IN THE COURT OF APPEALS OF IOWA

No. 6-215 / 05-0041
Filed August 23, 2006

WALTER M. CALINGER,
Plaintiff-Appellee,

vs.

KAY KONZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Montgomery County, J.C. Irvin, Judge.

The defendant appeals from a district court order that set aside a default judgment she had obtained against the plaintiff in a legal malpractice action. **AFFIRMED**.

John W. Kocourek of John W. Kocourek, P.C., Council Bluffs, for appellant.

John J. Reefe, Jr., Omaha, Nebraska, and Michael O'Bradovich, Omaha, Nebraska, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

MILLER, J.

Kay Konz appeals from a district court order that set aside the 1993 default judgment she obtained in her legal malpractice action against Walter Calinger. We affirm the district court.

I. Background Facts and Proceedings.

Calinger, an Omaha, Nebraska attorney, represented Konz in an Iowa workers' compensation proceeding. Konz's claim was dismissed by the deputy workers' compensation commission in 1988 after Calinger, who had since been appointed the mayor of Omaha, failed to respond to an order to show cause. The workers' compensation commissioner affirmed the dismissal, and the agency's decision was upheld by our supreme court. *See Konz v. University of Iowa*, No. 89-1648 (Iowa July 17, 1991).

In May 1992 Konz filed a legal malpractice action against Calinger. Konz attempted to personally serve Calinger at the Red Oak, Iowa law office of LaVon Billings, which Calinger had used as his professional Iowa address. The return came back as an unsuccessful diligent search, with a notation that "last they knew at the" Red Oak office, Calinger "is in South America." Calinger had in fact been residing in Santiago, Chile since the summer of 1991, and working at Santiago College.

Konz attempted to obtain Calinger's current address from numerous sources. Konz's attorney instructed a paralegal to obtain a current address for Calinger from the county courthouse. The paralegal obtained the following purported address from an unspecified source at Omaha's city hall: Los Leones

385, Dept. 102, Providencia, Santiago, Chile. This was the only address Konz was able to obtain for Calinger.

Konz accordingly attempted to serve Calinger under Iowa Code section 617.3 (1991), the long-arm statute. In August 1992 she mailed an original notice to Calinger, restricted mail, at the Los Leones 385 address. The notice was returned with a stamp indicating it had been received in Chile, but without any indication delivery had been attempted or why it was being returned.

Konz also hired a search firm to attempt personal service on Calinger in Chile. In June 1993, after several months passed without any indication the search firm had been successful, Konz sought and obtained an order of default. In an August 1993 hearing Konz's damages were established to be $1.5 million, and judgment was entered against Calinger in that amount. Sometime after entry of default but prior to the judgment entry, Calinger returned to the United States and established his residence in Colorado. Following judgment entry, the search firm informed Konz that Calinger was "never available for service despite numerous attempts in Chile."

Konz also filed an ethics complaint against Calinger with the Nebraska Bar Association. Communications between the bar association and Calinger were accomplished through another Omaha attorney, Jerry Pettit. Konz's attorney provided Pettit a copy of the default judgment and asked for Calinger's address and information regarding Calinger's malpractice insurer. At Calinger's request, Pettit refused to disclose Calinger's current address. Calinger denied Pettit informed him of the default judgment, and there is no evidence Calinger was in

fact informed of the judgment before being contacted directly by Konz's attorney sometime in 1995.

Calinger eventually moved to Ohio, and Konz subsequently registered her judgment in Ohio. Calinger then filed a claim, in June 2001, under a malpractice insurance policy he had held in 1989 and 1990. The insurer filed an action in Nebraska requesting a declaratory judgment that it was not required to provide coverage for Calinger on Konz's judgment. The district court granted the insurer summary judgment, which was affirmed on appeal to the Nebraska Supreme Court. *Continental Cas. Co. v. Calinger*, 657 N.W.2d 925, 927 (Neb. 2003).

