

IN THE COURT OF APPEALS OF IOWA

No. 1-821 / 11-0256
Filed November 23, 2011

RODNEY HETTINGER,
Plaintiff-Appellee,

vs.

FRANK S. GIBBS, EDWARD W.
GIBBS, and FRANK S. GIBBS and
EDWARD W. GIBBS d/b/a GIBBS
REALTY and GIBBS DAIRY,
Defendants,

DAVID ASCHLIMAN,
Intervenor-Appellant.

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

Intervenor, David Aschliman, appeals from an order dismissing his counterclaim and striking his affirmative defenses in a suit where default judgment previously had been entered in favor of buyer and against the sellers of real property. **APPEAL DISMISSED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.
Kathleen Neylan of Neylan Law Office, Elkader, for appellee Rodney
Hettinger.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Intervenor, David Aschliman, appeals from an order dismissing his counterclaim and striking his affirmative defenses in a suit where default judgment previously had been entered in favor of buyer and against the sellers of real property, but where his motion for intervention was granted. The appeal is not from a final judgment; it is therefore dismissed.

On August 28, 2009, Rodney Hettinger sued Frank Gibbs and Edward Gibbs (the Gibbises) requesting a decree to quiet title in real estate and specific performances of real estate sales contracts between Hettinger as buyer and Gibbises as sellers. The petition was docketed as EQCV 8456. The Gibbises failed to appear or file an answer.

On September 21, 2009, Aschliman appeared and moved to intervene on his own behalf, as a good-faith purchaser.

On October 6, 2009, the district court entered default judgment against the Gibbises, quieting title and ordering specific performance of real estate contracts between Hettinger and the Gibbises.

A week later, on October 13, 2009, the court granted Aschliman's earlier filed petition to intervene. Aschliman filed a counterclaim and affirmative defenses.

Almost a year later, Aschliman filed a petition to correct, vacate, or modify the default judgment entered against the Gibbises. He filed that pleading as assignee of the Gibbises' interest in the litigation. Although he now characterizes that petition as a "separate" action, it was not filed separately, with original notice

and a new docketing number. The petition to vacate was filed in the pending action docketed as EQCV 8456. That petition to vacate has not been ruled upon.

On January 11, 2011, the district court granted Hettinger's motion to dismiss Aschliman's counterclaim and strike his affirmative defenses. The court ruled that the counterclaim and affirmative defenses were "premature until such time, if ever, that the petition to vacate the default decree is granted." Aschliman appeals this ruling.

The supreme court, on its own motion, ordered the parties to address the question whether the January 11, 2011 ruling was a final judgment and ordered the issue submitted with the appeal. Aschliman contends the ruling was a final order, since it dismissed his counterclaim and affirmative defenses against Hettinger. Aschliman asserts that, if the ruling was not final, he does not request an interlocutory appeal.

Hettinger asserts the district court's January 11, 2011 ruling was final. He characterizes the questions before the district court as being: "Does the trial court have jurisdiction to hear the intervenor, Aschliman's, answer and counterclaim to the petition of Hettinger, was the intervenor's pleading a collateral attack on the existing judgment, and must the intervenor's case be dismissed?" Hettinger contends the court's order "ended the intervenor's case."

The district court dismissed Aschliman's counterclaim and affirmative defense as "premature." Aschliman's petition to vacate the default decree under Iowa Rule of Civil Procedure 1.1012 remains pending in the district court file. Therefore the ruling did not "place[] it beyond the power of the court to return the parties to their original positions." See *Ahls v. Sherwood/Div. of Harsco Corp.*,

473 N.W.2d 619, 621 (Iowa 1991). If Aschliman is successful in vacating the default judgment entered against the Gibbsses, he can then litigate his defenses to Hettinger's action. If he is not successful in vacating the judgment, his appeal may include the ruling dismissing his counterclaim and defenses. The appeal is not from a final judgment.

We treat the appeal as a request to appeal in advance of final judgment, see Iowa R. App. P. 6.104, but decline the request. Hettinger argues it is Aschliman's position that his answer, affirmative defenses, and counterclaims are not collateral attacks on the default judgment and he should be allowed to proceed even if he is unsuccessful in his separate petition to vacate the October 6, 2009 judgment. Aschliman's arguments before this court, however, focus exclusively on whether his motion to intervene should be considered timely. The court granted Aschliman's motion to intervene, and he is not aggrieved by that ruling. No ruling by the district court has addressed Aschliman's claim of right to the property at issue. Nor has it ruled on Hettinger's contention that Aschliman's claim is barred as a collateral attack on the default judgment. We do not address those questions. We dismiss the appeal.

APPEAL DISMISSED.