IN THE COURT OF APPEALS OF IOWA

No. 0-639 / 10-0124
Filed November 24, 2010

PRIMEBANK,
Plaintiff-Appellant,

vs.

DOUGLAS LEE SMITH a/k/a DOUGLAS L. SMITH, DEANNE RENE SMITH a/k/a DEANNE R. SMITH, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AMERICA'S WHOLESALE LENDER, and UNITED STATES OF AMERICA,
Defendants-Appellees.

Appeal from the Iowa District Court for Plymouth County, Steven J. Andreasen, Judge.

The plaintiff appeals from the district court's ruling setting aside a default entered against the defendants. **AFFIRMED.**

Richard H. Moeller of Berenstein, Moore, Heffernan, Moeller & Johnson, L.L.P., Sioux City, for appellant.

Benjamin Hopkins of Petosa, Petosa & Boeker, L.L.P., Clive, for appellees.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Primebank appeals from the district court order setting aside a default entered against Mortgage Electronic Registration Systems, Inc. and America's Wholesale Lender (collectively referred to as MERS).[1] Because we cannot say the district court abused its discretion in concluding MERS met the burden of establishing good cause based on excusable neglect under Iowa Rule of Civil Procedure 1.977 (2009), we affirm.

***I. Procedural Background*.**

On May 1, 2009, Primebank[2] filed a petition to foreclose a mortgage, naming Douglas and DeAnne[3] Smith as defendants, as well as MERS and the United States. MERS was served with original notice and the foreclosure petition, but did not file an answer.[4] *See* Iowa Rs. Civ. P. 1.302, 1.303. On June 2, 2009, Primebank caused MERS to be served with notice of intent to file written application for default. *See* Iowa R. Civ. P. 1.972(2). With no responsive filing by MERS, Primebank moved on June 16, 2009, for the entry of default against MERS, and the district court granted a default judgment against MERS on July 6, 2009. On August 6, 2009, Primebank filed an application for entry of default and a motion for judgment of default against the Smiths, as well as a

[1] Mortgage Electronic Registration Systems, Inc. and America's Wholesale Lender were represented by the same attorney in the proceedings, filing a joint motion to set aside the default. In their appeal brief, Mortgage Electronic Registration Systems, Inc. and America's Wholesale Lender refer to themselves collectively as MERS. Therefore, we do so as well.

[2] Primebank's former name was Le Mars Bank and Trust Company.

[3] DeAnne's name appears in the record spelled both as DeAnn and DeAnne.

[4] America's Wholesale Lender was served with original notice and the foreclosure petition on May 8, 2009. Mortgage Electronic Registration Systems was served with original notice and the foreclosure petition on May 11, 2009.

motion for summary judgment. On August 19, 2009, MERS moved to set aside the default, asserting that their failure to file an answer was the result of "mistake, inadvertence, and excusable neglect" and that they had a meritorious defense—Primebank's note and mortgage had been satisfied from the proceeds of notes and mortgages between the Smiths and MERS. In support of its defense, a loan payoff statement from Primebank and a settlement statement were attached to the motion. Primebank resisted the motion to set aside default, asserting "[t]here is not good cause for setting aside the defaults" and the "[d]efendants do not have a defense that precludes or impairs the relief sought by plaintiff."

An unreported hearing was held on September 14, 2009. On December 22, 2009, the district court found that good cause existed for setting aside the default, reasoning as follows:

