IN THE COURT OF APPEALS OF IOWA

No. 8-071 / 97-0078

BERNARD HICKS,

Plaintiff-Appellant,

vs.

TIM MORRISSEY,

Defendant,

KEN CAHILL,

Defendant-Appellee.

FILED
JUL 31 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Thomas Horan, Judge.

Plaintiff appeals the district court's ruling setting aside a default judgment entered against defendant. **AFFIRMED.**

Bruce A. Willey of the Willey Law Firm, P.C., Cedar Rapids, for appellant.

Deborah J. Hughes, Cedar Rapids, for appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ.

MAHAN, J.

Bernard Hicks appeals the district court's decision to set aside the entry of default against Ken Cahill. Hicks contends the district court erred when it considered whether excusable neglect occurred because (1) Cahill's only pled basis for setting aside default was improper service; (2) Cahill did not carry his burden of proof; (3) Cahill failed to provide a sound, effective, truthful reason upon which a finding of good cause could be made; and (4) Cahill failed to establish the existence of a meritorious defense. We affirm.

Hicks filed an action to recover money damages because he alleges Cahill misappropriated Hicks' property. Rita Dripps filed a return of service on June 24, 1996, claiming she served Cahill's wife, Marilyn. Cahill failed to appear, and the court declared Cahill in default on August 12, 1996.

On October, 1, 1996, Cahill filed a motion to set aside the default pursuant to Iowa Rule of Civil Procedure 236. It stated service had been ineffective. According to the motion, "the pleadings were left at the Cahill home with minor children under the age of 18 when no adult was home." Hearing on the motion was set for November 18, 1996. On the eighteenth, shortly before the hearing, Cahill filed a reply to Hicks' resistance to the motion to set aside the default. In it, Cahill set out the requirements of Iowa Rule of Civil Procedure 236.

The district court found Cahill, "has not established by clear and convincing evidence that the service of notice upon him by substituted service was defective." The district court also found Cahill had established good cause and excusable neglect under Iowa Rule of Civil Procedure 236.

I. NATURE OF THE APPEAL. The parties question whether this appeal is interlocutory or an appeal of a final judgment. A bare order of default alone does not attain the stature of a judgment. *Cogley v. Hy Vee Food Stores, Inc.*, 257 Iowa 1381, 1385, 137 N.W.2d 310, 312 (1965). Such an order is not a final adjudication. *Id.* (clearly the ruling of the trial court by which plaintiff's motion for default was sustained constituted nothing more than an order of default; no judgment on default was entered against defendant). Here, as in *Cogley*, no judgment on default was ever entered. Thus, this is an appeal of an interlocutory order, not a final judgment.

> Application for appeals of interlocutory decisions or rulings should be taken pursuant to Iowa Rule of Appellate Procedure 2. Attempts to use Iowa Rule of Appellate Procedure 1(c) to avoid applying for permission to take an interlocutory appeal are improper. . . . [W]e may grant an appeal pursuant to Iowa R. App. P 1(c). That rule enables us to treat the papers upon which the appeal is taken as though they were an application for interlocutory appeal under Iowa Rule of Appellate Procedure 2. As such, an appeal will be granted if we find that "such ruling or decision involves substantial rights and will materially affect the final decision and that a determination of its correctness before trial on the merits will better serve the interests of justice."

Hitachi Sales Corp. v. Commercial Trust & Sav. Bank, 342 N.W.2d 889, 891 (Iowa App. 1983). In this instance, we find it is clear this decision involves substantial

rights and will materially affect the final decision. If Hicks is correct, then no trial as to liability is necessary. If we decline to hear the case now, and wait until after a trial is held, then Hicks may be required to spend unnecessary legal fees and take up valuable court time. Therefore, we will address the issues presented by this appeal.

II. STANDARD OF REVIEW.

> We vest district courts with broad discretion in ruling on a motion to set aside a default. We reverse such a ruling only if this discretion is abused. Generally, we find such an abuse only when there is a lack of substantial evidence to support the district court's ruling. We are bound by the district court's ruling if supported by substantial evidence, and we view the evidence in the light most favorable to the district court's ruling. We will uphold the district court's ruling even when the court has made no findings of fact or based its ruling entirely on a different ground. We are more reluctant to interfere with the grant of a motion to set aside a default that with its denial.

Central Nat'l Ins. Co. v. Ins. Co. of North America, 513 N.W.2d 750, 753-54 (Iowa 1994) (citations omitted).

III. EXCUSABLE NEGLECT. Hicks contends the district court should never have reached the excusable neglect analysis because the only reason to set aside the default stated by Cahill was ineffective service. We find the district court properly considered excusable neglect because the initial motion to set aside stated it was pursuant to rule 236 and the later reply specifically set out rule 236 and the factors for determining good cause.

Iowa Rule of Civil Procedure 236 states:

> 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 the entry of judgment.

Iowa R. Civ. P. 236.

The burden is on the movant to plead and prove good cause under the rule. The movant establishes good cause only if one of the grounds in the rule is proved. *Central Nat'l Ins.*, 513 N.W.2d at 754. Good cause is a sound, effective, and truthful reason. *Id.* It is something more than an excuse, plea, apology, extenuation, or some justification for the resulting effect. *Id.* Good cause also requires at least a claimed defense asserted in good faith. *Id.*

> In determining "excusable neglect" constituting good cause, the district court should now focus on four factors. First, did the defaulting party actually intend to defend? Whether the party moved promptly to set aside the default is significant on this point. Second, does the defaulting party assert a claim or defense in good faith? Third, did the defaulting party willfully ignore or defy the rules of procedure or was the default simply the result of a mistake? Last, whether relief is warranted should not depend on who made the mistake.

Id. at 756. The district court found excusable neglect existed and default was not warranted. In making its ruling, the district court stated:

> First, the Defendant Ken Cahill did "move promptly" to set aside the default as soon as it was brought to his attention. Second, the Defendant Ken Cahill did not willfully ignore or defy the Rules of Procedure, because the default was simply a result of mistake and/or inadvertence. A failure to communicate between the Defendant Ken Cahill and his family resulted in the Defendant not receiving adequate

> notice and prevented him from adequately presenting his good-faith defense. Thirdly, the alleged defaulting party, Ken Cahill, does assert a claim or a defense in good faith; that is, he stated that he does not consider himself personally liable on Plaintiff's claims, which he contends arose out of corporate matters.

When viewing the evidence in the light most favorable to the district court's ruling, we find there is substantial evidence to support the district court's decision to set aside the entry of default.

For the reasons stated, we affirm the decision of the district court.

AFFIRMED.