IN THE COURT OF APPEALS OF IOWA

No. 3-906 / 13-0119
Filed December 5, 2013

POINT BUILDERS, L.L.C.,
Plaintiff-Appellee,

vs.

SHI ZHONG ZHENG,
Defendant-Appellant,

and

TING SI ZHENG, JIMMY CHENG and G.P. SCHOENFELDER, Trustee of the GERALD P. SCHOENFELDER 2003 REAL PROPERTY TRUST,
Defendants.

GERALD P. SCHOENFELDER 2003 REAL PROPERTY TRUST, ASSIGNEE OF REGIONS BANK, SUCCESSOR BY MERGER TO UNION PLANTERS BANK, N.A.,
Plaintiff-Appellee,

vs.

SHI ZHONG ZHENG, SPOUSE OF SHI ZHONG ZHENG, TING SI ZHENG, SPOUSE OF TING SI ZHENG, JUMMY CHENG, SPOUSE OF JIMMY CHENG, CITY OF WATERLOO, IOWA, POINT BUILDERS, L.L.C., and PARTIES IN POSSESSION,
Defendants.

Appeal from the Iowa District Court for Black County, Todd A. Geer, Judge.

Zheng appeals from the district court order dismissing his petition to vacate. **AFFIRMED AND REMANDED.**

Dennis J. Naughton of Naughton Law Firm, Marion, for appellant.

Kirsten N. Arnold and Eric W. Johnson of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellee Schoenfelder.

Mark Mershon of Mershon Law Firm, Cedar Falls, for appellee Point Builders, L.L.C..

Heard by Vogel, P.J., Potterfield, J. and Mullins, J.

MULLINS, J.

Shi Zhong Zheng filed a petition to vacate default judgments obtained against him approximately five years earlier while he was incarcerated in China. He alleges the judgments are void because his due-process rights were violated. Finding the due process requirements were met in the underlying actions, the district court held the judgments were not void. Accordingly, Zheng's petition to vacate was untimely and the court dismissed it.

Zheng asks us to reverse the dismissal of his petition to vacate, arguing service by publication violated due process requirements. He also argues he was entitled to, but did not receive, competent defense by a guardian ad litem. Because Zheng received due process in both service and representation in the underlying actions, the district court properly exercised its discretion in dismissing Zheng's petition to vacate because it was untimely. Accordingly, we affirm. We remand to the district court to determine the amount of appellate attorney fees to which Schoenfelder is entitled.

I. BACKGROUNDS FACTS AND PROCEEDINGS.

Zheng and two partners[1] planned to build and operate a restaurant near Crossroads Mall in Waterloo. They purchased real estate in May of 2005 and obtained a $300,000 loan secured by a mortgage from Union Planters Bank.

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[1] Zheng has referenced his co-owners as partners, even referring to himself in an affidavit, as a "majority owner." Ting Si Zheng and Jimmy Cheng were each served with the mechanics' lien foreclosure petition and appeared by counsel until counsel withdrew. Likewise, they were each served with the foreclosure petition and the amended petition, but defaulted. The record is not clear as to whether a legal partnership relationship existed between the three of them. We need not resolve that question in deciding this case.

Zheng received an undivided one-half interest in the property and his partners each received an undivided one-fourth interest. Zheng also signed a contract with Point Builders to perform work on the property. On December 8, 2005, Point Builders filed a mechanic's lien on the property for the work done up to that point. An amended mechanic's lien was filed on April 7, 2006, to reflect the work performed up to that date.

On March 29, 2006, Zheng traveled to China. He made arrangements with one of his business partners and a cousin to pay his bills while he was away. He also left emergency funds to cover expenses in case something occurred in his absence. On April 4, 2006, Zheng was arrested and incarcerated. He alleges he was not allowed to communicate with anyone at home during his incarceration in China.

On May 2, 2006, Point Builders filed a petition to foreclose its mechanic's lien. Unable to locate Zheng and serve him personally, Point Builders served Zheng by publication. A default judgment in rem was entered against Zheng on December 6, 2006. Point Builders eventually assigned its interest in the matter to Gerald Schoenfelder.

