I 1381, 1386-1387, 137 N.W.2d 310. We determine that the trial court abused its discretion. But is the evidence so overwhelming that defendant carried its burden of proof as a matter of law.

Blomgren's testimony that on receiving the case assignment he noted December 13, as the service date is uncontroverted. Blomgren's statements are clearly consistent with the action he took in filing an answer. The city's intent to defend is evidenced by the action of its insurance company in contacting Blomgren to defend. Blomgren's filing of an answer and jury demand is consistent with his position as to the notation of an appearance date. There was no ignoring of the notice here and but for the mistakened notation in service date the entire course of events indicated an intent to defend.

We note the short time period in question and the lack of prejudice to the defendant. We cannot, however, determine from the evidence that defendant carried its burden as a matter of law. Having determined that there is evidence in the record that would support a finding of mistake or inadvertence, we remand to the trial court for its determination of whether the evidence supports such a finding. We express no decision as to what the ultimate decision of the trial court should be.

REVERSED AND REMANDED.