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IN THE COURT OF APPEALS OF IOWA

No. 0-353 / 89-1880

IOWA HAM CANNING, INC.,

Appellant,

vs.

MIDWEST GAS COMPANY,

Appellee.

Appeal from the Iowa District Court for Buchanan County, Alan Pearson, Judge.

Iowa Ham appeals the setting aside of a default judgment in favor of Midwest Gas Company and the dismissal of its petition. **AFFIRMED.**

Robert J. Pattee, P.C., Independence, for appellant.

E. R. McCann and Jim D. DeKoster of Swisher & Cohrt, Waterloo, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

Plaintiff Iowa Ham Canning, Inc. is a customer of defendant Midwest Gas Company. In May 1989 Iowa Ham made an informal complaint before the Iowa Utilities Board requesting a refund for overpayment for gas service. Iowa Ham alleged Midwest Gas applied an incorrect rate when calculating its charges. By a letter dated June 14, 1989, the Board notified Iowa Ham a refund for any portion of the billing prior to their request for a rate change was not appropriate. The letter also notified Iowa Ham that they had 14 days from the board response to appeal to the Utilities Board for a formal proceeding.

Iowa Ham filed a petition in district court on June 29, 1989 and served Midwest Gas on June 30, 1989, seeking the refund they felt entitled to plus other damages arising from the overcharge. Due to a clerical error, counsel for Midwest Gas calculated that a response was due by July 31 rather than July 20. Iowa Ham sought and obtained a default judgment, entered July 21, 1989, when Midwest Gas did not answer within twenty days. On July 26, 1989, Midwest Gas filed an appearance and answer together with several motions. The court granted Midwest Gas' motion to set aside the default judgment pursuant to Iowa Rule of Civil Procedure 236. The court dismissed Iowa Ham's petition based on its failure to exhaust administrative remedies.

Iowa Ham appeals. Iowa Ham first claims the court abused its discretion in setting aside the default judgment. Iowa Ham contends Midwest Gas failed to show mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty, in order to justify setting aside the default.

Secondly, Iowa Ham contends that exhaustion of administrative remedies does not apply to its case. It asserts claims of overcharge, not involving a claim of an unreasonable rate, do not require exhaustion of administrative remedies. Furthermore, Iowa Ham points out the pursuit of administrative remedies is not necessary where it would be fruitless.

Lastly, Iowa Ham argues that even if exhaustion of administrative remedies is required, it should be given an opportunity to pursue those remedies. Iowa Ham states the court should have dismissed the action without prejudice and provided for Iowa Hams' pursuit of an administrative remedy regardless of any statute of limitations problem.

We review this case at law for correction of errors. Iowa R. App. P. 4. Findings of fact by the trial court bind us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

DEFAULT JUDGMENT. The trial court enjoys broad discretion when ruling upon a motion to set aside a default judgment and its findings of disputed facts are entitled to

the same weight as a jury verdict. Dew v. American Heritage Life Ins. Co., 431 N.W.2d 8, 9 (Iowa App. 1988)(citing Hansman v. Gute, 215 N.W.2d 339 (Iowa 1974)). We are more reluctant to interfere with the grant of a motion to set aside a default than a denial of such a motion. Flexsteel Ind., Inc. v. Morbern Ind. LTD., 239 N.W.2d 593, 596 (Iowa 1976).

Rule 236 of the Iowa Rules of Civil Procedure sets out the guidelines for rulings on motions to set aside default judgments:

> 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.

In Flexsteel the court stated that neglect in respect to Rule 236 motions means "omission of proper attention; disregard of duty, from indifference or willfulness; failure to do, use, or heed anything; negligence." Id. (quoting Booth v. Central States Mutual Ins. Assn., 235 Iowa 5, 9, 15 N.W.2d 893, 895 (1944)). The trial court found the defendant at all times intended to defend this case and only minimal delay resulted from the miscalculations of the response deadline. We agree, and find any negligence on the part of the defendant does not warrant a finding of willfulness or indifference and constituted excusable negligence or mistake.

The trial court set the default aside " [b]ased upon... consideration of all factors". After evaluating all the factors of this case we find substantial evidence existed as a basis to set aside the default judgment entered in favor of the plaintiffs.

DISMISSAL. The exhaustion rule does not apply unless two conditions are met: "An administrative remedy must exist for the claimed wrong, and the statutes must expressly or impliedly require that remedy be exhausted before resort to the courts." City of Des Moines v. Des Moines Police, 360 N.W.2d 729, 731 (Iowa 1985)(quoting Rowen v. LeMars Mutual Insurance Co., 230 N.W.2d 905, 909 (Iowa 1975)). Both parties agree an administrative remedy does exist in that the Utilities Board may order retroactive refunds for overcharges, so we need only discuss the second condition. See Mid-Iowa Community Action, Inc. v. Iowa State Commerce Commission, 421 N.W.2d 899 (Iowa 1988).

