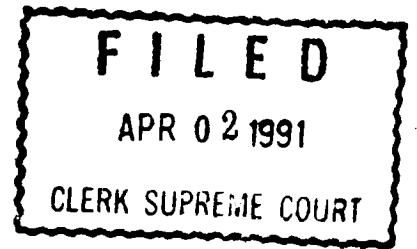


IN THE COURT OF APPEALS OF IOWA

No. 0-701 / 90-138



JAMES H. WILLIAMSON, JR.,

Appellee,

vs.

KINGSON MANUFACTURING CORP., an Iowa Corporation,

Appellant.

419

Appeal from the Iowa District Court for Johnson County,
Larry J. Conmey, Judge.

Kingson appeals a district court order foreclosing its interest in certain real estate and personal property. Kingson contends the district court erred in striking its answer and affirmative defenses as a sanction for failing to timely file a pretrial statement. **AFFIRMED.**

Kenneth F. Dolezal of Dolezal, Miller & Garrels, Cedar Rapids, for appellant.

John H. Ehrhart of Fisher, Ehrhart, McCright & Turner, Cedar Rapids, for appellee.

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

DONIELSON, P.J.

From 1978 to 1989, Kingson Manufacturing, through its agent Raymon Kingery, executed three loans from the Solon Bank. James Williamson personally guaranteed the loans and each loan was secured by a security agreement which included, in part, some real property. Kingson Manufacturing was owned in part by Kingery and Williamson. When Kingson Manufacturing defaulted on the loans, Williamson paid the bank the sums due. The bank then assigned the notes and mortgages and security agreements to Williamson in August 1989. After Kingson failed to cure the default, Williamson filed this foreclosure petition. Kingson filed an answer and affirmative defenses. The affirmative defenses alleged that Williamson had prohibited the corporation from paying on the loans by misappropriating certain items from the business. (The defenses are also the subject matter of a separate lawsuit. Previously, the district court denied Kingson's request to consolidate the two actions.)

In June 1989, the district court entered an order setting the time for trial and requiring pretrial statements. Pretrial statements were due September 25, 1989, and were to include (in part) any agreement as to the admission of uncontroverted facts, documents, or records, statements of the factual and legal issues to be litigated, and specifying all proposed exhibits. Kingson failed to file a pretrial statement.

On October 16, 1989, Williamson presented his case to the court. During cross-examination of Williamson, Kingson's counsel attempted to establish its affirmative defenses by use of several documents. The district court denied Kingson's attempted offer of proof until a pretrial statement was filed. The district court then continued the trial. The district court stated it was "giving [Attorney Dolezal] another chance" to file the pretrial statement so as not to penalize Dolezal's client for the attorney's failure to comply with the court order.

On October 17, 1989, the district court ordered Kingson to prepare and file a pretrial statement on or before 12 o'clock noon, October 27, 1989. Again, the pretrial statement was to state any factual issues and all legal issues to be litigated at trial, to detail all damages, to list all exhibits and give a brief statement concerning what each exhibit was intended to prove.

On October 27, 1989, at 3:55 p.m., Kingson filed a motion to extend time and a preliminary draft of its pretrial statement. In paragraph 3 of the motion to extend time, Attorney Dolezal alleged:

Both of our office secretarial staff were ill during the week to the point of being unable to report to work on three days during this week. Temporary agency assistance was utilized but were almost negatively productive.

Williamson resisted and moved to strike Kingson's answer, affirmative defenses, and several other documents.

On October 30, 1989, Dolezal filed a supplemental trial statement.

A hearing on the pending motions was held on November 15, 1989. On November 17, 1989, the district court denied the motion to extend deadlines and sustained the motion to strike answer and affirmative defenses. The November 17 order provided in part:

The Court finds after reviewing the supplemental trial statements filed herein on October 27 and 30, 1989, that the same do not comply with the Court Order entered by this Court on October 17, 1989; they do not comply in that they fail to state any factual issues relied upon by Attorney Dolezal in the representation of the Defendant; that they refer to exhibits which involve corporations and entities that are not parties to this lawsuit; and in many cases they fail to state how the exhibits relate to the lawsuit; also, the statements were not timely filed as ordered on October 17, 1989. The Court finds specifically that the representations set out in paragraph 3 [of the motion to extend] are false, in that it is stated "Both of our office secretarial staff were ill during the week to the point of being unable to report for work on three days during this week." A record was made regarding the representations.

