IN THE COURT OF APPEALS OF IOWA

No. 0-285 / 09-1266
Filed May 12, 2010

PLANNING DESIGN BUILD, INC.
n/k/a ICONICA,
Plaintiff-Appellee,

vs.

RIVER BLUFF RESORT, L.L.C.,
RBR DESIGN/BUILD, INC., FREEMAN
MICHAELS, ERIC CLAY, and JAMES DAUGHTRY,
Defendants-Appellants.

Appeal from the Iowa District Court for Clayton County, John Bauercamper, Judge.

Defendants appeal from the entry of a default judgment and assessment of costs and attorney fees. **REVERSED AND REMANDED.**

William H. Roemerman of Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, for appellants.

Davin C. Curtiss and Christopher C. Fry of O'Connor & Thomas, P.C., Dubuque, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

DOYLE, J.

Defendants challenge the district court's entry of a default judgment and assessment of costs and attorney fees as a sanction for their failure to produce witnesses for depositions. We reverse and remand.

***I. Background Facts and Proceedings*.**

In January 2007, Planning Design Build, Inc., now known as Iconica, filed a petition in district court alleging a cause of action against defendants for defendants' default on a promissory note. In January 2008, the petition was amended to add additional causes of action against defendants for breach of contract, quantum meruit, and unjust enrichment. Iconica's claims arose out of its provision of planning, design, and consulting services in connection with the planned Highland Bluffs Golf & Water Play Resort near McGregor, Iowa. In May 2008, Iconica served interrogatories and requests for production on all defendants. Iconica's counsel made written and telephonic requests for defendants' responses, but had not received any as of the spring of 2009.

After having been continued twice, the non-jury trial date was set for a third time for April 29, 2009. In early March 2009, Iconica's counsel contacted defendants' counsel by letter and by phone requesting available deposition dates for defendants. On March 16, 2009, Iconica's counsel sent a letter to defendants' counsel requesting to take defendants' depositions on April 3. Enclosed with the letter were three notices of deposition duces tecum directed to each of the three individual defendants. The depositions were noticed for April 3, 2009. On April 2, defendants' counsel informed Iconica's counsel that defendants would not appear at the depositions noticed for April 3. No

explanation was given. On April 13, Iconica filed a motion to compel discovery seeking an order compelling defendants to answer interrogatories and respond to requests for production. Iconica also filed a motion for default judgment requesting entry of default judgment as a sanction for the failure of defendants to attend the depositions noticed for April 3.

On April 15, Iconica filed an amendment to its motion for default judgment requesting alternative sanctions in the event default judgment was not granted. It also served a second set of deposition notices on defendants' counsel noticing depositions of the individual defendants for April 24. Defendants filed a perfunctory resistance and asked that the matter be set for hearing.

At the April 20 pretrial conference, the parties were informed that a judge was not allowed to travel to Clayton County for the April 29 trial due to judicial budget cuts,[1] but that the trial could be held in Allamakee County. Defendants, all residents from outside the state of Iowa, refused to agree to a change of venue. The April 29 trial was therefore cancelled and another pretrial conference was set for the purpose of setting a new trial date.

On April 23, defendants' counsel informed Iconica's counsel that the individual defendants would not appear at the depositions noticed for April 24. Again, no reason was given. Iconica responded with a second amendment to its motion for default judgment to apprise the court of defendants' failure to appear

[1] In its April 21 order, the district court stated:

> By order of the Iowa Supreme Court, this case is to be tried in Allamakee County because the presiding judge assigned to Clayton County is domiciled in Allamakee County with his court reporter and current budget restrictions on judicial travel prevent travel for this trial. The defendants object to trial of this case outside Clayton County. Pursuant to Iowa law and the Supreme Court Order implementing the travel restrictions, the defendants must agree to an alternative place of trial.

at the depositions. An unreported telephone hearing on the motion for default judgment was held April 29. The district court entered its order for judgment the same day. It found

> that the defendants twice failed to appear for depositions upon due notice from the plaintiff and that no good cause for failure to appear for depositions has been shown. [Iowa] Rule [of Civil Procedure] 1.517(4) [(2007)] requires attendance at depositions. No motion to compel attendance at a deposition is required. Sanctions are warranted. This case has been on file since January 23, 2007 and has not progressed to trial in the manner contemplated by the Iowa Supreme Court time standards for case processing.

The court granted the motion for default judgment and ordered the clerk of court to

> enter judgment in favor of the plaintiff and against all defendants jointly and severally, in the amount of $360,900.00, plus interest as provided by the promissory note, attorney fees in an amount to be determined on later motion, and court costs as taxed by the clerk.