Iowa Code section 476.13 and Chapter 17A govern judicial review of Utility Board actions. Iowa Code section 17A.19 provides:

> Except as expressly provided otherwise by another statute referring to this chapter by name, judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action....
> (1). A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review

> thereof under this chapter.... A preliminary, procedural or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy.

Iowa Code section 476.3(1) in 1979 empowered the Utility Board when "there is filed with the commission by any person ... a written complaint requesting the board to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by any public utility subject to the chapter, in contravention of the provisions thereof" to forward the complaint to the utility for action or a written response. If the commission (board) determined the public utility's response was inadequate and reasonable ground for an investigation existed or if the complainant filed a petition, a formal proceeding was promptly initiated. If after the hearing, the commission (board) found the "public utility's rates, charges, schedules, service, or regulations are unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law, the commission shall determine just, reasonable, and nondiscriminatory rates, charges, schedules, services, or regulations to be thereafter observed and enforced."

In 1981 the legislature amended Iowa Code section 476.3 by deleting the word "thereafter" from the sentence empowering the Board to determine just and reasonable rates and charges. Prior to this change, the court in Oliver v.

Iowa Power & Light Company, 183 N.W.2d 687 (Iowa 1971), held a customer seeking a refund need not exhaust administrative remedies because the agency could only grant prospective relief. Mid-Iowa Community Action, Inc. v. Iowa State Commerce Commission, decided after the 1981 amendment, found the Utility Board can now provide both retroactive and prospective relief. Id. at 398-399. Consequently, the Oliver decision no longer applies to cases where, as in Iowa Ham's circumstance, the Utility Board can provide adequate relief when retroactive refunds are appropriate.

Cases concerning utility charges separate into two general types, each with its own initial jurisdiction. Iowa Electric Light and Power Co. v Lagle, 430 N.W.2d 393, 398 (Iowa 1988). In the first type of case the customer complains about the alleged overcharges without claiming an unreasonable underlying rate. Examples of this type of case include claims involving misread meters or charges exceeding the filed tariff. The courts properly resolve cases of this type. Id.

Cases of the second type involve claims by customers of unreasonable rates or other "technical-type" complaints. In these cases the customer/complainant must proceed before the appropriate board for assessment of the reasonableness of the rate. Id.

At first blush Iowa Ham's case appears to involve the first type of claim. Iowa Ham contends Midwest Gas failed to use the correct rate and therefore must refund Iowa Ham for excess charges. A closer reading of the controversy discloses that Iowa Ham's contentions are correct only if certain technical criteria for maximum use have been met, if customers are not required to request a change or evaluation of current usage prior to receiving a new rate and if the utility has an on-going duty to notify customers of potential benefits for changing rates. Further, the controversy appears to involve some technical issues about computation of peak usage.

We agree with the trial court's finding that this case involves issues which must first be presented to an administrative agency with expertise in the area of setting and computing energy use rates. This case also involves issues relating to a utility's responsibilities for on-going assistance to customers in choosing the most economical rates as well as how a utility verifies and calculates a customer's peak use. Additionally, what type of utility service Iowa Ham actually enjoyed during the time of the alleged overcharge remains at issue.

As the court in City of Des Moines v. Des Moines Police, 360 N.W.2d 729, 731 (Iowa 1985)(quoting B. Schwartz, Administrative Law §172 at 498 (1976)) stated:

> The agency, as the tribunal of first instance, should be permitted to develop the factual background upon which decisions should be based.

> Like the trial court, the agency should be given the first chance to exercise discretion and apply its expertness. In addition, judicial efficiency requires the courts to stay their hand while the party may still vindicate his rights in the administrative process. If he is required to pursue further agency remedies, the courts may never have to intervene.

We believe the trial court correctly found Iowa Ham must exhaust its administrative remedies before proceeding in district court. Iowa Ham's claims involve technical issues better resolved by a body with expertise in the area of utility rates.

We find Iowa Ham's argument about the fruitlessness of further administrative proceedings meritless. Iowa Ham bases its contention only on speculative theories of bias and a mistaken reading of the board's letter that the Board cannot provide a retroactive remedy rather than the Board's assertion that it is not entitled to a lower rate prior to filing a request for the lower rate.

We next turn to Iowa Ham's contention that even if they must exhaust their administrative remedies, the trial court should have dismissed their petition without prejudicing their right to pursue an administrative remedy. "Dismissal of an action does not rest in the discretion of the trial court; it turns on legal grounds." Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 390 (Iowa 1988). In this circumstance where Iowa Ham failed to exhaust its administrative remedies, and that exhaustion was a prerequisite to proceeding in district court, the trial

court properly dismissed Iowa Ham's petition. Since the merits of Iowa Ham's claims were never reached, Iowa Ham may return to the district court after exhaustion of its administrative remedies if it so chooses.

We understand Iowa Ham's concern that the opportunity to proceed formally in the Utility Board appeals process may no longer exist but we feel that Iowa Ham made a conscious decision to bypass formal administrative agency proceedings by filing this suit the morning after the time passed for starting formal proceedings. Hasty decisions to litigate can not be later tempered by this court.

AFFIRMED.