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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed april 30, 1985

DANNE A. DELAIR,

Plaintiff-Appellee,

vs.

WELLS FARGO GUARD SERVICE and LELAND BOBIER,

Defendants-Appellants.

5-91
84-789

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Defendant company appeals from the order overruling motion to set aside default judgment in an action for wrongful termination of employment. AFFIRMED.

Timothy w. Shuminsky of Shuminsky, Shuminsky & Molstad, Sioux City, for defendants-appellants.

Gregory E. Jones, Sioux City, for plaintiff-appellee.

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

OXBERGER, C.J.

Default judgment was entered below against the defendant, Wells Fargo Guard Services. The company appeals from the trial court order overruling its motion to set aside the default judgment. We affirm.

On June 15, 1982, plaintiff filed his petition alleging he had been fired by the company because he refused to work on a Sunday due to his deep religious convictions. Service was made upon the attorney for the company and upon the other defendant, Leland Bobier, manager of the corporation, on November 16, 1982. On the same day he received the material Bobier sent a copy of the petition and a letter to the in-house counsel, noting, "We have twenty days in which to respond." The attorney, David Birch, wrote to the plaintiff's attorney on November 29, 1982, advising of the corporation's position in the matter and stating, "If I do not hear from you by December 1, we will proceed to retain local counsel and assert our counterclaim. . . " Another letter was written by the attorney on December 29, 1982, indicating, "we will have no alternative but to file an answer. . . on January 4, 1983, along with a counterclaim" and requesting immediate contact from the plaintiff. No response was obtained. The attorney then inadvertently put the file away and no further action was taken for one year. A default judgment was obtained December 29, 1983. After evidence was presented, the court awarded $10,064.80 to the plaintiff with interest and costs. Defendant filed a motion to set aside the default January 24, 1984.

Defendant argues that motion should have been granted, referring to holdings of our court which distinguish between an attorney's acts which result in the default and where it comes about because of the client's actions. Because of this, and our liberal attitude in granting a rule 236 motion, defendant says we should find here the court erred in not finding there was excusable mistake. Peterson v. Eitzen, 173 N.W.2d 848, 853 (Iowa 1970). A thorough definition of the type of mistake which would warrant grant of this type of motion has been set out at Dealers Warehouse Co. v. Wahl & Associates, 216 N.W.2d 391, 394-95 (Iowa

1974):

> What constitutes good cause in relation to grounds of mistake, inadvertence and excusable neglect has been settled in our cases. Good cause is a sound, effective, truthful reason, something more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. He must show affirmatively he did intend to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them.

The question presented here, then, involves whether the attorney's actions should be imputed to the client. In Dealers the court found there was no good excuse for failure to act on a case resulting in a 215.1 dismissal, despite plaintiff's claim of a breakdown in communication with his lawyers, and the fact that one of his lawyers withdrew from the case. Id. at 395. The court stated the communication problem was due in large part to the plaintiff's negligence, and, "More significantly he did nothing to assure his interests were being protected in the case until 15 days (November 2 to November 17) after receiving a copy of the application to withdraw." Id.

An extensive review of the attorney/client distinction as it relates to reinstatement and setting default aside was made in Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18 (Iowa 1974). The court listed various cases on the question, including Reilley v. Kinkead, 181 Iowa 615, 165 N.W. 80 (1917) where the court concluded a default judgment should be set aside. Id. at 23. The court in Wharff noted it was significant to the Reilley decision that the mistake by the attorney did not involve negligence on his part or by his client. Id. The distinction between attorney fault and client fault was given more importance in Hatt v. McCurdy, 223 Iowa 974, 274 N.W. 72 (1937) and the basis for the court's grant of a motion to set aside default in Newell v. Tweed, 241 Iowa 90, 40 N.W.2d 20 (1949)

was reliance on the distinction. Id. at 24. After reviewing these cases the court then clarified the current point of view regarding the distinction:

> In general, the distinction between client error and attorney error is relevant in determining whether a default judgment should be overturned. It would not seem to be the sole factor, however; rather, it is part of the overall situation which might include prompt attention to the default, existence of a meritorious defense, appellate court's reliance on trial court's discretion and the policy of trial on the merits. Furthermore, there are limits on the extent to which the distinction will be carried. . . . The problem thus is not so much who made the cause for dismissal but the substance of the cause.

Id. The court then found that although plaintiff claimed his case should be reinstated because his attorney entered the case only shortly before its dismissal, it also noted almost nine months expired after the petition was filed without any action on the part of the plaintiff. Id. at 23. The court found that in view of all the circumstances reinstatement was not warranted. Id.

While the attorney's mistake may excuse the client from the consequences of the action, an overview of all the circumstances here does not warrant setting aside the default. Defendant has presented a meritorious defense in claiming plaintiff knew of the requirement to work on Sundays and further was an employee at will. While we favor the policy of a trial on the merits of a case, we must also note the trial court has discretion in the matter and its denial of a motion to set aside here will be overturned only if an abuse of discretion is shown. Id. Defendant claims an intent to defend is shown by the letters written which indicate an answer was intended to be filed. However, we find significant the fact that for one year after the letters were sent no action was taken, and there is no evidence that the corporation ever phoned its attorney or otherwise inquired into the status of the case. We find this somewhat similar to the Dealers case where two weeks elapsed before the client inquired into the status of his case, and the Wharff case, where nine months without action was found to be too long to indicate a good intent to defend.

Defendant finally argues that it is illogical on the part of the trial court to allow the default to be set aside against the registered agent and manager of the corporation, Bobier, but to find the judgment should continue against the corporation. However, the grant of the motion to set aside the default against Bobier has not been appealed. Whether error occurred in that part of the ruling is not for this court to decide. Instead, we limit ourselves to the facts surrounding entry of the default against the corporation and find no error in the trial court's ruling.

AFFIRMED.