

IN THE COURT OF APPEALS OF IOWA

No. 9-405 / 89-82

FILED

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CLERK SUPREME COURT

WALTER MORTVEDT,

Plaintiff-Appellant,

vs.

BETHANY MANOR, INC. and MICHAEL BONELLO, Individually,

Defendants-Appellees.

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Appeal from the Iowa District Court for Story County,
Carl Baker and Dale Ruigh, Judges.

Appellant appeals the district court's refusal to grant summary judgment and vacate a dismissal pursuant to Iowa Rule of Civil Procedure 215.1. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Thomas Mann, Jr. of Mann & Mann, Des Moines, for plaintiff-appellant.

Brian L. Campbell of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for defendants-appellees.

Heard by Schlegel, P.J., Sackett and Habhab, JJ.

SACKETT, J

The first issue before us is whether a case that has been submitted to the trial court on a motion for summary judgment is subject to dismissal under Iowa Rule of Civil Procedure 215.1. We hold, under this record, it was not and find the trial court should have vacated the clerk's order dismissing the case.

The second issue is whether the trial court should have affirmed plaintiff's motion for summary judgment. We affirm the trial court on this issue.

Notice was given to the parties that this case would be dismissed under Iowa Rule of Civil Procedure 215.1 if not tried by January 1, 1988. In October 1987 plaintiff filed a motion for summary judgment. A ruling denying the motion for summary judgment was filed January 6, 1988. On January 8, 1988, the clerk of court dismissed the case. Neither party received notice that the case had been dismissed. The attorneys for both parties did not discover the clerk had dismissed the case until July 15, 1988, when the trial court refused to rule on a motion because the case had been dismissed. Plaintiff filed a petition to vacate the dismissal and a motion to reinstate. Both were denied by the trial court. Plaintiff appeals the denial.

The order dismissing this case should be vacated. This case was not governed by Iowa Rule of Civil Procedure 215.1. At the time the case came up for dismissal, the

motion for summary judgment was submitted. It had not yet been ruled on. Iowa Rule of Civil Procedure 215.1 provides, in applicable part:

This rule shall not apply to cases (a) pending on appeal from a court of record to a higher court or under order of submission to the court; (b) in which proceedings subsequent to judgment or decree are pending

Because the matter was under submission to the court under a motion for summary judgment, the rule did not apply. Humboldt Livestock Auction, Inc. v. B & H Cattle Co., 261 Iowa 419, 425-26, 155 N.W.2d 478, 482-83 (1967). In Humboldt, a motion for summary judgment was filed on December 12, 1966, and argued on December 27, 1966. An order granting it was filed on January 5, 1967. The court determined, 261 Iowa at 426, 155 N.W.2d at 483, that with reference to the December 31, 1966, dismissal, rule 215.1 did not apply because the case was under submission to the court. Because this case was not governed by rule 215.1 when the clerk of court, without advising the parties, dismissed it on January 8, 1988, the clerk was without jurisdiction to enter the dismissal and it should be vacated.

While it is not relevant to the issue, we do note there is no claim of delay on the part of plaintiff in proceeding to ready the case for trial.

Plaintiff also complains the trial court should have granted summary judgment. We review appellant's arguments

and find the trial court was correct in denying summary judgment. Having so determined, we need not consider the timelines of the appeal on this issue.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Schlegel, P.J., concurs; Habhab, J., dissents in part and concurs in part.

HABHAB, J. (dissenting in part and concurring in part)

I agree with the majority's holding in regard to the trial court's denying appellant's claim for summary judgment. I dissent from that portion of the majority opinion relating to vacation of the rule 215.1 dismissal.

Appellant filed this suit in March 1986 alleging breach of an oral employment contract, intentional interference with a contractual relationship, breach of an implied employment contract, and wrongful discharge. The parties were given notice on July 29, 1987, that the case would be dismissed under Iowa Rule of Civil Procedure 215.1 if not tried by January 1, 1988.

Appellant filed a certificate of readiness for trial. In October 1987 the district court extended the discovery deadline until January 15, 1988, and trial was set for August 30, 1988. Appellant also filed a motion for summary judgment in October 1987. The court denied his motion on January 6, 1988.