> In the within matter, the court finds and concludes that good cause exists for setting aside the default. The court agrees with Primebank that the judgment previously entered is a substantive judgment. The court would note, however, that a final foreclosure decree has not yet been entered in this matter. The court would further note that the motion to set aside default is limited to the issue of priority between Primebank and MERS and Wholesale. This issue of priority certainly affects the amount of recovery or proceeds that may be obtained by Primebank; however, it does not affect its claims against defendants Douglas Smith and Deanne Smith or against the property itself.
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> In reaching the within conclusion, the court has considered exhibits A and B attached to the motion to set aside default. The court does not at this time make any findings or conclusions as to the merits of the claim asserted by MERS and Wholesale. The Court concludes, however, that exhibits A and B establish that MERS and Wholesale asserting a defense in relation to the issue of priority in good faith. In reviewing the file, it also appears to the court that because MERS and Wholesale had not filed an answer, a copy of the July 6, 2009, default judgment was not mailed or otherwise provided to MERS and Wholesale by the court. Because no answer had been filed, the court was not required to provide

> such a copy to MERS and Wholesale. Considering the fact that a copy was not mailed to MERS and Wholesale, however, the court believes the filing of the motion to set aside default on August 19, 2009, suggests a diligent effort on behalf of MERS and America's Wholesale to challenge the default judgment. It also suggests that MERS and America's Wholesale did not *willfully* ignore or defy the rules of procedure. *See Brandenburg* [*v. Feterl Mfg. Co.*, 603 N.W.2d 580, 585-86 (1999)].
>
> Finally, the court believes setting aside the default judgment in this case best serves the purpose of determining the within litigation on its merits. Primebank will still have the ability to obtain a judgment in rem against the property and will be given an opportunity to litigate the issue of priority. If it is determined that the interests of Primebank are not superior to those of MERS and Wholesale, Primebank may obtain no proceeds from the sale of the foreclosed property. This would occur, however, only if it is determined that Primebank's mortgage was previously satisfied by the note and mortgage of MERS and Wholesale. It is therefore difficult for the court to determine any prejudice to Primebank. Again, a final foreclosure decree has still not been entered and, thus, there would be little, if any, additional delay in the sale of the foreclosed property as a result of the default judgment being set aside.

(Emphasis in original.) Therefore, the district court granted MERS's motion and set aside the default. Primebank filed an application for interlocutory appeal pursuant to Iowa Rule of Appellate Procedure 6.104, which our supreme court granted on February 18, 2010.[5]

[5] MERS asserts that Primebank may not appeal from an order setting aside a default and consequently, this court does not have jurisdiction and must dismiss the appeal. *See Kulhavy v. Rugger*, 241 Iowa 520, 521, 41 N.W.2d 664, 665 (Iowa 1950). MERS is correct that an order setting aside a default, except in cases of dissolution of marriage or annulment, is not a final order and may not be appealed. *See* Iowa R. App. P. 6.103(1). However, our appellate rules permit appeals of interlocutory decisions and rulings when our supreme court grants permission for such an appeal. Iowa R. App. P. 6.104; *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 627 (Iowa 2000). In the present case, our supreme court granted permission for Primebank's interlocutory appeal. MERS's reiteration of the argument in the appellate brief is improper. *See Wederath v. Brant*, 319 N.W.2d 306, 310 (Iowa 1982) ("We question that a party can proceed in such a manner, otherwise [supreme court] orders on motions would not have finality regarding the point ruled on.").

II. Standard of Review.

Fundamental principles guide our review of the district court's ruling. District courts are vested with broad discretion in ruling on a motion to set aside a default. *Central Nat'l Ins. Co. of Omaha v. Ins. Co. of N. Am.*, 513 N.W.2d 750, 753 (Iowa 1994). We reverse such a ruling only if we find this discretion abused, that is, when there is a lack of substantial evidence to support the district court's ruling. *Id*. "[W]e view the evidence in the light most favorable to the district court's ruling. We will uphold the district court's ruling even when the court has made no findings of fact . . . ." *Id*. (citations omitted). We are more reluctant to interfere with a court's grant of a motion to set aside a default than with its denial. *Brandenburg*, 603 N.W.2d at 584. We look with disfavor on a denial of such a motion, and all doubt should be resolved in favor of setting aside the default. *Id*.