The $3000 monthly mortgage payments on the Waterloo property were paid for approximately six months until funds were exhausted. On March 23, 2007, Regions Bank, as successor of Union Planters Bank, filed a petition to foreclose the mortgage without redemption. Regions Bank disclosed its belief that Zheng was incarcerated in China and moved for alternate service. The court granted the motion, specifically allowing service by publication. Regions Bank

later assigned its interest in the case to Schoenfelder, and a decree was entered in Schoenfelder's favor on October 29, 2007. On December 27, 2007, Schoenfelder purchased the property at a sheriff's sale.

Zheng was released from prison on October 3, 2011, and returned to the United States the same month. On June 19, 2012, he filed a petition to vacate the default judgments in the above cases, which Schoenfelder resisted. Following a hearing, the court entered its order dismissing the petition to vacate because it was untimely.

II. STANDARD OF REVIEW.

A proceeding to vacate judgment is on assigned errors, not de novo. *Stoner v. Kilen*, 528 N.W.2d 648, 650 (Iowa Ct. App. 1995). The trial court is vested with considerable discretion when ruling on a petition to vacate judgment, and we will only reverse if that discretion has been abused. *Soults Farm, Inc. v. Schafer*, 797 N.W.2d 92, 109 (Iowa 2011). However, we are more inclined to find an abuse of discretion when relief has been denied than when granted. *Id*.

III. ANALYSIS.

The court may vacate a final judgment in specified cases. Iowa R. Civ. P. 1.1012. A petition to vacate "must be filed and served in the original action within one year after the entry of the judgment or order involved." Iowa Rs. Civ. P. 1.1012, 1.1013. There is no question Zheng failed to file his petition to vacate within one year of the judgments.

However, while a petition to set aside a voidable judgment must be filed within one year under rule 1.1013, a void judgment may be vacated at any time.

Johnson v. Mitchell, 489 N.W.2d 411, 414 (Iowa Ct. App. 1992). A judgment is void if the court acted without or in excess of its jurisdiction. *Id.* If a judgment is rendered in violation of due process of law, it is void. *Id.* The question then is whether the judgments were entered in violation of due process. On appeal, Zheng argues the default judgments violated his due-process rights in two ways: he argues that service by publication was inadequate (in the mechanic's lien action) or defective (in the mortgage-foreclosure action), and that Iowa Rule of Civil Procedure 1.211 was violated.

A. Service by publication.

The Due Process Clause requires that any deprivation of property "be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." *Quality Refrigerated Serv. v. City of Spencer*, 586 N.W.2d 202, 205 (Iowa 1998). To determine the notice required, the court must balance the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment." *Id.* Although personal service is the "classic form of notice," it is not always required. *Id.* The focus is on reasonableness; whether a particular method of notice is reasonable depends on the circumstances of each particular case. *Id.* The practical difficulties and costs that accompany personal service are among the considerations the court takes into account in determining whether personal notice is constitutionally required. *Id.*

Zheng argues service by publication is not reasonably calculated to give an adverse party knowledge of proceedings where, as here, the adverse party is imprisoned outside the United Stated. However, our supreme court has held that

in cases where the whereabouts of a party are unknown, the requirement of due process is met by published notice pursuant to statute. *In re Marriage of Meyer*, 285 N.W.2d 10, 11 (Iowa 1979). The Iowa Rules of Civil Procedure—which have the force and effect of statute, *Van Gundy v. Van Gundy*, 56 N.W.2d 43, 494-95 (Iowa 1952)—allow for service by publication in certain categories of cases, including actions brought for recovery of real property or an interest therein. Iowa R. App. P. 1.310(1).

Zheng does not dispute that all of the procedural requirements for service by publication were fulfilled in the mechanic's lien case; personal service was unsuccessfully attempted in two different counties. Because the service-by-publication requirements were followed, we find due process requirements were satisfied.

