

FILED

215

IN THE COURT OF APPEALS OF IOWA **JUN 24 1977**

AVCO FINANCIAL SERVICES, INC.,)

Appellee,)

vs.)

ARTHUR W. MILLER,)

Appellant,)

PAUL CHRISTENSEN, d/b/a First)
Line Auto Service of Kimballtown,)
Iowa, and Guy E. Tam and Harold)
Hansen,)

Additional Defendants.)

CLERK SUPREME COURT

Filed June 24, 1977

92

No. 2-58458

Appeal from Guthrie District Court -- M. C. Herrick, Judge

An appeal from a judgment by the court on a retail installment contract originally filed as an action for replevin involving 215.1, Dismissal, and rule 27, R.C.P., Improper Joinder - AFFIRMED.

Taylor, Taylor & Feilmeyer, of Guthrie Center, R. E. Feilmeyer, counsel for appellant.

John Donahey, of Panora, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

This is an appeal from a judgment rendered by the court in favor of plaintiff on certain retail installment contracts. The suit was commenced as an action for replevin on November 24, 1970.

On February 18, 1975, plaintiff amended the petition to include the cause of action on the retail installment contracts. Plaintiff, in its amended petition, alleged there was \$3,740.05 owing on one retail installment contract plus interest of \$1,430.55, and attorney's fees of \$91.70, totaling \$5,262.30 and \$2,615.55 on the other contract plus \$1,000.24 interest and \$76.15 attorney's fees totaling \$3,691.94.

The defendant appeals on three grounds. First, he contends the trial court erred in overruling his motion to dismiss for failure of the plaintiff to serve notice of a motion for continuance as required by rule 215.1, Rules of Civil Procedure. Second, the defendant contends there was an improper joinder of plaintiff's original replevin action with the second cause of action based upon the installment contracts. Finally, the defendant contends the proof as to the installment contracts was irrelevant and insufficient because of improper joinder.

I

215.1 Dismissal

Pursuant to rule 215.1, R.C.P., the clerk of court for Guthrie County issued a try or dismiss notice to the parties on August 2, 1974. On December 23, 1974, the plaintiff filed a motion for continuance. The district court set a hearing on the motion for December 30 and directed that notice be given to the defendant or his attorney of record by ordinary first class mail to their last known address at least five days prior to the hearing. The proof of service stamp indicated that it was

mailed on the same day to the defendant's attorney of record. Here, is where the problem developed. Appellant-defendant's attorney, Feilmeyer, filed an appearance as attorney of record on May 24, 1971. Thereafter he withdrew his appearance as attorney of record on February 22, 1973. The court order indicating that the motion for a continuance and order should be given to the *"Defendants or their Attorneys of record by forwarding a copy ..."* had stamped on the order a statement that the motion and order were mailed to each of the attorneys of record at their respective addresses on December 23, 1974.

Defendant's attorney, Feilmeyer, then reentered the case filing a motion entitled Combined Motion to Strike, Order for Dismissal and for Ruling on Point of Law on March 3, 1975. This motion in effect alleges that there was no proper notice under 215.1, R.C.P., and, therefore, the case should be dismissed. He, in effect, states that if it was sent to him, it was improper because he was not, at the time, the attorney of record and that it should have been sent to his client or former client since it was during this period which he had withdrawn from the case. There is no indication in the record from attorney-Feilmeyer whether he had received the appropriate motion and order or had received it and mailed it to his former client. This fact adds credibility to the subsequent and amended proof of service.

The defendant's attorney, Feilmeyer, then filed a new appearance as attorney of record on March 17, 1975, why, considering rule 65, R.C.P., is not clear from the record.

The appellee-plaintiff then filed a resistance and application for reinstatement on March 17, 1975, accompanied by a new proof of service which indicated that Helen Heiland had

used a "new" stamp for proof of service without realizing that it only indicated service to attorneys of record. It further alleges that she had mailed the motion and order to defendant-Miller's last known address in accordance with the order of the court. The appellant denied he ever received the motion and order. The trial court on March 17, 1975, overruled the motion to strike and dismiss.

In reviewing the trial court's action under 215.1, the Supreme Court has held the trial court's finding of facts and inferences inherent therein are binding if supported by substantial evidence. *Wharff v. Iowa Methodist Hospital*, 219 N.W.2d 18, 21 (Iowa 1974). Further, the court will interfere more reluctantly where jurisdiction over the case has been retained than where it has been denied. *Rath v. Sholty*, 199 N.W.2d 333, 336 (Iowa 1972). These decisions indicate the policy of the Supreme Court in favor of ruling on the merits of the case rather than procedural matters. The legislature followed this policy when in 1965, they amended §215.1 giving the trial court discretionary power to reinstate an action when the dismissal was the *"result of oversight, mistake or other reasonable cause, ..."* In view of the court's discretionary power and the plaintiff's affidavit stating that the notice was in fact mailed to the defendant's last known address, we find there was substantial evidence to support the trial court's ruling.

II

Rule 27, R.C.P., Improper Joinder of Actions

Defendant's second contention was that there was an improper joinder by including an action on the retail installment contract pursuant to 643.2, The Code 1975. In the instant case, the defendant sought a remedy to the improper joinder by

an application for ruling on a point of law. We find that the issue of improper joinder was not raised in the matter prescribed by rule 27(b), R.C.P., which states that the "*only remedy for improper joinder of actions shall be by motion*" and on such motion, the court shall either order the cause docketed separately or strike the cause which should be stricken. Defendant's failure to make such a motion constituted a waiver of any misjoinder. *Claeys v. Moldenschar dt*, 169 N.W.2d 885, 889 (Iowa 1969). Misjoinder of parties, 27(a), R.C.P., is not grounds for dismissal. *Wheeler v. Waller*, 197 N.W.2d 585 (Iowa 1972). Misjoinder of actions may result in separate docketing or to strike. Here the court failed to find a misjoinder of actions. We find *Claeys*, *supra*, dispositive.

We also note that the trial court rendered judgment against the defendant not on the original filing concerning the action for replevin but rather on the amended pleading, division 2, which was the retail installment contract.

III

Rule 100, R.C.P.

Defendant's final contention was that the trial court erred in overruling the defendant's motion for a directed verdict. As an appeals court, we must view the evidence in the light most favorable to the party against whom the motion was made. Rule 344(f)(2), R.C.P.; *Schiltz v. Cullen-Schiltz & Associates, Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). We agree with the trial court in that the plaintiff had established a *prima facie* case by offering the contracts signed by the defendant and not denied by the defendant pursuant to rule 100, R.C.P. When the signatures on the instrument are not denied, the instrument stands admitted. *Evans v. Herbranson*, 241 Iowa 268, 41 N.W.2d 113 (1950). The proof of payment by the defendant is an affirmative defense. *Glenn v. Keedy*, 248 Iowa 216, 80 N.W.2d 509 (1957).

AFFIRMED.