IN THE COURT OF APPEALS OF IOWA

No. 0-872 / 10-0013
Filed January 20, 2011

MICHAEL E. KATS and
LORINDA K. KATS,
Plaintiffs-Appellants,

vs.

KENTON J. BROADWAY,
Defendant-Appellee.

Appeal from the Iowa District Court for Lyon County, James D. Scott (first motion to extend), Don E. Courtney (second motion to extend), and Patrick M. Carr (motion to reinstate), Judges.

The plaintiffs appeal from the dismissal and subsequent denial of their motion to reinstate this case. **AFFIRMED.**

Patrick W. O'Bryan, Des Moines, for appellants.

Alan E. Fredregill of Heidman Law Firm, L.L.P., Sioux City, and William Stoos, North Sioux City, South Dakota, for appellee.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

This appeal arises from a personal injury suit commenced by plaintiffs, Michael and Lorinda Kats, against defendants, Kenton Broadway and Lyon County. On appeal the Katses contend the district court erred in not extending the try-or-dismiss deadline and in denying their motion for reinstatement, both matters being governed by Iowa Rule of Civil Procedure 1.944. Finding no abuse of discretion in either ruling, we affirm.

I. Background Facts and Proceedings.

In November 2006, the Katses filed this personal injury suit against Kenton Broadway and Lyon County arising from a motor vehicle accident. The original trial date was March 18, 2008.

On January 11, 2008, the district court granted summary judgment to Lyon County.

On February 19, 2008, the Katses moved to continue trial and extend the deadline for rule 1.944 dismissal, asserting additional time was needed to investigate Michael Kats's ongoing symptoms, and interlocutory appeal of the summary judgment ruling was being sought. Over defendant Broadway's resistance, on March 10, 2008, the court granted the motion to continue. Interlocutory appeal was denied on March 26, 2008.

Trial was rescheduled for January 27, 2009, and the deadline for rule 1.944 dismissal was extended to July 1, 2009, notice of which was "faxed to attys."

On May 11, 2009, plaintiffs' counsel, Brian Van Engen, moved to withdraw and filed a notice of attorney's lien. Broadway resisted the motion, asserting the

"case has been settled"; the "only thing necessary in this case to complete the settlement, is the return of the settlement documents sent to the Plaintiffs' attorney following the settlement of this case"; the court "was informed on the evening of the settlement [January 22, 2009], by Brian Van Engen, that the parties had settled this case and that the trial previously scheduled in this matter was no longer necessary"; and allowing the withdrawal of Van Engen "would simply delay the resolution of the lawsuit . . . and waste further time and resources on a case that is already settled."

A hearing on the motion was held June 11, 2009. At the hearing, Michael Kats expressed his dissatisfaction with Van Engen; requested Van Engen to withdraw; and advised he had spoken with other counsel. Kats also made reference to the "alleged settlement" and "forced settlement." During the hearing, Van Engen stated:

> [T]here is a bit of a question in this matter whether this matter is settled and, if so, if Mr. Kats can withdraw that settlement based on newly discovered information. And it—as brought out by [defense counsel], and in his resistance, he's referred to me and actions that I have taken. And if this becomes an issue in this matter, I would be presumably potentially called as a witness in this matter and, therefore, would be unable to continue the representation . . . . I would have to withdraw on those grounds, as well.

Later on the same day, Thursday, June 11, the court filed its ruling, finding Van Engen had "a mandatory duty to withdraw" under the rules of professional conduct and "[a]lthough Plaintiffs' discharge of Mr. Van Engen complicates the resolution of this lawsuit, . . . the Court is compelled to relieve Mr. Van Engen where he has been discharged from representation by his clients." Van Engen was "immediately permitted to withdraw as counsel of record" and ordered to

provide the court with the Katses' last known mailing address and telephone numbers.

On Monday June 15, 2009, Van Engen filed a motion to extend the rule 1.944 deadline "to allow [plaintiffs] time to resolve outstanding issues in this case"; noted it was defendant's position "that final settlement has been reached"; and asserted no prejudice would result. Broadway resisted on grounds the matter was settled and "trial has been delayed twice due to the Plaintiffs."

On June 18, 2009, Van Engen sent a letter to the clerk of court with the Katses' contact information.

On June 26, 2009, the district court (Judge Scott) overruled the motion to extend the rule 1.944 deadline, concluding alternatively "[t]he motion is improperly filed because Mr. Van Engen is no longer counsel for Plaintiffs" and "the motion does not set forth good cause for an extension."[1] On appeal, the Katses argue this ruling was an abuse of discretion.

On June 29, 2009, the plaintiffs filed a pro se motion to extend the rule 1.944 deadline or provide a trial date before July 1, 2009. They asserted: "Due to the fact that we are no longer represented by legal counsel, we feel an extension needs to be granted so we can provide our information to an attorney."