With regard to the foreclosure action, Zheng contends service by publication was defective on its face and was therefore inadequate to obtain jurisdiction. Specifically, he claims the original notice failed to comply with the requirements of rule 1.302, which sets forth what an original notice must contain. Subpart (d) of the rule states:

> The time within which these rules or statutes require the defendant, respondent, or other party to serve, and within a reasonable time thereafter file, a motion or answer.
>
> The original notice shall also state that if the defendant, respondent or other party fails to move or answer, judgment by default may be rendered for the relief demanded in the petition. The original notice shall also include the compliance notice required by the Americans with Disabilities Act (ADA). A copy of the petition shall be attached to the original notice except when service is by publication. *If service is by publication, the original notice alone shall be published and shall also contain a general statement of the*

> *claim or claims and, subject to the limitation in rule 1.403(1), the relief demanded*.

Iowa R. Civ. P. 1.302(1)(d) (emphasis added). Zheng complains the published notice failed to contain any statement of the plaintiff's claims or the relief demanded.

Originally, our courts required literal compliance with the rules setting forth the components of an original notice; a missing component rendered an original notice defective and did not confer jurisdiction over the party served with it. *Krebs v. Town of Manson*, 129 N.W.2d 744, 746 (Iowa 1964). The literal compliance standards relaxed over time to distinguish between irregularities that do not cause prejudice and defects that fail to substantially comply with the statute, thus depriving the court of jurisdiction. *Id.* Under strict interpretation, mere irregularities that principally relate to the form of the notice, or to technical or clerical errors that do not deceive or mislead the defendant are not fatal; substantial departure from the substance requirements of the rule are, and prejudice is presumed. *Parkhurst v. White*, 118 N.W.2d 47, 49-50 (1962). Under these prior interpretations, the failure of a notice to contain a statement of the cause of action or the sum demanded was fatally defective. *Krebs*, 129 N.W.2d at 746; *Parkhurst*, 118 N.W.2d at 50. "The rule of liberal construction of irregularities did not apply." *Krebs*, 129 N.W.2d at 746.

But in 1975, the rules relating to process were amended and strict compliance was no longer demanded. *Patten v. City of Waterloo*, 260 N.W.2d 840, 841-42 (Iowa 1977). This change reflected the growing acceptance of the trend toward liberality in construction of procedural rules. *Id.* at 842. "It was

hoped, with the amendment of our process rules in 1975, that parties served with an original notice of actions then on file would find no advantage in searching out technical defects or omissions in the original notice." *Id.*

Shortly after the adoption of the new rules, our supreme court considered the adequacy of an original notice with "apparent" flaws, including the "wholesale failure to tell the [defendants] they had to defend against the suit in order to avoid default," another requirement of what is now rule 1.902(1)(d). *Holmes v. Polk City Savings Bank*, 278 N.W.2d 32, 34 (Iowa 1979). The court held that while "[t]his deficiency, at first blush, would seem to be a ground to set aside the default," the defendants could not complain. *Id.* at 35.

> The notice directed the [defendants] to at least appear. . . . [A]n appearance alone (that is, an appearance unaccompanied by a motion or pleading) is a submission to jurisdiction. The notice served on the [defendants] was sufficient to establish jurisdiction so that the [defendants] were in default upon their failure to appear. While the absence of a directive to defend did not render notice (and any judgment based on it) void it is clear that, if a party can show prejudice, such a notice and the subsequent judgment are voidable.

Id.

Here, the published notice in the foreclosure action states a petition has been filed in the Black Hawk County Clerk of Court's office naming Zheng, among others, as a defendant. It states Zheng must serve a motion or answer within twenty days and file the motion or answer within a reasonable time with the clerk of court. The notice also makes the required statement that failure to serve a motion or answer may lead to a default judgment for the relief demanded in the petition. It contains the required ADA compliance notice.

