

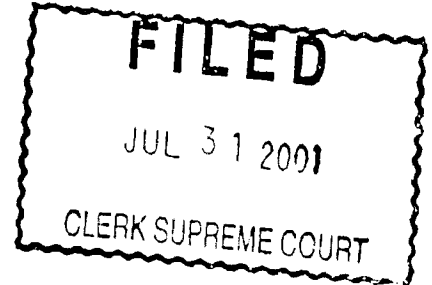
IN THE COURT OF APPEALS OF IOWA

No. 1-298 / 00-1455
Filed July 31, 2001

MINTER WEISMAN, QUAD CITIES
DIVISION,
Plaintiff-Appellee,

vs.

TECKENBURG, INC., d/b/a
PLEASIN' PEOPLE, also d/b/a
PETRO-N-PROVISIONS and
JERRY TECKENBURG, Individually,
Defendants-Appellants.



Appeal from the Iowa District Court for Scott County, John A. Nahra,
Judge.

Defendant appeals from the district court ruling denying his motion to set
aside a default judgment and quash garnishment. **AFFIRMED.**

Timothy D. Ament of Gartelos, Wagner & Ament, Waterloo, until
withdrawal, then Jerry Teckenburg, Cedar Rapids, pro se.

John T. Bribriesco of Bribriesco Law Offices, Davenport, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

HECHT, J.

Defendants appeal from the district court ruling denying their motion to set aside a default judgment and quash garnishment. They contend the court abused its discretion by failing to find it satisfied the requirements for setting aside the default judgment under Iowa Rule of Civil Procedure 236. We affirm.

I. Factual Background and Proceedings. In an ongoing business relationship, Teckenburg, Inc.,¹ a corporation operating several convenience stores in central Iowa, received merchandise on credit from Minter Weisman, a wholesale supplier of candy, tobacco, and sundry items. During 1999, Teckenburg accumulated a debt of \$89,700 to Minter Weisman who made demand for immediate payment on December 22. On January 20, 2000, Minter Weisman filed a petition at law seeking judgment against defendants for the full amount of the debt. Service of process was achieved on January 25, 2000.

On February 2, Teckenburg's attorney, Timothy Ament, faxed Minter Weisman a letter stating Teckenburg's belief the account was paid in full, a dismissal would follow shortly, and no answer would be filed unless an outstanding balance did in fact remain. On the same day, Teckenburg submitted a partial payment to Minter Weisman for approximately \$9600. The check bounced. Attorney Ament sent Teckenburg a letter on February 17, warning his client because no answer to plaintiff's petition had been filed, it was vulnerable to default judgment. On March 21, 2000, Teckenburg made another payment to

¹ We will refer to the defendants collectively as Teckenburg.

Minter Weisman, leaving an unpaid balance of more than \$21,000 on the account.

Teckenburg was served with Minter Weisman's notice of intent to file application for default on March 25, 2000. The notice informed Teckenburg unless it acted within ten days, default would be entered. On May 2, attorney Ament learned the action had not been dismissed. He again notified Teckenburg by letter of the threat of default judgment. On June 14, the district court granted Minter Weisman's request for default judgment against defendants and its funds were garnished to satisfy the \$21,711 judgment and costs. Teckenburg received court notice of the garnishment on July 24, and moved to quash the garnishment and set aside the default on July 31. The district court denied this motion and Teckenburg now appeals.

II. Standard of Review. We vest district courts with broad discretion in ruling on a motion to set aside a default, and our review is for abuse of that discretion. *Central Nat'l Ins. Co. of Omaha v. Insurance Co. of N. Am.*, 513 N.W.2d 750, 753 (Iowa 1994). We find such an abuse only when there is lack of substantial evidence to support the district court's ruling. *Id.* We are bound by the district court's findings of fact if supported by substantial evidence, and we view the evidence in the light most favorable to the district court's ruling. *Id.* A determination of whether a movant has established good cause is not a finding of fact; rather, it is a legal conclusion, which is not binding upon us. *Brandenburg v. Feterl Mfg. Co.*, 603 N.W.2d 580, 584 (Iowa 1999).

III. Ruling on Motion to Set Aside Default. Iowa Rule of Civil

Procedure 236 provides in relevant part:

On motion and for good cause shown, . . . the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty.

Iowa R. Civ. P. 236. As a threshold principle, we note the purpose of rule 236 is to allow determination of controversies on their merits rather than on the basis of nonprejudicial inadvertence or mistake. *Whitehorn v. Lovik*, 398 N.W.2d 851, 854 (Iowa 1987). The burden is on the movant to plead and prove good cause on one of the permitted grounds in order to have a default judgment set aside. *Dealers Warehouse Co. v. Wahl and Assoc.*, 216 N.W.2d 391, 394 (Iowa 1974).

Teckenburg contends its failure to defend against the lawsuit was “excusable neglect” under rule 236. Our supreme court has articulated a four-part test to determine when “excusable neglect” constitutes good cause to set aside a default judgment:

First, did the defaulting party actually intend to defend? Whether the party moved promptly to set aside the default is significant on this point. Second, does the defaulting party assert a claim or defense in good faith? Third, did the defaulting party willfully ignore or defy the rules of procedure or was the default simply the result of a mistake? Last, whether relief is warranted should not depend on who made the mistake.

Central Nat'l Ins. Co. of Omaha, 513 N.W.2d at 756. We employ a liberal approach in applying these factors to advance the goal of resolving controversies on the merits. *Millington v. Kuba*, 532 N.W.2d 787, 791 (Iowa 1995).

