IN THE COURT OF APPEALS OF IOWA

No. 2-515 / 11-1969
Filed August 8, 2012

THOMAS J. BUDDE,
Plaintiff-Appellee,

vs.

JOHN P. THOMA and KELLY THOMA,
Defendants-Appellants.

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

Defendants appeal the district court's denial of their petition to vacate a default judgment against them. **AFFIRMED.**

Susan M. Hess of Hammer, Simon & Jensen, Dubuque, for appellants.

David A. Lemanski, Dubuque, for appellee.

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

VAITHESWARAN, P.J.

John and Kelly Thoma (the Thomas) appeal the district court's denial of their petition to vacate a default judgment against them.

I. Background Proceedings

Thomas Budde sued the Thomas for breach of a farm lease agreement. The Thomas retained an attorney to defend them, but he passed away before trial. Following the death, the attorney's law partner took over, moved to postpone the trial, and then filed a motion to withdraw. The district court granted the motions.

The Thomas failed to appear for trial on the rescheduled date. The district court entered a default and scheduled a hearing on damages. A copy of this order was mailed to the Thomas.

Two days before the damages hearing, Kelly Thoma spoke to her former attorney about the hearing. He told her that, whatever they did, the Thomas needed to "show up" and "explain the situation to the judge." The Thomas did not attend the damages hearing, and the district court entered judgment against them for $30,854.07.

Two-and-a-half months after judgment was entered, the Thomas filed a petition to vacate the judgment on the grounds of unavoidable casualty or misfortune. Following an evidentiary hearing, the district court denied the petition and denied a motion to reconsider the ruling.

The Thomas appeal. Our review of the district court's ruling is on assigned error. *In re Trust of Killian*, 494 N.W.2d 672, 675 (Iowa 1993).

The Thomas assert they were entitled to have the judgment set aside pursuant to Iowa Rule of Civil Procedure 1.1012(5), which authorizes relief where "[u]navoidable casualty or misfortune" prevented a party from defending the action. The burden is on them to establish unavoidable casualty or misfortune. *Home Fed. Sav. & Loan Ass'n v. Robinson*, 464 N.W.2d 894, 896 (Iowa Ct. App. 1990). Negligence does not amount to unavoidable casualty or misfortune. *Id*. at 895.

The Thomas specifically contend they "would have appeared and defended the claim if they had known of the trial date, and they were too sick to attend the hearing on damages." The district court found Kelly Thoma's testimony on these points not credible. We defer to this credibility finding, because we do not have the benefit of assessing her demeanor and because the remaining record supports this adverse credibility finding. *See McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 825 (Iowa 1996) ("We are obliged to give great deference to the trial court on issues of witness credibility."). For example, the Thomas' former attorney testified that a copy of the order rescheduling trial was sent to them. That order was also placed in a packet of documents Kelly Thoma requested but never picked up. As for the Thomas' non-attendance at the damages hearing, Kelly Thoma conceded she was aware of the hearing but stated she and her husband were too ill to appear. When asked why she did not call the clerk's office or court administrator and apprise them of the illness, she stated she was too sick to do so. However, she acknowledged she called her daughter to milk the cows. She also acknowledged it "probably didn't even

cross" her mind to call the court, notwithstanding her former attorney's insistence that they make attendance at the hearing a priority.

Based on this record, the district court did not err in concluding that the Thomas failed to sustain their burden of showing unavoidable casualty or misfortune under rule 1.1012(5).

Our conclusion is bolstered by the fact that the Thomas also did not seek to have the default set aside pursuant to rule 1.977. That rule allows a court to set aside a default or judgment thereon for "mistake, inadvertence, surprise, excusable neglect or unavoidable casualty," but requires the motion to be filed no more than sixty days after entry of the judgment. Iowa R. Civ. P. 1.977. As Budde points out, the Thomas knew about the default within days of its entry but "did nothing." Their failure to take action under rule 1.977 foreclosed the relief they sought under rule 1.1013(1) (requiring a showing that the grounds for relief "were not and could not have been discovered in time to proceed under rule 1.977 or 1.1004"). *See also Home Fed. Sav.*, 464 N.W.2d at 896 (indicating that a defendant's motion to vacate under what is now rule 1.1012 was properly denied because she neglected to state why she could not have discovered the grounds asserted in her petition to vacate within the time period allowed for her to file a motion to set aside a default).

We affirm the denial of the Thomas' motion to vacate the default judgment.

AFFIRMED.