

IN THE COURT OF APPEALS OF IOWA

No. 0-289 / 09-1427
Filed May 12, 2010

MS FINANCIAL, INC.,
Plaintiff-Appellant,

vs.

MARSHA K. FOSS,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Mark J. Smith,
Judge.

Appeal from the district court judgment on a credit card debt. **AFFIRMED.**

Curtis McCormick of Neiman, Stone & McCormick, P.C., Des Moines, for
appellant.

Marsha Foss, Davenport, pro se.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

SACKETT, C.J.

Plaintiff appeals, seeking a reversal of a district court judgment awarding it \$200 plus costs from defendant. We affirm.

SCOPE OF REVIEW. Our review is for errors at law. Iowa R. App. P. 6.907; *Van Oort Constr. Co. v. Nuckoll's Concrete Serv., Inc.*, 599 N.W.2d 684, 689 (Iowa 1999). The district court's findings have the effect of a special verdict and are binding on us if supported by substantial evidence. *Data Documents, Inc. v. Pottawattamie County*, 604 N.W.2d 611, 615 (Iowa 2000). We view the evidence in the light most favorable to upholding the district court's judgment. *Id.* We are not bound by the district court's conclusions of law. *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 617 (Iowa 1999).

BACKGROUND AND PROCEEDINGS. Plaintiff MS Financial, Inc. filed a petition on October 16, 2008, seeking judgment for \$6,113.14 plus interest of 11.990% from October 29, 2004, on the basis that plaintiff had purchased and/or received from plaintiff goods, wares, services, and/or cash advances on account.¹ Defendant filed a motion denying the claim.

On September 29, 2008, the plaintiff made a motion for summary judgment and on May 28, 2009, the district court overruled it.² The matter came on before the district court on July 15, 2009. Plaintiff appeared through counsel and defendant appeared pro se. The plaintiff orally renewed its motion for

¹ There were attachments to the petition that are not included in the appendix. The statement of account was not itemized but provided that Foss owed MS Financial, Inc. an assignee of Provident Bank the sum of \$6,133.14 but indicated it did not reflect interest pursuant to the agreement.

² Neither the motion nor the ruling was included in the appendix.

summary judgment and the district court denied it.³ Following a transcribed hearing, none of which is included in the appendix, the district court entered judgment against defendant for \$200 plus interest at 2.5% from the date of the filing of the petition. In entering the judgment the district court found:

After hearing testimony from the Defendant, the Court finds that she had a credit card with a \$200 limit from Providian Financial which was sold to Washington Mutual Companies. The Plaintiff received the credit card balance through various assignments since that time. Although the defendant was sent a request for admissions, she contacted the attorney for plaintiff and indicated she had lost same. She requested an additional copy be sent to her. An additional copy of the request for admissions was not received by the defendant until July 12, 2009. Therefore the court declines to enter judgment for the full amount against the defendant based on her failure to answer the requests for admissions. Based on the testimony of the defendant, the court finds that judgment should enter against the defendant in the amount of \$200 plus interest at the rate of 2.5 percent from the date of the filing of the petition and the costs of this matter.

The order that appears in the appendix was dated July 15, 2009. The next document we find in the appendix is a September 17, 2009 notice of appeal from a final order entered on August 18, 2009.

On going to the district court file, we learned plaintiff had filed a motion to reconsider on July 27, 2009. Plaintiff requested in the motion that the district court (1) recognize that the rules of civil procedure apply equally to pro se litigants, (2) recognize the defendant received the admissions, (3) recognize the admissions from defendant's lack of responses, and (4) award plaintiff the sum sought in its petition admittedly owed by the defendant. On August 18, 2009, the district court denied the motion and in denying it said:

³ The portions of the transcript showing these facts were not included in the appendix.