In October 2001 Calinger filed the present action, seeking to set aside Konz's default judgment and for an injunction to prevent execution and enforcement of the judgment. Calinger asserted the judgment was void for lack of personal jurisdiction. The matter came for trial before the district court in January 2004. Calinger denied receiving a copy of the original notice and presented evidence, in the form of tax returns and personal testimony, that he had never lived at the address to which the original notice was mailed.

The district court determined Konz had failed to comply with section 617.3 because the address she used was not Calinger's, there was no adequate showing of the source of the address, Calinger could not be charged with failure to respond, and the address used was not reasonably calculated to give Calinger notice. The court accordingly granted Calinger's petition and set aside the default judgment. Konz filed a motion for additional findings, requesting the court rule on her affirmative defenses, "the gravemen" of which "is laches." The court

denied the motion, determining Calinger had no obligation "to take any action" against the void judgment until Konz sought to enforce it.

Konz appeals. She asserts the court erred in finding Calinger's testimony credible, and in not finding Calinger had intentionally prevented his address from being known and had willfully evaded service. She asserts the court further erred in determining she had not complied with the long-arm statute. Finally, she contends that even if she failed to comply with the long-arm statute, under the unique circumstances of this case her judgment should not be set aside.[1]

II. Scope and Standard of Review.

The petition in this matter was docketed in equity, the parties agree this case was tried in equity, and although it ruled on some objections the district court stated this was an equity matter. Accordingly, our review is de novo. Iowa R. App. P. 6.4; *Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 690 (Iowa 2005) (providing review is governed by how case was tried below). Although not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*).

III. Discussion.

We turn first to Konz's claims regarding Calinger's credibility and the district court's factual findings. Konz takes great pains to point out inconsistencies in various statements and assertions by Calinger, and a pattern of behavior by Calinger that could support a conclusion he was attempting to

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[1] Konz also asserts the district court failed to consider her affirmative defense of equitable estoppel. Even if we assume Konz's answer was sufficient to raise such a defense, it was neither ruled on by the district court, nor raised as an omission in Konz's post-ruling motion. Therefore error, if any, was not preserved. *See Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995).

evade service. However the district court, which had the ability to observe the witnesses as well as consider the content of their testimony, gave credence to many if not all of Calinger's assertions. While portions of the record do tend to impugn the veracity of some of Calinger's statements, his testimony is not so self-contradictory or unbelievable as to warrant setting aside the district court's credibility assessments and factual findings.

With that determination in mind, we turn to the question of whether Konz complied with section 617.3, Iowa's long-arm statute. At issue is whether Konz mailed the original notice to Calinger "at an address in the state of residence." Iowa Code § 617.3. Because section 617.3 provides an extraordinary method for securing jurisdiction, "clear and complete compliance with its provisions is required." *Barrett v. Bryant*, 290 N.W.2d 917, 922 (Iowa 1980).[2]

Here, the original notice was sent to Los Leones 385, Dept. 102, Providencia, Santiago, Chile. Calinger asserted, and Konz does not dispute, that he never received the notice. Calinger testified he never lived at the Los Leones 385 address, a secured apartment building close to Santiago College. He stated that, except for a brief period of time after he arrived in Santiago, he lived at Ladislao Errazuriz 2149, B-10, Providencia. The Ladislao Errazuriz address also appeared on tax returns Calinger filed in December 1992. Calinger further testified that, while Santiago College was located on Los Leones, and he received mail at the college, his address at the college was Los Leones 584. The only evidence Konz offered in attempted contradiction of Calinger's evidence

[2] An exception to this requirement, inapplicable in the present action, is that a party need only substantially comply with the statute's provisions regarding the language used in the notification of filing and original notice. *Id*.

was a written note from her attorney directing a paralegal to obtain Calinger's current address from the county clerk of court, a typed response containing the Los Leones 385 address, and a professional statement from the attorney that the paralegal had obtained the address from an unspecified source at city hall.

