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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

14

Filed November 29, 1982

2-314
2-67837

MAX E. BROWN AND CORINNE E. BROWN AND FLAIRE COLOR PHOTOGRAPHY INCORPORATED,

Plaintiffs-Appellants,

vs.

AMERICAN PROFESSIONAL COLOR CORPORATION AND EASTMAN KODAK COMPANY,

Defendants-Appellees.

Appeal from Black Hawk District Court, Peter Van Metre, Judge.

The plaintiffs appeal from the trial court's sustaining defendants' special appearance in ruling that the case was dismissed by operation of law under Rule 215.1, Iowa Code of Civil Procedure. The plaintiff contends that dismissal of the case under rule 215.1 should not be sustained because (1) the court ordered the case to be continued through the year 1981 in an order dated March 18, 1980, and (2) because dismissal under 215.1 is a denial of due process. AFFIRMED.

Paul Moser, Jr., and Robert L. Huffer, Des Moines, for plaintiffs-appellants.

Edward J. Gallagher of Gallagher, Langus and Gallagher, P.C., Waterloo, for defendant-appellee Eastman Kodak Company.

Jim D. DeKoster, Waterloo, for defendant-appellee American Professional Color Corporation.

Heard en banc.

OXBERGER, C.J.

The plaintiffs appeal from the trial court's sustaining defendants' special appearance in ruling that the case was dismissed by operation of law under Rule 215.1, Iowa Code of Civil Procedure. The plaintiff contends that dismissal of the case under rule 215.1 should not be sustained because (1) the court ordered the case to be continued through the year 1981 in an order dated March 18, 1980, and (2) because dismissal under 215.1 is a denial of due process.

Proceedings in this case began in August, 1976. In July, 1978, the clerk of the district court sent a "try or dismiss" notice to plaintiffs and defendants advising them that the case was subject to dismissal on January 1, 1979, unless sooner tried or continued by order of the court. Because plaintiffs took no action in response to that notice, the case was dismissed under rule 215.1 on January 1, 1979. Upon application by the plaintiffs, the court granted reinstatement on March 7, 1979. A further continuance was granted in November, 1979, in response to a motion for continuance under rule 215.1 asking for extension into the calendar year 1980. A written ruling and order confirming this oral ruling was entered by the court on March 18, 1980. The written order stated that the case was "removed from the operation of R.C.P. 215.1 during 1981." The court later stated that the reference to 1981, as opposed to 1980, "was clearly a typographical error." On July 28, 1980, the clerk of the district court sent the plaintiffs a "try or dismiss" notice under rule 215.1 advising the plaintiffs that the case would be dismissed on January 1, 1981, unless sooner tried or continued by order of the court. During the remainder of 1980, the plaintiffs made no written application or motion for continuance under rule 215.1, there was no hearing on the issue, and the court entered no order continuing the matter through 1981. Nor did the plaintiffs apply for reinstatement between January 1, 1981, and July 1, 1981.

This is yet another example of "a veritable Rip Van Winkle of a lawsuit." Nitta v. Kuda, 249 Iowa 853, 855, 89 N.W.2d 149, 149-50 (1958); Greene v. Tri-County Community School District, 315 N.W.2d 779, 780 (Iowa 1982). In Greene, the supreme court once again declared that "[b]ecause the stakes are high, and the results harsh, the formality prescribed to implement the rule 215.1 procedure must be strictly observed. [Citation.]" Id. at 782.

Once a case has come under 215.1 notice, it is automatically dismissed at the end of a continuance if it has not been tried and no further continuance has been obtained. Rhiner v. Arends, 292 N.W.2d 399, 402 (Iowa 1980). Dismissal under 215.1 is automatic, and requires no formal action by the clerk or by the court. Brown v. Iowa District Court for Polk County, 272 N.W.2d 457, 459 (Iowa 1978).

Plaintiffs' reliance upon the erroneous continuance through 1981 in the court's order of March 19, 1980, is misplaced. The plaintiffs never applied for a continuance through the calendar year 1981. Rule 215.1 clearly stipulates that cases must be assigned and tried or dismissed "unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte." The rule goes on to provide that no continuance may be "by stipulation of parties alone but must be by order of court." "In the absence of a timely application there is no trial court discretion in the matter. It is then beyond the power of the court to rescue the case from its automatic dismissal." Greene, at 782, citing Koss v. City of Cedar Rapids, 300 N.W.2d 153, 157 (Iowa 1981). Even if the reference to the year 1981 had not been a typographical error, rule 215.1 would have required dismissal of the case on January 1, 1981, because the court lacked discretion to grant a continuance for which no application had been made.

Despite the fact that plaintiffs were aware of the requirements of rule 215.1 and had ample notice from the clerk of the court that their case would be dismissed if not tried before January 1, 1981 they did not comply with the procedural requirements of rule 215.1 to apply for a further continuance into 1981. After receiving the clerk's notice of July 28, 1980, plaintiffs should have been alerted to inquire into the correctness of the court's order of reinstatement entered March 18, 1980. They did not do so. Nor did they make timely application for a reinstatement after January 1, 1981.

Because the plaintiffs did not raise the question of due process in arguments before the trial court, they have waived their right to raise that issue on appeal. State v. Holmes, 276 N.W.2d 823, 828 (Iowa 1979). The plaintiffs' argument regarding due process focuses upon allegedly arbitrary, improper, and unreasonable action by the trial court. They had an opportunity to object to these alleged improprieties in their resistance to defendants' special appearances. It is their responsibility to show that they raised these objections at the earliest possible time in the proceedings. State v. Gibb, 303 N.W.2d 673, 678 (Iowa 1981).

After having given careful consideration to each of plaintiffs' arguments, we find them to be without merit. We find that this case was dismissed by operation of law on January 1, 1981.

AFFIRMED.