In reviewing the Court's entry of judgment, the Court finds it neglected to indicate in its findings that the testimony of the Defendant was uncontroverted that she contacted the Plaintiff's attorney's office, who indicated they would send her another copy of the request for admissions. No request was forthcoming. The 30 days had expired at the time of the Plaintiff's motion for summary judgment when they attached the unanswered request for admissions to their motion. Attaching the request for admissions to the motion is not in compliance with Plaintiff's request she be sent another copy of the request for admissions so that she may answer them within the 30-day period. There was no testimony that would indicate the law firm did not promise to resend the request for admissions or that the Defendant owed the Plaintiff more than the \$200.00 Defendant testified was the limit on her credit card. The Court did not consider the unanswered request for admissions because of the testimony of the Defendant and the Plaintiff had acquiesced and agreed to resend this request. Due to the fact the court did not consider the unanswered request for admissions as uncontroverted proof, the burden remained on the Plaintiff to prove the amount due and owing under the credit card agreement. The burden is not on the Defendant to prove damages on behalf of the Plaintiff. The Plaintiff's motion should be and is hereby denied.

A notice of appeal from the August 18, 2009 ruling and all adverse rulings and orders inhering therein was served on Kathy Bryant, court reporter, and on defendant, and filed with the clerk of the Scott County district court on September 21, 2009.

ISSUES ON APPEAL. Plaintiff contends that the district court erred (1) in not granting its motion for summary judgment renewed before trial, (2) in not considering the undenied request for admissions or alternatively abused its discretion in refusing to consider them, (3) in awarding it only \$200 in light of the undenied request for admissions.

Plaintiff has done little to help us with our review and the defendant has not responded. The appendix included a petition, requests for admissions that refer to previous originals or copies attached to plaintiff's petition, which invoices

and statement of account are not included in the appendix, a copy of the judgment entry of July 15, 2009, and a notice of appeal dated September 17, 2009.

Plaintiff makes reference to, but has not included in the appendix, defendant's answer, plaintiff's motion for summary judgment, the court docket,⁴ the witness and exhibit list, plaintiff's renewed motion for summary judgment, certain testimony in the transcript,⁵ a motion to reconsider, and the August order from which appeal is taken.⁶ While references are made in argument to testimony at trial this testimony is not included in the transcript.⁷

The statement of the case indicates plaintiff filed a motion to reconsider on July 27, 2009, which it contends was ruled on August 18, 2009, and appeal was filed September 21, 2009.

Despite plaintiff's failure to follow a number of rules of appellate procedure we assume it is challenging the July 15, 2009 entry of judgment and the August 18, 2009 ruling denying its post trial motion; we considered the issues it raises on appeal.

The three issues raised all are dependent on the plaintiff showing that the district court erred in not determining that the unanswered requests for admission proved that defendant owed the sum requested. The district court did not consider the unanswered request for admissions, finding the defendant and the plaintiff had acquiesced and agreed that plaintiff would send the request for

⁴ See Iowa R. App. P. 6.905(2)(b)(2).

⁵ See *id.* Iowa R. App. P. 6.905(2)(b)(2).

⁶ Iowa R. App. P. 6.905(2)(b)(7).

⁷ Iowa R. App. P. 6.905(2)(b)(3).

admission to her again, but it was not done until just before the hearing. Plaintiff does not directly contest this finding or its acquiescence in the defendant's request to have the requests for admission mailed to her again. Rather plaintiff argues that the court should apply the same rules of civil procedure to all litigants including the pro se defendant. We agree with plaintiff that a pro se litigant is bound by the same rules of civil and appellate procedure as one represented by an attorney. See *Kubik v. Burk*, 540 N.W.2d 60, 64 (Iowa 1995). However, we do not see defendant's failure to comply with a rule of civil procedure as the issue here. The district court basically found that plaintiff agreed to give defendant an additional opportunity to receive and answer the requests, yet failed to do so until just before the hearing. Based on that finding, the court did not find defendant's failure to answer the requests to prove the case. We agree with the district court on this issue and deny all of plaintiff's requests for relief as they all fail absent a finding that the admissions proved the plaintiff's case.

AFFIRMED.