FILED
JUN 24 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

281

THOMAS A. MOUW and BERNICE A. MOUW,

Appellants,

vs.

O'BRIEN COUNTY BOARD OF SUPERVISORS OF O'BRIEN COUNTY, IOWA; LELAND BRUEGMANN; GEORGE CALLENIUS; HARRISON FISCH; THOMAS T. MANLEY; ARIE VAN NYHUIS; and CORRINE GILLESPIE, COUNTY AUDITOR OF O'BRIEN COUNTY, IOWA,

Appellees.

Filed June 24, 1977

102
No. 2-57988

Appeal from O'Brien District Court - James P. Kelley, Judge.

An appeal from the trial court's ruling dismissing the case under rule 216, Rules of Civil Procedure, prior to an evidentiary hearing by either party. - REVERSED AND REMANDED

Earl T. Klay, of Klay, Bastemeyer & Veldhuizen, of Orange City, counsel for appellants.

Thomas J. Whorley, of Wolff & Whorley, of Sheldon, and Richard T. Smith, O'Brien County Attorney, counsel for appellees.

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

282

DONIELSON, J.

The plaintiffs, Thomas and Bernice Mouw, appeal district court's dismissal of their Petition in equity claiming that the court erred in dismissing the Petition after the Answer was filed without a hearing or a trial on the merits.

The plaintiffs are owners of the property of abutting a road which the defendant, County Board of Supervisors, were proceeding to vacate. Prior to the defendant reaching a final decision, plaintiffs filed a Petition in equity requesting that the defendant be temporarily enjoined from closing the road. After a hearing, the court denied a temporary injunction. Thereafter, the defendant issued a "final order" which provided that the road should be closed contingent upon certain events. Subsequently, the plaintiffs filed a supplemental Petition to the Petition in equity requesting the court to find that the defendant's final order was null and void, and to enjoin the implementation of the order. The defendant filed an Answer to the supplemental Petition and the matter was set for hearing.

At the hearing, prior to the presentation of evidence, the defendant moved to dismiss the Petition. The plaintiffs in resistance to the motion, stated that at this stage of the proceedings, no showing had been made as to the allegations in the plaintiffs' Petition since no hearing had yet been held. The plaintiffs further stated that any motion to dismiss should be heard only after an evidentiary issue as to its merits have been heard. The court responded in the affirmative to the plaintiffs, however, found that the matter was submitted and a ruling would be forthcoming.

Subsequently, the court sustained the motion to dismiss finding that the Board of Supervisors' action appeared not to be illegal, fraudulent, or clearly oppresive and that the

plaintiffs should not have the benefit of equitable relief since an adequate remedy at law existed.

It would have greatly assisted this court if the defendant's counsel had stated the precise Rule of Civil Procedure that he was using in his motion to dismiss at the time of the hearing. The trial court likewise does not mention which rule of civil procedure is applicable in his order. The defendant's brief yields no citation of authority referring to which rule of civil procedure he had previously relied upon.

Our review brings us to the conclusion that rule 104(b), R.C.P., is not applicable since an answer had been filed prior to the trial court's ruling. Rule 237(b), R.C.P., is not applicable because a genuine issue of fact is clearly apparent. Additionally, the motion in question was made at the time of the hearing and was not filed ten days prior to the hearing as provided by the rule. Rule 222, R.C.P., which is essentially judgment on the pleadings is obviously not applicable since there are material controverted facts alleged in the pleadings and orally.

We, therefore, agree with the legal conclusion propounded by the appellants that this is a motion pursuant to rule 216, R.C.P., an Involuntary Dismissal. The pleadings show a properly pleaded allegation of illegality fraud, oppression, bad faith allegations. The resistance of the motion to dismiss made at the time of the oral hearing restates these precise allegations, and a review of the record shows that no evidentiary hearing was provided.

The defendant's motion to dismiss then falls within the purview of rule 216, R.C.P., Involuntary Dismissal, which

reads as follows:

> "A party may move for dismissal of any action or claim against him or for any appropriate order of court, if the party asserting it fails to comply with these Rules or any order of Court. After the plaintiff has completed his evidence, a defendant may move for dismissal because plaintiff has shown no right to relief, under the law or facts, without waiving his right to offer evidence thereafter." (emphasis added)

As directed, the defendant's motion for dismissal should come after the plaintiffs have completed their evidence. In the instant case, an evidentiary hearing never took place. To say the least, defendant's motion and the court's subsequent dismissal was premature. The court's findings were based on the record that was not existent.

The general posture of a motion to dismiss under rule 216, R.C.P., in an equity hearing is that it would be made at the defendant's peril if made after the plaintiffs' case and the case was appealed and reversed. See the law set forth in Dee v. Collins, 235 Iowa 22, 15 N.W.2d 883, 887 (1944) and Amdor v. Cooney, 241 Iowa 777, 43 N.W.2d 136 (1950). See also the comment on rule 216, R.C.P., at 299. Here the rule is inapplicable since the motion as an involuntary dismissal was filed *before either* plaintiffs or defendant put on any evidence.

We, therefore, reverse and remand and instruct the trial court to have an evidentiary hearing to determine the merits of the petition.