

IN THE COURT OF APPEALS OF IOWA

No. 2-463 / 11-1250
Filed June 27, 2012

MIDLAND FUNDING, L.L.C.,
Plaintiff-Appellee,

vs.

MELROY BUHR,
Defendant-Appellant.

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

Melroy Buhr appeals from an order dismissing his counterclaim against Midland Funding, L.L.C. **REVERSED AND REMANDED.**

Melroy Buhr, Elma, pro se.

Kevin Abbott of Wetsch, Abbott & Osborn, P.L.C., Des Moines, for appellee.

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

DOYLE, J.

Melroy Buhr appeals from an order dismissing his counterclaim against Midland Funding, L.L.C. (Midland). Upon our review for correction of errors at law, see *Strickland v. Iowa Bd. of Med.*, 764 N.W.2d 559, 561 (Iowa Ct. App. 2009), we reverse and remand.

Midland sued Buhr to recover sums it alleged were owed on a charge/credit account. Buhr, pro se, responded with an “Answer, [Counterclaim], and Jury Demand.”¹ The counterclaim filed by Buhr sought damages and legal expenses at a rate equivalent to that of an attorney. The counterclaim was based upon Buhr’s belief that Midland was “trying to harass, and intimidate [Buhr] to give up his rights and/or possessions.” Midland did not respond to the counterclaim. Buhr later filed a motion to dismiss Midland’s petition and requested sanctions. He also filed a motion to compel discovery. Midland did not respond to these motions.

Hearing on all pending motions was set for May 16, 2011. On that date, the district court entered an order stating in relevant substance:

Be it remembered that the court was presented with a motion to dismiss by plaintiff.^[2] Said motion was not resisted.

It is hereby ordered: Said motion is granted.

Plaintiff’s petition dismissed without prejudice. Defendant’s cross petition remains. Costs on Plaintiff’s action taxed to Plaintiff.

On June 30, 2011, Midland filed a dismissal without prejudice stating it “hereby dismisses the above-captioned cause without prejudice.” Buhr did not

¹ The caption of Buhr’s filing stated “Cross Petition” rather than “Counterclaim,” but it is in substance a counterclaim, and we therefore treat it as such. See *Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 395 (Iowa 1988).

² Use of the word “plaintiff” appears to be a scrivener’s error as the only motion to dismiss pending before the court was the motion filed by defendant Buhr.

respond. On July 6, 2011, Midland's dismissal filing came before a different district court judge. Buhr was not present. The court then entered an order stating the "[d]ismissal filed June 30, 2011, is approved and this case is dismissed at Plaintiff's costs."

Buhr appeals, asserting in his pro se brief that he "was not served [with Midland's] motion to dismiss dated June 30, 2011 and had no knowledge of [the] hearing on July 6, 2011." Further, "[d]ismissal was brought before a different judge who had no knowledge of the case or that the cross/counter claim was still active." He argues he had a right to be heard before his counterclaim was dismissed. Midland has not filed an appellee's brief.

When Midland filed its June 30, 2011 dismissal, its petition had already been dismissed by the court's May 16, 2011 order. So, Midland's dismissal was, at best, redundant. In any event, Midland's dismissal filing could not operate to dismiss Buhr's counterclaim. Iowa Rule of Civil Procedure 1.943 provides that "[a] party may, without order of court, dismiss that party's *own* petition, counterclaim, cross-claim, cross-petition or petition of intervention, at any time up until ten days before the trial is scheduled to begin." Iowa R. Civ. P. 1.943 (emphasis added); *see also Hardaway v. City of Des Moines*, 166 N.W.2d 578, 580 (Iowa 1969) ("[A] party may dismiss his own petition or counterclaim without prejudice any time before trial. He may not dismiss his opponent's petition or counterclaim."). Midland's right to dismiss extended no further and did not entitle Midland to unilaterally dismiss Buhr's counterclaim. *Id.* Furthermore, Midland's dismissal filing could not countermand the court's May 16, 2011 order that specifically stated "[Buhr's] cross petition remains."

Assuming then that Midland's dismissal filing could be taken as a motion to dismiss Buhr's counterclaim, it failed to follow the Iowa Rules of Civil Procedure. Motions "shall be served upon each of the parties." Iowa R. Civ. P. 1.442(1). No certificate of service is affixed to the filing, nor does it contain any indication that it had been served upon Buhr, and indeed, Buhr asserts he was not served with the document. See Iowa R. Civ. P. 1.442(7) ("All papers required or permitted to be served or filed shall include a certificate of service."). Moreover, rule 1.442(7) specifically provides "[a]ction *shall* not be taken on any paper until a certificate of service is filed in the clerk's office." (Emphasis added.) No such certificate appears in the record before us.

Under the circumstances presented here, we conclude the district court erred when it dismissed Buhr's counterclaim upon the filing of Midland's dismissal without prejudice.³ In reaching this conclusion, we offer no opinion regarding the merits of the counterclaim. Accordingly, we reverse the district court's July 6, 2011 order dismissing Buhr's counterclaim and remand for further proceedings.

REVERSED AND REMANDED.

³ We assume that in dismissing the whole "case" as opposed to just dismissing "plaintiff's petition," the July 6, 2011 order necessarily included dismissal of Buhr's counterclaim, thus overriding the court's May 16, 2011 order.