IT IS THE ORDER OF THIS COURT that the Plaintiff's Motion to Strike Answer and Strike Affirmative Defenses is sustained.

IT IS THE FURTHER ORDER OF THIS COURT that the Motion to Extend Deadlines is denied.

In December 1989, the district court entered its order of foreclosure on Kingson's interest in real estate and personal property.

Kingson appeals. (On June 15, 1990, the supreme court granted Kingson's motion to reinstate this appeal following a dismissal of the appeal pursuant to Iowa Rule of Appellate Procedure 19.) Kingson contends the district

court erred in: (1) denying Kingson the opportunity to make an offer of proof; (2) striking Kingson's answer and affirmative defenses for failing to timely file a pretrial statement; (3) denying Kingson's motion to consolidate this action with another; and (4) granting the foreclosure decree. We now affirm.

Foreclosure proceedings are equitable in nature and, therefore, our scope of review is de novo. Iowa R. App. P. 4. We thus give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

We first address Kingson's allegation that the district court denied Kingson the opportunity to make an offer of proof. We reject this contention for two reasons. One, the trial court did not deny Kingson the opportunity to make an offer of proof. In fact, the district court afforded Kingson several opportunities to make an offer of proof. On more than one occasion Attorney Dolezal embarked on lengthy and rambling "offers of proof" which were eventually terminated by the district court.

Two, like the district court, we conclude Kingson was attempting to use the "offer of proof" to prove its affirmative defenses without having filed a pretrial statement. Kingson was, and is, attempting to circumvent the consequences of its failure to comply with a court

order. The district court was not required to accept Kingson's "offer of proof" under these circumstances.

In any event, the district court continued the trial to allow Kingson another opportunity to submit a pretrial statement. Kingson again failed to comply with the court order. The district court struck Kingson's answer and affirmative defenses as a sanction for the failure to comply with the court order. Kingson now complains the district court's sanction was overly harsh and an abuse of discretion. We cannot agree.

Iowa R. Civ. P. 136(e) provides in pertinent part:

If a party or party's attorney fails to obey a scheduling or pretrial order, . . . , the court, upon motion or the court's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in R.C.P. 134(b)(2)(B)-(D).

The district court is thus authorized to make:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient part;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

Iowa R. Civ. P. 134(b)(2)(B)-(D).

The district court was well within its discretion in striking Kingson's answer and affirmative defenses. See Id. 134(b)(2)(C). Kingson or Kingson's attorney had

failed to obey, not one, but two pretrial orders. See Postma v. Sioux Center News, 393 N.W.2d 314, 318 (Iowa 1986) (dismissal is a discovery sanction generally reserved for use when a party has violated a trial court's order). As a result of the first failure to obey, the district court did not immediately resort to striking the pleadings but rather entered a second order and allowed Kingson an opportunity to come into compliance. It was only after Kingson again failed to obey the order to submit a pretrial statement that the district court granted Williamson's motion to strike. Furthermore, the district court found Kingson's attorney, Dolezal, had, at least misrepresented facts, if not lied to the court about the reasons for failing to obey the court order. Under these circumstances, we find the district court's sanction well deserved.

Attorney Dolezal argues if fault exists, it is his alone and should not be visited upon his client. "We regret that the sanction in this case visits the sins of counsel on his client. But '[a] litigant chooses counsel at his peril, and here, as in countless other contexts, counsel's disregard of his professional responsibilities can lead to extinction of his client's claim.'" Krugman v. Palmer College, 422 N.W.2d 470, 475 (Iowa 1988) (quoting Cine Forty-Second St. Theatre v. Allied Artists, 602 F.2d 1062, 1068 (2d Cir. 1979), citing Link Wabash R. Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1390, 8 L. Ed.2d 734, 740 (1962)).

Because we affirm the district court's order striking Kingson's answer and affirmative defenses, the remainder of Kingson's arguments are moot and will not be addressed.

AFFIRMED.