FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ARTHUR BAUDER,

Claimant-Appellant,

vs.

ROY BAUDER, Fiduciary of the Estate of Amelia Bauder, Deceased,

Appellee.

Filed October 28, 1982 **170**

2-260
2-67329

Appeal from Sioux District Court - James P. Kelley and Lawrence W. McCormick, Judges.

Claimant appeals from the order in which the court set aside the default judgment entered against the fiduciary and confirmed its earlier ruling that claimant could not recover on his claim against his mother's estate because his claim failed to allege all the necessary facts. AFFIRMED.

Harold O. Postma, Orange City, for claimant-appellant.

James D. Scott of McGill, McGill & Scott, Rock Valley, for fiduciary-appellee.

Considered en banc.

Claimant, Roy Bauder, appeals from the order in which the court set aside the default judgment entered against the fiduciary and confirmed its earlier ruling that claimant could not recover on his claim against his mother's estate because his claim failed to allege all the necessary facts. On appeal, Arthur contends that (1) there were no permissible grounds proven for setting aside the default judgment; and (2) the ruling on the motion for separate adjudication of law points was erroneous on its merits and was entered without jurisdiction. We affirm.

Actions for the establishment of contested claims are triable in probate as law actions. Iowa Code § 633.33 (1981). Our review, therefore, is on assigned errors.[1]

I.

In September, 1979, Arthur Bauder filed a claim against the estate of his mother alleging that he should be compensated for improvements he made to his mother's farm while he was a tenant. His brother and executor of the estate, Roy Bauder, disallowed the claim on the ground that the farm was not part of the estate and not a proper subject of claims against the estate since their mother had owned only a life estate in the farm. Arthur then requested a hearing on the claim and, upon Roy's request, filed a more specific statement of the claim. Roy did not file an answer pursuant to Iowa Code § 633.444 (1979).

Approximately one year later, Roy filed a certificate of readiness for trial and moved for separate adjudication of law points alleging that Arthur's claim was

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1 While an order setting aside a default judgment is not considered on appealable final judgment, see Kulhavy v. Rugger, 241 Iowa 520, 41 N.W.2d 664 (1950), under the unusual circumstances of this case the order which set aside the default judgment has the effect of reinstating a previous ruling which disposed of the case. Under these circumstances, we believe the order is an appealable judgment. Even if treated as an appeal from an interlocutory order, it will be permitted pursuant to Iowa Rules of Appellate Procedure 1(c) and 2. Accordingly, we proceed to the merits.

defective because it failed to assert that their mother, as life tenant, had agreed to reimburse Arthur for improvements to the farm.

On July 28, 1981, the court ruled favorably to Roy on his motion for separate adjudication of law points and concluded that Arthur could not recover on his claim. However, on July 30 the clerk of court entered a default judgment in favor of Arthur because of Roy's failure to file an answer pursuant to section 633.444.

Roy then moved to set aside the default judgment. The trial court granted this motion, set aside the default judgment, and concluded that the July 28 ruling on the motion for separate adjudication of law points had disposed of Arthur's claim. It is from this ruling that Arthur appeals.

II.

Claimant first contends that the court erred in granting the motion to set aside the default judgment. We disagree. Iowa Rule of Civil Procedure 236 provides that a default judgment may, on motion and for good cause shown, be set aside "for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty." Whether to grant such motion is a matter within the trial court's discretion and when challenged, we view the evidence in the light most favorable to the ruling. Dealer's Warehouse Co. v. Wahl & Associates, 216 N.W.2d 391, 394, (Iowa 1974).

Here the default judgment was entered for the fiduciary's failure to answer the more specific statement which claimant filed on July 11, 1980. But it appears from the record that the parties had agreed that Roy would not file another denial; both understood that the denial to the original claim would stand as a denial to the more specific statement of the claim. Claimant's argument that this agreement is void for want of consideration is misplaced. We need not find that there is a valid contract, but only that respondent's failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or

inattention, but was because of some misunderstandings, accident, mistake or excuse. Id. at 394-95.

We believe it was appropriate for the court to consider the agreement in determining whether Roy's failure to file an answer was excusable. Viewing the record in the light most favorable to the ruling setting aside the default judgment, we affirm this exercise of the court's discretion.

III.

Claimant also challenges the court's ruling on Roy's motion pursuant to Iowa Rule of Civil Procedure 105 for separate adjudication of law points. His first argument is that the court lacked jurisdiction to make the ruling because the issues could not be joined in the absence of an answer being filed. We have already found that the parties had agreed that denial to the more specific statement was unnecessary; the fiduciary's denial of the claim applied to the more specific statement as well. Accordingly, we find that the motion was properly entertained.

Claimant filed his claim in probate pursuant to Iowa Code § 633.448 (1979). Under that section he was required to describe the nature and amount of the claim and to include an affidavit that the amount is "justly due." Under Iowa law a landlord is not liable to a tenant for improvements or repairs made to leased property in the absence of an agreement by the landlord to reimburse the tenant for such improvements or repairs. Resnick v. City of Fort Madison, 259 Iowa 587, 582, 145 N.W.2d 11, 14 (1966). In its ruling the court found that the claimant alleged no agreement by the landlord to pay for the repairs and improvements and that there was no legal liability on her part to pay for the repairs and improvements made by claimant. The court noted incidentally that, even if claimant could have recovered for these improvements, most of the claims would be barred by the statute of limitations. Because the claimant failed to allege that he could recover

for the costs of improvements made, he failed to demonstrate that the amount requested was "justly due" as required under section 633.448.

Iowa Rule of Civil Procedure 105 provides, in part, that the court may "separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case." The court's ruling that claimant could not recover for the improvements was a determination which went to the whole of his case. We find, therefore, that the court was correct to conclude that the ruling on the separate adjudication of law points had disposed of Arthur's claim.

AFFIRMED.