We find the present circumstances to be very similar to those in *Barrett v. Bryant*, 290 N.W.2d 917 (Iowa 1980). There, the original notice intended for defendant Bryant was sent to the home of another defendant, Cherry, who resided at Rural Route 1, Box 7, Battleboro, North Carolina. *Barrett*, 290 N.W.2d at 922. The notice was accepted by Cherry's wife. *Id*. Bryant filed an uncontroverted affidavit stating that his actual address was 705 Ravenwood Drive, Rocky Mount, North Carolina, that he had never resided with the Cherrys, that he had not authorized the Cherrys to accept his mail, and that he had never received notification through the mail. *Id*. In response, the plaintiff's attorney filed an affidavit stating he had obtained the Rural Route 1 mailing address from a private investigator who had purportedly obtained the address from Bryant's employer. *Id*. Our supreme court determined that, under this record, the plaintiff had not sufficiently complied with section 617.3.

We cannot agree with Konz's contention that *Barrett* is distinguishable from the present case. We see no meaningful distinction between a case involving mail that was received by an unauthorized person, and one where the mail was not received at all. The controlling factor in either is whether the record indicates the original notice was sent to an address that was valid for the defendant. Here, the record does not reveal any demonstrable connection between the Los Leones 385 address and Calinger. Konz's contention the Los

Leones 385 address originated from either Calinger, or a third party with direct knowledge of Calinger's actual address, is no more than unsupported speculation. [3]

Giving weight to the district court's fact findings and credibility assessments, we conclude the record establishes Konz's lack of compliance with section 617.3. Because Konz did not comply with section 617.3, the Iowa district court did not obtain personal jurisdiction over Calinger. We accordingly find it unnecessary to address Konz's claim that due process was satisfied because, under the circumstances, the notice was nevertheless reasonably calculated to reach Calinger. *See Barrett*, 290 N.W.2d at 923; *see also Stanton v. St. Jude Medical, Inc*., 340 F.3d 690, 692 (8th Cir. 2003) (noting court first determines if jurisdiction is proper under long-arm statute and then, if the long-arm statute is satisfied, determines whether the notice comports with due process).

Finally, we consider Konz's contentions that, even if she did fail to comply with section 617.3, it is nevertheless error to set aside her default judgment against Calinger. Konz first contends that, because "[e]quity requires doing justice to all parties in the action," *Folkers v. Southwest Leasing*, 431 N.W.2d 177, 182 (Iowa Ct. App. 1988), this court must conclude Calinger "waived any defect in personal jurisdiction by his own inexcusable neglect." In essence,

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[3] Konz asserts that, because the statute states notice must be sent to "an" address, there is no requirement the address be the defendant's current or former residence. This contention might have some relevance if Konz had used a non-residential mailing address for Calinger, such as his address at Santiago College. However, the statute cannot be interpreted as allowing service at an address with no demonstrable connection to the defendant. Doing so would render the notice requirements meaningless. *See In re Barkema Trust*, 690 N.W.2d 50, 56 (Iowa 2004) ("In interpreting statutes, we will assume that the legislature intends to accomplish some purpose and that the statute was not intended to be a futile exercise." (citation omitted)).

Konz urges us to "do equity" because Calinger was aware Konz had a potential malpractice claim against him, yet he failed to leave a forwarding address. In support of this contention Konz relies on the case of *Kraft v. Bahr*, 128 N.W.2d 261 (1964), which involved notice under Iowa non-resident motor statute.

We first note that Konz has not directed us to where in the record this issue was raised and preserved. This failure alone is sufficient to waive any error. Iowa R. App. P. 6.14(1)(*f*); *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001). Moreover, in relevant part, *Kraft* provides only that under Iowa's non-resident motor statute, a plaintiff can rely on the address the defendant provided authorities at the time of the accident until the plaintiff is notified to the contrary by the defendant or defense counsel. *Kraft*, 128 N.W.2d at 265-66. It does little to assist Konz in this case, which involves application of Iowa's long-arm statute and the question of whether the address used to serve notice was ever a correct address for the defendant. Giving due weight to the district court's fact findings and credibility assessments, we see no basis, under general equitable principles, for determining Calinger has waived the absence of personal jurisdiction.