The clerk of court dismissed appellant's case pursuant to rule 215.1 on January 8, 1988. However, no notice of this dismissal was sent to the parties, who continued to pursue the case. The parties did not discover the case had been dismissed until July 15, 1988, when the court refused to rule on appellant's motion for adjudication of law points on the ground that the case had been dismissed. Appellant filed a motion to reinstate the case and a petition to vacate the dismissal. The court denied these

motions, finding that the case had not been specifically continued to avoid the rule 215.1 dismissal.

The issue is whether the district court erred in not reinstating appellant's action. Iowa Rule of Civil Procedure 215.1 provides, in relevant part:

All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be for trial at any time prior to January 1 of the next succeeding year. The clerk shall prior to August 15 of each year give notice to counsel of record as provided in R.C.P. 82 . . . the notice shall state that such case will be for trial and subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. All such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte. This rule shall not apply to cases (a) pending on appeal from a court of record to a higher court or under order of submission to the court

No continuance under this rule shall be by stipulation of parties alone but must be by order of the court. Where appropriate the order of continuance shall be to a date certain.

The trial court may in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefore, shall be filed within six months from the date of dismissal.

The clerk gave all parties proper rule 215.1 notices on July 29, 1987. Consequently, under the circumstances here, appellant's action was subject to dismissal on January 1, 1988, unless the submission of appellant's summary judgment motion removes the case from the dismissal impact of rule 215.1. The majority concludes that it does. I would hold that it does not.

I believe that appellant's motion for summary judgment temporarily permitted the district court to retain jurisdiction of the case while it considered that motion. Schimerowski v. Iowa Beef Packers, Inc., 196 N.W.2d 551, 554 (Iowa 1972). I also believe that had the court sustained the motion for summary judgment, that would have been dispositive. But here when the district court overruled appellant's summary judgment motion on January 6, 1988, and no order of court was obtained continuing the case beyond the January 1 deadline, I believe the case was again subject to dismissal. See Schimerowski, 196 N.W.2d at 554. As the Iowa Supreme Court in Schimerowski, 196 N.W.2d at 554, stated:

We now hold where a motion for continuance is filed and submitted on notice before the rule 215.1 deadline for trial, continuance or dismissal, jurisdiction is retained by trial court while it has such motion under advisement. Of course, if under such circumstances the motion is overruled, the result to plaintiff's cause may be fatal.

Although Schimerowski involved a motion for continuance and here the dispute centers around a motion for summary judgment, I see no significant reason to treat the result any different. To do so will only bring about further confusion to an already complicated rule.

For instance, as I read the majority's opinion, had the order overruling the summary judgment been entered after August 15 but prior to January 1, the case would still be beyond the dismissal effect of rule 215.1 for the case was

under submission. I am also concerned about the dismissal effect of other motions that go to the merits of the controversy but are under submission after the mailing of the try or dismissal notice. If those motions are overruled after the January 1 deadline has passed, will those cases also escape the dismissal effect of rule 215.1. I do not believe the drafters of rule 215.1 intend that result. Nor do I believe that when the provision relied upon by the majority for reversal is considered in light of the entire rule that the result reached is consistent with the purpose of rule 215.1. I would affirm on this issue.

As to the remaining issue directed to our attention by the appellant, the clerk was not required to give the parties notice that the action had been dismissed. See Greif v. K-Mart Corp., 404 N.W.2d 151, 154 (Iowa 1987). Appellant thereafter had six months in which to seek reinstatement. Having failed to seek reinstatement until after this six-month deadline had passed, the district court was without authority to reinstate appellant's case. See Koss v. City of Cedar Rapids, 300 N.W.2d 153, 157 (Iowa 1981). I, therefore, find the district court properly refused to reinstate appellant's case pursuant to rule 215.1.

Similarly, I find no basis for vacating the dismissal pursuant to Iowa Rule of Civil Procedure 252(a). Rule 252(a) permits a court to vacate a final judgment or order

upon mistake, neglect, or omission by the clerk. Since I have already determined that the clerk was correct in dismissing appellant's case pursuant to rule 215.1, I find no basis for a rule 252(a) vacation.