In an order dated June 30 and file-stamped July 2, the district court noted it had received a fax copy of the motion, which did not evidence proof of service

[1] The proof of service on Van Engen's motion to extend reflects that the motion was served on opposing parties by a copy being place into the U.S. mail on June 12, 2009. We agree with the Katses that Van Engen may have taken steps to file the motion to extend before he received the order filed on June 11, 2009, relieving him of any further responsibility. For purposes of this ruling, we will assume Van Engen's motion to extend should not have been denied on the basis that Van Engen no longer represented the Katses.

on defendant. The court requested the clerk mail a copy of the motion to defendant's counsel and stated "no ruling will be made on the motion until such time as Defendant's counsel has received a copy of the Plaintiffs' pending motion from the Clerk and been permitted time under the Iowa Rule of Civil Procedure to file a response."

On July 8, Broadway resisted, noting the two prior continuances, the settlement of the case, and arguing the motion to extend the rule 1.944 deadlines was untimely, defective in form and service, and stated "no excuse, oversight, or reasonable ground for extending" the deadlines.

A hearing on the motion to extend was held on August 3, 2009, and on August 27, 2009, the district court (Judge Courtney) concluded the case was dismissed by operation of law on July 1, 2009.

On December 14, 2009, the plaintiffs filed a pro se motion to reinstate asserting "reasons and grounds to reinstate" in seventy-two paragraphs. Broadway resisted the motion to reinstate.

The district court (Judge Carr) observed that the motion "fundamentally misunderstands the role of the court system." The court noted the case had been dismissed by operation of law and the motion did not include any showing of "oversight, mistake or other reasonable cause" to reinstate. The court stated delays in the case "were caused by the plaintiffs themselves" and difficulty in obtaining counsel is not sufficient reason to reinstate. Additionally, the court noted the motion to extend was filed two days before the deadline ran, and the motion to reinstate was filed seventeen days before the six-month deadline for

filing such a motion. The court denied the motion to reinstate and plaintiffs now appeal.

II. Analysis.

Rule 1.944. Iowa Rule of Civil Procedure 1.944 reads in relevant part,

> 1.944(1) It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.
>
> 1.944(2) All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be tried prior to January 1 of the next succeeding year. The clerk shall prior to August 15 of each year give notice to counsel of record as provided in rule 1.442 of the docket number, the names of parties, counsel appearing, and date of filing petition. The notice shall state that such case will be subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. All such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte.
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> . . . .
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> 1.944(5) No continuance under this rule shall be by stipulation of parties alone but must be by order of court. Where appropriate the order of continuance shall be to a date certain.
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> 1.944(6) The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefor, shall be filed within six months from the date of dismissal.

Denial of June 15, 2009 motion to extend. We review a denial of a motion to extend rule 1.944 deadlines for an abuse of discretion. *Miller v. Bonar*, 337 N.W.2d 523, 527 (Iowa 1983). "Absent a showing the trial court's discretion was exercised on grounds or reasons clearly untenable or to an extent clearly unreasonable, we will not interfere." *Lundy, Butler & Lundy v. Bierman*, 398 N.W.2d 212, 214 (Iowa Ct. App. 1986).

This case was filed in November 2006, and the motion to extend was filed over two and one-half years later on June 15, 2009. Trial had been continued once at plaintiffs' request. Van Engen's motion to extend asserted the plaintiffs needed time to "to allow [plaintiffs] time to resolve outstanding issues in this case." However, the motion was filed almost five months after the court had been informed by plaintiffs' counsel the case had been settled and no trial was needed. During those several months, plaintiffs did not inform the court of their dispute about settlement. They did not seek another trial date. Two trial dates had come and passed. A prior deadline pursuant to rule 1.944, July 1, 2008, had been extended to July 1, 2009. Under these circumstances, we find no abuse of discretion in the district court's ruling "the motion does not set forth good cause for an extension." *Cf. Lundy*, 398 N.W.2d at 214 (finding no abuse of discretion in granting extension where plaintiffs asserted unsuccessful settlement negotiations as reason for delay).

Automatic dismissal. The purpose of rule 1.944 is to promote expeditious trial of cases on the merits by clearing the docket of cases not prosecuted and assuring "'the timely and diligent prosecution of those cases that should be brought to a conclusion.'" *O'Brien v. Mullapudi,* 405 N.W.2d 815, 816 (Iowa 1987) (citation omitted). The rule sets out the specific manner in which this policy will be accomplished. "[I]ts terms are positive, definite, and mandatory, and its operation is not discretionary with the court." *Duder v. Shanks*, 689 N.W.2d 214, 218 (Iowa 2004). The responsibility for keeping a case alive rests "squarely on the shoulders of the party seeking to avoid dismissal." *Greif v. K-Mart Corp.,* 404 N.W.2d 151, 154 (Iowa 1987).

> Rule 1.944[(2)] provides that a case not tried within the stated timeframe will be dismissed unless the plaintiff establishes "satisfactory reasons for want of prosecution" or shows "grounds for continuance." The trial court has discretion to grant a continuance for just cause, but there must be a timely application for a continuance; the court has no authority to continue a matter on its own. Moreover, if the case has not been continued prior to the date set for dismissal, dismissal is automatic, provided the try-or-dismiss notice required by the rule has been served on the parties.

Duder, 689 N.W.2d at 218.