Defendants filed a motion to amend and modify ruling. Iconica resisted and also filed an application for attorney fees and costs. The court denied defendants' motion to amend and modify ruling, and defendants filed their notice of appeal on August 19, 2009. On September 8, the district court held a hearing on Iconica's application for attorney fees and costs and ordered that the costs taxed to defendants "shall include attorney fees and expenses incurred by [Iconica] in the amount of $30,724.00, plus court costs taxed by the clerk in the amount of $254.40." Defendants then filed their second notice of appeal.

***II. Discussion*.**

Iowa Rule of Civil Procedure 1.517(4) provides, in relevant parts:

> If a party . . . fails:
>
> a. To appear before the officer who is to take the person's deposition, after being served with a proper notice; . . .

> . . . .
> c. . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under rule 1.517(2)(*b*)(1), (2), (3), and (5).

Among the sanctions available under rule 1.517(2)(*b*) is entry of default judgment against the disobedient party. Iowa R. Civ. P. 1.517(2)(*b*)(3).

"A district court's order imposing discovery sanctions will not be disturbed unless the court abused its discretion. An abuse of discretion consists of a ruling which rests upon clearly untenable or unreasonable grounds." *In re Marriage of Williams*, 595 N.W.2d 126, 129 (Iowa 1999) (internal citation omitted). Because the drastic sanctions of dismissal and default judgment preclude a trial on the merits, the range of the district court's discretion to impose such sanctions narrows. *See Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). "In order to justify the sanction of default, a party's noncompliance with a court's discovery orders must be the result of willfulness, fault, or bad faith." *Williams,* 595 N.W.2d at 129; *see also Suckow v. Boone State Bank & Trust Co.*, 314 N.W.2d 421, 425 (Iowa 1982) ("In order to justify dismissal of the action, a party's non-compliance must be due to willfulness, fault or bad faith."). The rationale for this special "rule reflects the 'proper balance between the conflicting policies of the need to prevent delays and the sound public policy of deciding cases on their merits.'" *Kendall/Hunt*, 424 N.W.2d at 240 (quoting *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977)). This balance should render the sanction of default judgment a "rare judicial act." *See id*. A sanction that deprives litigants of their day in court carries due process implications. *See Societe Internationale Pour Participations Industrielles et Commerciales*, *S.A. v.*

Rogers, 357 U.S. 197, 209, 78 S. Ct. 1087, 1094, 2 L. Ed. 2d 1255, 1265 (1958); *Marovec v. PMX Indus.*, 693 N.W.2d 779, 787-88 (Iowa 2005) (Cady, J., dissenting). We believe judgment by default is a drastic discovery sanction and should be applied only in extreme circumstances.

With these principles in mind, we turn to the record as it existed at the time the default was entered. We note first that Iowa Rule of Civil Procedure 1.517(5) provides:

> No motion relating to *depositions* or discovery shall be filed with the clerk or considered by the court unless the motion alleges that counsel for the moving party has made a good faith but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court.

(Emphasis added.) Motions filed under rule 1.517(4) are not excepted from the requirements of rule 1.517(5). Iconica's motion to compel makes no allegation its counsel made a good faith but unsuccessful effort to resolve the deposition issue with opposing counsel.[2] Neither does Iconica's motion for default judgment filed contemporaneously with the motion to compel. Without such an allegation, Iconica's motion for default, founded upon defendants' failure to appear for their noticed depositions, should not have been considered by the district court.

Before entering a default judgment as a discovery sanction, a court must find the noncompliance was the result of "willfulness, fault, or bad faith." *See Suckow*, 314 N.W.2d at 425; *Williams*, 595 N.W.2d at 129. No such finding was made by the district court.

Thus, entry of default judgment as a discovery sanction in this case is flawed in two ways: (1) no mandatory allegation of a good faith effort to resolve

[2] This motion was not ruled on by the district court.

the issue was made by Iconica and (2) no finding that defendants' noncompliance was the result of willfulness fault or bad faith was made by the district court. We therefore conclude the district court abused its discretion in granting default judgment in Iconica's favor. As a result, the district court's September 15, 2009 order taxing costs is similarly flawed. Accordingly, we reverse the district court's order for judgment filed April 29, 2009, and its order taxing costs filed September 15, 2009, and remand for further proceedings.

In reaching our decision, we are not unmindful of the consternation and frustration caused by defendants' recalcitrant, dilatory, and obstructive conduct with regard to Iconica's discovery requests. Defendants conceded before the district court "that on the state of the current record the Court would be justified in entering an order compelling discovery and further ordering Defendants to pay Plaintiff's costs associated with the motion to compel." Upon proper finding on remand, the whole plethora of sanctions under rule 1.517 will be available to the district court.

REVERSED AND REMANDED.

Vaitheswaran, P.J., concurs; Mahan, S.J., concurs specially.

MAHAN, J. (concurring specially)

I agree with the majority that the defendants engaged in "recalcitrant, dilatory, and obstructive conduct." I also agree with the decision reached by the majority in this case. Therefore, despite the frustrating actions of the defendants, I reluctantly concur in the final resolution of this appeal.