While the notice does not identify the cause of action or relief demanded, it does state that a copy of the petition containing that information has been filed with the Blackhawk County Clerk of Court, alerting the reader that it can be examined there, and the notice otherwise comports with the requirements of rule 1.302(1). As such, it was sufficient to satisfy the requirements of due process; that is, it gave adequate notice. Liberally construing our rules, we find the original notice was sufficient to confer jurisdiction on the court. We need not decide whether the judgment was voidable for failure to meet all the technical requirements of rule 1.302 as Zheng failed to timely petition to vacate within a year of default judgment being entered.

Because Zheng received due process in the service of original notice in both actions, the district court properly exercised its discretion in dismissing the petition to vacate as untimely.

B. Guardian ad litem.

Iowa Rule of Civil Procedure 1.211 provides in pertinent part:

> No judgment without a defense shall be entered against a party then a minor, or confined in a penitentiary, reformatory or any state hospital for the mentally ill, or one adjudged incompetent, or whose physician certifies to the court that the party appears to be mentally incapable of conducting a defense. Such defense shall be by guardian ad litem . . . .

Where a party who has been served with an original notice appears to be subject to rule 1.211, the court may appoint a guardian ad litem for the party. Iowa R. Civ. P. 1.212.

Zheng contends the default judgment entered in the mechanic's lien action is void because the court failed to appoint a guardian ad litem to represent him.

In that case, the district court found: "Plaintiff is requesting only a judgment in rem against the one-half interest of the real estate held by Shi Zhong Zheng, and that a guardian ad litem is not required in this case . . . ." Zheng challenges this finding.

In *In re Property Seized from Hickman*, 533 N.W.2d 567, 568 (Iowa 1995), the appellant challenged a forfeiture order entered while he was incarcerated on the ground he had not been appointed a guardian ad litem pursuant to what is now rule 1.211. The court held that because the defendant in a forfeiture proceeding is the property sought to be forfeited, not its owner, rule 1.211 did not apply. *Hickman*, 533 N.W.2d at 568. This holding is applicable here because a judgment of foreclosure on a mechanic's lien is not a personal judgment; the mechanic's lien only attaches to the real property. *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 64-65 (Iowa 2003). Accordingly, rule 1.211 does not apply and a guardian ad litem was not required.

In the mortgage foreclosure action, the plaintiff requested the court appoint a guardian ad litem, which the court did. However, Zheng contends the guardian ad litem's defense was so deficient as to constitute no defense at all. The district court rejected this argument, finding the guardian ad litem acted appropriately in fulfilling his responsibilities, which included "communication with opposing counsel regarding service issues and further research of those issues on his own." This finding has the force of a jury verdict; because substantial evidence supports the finding, it is binding on appeal. *See In re Trust of Killian*, 494 N.W.2d 672, 675 (Iowa 1993).

Because no guardian ad litem was required in the mechanic's lien proceedings and substantial evidence supports the court's finding Zheng's guardian ad litem acted competently in the mortgage foreclosure proceedings, due process was given and the judgments are not void. Accordingly, the district court properly exercised its discretion in dismissing Zheng's petition to vacate as untimely.

C. Appellate attorney fees.

Schoenfelder requests an award of his appellate attorney fees. As a general rule, an award of attorney fees is not allowed unless authorized by statute or contract. *W.P. Barber Lumber Co.*, 674 N.W.2d at 66. Schoenfelder asserts he is entitled to an award of attorney fees under both the written mortgage and Iowa Code section 572.32 (2011), which provides a prevailing plaintiff may be awarded reasonable attorney fees in an action to enforce a mechanic's lien. *See Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 23 (Iowa 2001) (finding appellate attorney fees are available in addition to trial attorney fees under section 572.32). An award of attorney fees is discretionary. *See* Iowa Code § 572.32 (providing attorney fees *may* be awarded).

Having prevailed on appeal, Schoenfelder is entitled to an award of appellate attorney fees. We therefore remand to the district court for entry of an additional judgment to compensate plaintiff for the reasonable expense of these appellate proceedings. We do not retain jurisdiction.

AFFIRMED AND REMANDED.