III. Default.

The underlying purpose of Iowa Rule of Civil Procedure 1.977 is "to allow a determination of controversies on their merits rather than on the basis of nonprejudicial inadvertence or mistake." *Id*. (citation omitted). For good cause shown, a court may set aside a default judgment for "mistake, inadvertence, surprise, excusable neglect or unavoidable casualty." Iowa R. Civ. P. 1.977. "Good cause" "is something more than an excuse, a plea, apology, extenuation, or some justification, for the resulting effect. Good cause also requires at least a claimed defense asserted in good faith." *Central Nat'l Ins. Co. of Omaha*, 513 N.W.2d at 754. Good cause is established only if one of the grounds in the rule is proved. *Id*. A determination of whether good cause was established is not a

finding of fact; rather, it is a legal conclusion which is not binding upon us. *Brandenburg*, 603 N.W.2d at 584. MERS had the burden to plead and prove good cause under the rule. *Central Nat'l Ins. Co. of Omaha*, 513 N.W.2d at 754.

We turn to the record in the present case. In its motion to set aside the default, MERS raised three of the rule 1.977 grounds—mistake, inadvertence, and excusable neglect. In determining if there was "'excusable neglect' constituting good cause," a court must focus on four factors:

> 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.

Id. at 756.

Several of these factors were clearly present here. MERS made a prima facie showing of a meritorious defense to Primebank's petition, specifically that Primebank's note and mortgage were satisfied from proceeds of a note and mortgage between MERS and Wholesale and Doug and Deanne Smith, thus making the interest of MERS and Wholesale in the real property superior to any interest of Primebank. In examining exhibits A and B attached to the motion to set aside the default, the district court concluded (without deciding the merits) the exhibits established MERS was asserting a defense in good faith. The court also found MERS diligently sought to challenge the default, a finding that is not open to dispute.

Primebank's most serious argument pertains to the third factor. "As to the third factor, to uphold a denial of a motion to set aside a default and default judgment, there must be substantial evidence that *the defaulting party willfully ignored or defied* the rules of procedure." *Brandenburg*, 603 N.W.2d at 585 (emphasis in original); *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 166 (Iowa 2003). It naturally follows that if the defaulting party did not willfully ignore or defy the rules, the motion to set aside should be granted.

Although MERS's motion to set aside default provided two exhibits to establish a good-faith defense, MERS did not offer any written explanation for its failure to file a timely answer, other than asserting it was the result of "mistake, inadvertence, and excusable neglect." Unfortunately, the hearing on the motion was not reported, so we have no record of the statements and arguments made. It is undisputed that no additional documentary evidence was presented at the hearing. There is nothing in the record to show whether defense counsel made a professional statement at the hearing. Regardless, following the hearing, the district court made a finding under the third factor, namely that MERS "did not *willfully* ignore or defy the rules of procedure." (Emphasis in original.)

Under all the circumstances, given Iowa's preference for litigating disputes on the merits, given that we are reviewing a grant rather than a denial of a motion to set aside a default judgment, given the clear evidence that MERS met the other three factors enumerated in *Central National Insurance Co. of Omaha,* and given our inability without a transcript of the hearing to adequately review the remaining factor, we decline to overturn the district court's ruling. Certainly, there

is no substantial evidence in the record that MERS willfully ignored or defied the rules of procedure. Keeping in mind the precepts outlined above and the principles guiding our review, we cannot say the district court abused its discretion in concluding MERS met the burden of establishing good cause based on excusable neglect under rule 1.977. We therefore affirm the district court's ruling setting aside the default judgment.

AFFIRMED.

Mansfield, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully dissent. I would find that because MERS did not set forth a reason for defaulting, MERS failed to prove "good cause" as required under Iowa Rule of Civil Procedure 1.977.

