

IN THE COURT OF APPEALS OF IOWA

49

No. 0-55 / 89-1039

ILA J. BOYSEN,

Appellee,

vs.

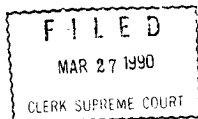
PEOPLE'S DRUG STORE, INC., d/b/a PEOPLES DRUG,

Appellant,

and

FLOY V. FRICKS, d/b/a FRICKS' TAVERN; THE SOUTHLAND CORPORATION, d/b/a SEVEN-ELEVEN; JOHN E. COUSINS, II, d/b/a COUSINS TAP; LOYAL ORDER OF MOOSE LODGE #363, OF CLINTON, IOWA,

Defendants.



Appeal from the Iowa District Court for Clinton County,
L. D. Carstensen, Judge.

In this dram-shop action against several defendants, the district court entered a default judgment against one defendant, People's Drug Stores, Inc. (Peoples). Peoples moved to set aside the default judgment, but the district court refused to do so. Peoples then filed this appeal. Peoples contends the plaintiff's service of original notice was inadequate to give the court jurisdiction. **AFFIRMED.**

Thomas J. Shields and Maria Mihalakis Waterman of Lane & Waterman, Davenport, for appellant.

James D. Bruhn and Richard W. Farwell of Farwell & Bruhn, Clinton, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

The plaintiff filed a dram-shop action against five defendants. One of the defendants was People's Drug Stores, Inc., d/b/a/ Peoples Drug (Peoples), a corporation which operates stores in both Iowa and Illinois. The plaintiff's petition alleged an intoxicated driver had purchased alcohol at a Peoples store in Davenport, Iowa. The plaintiff's petition was served on the manager of a Peoples store in Milan, Illinois. (Apparently this was done because the Davenport city clerk incorrectly advised plaintiff the Milan store was the liquor licensee for the Davenport store.) The Milan store manager asserts she passed the petition on to Peoples' District Manager, Larry Webb. However, Peoples asserts no responsible executive or officer of Peoples ever received the notice served on the Milan store manager.

Peoples did not defend against the suit in any way or appear for trial. In November 1988 a default judgment was entered against Peoples in the amount of \$85,000. Peoples asserts it was unaware of the lawsuit until it was informed of the judgment by its insurer on December 22, 1988.

Peoples filed a motion to set aside the default judgment. After a hearing, the district court refused to set aside the default. The district court found, among other things: (1) the Milan store manager forwarded the notice served upon her to Peoples' management personnel, (2) Peoples was aware of the lawsuit prior to entry of the

judgment, (3) the notice employed by plaintiff was not intended to confuse the defendant, and (4) Peoples' failure to answer or defend against the lawsuit was Peoples' own fault, due apparently to the negligence of Peoples' agents and employees.

Peoples has appealed from the district court's refusal to set aside the default judgment. Peoples challenges the district court's conclusion that service on the manager of the Milan store was adequate to bring the corporation into the case as a defendant. Peoples argues the court lacked jurisdiction to enter the default judgment against it. In the alternative, even if jurisdiction was present, Peoples argues under the facts sketched above, the district court abused its discretion by refusing to vacate the default judgment.

I. Applicability of Rule 236. In general, a default judgment may be entered only against persons who have been both properly named as parties to the suit and properly served. Norton v. Adair County, 441 N.W.2d 347, 359 (Iowa 1989). A default judgment may be held void for lack of jurisdiction. See Dimmitt v. Campbell, 260 Iowa 884, 888, 151 N.W.2d 562, 565 (1967).

A void judgment may be attacked at any time. Rosenberg v. Jackson, 247 N.W.2d 216, 218 (Iowa 1976). The conventional method of attacking a judgment claimed to be void is by a suit in equity. In re Marriage of Thrailkill, 438 N.W.2d 845, 848 (Iowa App. 1989). However, a judgment

may be attacked by motion. Id. Motions to vacate for lack of jurisdiction are heard de novo. Miller v. Farmers Coop. Co., 176 N.W.2d 832, 835 (Iowa 1970).

Citing Life v. Best Refrigerated Express, 443 N.W.2d 334 (Iowa App. 1989), plaintiff claims a lack of jurisdiction is not a ground for setting aside a default judgment. That opinion specifically declined to decide whether jurisdictional defects could be raised under rule 236. Life, 443 N.W.2d at 337. The court did not have to reach that decision because apparently the defendant had appealed both the trial court's overruling of its special appearance and its motion to set aside the default judgment.