Konz's final argument relies on Restatement of Judgments section 129, at 621 (1942), which was cited with approval by our supreme court in *In re Marriage of Ivins*, 308 N.W.2d 75, 77 (Iowa 1981):

> Equitable relief from a judgment may be refused to a party thereto if
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> (a) before or after the judgment was rendered the complainant or a person representing him failed to use care to protect his interests, or
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> (b) after ascertaining the facts the complainant failed promptly to seek redress.

Konz asserts that, under *Ivins* and section 129, Calinger waived any objection to personal jurisdiction because he did not challenge the default judgment until at least six years after he learned of its existence.[4]

We are not convinced *Ivins* can be extended to support a conclusion that Calinger waived any objection to personal jurisdiction. We first note *Ivins* was decided under the particular circumstances of that case, which included "the disruptive effect of vacating a [two-year-old] custody order . . . ." *Id*. Moreover, a review of the comments to section 129 indicates that they contemplate more than mere lack of action by a person seeking to set aside a void judgment.

For example, the defendant to the original action will be deemed to have failed to use reasonable care to protect his interests when he becomes aware of a technical failure in service, but the plaintiff does not. Restatement § 129 cmt. b. In such cases the defendant was not denied a substantial opportunity to defend, but is attempting to avoid the consequences of the judgment by exploiting a technical failure and the plaintiff's ignorance thereof. *See id*. Here, in contrast, the record established that it was Konz, the plaintiff in the legal malpractice action, who was aware of the failure in service, and that Calinger, the defendant to the action, was unaware of suit until some two years after the default judgment was entered.

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[4] Konz also asserts any objection to personal jurisdiction was waived because Calinger failed to inform his insurer of Konz's potential malpractice claim before the claim was filed, failed to take adequate steps to provide a forwarding address, refused to provide Konz his address in 1993, and otherwise acted in bad faith and in an attempt to intentionally avoid knowledge of the default judgment. Some of these contentions must be decided adversely to Konz in light of the weight we give to the district court's fact findings and credibility assessments. Others simply do not rise to the level of "contributory fault" contemplated by *Ivins*. *See id*.

In addition, when assessing whether a party has promptly sought redress, the length of time that had passed is not the only consideration. *See id*. at cmt. d. A court should also consider (1) whether the delay in bringing the challenge to personal jurisdiction was unreasonable, and (2) whether the delay would cause hardship to the party holding the judgment because of a change of circumstance or create a substantial chance of an erroneous decision. *Id*.

As to the first element, delay in moving to set aside a default judgment may be reasonable where the party who obtained the judgment did not seek enforcement. *See id*. at cmt. e. Here, the district court determined Calinger could not be faulted for failing to take action to set aside the judgment before Konz attempted to enforce it, and it appears from the record that Konz did not attempt to enforce the judgment prior to 2001. In addition, Calinger testified that he did not move to set aside the judgment in 1995 because, at that time, he did not have the financial wherewithal to mount a legal challenge. We agree that, under these circumstances, Calinger's delay in challenging jurisdiction was not unreasonable. In addition, Konz does not assert the delay resulted in any hardship to herself or that it created a substantial chance of an erroneous decision. Moreover, even if Konz had addressed these considerations, we note both contemplate the effects of a delay that was without adequate or satisfactory reason. *Id*. at cmts. f, h. As we have already determined, however, the delay in this case was not unreasonable.

IV. Conclusion.

Konz has raised numerous claims in this appeal. We have considered all of those claims, whether or not specifically discussed. We conclude that Konz

did not comply with section 617.3, and thus the district court did not obtain personal jurisdiction over Calinger in the legal malpractice action. As no reason has been shown to justify denial of Calinger's petition to set aside the default judgment, the district court's order setting aside the judgment is affirmed.

AFFIRMED.