A default may be set aside under Iowa Rule of Civil Procedure 1.977, for good cause. In order to prove good cause, the movant must establish that the default was the result of mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty, in addition to asserting a good faith defense. *Central Nat. Ins. Co. v. Ins. Co. of N. Am.*, 513 N.W.2d 750, 754 (Iowa 1994); *Sheeder v. Boyette*, 764 N.W.2d 778, 780 (Iowa Ct. App. 2009) (stating that the reason for the default must rise to one of the grounds enumerated in the rule). This requires that the movant set forth a reason for the default—an explanation for the default and facts to support that explanation. *See Sheeder*, 764 N.W.2d at 782 (discussing that the movant must put forth a credible reason for defaulting); *see also Central Nat. Ins. Co.*, 513 N.W.2d at 754 ("Good cause is a sound, effective, and truthful reason."); *Paige v. City of Chariton*, 252 N.W.2d 433, 437 (Iowa 1977) (discussing that the reason the movant failed to defend cannot be due to the movant's own carelessness, inattention, or negligence); *Williamson v. Casey*, 220 N.W.2d 638, 640 (Iowa 1974) (discussing that where the defendant's motion simply offered an explanation for failing to appear, the defendant did not prove good cause under rule 1.977).

In its motion to set aside the default, MERS raised three of the rule 1.977 grounds—mistake, inadvertence, and excusable neglect. However, the motion

did not contain any explanation for MERS's failure to appear, nor did it assert any facts to support "mistake, inadvertence, or excusable neglect." *See First Nat. Bank v. Claiser*, 308 N.W.2d 1, 2 (Iowa 1981) (indicating that a motion to set aside a default required an explanation and facts, and unless those facts were admitted, the movant was required to introduce evidence); *Williamson*, 220 N.W.2d at 640 (discussing that an explanation by itself was inadequate). The two attachments to the motion did not even attempt to explain MERS's failure to appear, but only addressed MERS's asserted defense. An unreported hearing was held, but MERS did not introduce any evidence in support of "mistake, inadvertence or excusable neglect." As a result, the record is devoid of a factual basis to support a good cause ground under rule 1.977. Nonetheless, the district court found MERS established good cause, but did so without reciting any supporting facts as to why MERS did not respond to Primebank's notices. The court jumped over the initial showing of "mistake, inadvertence or excusable neglect," which MERS had plead, and simply relied upon MERS's asserted defense. *Cf. Central Nat. Ins. Co.*, 513 N.W.2d at 754 (discussing that in addition to providing one of the grounds under the rule, good cause "also requires at least a claimed defense asserted in good faith").

The majority finds that the district court properly set aside the default judgment on the ground of "excusable neglect" with no facts in the record to support that finding. When determining whether a default judgment should be set aside on the ground of excusable neglect, the court should consider four factors:

> (1) whether the defaulting party actually intended to defend; (2) whether the defaulting party asserted a claim or defense in good faith; (3) whether the defaulting party willfully ignored or defied the rules of procedure or was the default simply the result of the mistake; and (4) whether relief is warranted should not depend on who made the mistake.

Sheeder, 764 N.W.2d at 781 (citing *Brandenburg v. Feterl Mfg. Co.*, 603 N.W.2d 580, 585 (Iowa 1999)). The cases examining these factors, all have done so where the movant set forth a reason for defaulting. *See, e.g.*, *Brandenburg*, 603 N.W.2d at 585 (movant set forth a reason for its default); *Central Nat. Ins. Co.*, 513 N.W.2d at 754 (same); *Sheeder*, 764 N.W.2d at 780 (same). Because MERS as the movant did not provide a reason for defaulting, I do not believe that factors one, three, and four can be evaluated adequately, if at all. For example, in considering the first factor, we are to examine whether the movant intended and took steps to defend, but for some stated reason failed to do so. *Brandenburg*, 603 N.W.2d at 585 (stating that the first factor carried forward requirements set forth in prior cases and citing *In re Marriage of Huston*, 263 N.W.2d 697, 698 (Iowa 1978) ("The movant must affirmatively show he intended to defend and took steps to do so, but because of some misunderstanding, accident, or excusable neglect failed to do so.")). Without a reason for defaulting made part of the record, we cannot fully consider this factor because we do not know what caused MERS to default. MERS simply does not demonstrate that it intended to defend and took steps to do so but for some "excusable neglect," failed in its efforts. Although MERS promptly sought to challenge the default, this alone is not sufficient to show that it took steps to defend prior to the entry of the default. Another example, in considering the fourth factor, we do not determine