We reject plaintiff's argument. Our supreme court has recognized a lack of jurisdiction may be the basis for vacating a judgment under rules 252 and 253, Miller, 176 N.W.2d at 834, and those rules, like rule 236, do not specify jurisdictional defects as a ground for vacating a judgment. Furthermore, our supreme court has implicitly suggested a lack of jurisdiction may be a basis for bringing an action to set aside a default judgment. See In re Marriage of Ivins, 308 N.W.2d 75, 77 (Iowa 1981); see also Rosenberg, 247 N.W.2d 217 (supreme court ruled on a case involving a rule 236 motion to set aside a default judgment because of a failure in serving original notice, and it did not indicate jurisdictional defects could not be raised under rule 236).

II. Jurisdiction. Since motions to vacate or to set aside for lack of jurisdiction are heard de novo, Thrailkill, 438 N.W.2d at 848, we must ascertain the facts, and we are to do so from the records in the case which were before the trial court and are now before us. Id. However, the findings of the trial court are entitled to weight. Id.

The record reveals Deputy George Rasmussen of the Rock Island County Sheriff's office served original notice of plaintiff's suit on Myvonne Elsey at the People's Drug Store in Milan, Illinois, on June 17, 1986. Deputy Rasmussen testified by affidavit that he was informed Ms. Elsey was the manager of the store when he served the original notice. Ms. Elsey was the manager of the Milan store. She testified by affidavit that she forwarded the original notice to Peoples' district manager Larry Webb. Contrary to Peoples' assertions, the affidavit of plaintiff's counsel and his phone records indicate Peoples was aware of the existence of the suit prior to entry of the default judgment.

Peoples contends Ms. Elsey was not a proper party for service of process. The rules of civil procedure indicate personal service may be made as follows:

Upon a partnership, or an association suable under a common name, or a domestic or foreign corporation by serving any present or acting or last known officer thereof, or any general or managing agent, or any agent or person now authorized by appointment or by law to receive service of original notice, or on the general partner of a partnership.

Iowa R. Civ. P. 56.1(f) (emphasis added). Peoples claims Elsey was not a "managing agent" within the meaning of Iowa R. Civ. P. 56.1(f).

The term "managing agent" was the subject of recent interpretation by this court. In Life v. Best Refrigerated Express, 443 N.W.2d 334, 337 (Iowa App. 1989), we concluded an office manager of a corporation was a proper party for service of process. In Life, we cited 19 Am. Jur. 2d Corporations § 2198 (1986), and stated a "managing agent" is one whose contract of employment demands the exercise of judgment and discretion in the business affairs of his or her principal in the locality where he or she is stationed. Life, 443 N.W.2d at 337. One need not have charge of all the business and operations of a corporation to be a "managing agent." Id.

A person is a "managing agent" if his or her position is one of sufficient character and rank to make it reasonably certain the corporation will be apprised of the service made through the agent. Id. Some jurisdictions have held local managers or other representatives in charge of branch plants, offices, or stores to be managing agents. 19 Am. Jur. 2d § 2199 (1986).

The term "managing agent" is included in the federal rule of civil procedure governing the service of process.

The general rule is that the person served must have some measure of discretion in operating some phase of the defendant's business or in the management of a given office. He must have at least such status that common sense would trust him to see that the summons gets promptly into the hands of the right corporate people.

Fed. R. Civ. P. 4 commentary C4-23 (1989).

We find Ms. Elsey, as the manager for Peoples' Milan retail facility was a "managing agent" within the scope of Iowa Rule of Civil Procedure 56.1(f). Service was properly made upon Peoples by leaving the original notice with Ms. Elsey.

Peoples' major objection to the services of process appears to be the fact that the service was made at a different store in a different state and not upon the store where the cause of action allegedly arose. A corporation is an artificial entity, Wyatt v. Crimmins, 277 N.W.2d 615, 616 (Iowa 1979), which cannot be personally served with process. It can only be served through an officer or agent or by one authorized by appointment or law to receive the service. Iowa R. Civ. P. 56.1(f); Iowa Code § 617.3; 19 Am. Jur. 2d Corporations § 2194 (1986).

People's Drug Store, Inc. was the defendant in this action. As a corporate entity, service could be made upon one of its managing agents. The fact that service was made on a managing agent outside of the state does not defeat the court's jurisdiction. Iowa Rule of Civil Procedure 56.2 provides service may be made on any corporation as provided in rule 56.1 "within or without the State." See also Life, 443 N.W.2d at 336 ("Thus when service is made pursuant to rule 56.2 and in accordance with rule 56.1, Iowa courts may have jurisdiction.").

The rules clearly recognize the existence of out-of-state service. Such service is limited, however, by the prerequisites of rule 56.1. Because service must be made on a party who is reasonably certain to apprise the corporate entity of service of process, i.e., an officer or a general or managing agent, the defendant is not prejudiced by out-of-state service. Regardless of the location of a corporation's managing agent, it is reasonably certain that once served with notice of the suit, the agent will convey it to the appropriate corporate authorities.

The record supports the trial court's finding that Peoples was served with notice of process and its failure to appear and defend was a result of its own negligence. No basis exists for setting aside the default judgment.

AFFIRMED.