Plaintiffs' attempts to shift or avoid responsibility for not obtaining a continuance prior to the dismissal by operation of law are unavailing. It was plaintiffs' responsibility, not the court's, to obtain an order of continuance before the automatic dismissal occurred. *Sanchez v. Kilts,* 459 N.W.2d 646, 649 (Iowa Ct. App. 1990). The mere filing of a motion for continuance before the rule 1.944 deadline approaches does not stay the dismissal of the case. *Tiffany,* 508 N.W.2d at 91–92. Thus, dismissal under rule 1.944 was automatic on July 1, 2009, and we find no error. *See id.*

Denial of motion to reinstate. Reinstatement of civil actions dismissed under rule 1.944 can occur in two ways: mandatory reinstatement, which requires a showing that the dismissal was a result of oversight, mistake or other reasonable cause; or discretionary reinstatement. *O'Brien,* 405 N.W.2d at 816–17. Our court has previously stated:

> Ignoring notice while showing nothing more than excuse, plea, apology, or explanation, is not sufficient . . . . Among the factors to be considered are whether the plaintiff made a good faith effort to prosecute or continue the action; whether the plaintiff was seeking a trial assignment or merely a continuance when the case was dismissed; whether the mistake or oversight is understandable under the circumstances; or whether plaintiff promptly applied to reinstate the case.

> "Oversight" has been defined as "something overlooked" or "omission or error due to inadvertence." "Inadvertence" is "lack of care or attentiveness." On one hand an oversight is similar to excusable neglect, but it does not rise to the level of gross neglect nor willful procrastination.

Holland Bros. Constr. Co. v. Iowa Dep't of Transp., 434 N.W.2d 902, 904 (Iowa Ct. App. 1988) (finding plaintiffs had proved mistake given their reliance on certain acts of the court administrator where they had "diligently attempted to move the action toward trial" and nothing indicated they were dilatory in any way).

Whether a claim for reinstatement is understood as mandatory or discretionary, the party requesting relief has the burden to prove reasonable diligence in the preparation of the case for trial. *Berkley Int'l Co. v. Devine,* 423 N.W.2d 9, 12 (Iowa 1988).

We review a mandatory reinstatement determination for errors at law. *O'Brien*, 405 N.W.2d at 817. We review a discretionary reinstatement determination for an abuse of discretion. *See id.; see also Tiffany,* 508 N.W.2d at 91.

The plaintiffs moved to reinstate their case on December 14, 2009. They now argue their failure to affix proof of service on their pro se motion to extend constituted oversight or mistake, a finding that, if satisfactorily established, would support mandatory reinstatement. *See Holland Bros.*, 434 N.W.2d at 904. However, this claim was not made to the district court and thus is not properly before us. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (noting "fundamental doctrine of appellate review" that issues must be raised and decided by the district court before we will decide them on appeal).

The plaintiffs' motion to reinstate did not assert the rule 1.944 "dismissal was the result of oversight, mistake or other reasonable cause." Rather, as the district court noted:

> [The motion] projects a high degree of dissatisfaction on the part of Mr. Kats with his lawyer, one of his treating physicians, defendant Kenton Broadway, Mr. Broadway's spouse, his insurance carrier and the attorney assigned by his insurance carrier to defend the claim. The filing fundamentally misunderstands the role of the court system. In many particulars set forth in the motion to reinstate, the direct intervention of the court system is requested, inviting the court to subpoena documents, letters and information, to subpoena individuals against whom complaints are made, to initiate perjury proceedings against identified individuals, and to "clear up all these allegations," and others, too numerous to detail here. In brief summary, the filing reflects an individual completely at odds with everyone interested in his case.

The district court could have reinstated the case at its discretion under rule 1.944(6).

The court denied reinstatement, stating delays in the case "were caused by the plaintiffs themselves"; trial had been continued at plaintiffs' request; and difficulty in obtaining counsel was not sufficient reason to reinstate. Additionally, the court noted the Katses' pro se motion to extend was filed two days before the deadline ran, and the motion to reinstate was filed seventeen days before the six-month deadline for filing such a motion.

We have reviewed the record and find no abuse of the court's discretion in refusing to reinstate this case. "Any alleged difficulty in obtaining counsel is not a sufficient reason to overturn a district court's denial of discretionary reinstatement." *Tiffany*, 508 N.W.2d at 91. The length of time between dismissal and a subsequent request for reinstatement is a pertinent factor in the analysis of whether a party was diligently pursuing trial. *See O'Brien*, 405 N.W.2d at 817-18

(noting time period between dismissal and application for reinstatement); *Wharff v. Iowa Methodist Hosp.,* 219 N.W.2d 18, 25 (Iowa 1974) (noting four months between dismissal and the motion for reinstatement); *In re Estate of Bearbower,* 376 N.W.2d 922, 925 (Iowa Ct. App. 1985) (noting a factor mitigating in favor of reinstatement was that the plaintiff had "promptly" filed the application for reinstatement after receiving notice of the dismissal).

III. Conclusion.

We find no abuse of discretion in the district court's ruling denying the motion to extend rule 1.944 deadlines. The case was dismissed by operation of law on July 1, 2009, and the district court did not abuse its discretion in denying the motion to reinstate. We affirm.

AFFIRMED.