whether relief is granted based upon who made the mistake. Without a reason for defaulting, this factor is useless because the party who caused the default is unknown, let alone if a mistake was even made.

The majority found the third factor was not as clear, but ultimately relied upon a lack of evidence in the record that was caused by MERS and a district court finding that was not supported by evidence in the record. In considering the third factor, we consider evidence that the movant willfully ignored or defied the rules of procedure as compared to evidence the default occurred as a result of a mistake. *Brandenburg*, 603 N.W.2d at 585. The evidence proved that MERS was served with original notice, as well as served with Primebank's notice of intent to take a default. MERS did not respond to either. Only after it learned of the entry of the default did MERS respond with its motion to set aside the default. Yet, while asserting "mistake, inadvertence and excusable neglect," it failed to provide the court with a reason for not responding to Primebank's notices. *See id.* (stating that the movant set forth undisputed facts that the default resulted from a mistake when determining the default was not willful). With no evidence in the record, we could just as easily assume that MERS willfully defied and ignored the rules of procedure, but then later changed its mind and decided to defend the action.

As noted, the majority focuses on the record's lack of evidence that MERS willfully ignored or defied the rules of procedure, but this lack of evidence was caused by MERS and only serves to undercut its position. MERS is the party who defaulted and possesses the information as to why it defaulted.

Consequently, MERS has the burden to prove a ground under the rule. By not requiring MERS to provide the reason for defaulting, the burden is essentially shifted to Primebank to demonstrate that MERS's inaction was not one of willful defiance. This burden shifting results in a difficult, if not an impossible task for Primebank. Additionally, the majority relies upon the district court's finding that MERS did not willfully ignore or defy the rules of procedure, but this finding must be supported by evidence in the record. *Williamson*, 220 N.W.2d at 640. There is no evidence in the record, nor was any cited in the district court ruling.

As the majority acknowledges, the underlying purpose of rule 1.977 is "to allow a determination of controversies on their merits rather than on the basis of nonprejudicial inadvertence or mistake." *Brandenburg*, 603 N.W.2d at 584. However, this objective is qualified and cannot be extended to the point where a default judgment will be vacated when the movant has not provided a reason for the default. *See Sheeder*, 764 N.W.2d at 780. "'[W]e have never upheld such a grant where the movant fails to show any effort to appear in response to a due and timely notice.'" *Id*. (quoting *Haynes v. Ruhoff*, 261 Iowa 1279, 1282, 157 N.W.2d 914, 916 (1968)).

On our review, we are to view the evidence in the light most favorable to the district court's ruling and, generally, we find an abuse of discretion only when there is a lack of substantial evidence to support the district court's ruling. *Central Nat. Ins. Co.*, 513 N.W.2d at 753–54. MERS failed to provide a reason for defaulting and the record contains no evidence or explanation as to why MERS defaulted. The record contains no evidence to support the district court's

finding that MERS did not willfully ignore or defy the rules of procedure. *See Williamson*, 220 N.W.2d at 640 ("A trial court abuses its discretion if it sets aside a default judgment under [rule 1.977] without some proper basis in the record."). The only evidence in the record leaps over the "good cause" reason, and jumps straight to MERS asserted defense of the underlying action. Rule 1.977 requires more than simply asserting a defense. It requires the movant to establish that the default was the result of "mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty." As MERS failed to prove a rule 1.977 ground, it in turn did not prove the requisite "good cause." I would find that the district court abused its discretion in setting aside the default.