A. *Intent to Defend.* Teckenburg relies upon its attorney's letter of February 2, to counsel for Minter Weisman as evidence of its intent to defend this

suit. In that letter, Teckenburg's attorney relayed defendant's assurances the account was fully paid, conveyed his understanding a dismissal was imminent, and disclosed he would file an answer only if the matter was not in fact resolved. Teckenburg, however, knew the claim would not be soon resolved: the payment that was to result in the case's dismissal was in fact a bad check to Minter Weisman for less than twenty percent of the account balance.

Good cause for setting aside a default judgment has never included a party's intentional conduct to mislead its own attorney and opposing counsel. As our supreme court has explained, "good cause" requires a "sound, effective, *truthful* reason" *Dealers Warehouse Co.*, 216 N.W.2d at 394 (emphasis added). A defendant cannot completely abdicate responsibility for defense to lawyers with whom he fails or refuses to cooperate. *Id.* at 395. Moreover, Teckenburg's reliance on its attorney's conditional vow to file an answer is also misplaced. As we stated in *Langner v. Mull*, 453 N.W.2d 644, 648 (Iowa Ct. App. 1990), "[a] mere assertion of intent to defend without evidence of actual efforts in support thereof will defeat efforts to set aside a default judgment." Despite the opportunity and duty to do so, Teckenburg failed to substantively manifest his intent to defend the lawsuit in the six months between Minter Weisman's January 20, petition and Teckenburg's July 31, appeal of the default. Defendant ignored multiple communications regarding the claim and waited until after the garnishment was executed before attempting to excuse its untimeliness. As the fact finder correctly concluded, Teckenburg's intent was not to defend, but to deceive and delay.

B. Good Faith Defense. The second factor of the “excusable neglect” test asks whether the defendant in good faith asserted a defense to plaintiff’s action. See *Flexsteel Indus., Inc. v. Morbern Indus. Ltd.*, 239 N.W.2d 593, 599 (Iowa 1976). The court must ascertain from the evidence whether facts exist which, if established in a trial on the merits, would prima facie constitute a defense. *Id.* A minimal showing of fact is sufficient to demonstrate prima facie a meritorious defense under rule 236. *Id.* at 601 (holding a general denial in an answer sufficient as a prima facie showing of a meritorious defense). Teckenburg’s unresponsiveness to the claim and prolonged failure to explain its delinquency justify the conclusion it did not assert a meritorious defense.

Minter Weisman invited Teckenburg to contest any disputed invoices in its demand letter of December 22, but no dispute was communicated. As we have noted above, Teckenburg failed to assert a defense in a timely-filed answer to plaintiff’s petition. Instead, in an answer and motion to set aside default filed more than six months after service of process, the debtor alleged the existence of documentary evidence proving it owed plaintiff no balance whatsoever. Given the timing of this bald assertion—raised for the first time a week after defendant’s formal notice of garnishment—it was not an abuse of discretion for the district court to find the claim disingenuous and lacking in merit.

C. Willfully Ignoring or Defying Procedural Rules. To uphold the denial of a motion to set aside a default, there must be substantial evidence the defaulting party willfully ignored or defied the rules of procedure. *Brandenburg*, 603 N.W.2d at 585. Our supreme court has construed “willfully” and “defying” to signal

conduct that is not merely negligent or careless, but evincing the defaulting party's deliberate intention to ignore, and resist any adherence to, the rules of procedure. *Id.* Substantial evidence the default occurred due to mistake would be inconsistent with the supreme court's interpretation of "willfully" and "defying." *Id.*

Teckenburg suggests (1) its failure to file a timely appearance or answer resulted from the mistaken belief its debt to Minter Weisman was satisfied, and (2) it did not receive plaintiff's March 25, notice of intent to file for default, for if it had it "surely would have responded," particularly given the numerous warnings from its own counsel. Like the district court, we are unpersuaded by this reasoning. Noticeably absent in the record is documentation upon which a good faith assertion could be made that the account was paid in full. On the contrary, substantial evidence indicates Teckenburg knew of, but chose to ignore, the ongoing claim. An affidavit by counsel for Minter Weisman details a series of letters, messages, unreturned calls, and conversations with Teckenburg's office manager regarding the outstanding balance and related proceedings. Returns of service dated February 11, and March 25, confirm defendant's notice of Minter Weisman's original petition and intent to file for default, respectively. Partial payments by Teckenburg evidence its awareness of the unpaid balance. Repeated warnings from its own counsel show defendant's knowledge of potential default litigation. Attorney Ament's notes suggest Teckenburg recognized the duty to file an answer and affirmatively instructed counsel not to

do so. Compelling evidence supports the district court's conclusion defendant willfully ignored or defied applicable procedural rules.

D. Source of Mistake. The fourth factor of the "excusable neglect" test seeks to eliminate the courts' tendency to afford greater liberality in granting relief when the mistake was that of a party's attorney rather than of the litigant alone. *Brandenburg*, 603 N.W.2d at 585. The distinction is irrelevant here, because neither Teckenburg nor its counsel made a "mistake" as that term has been defined for purposes of rule 236. See generally *id.* (defining "mistake" as "an error in action, calculation, opinion, or judgment caused by poor reasoning, carelessness, insufficient knowledge"). Attorney Ament was aware and repeatedly warned Teckenburg of the likelihood of default judgment. Further, his notes reflect defendant made a conscious decision not to file legal pleadings in this matter. In short, the record suggests defendant was more interested in ignoring the case than defending it. *Dealers Warehouse Co.*, 216 N.W.2d at 395.

The district court's findings demonstrate Teckenburg's failure to show good cause under the *Central Insurance* factors for "excusable neglect." We find no abuse of discretion and therefore affirm the court's ruling refusing to set aside the default entry against defendants under rule 236.

AFFIRMED.

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