IN THE COURT OF APPEALS OF IOWA

No. 7-210 / 06-1245
Filed May 9, 2007

RICHARD KLEIN,
Plaintiff-Appellant,

vs.

ANTHONY WISMAN
AND NEAL MENZER,
Defendants-Appellees.

Appeal from the Iowa District Court for Washington County, Michael R. Mullins, Judge.

Plaintiff appeals the dismissal of his tort action under Iowa Rule of Civil Procedure 1.944. **AFFIRMED.**

Craig Arbuckle, Washington, for appellant.

Terri C. Davis and Sarah Gayer of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellees.

Considered by Vogel, P.J., and Vaitheswaran, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

I. Background Facts & Proceedings

On June 17, 2003, Richard Klein filed a tort suit against Anthony Wisman and Neal Menzer based on a motor vehicle accident. On July 20, 2004, the parties received notice the case would be automatically dismissed under Iowa Rule of Civil Procedure 1.944 unless it was tried by January 1, 2005.

Trial was scheduled for October 19, 2004, but on October 1, 2004, Klein requested a continuance to complete discovery. The case was rescheduled to March 22, 2005. On March 11, 2005, on Klein's motion, an order was entered again continuing the trial date and stating plaintiff would prepare a new scheduling order.

At a pretrial conference in March 2005, the court informed the parties the case had been automatically dismissed on January 1, 2005. Klein filed an application on May 31, 2005, seeking to reinstate the case. The reason given was that a continuance of the March 22 trial date had been requested due to family health matters. The district court overruled the application because it did not cite any of the grounds for relief contemplated in rule 1.944(6).

On August 15, 2005, Klein filed another application seeking to reinstate the case. The court found the application was untimely under rule 1.944(6) because it was filed more than six months from the date of dismissal. Klein appeals the dismissal of his tort suit under rule 1.944.

II. Standard of Review

Our scope of review in this action is for the correction of errors at law. Iowa R. App. P. 6.4; *Duder v. Shanks*, 689 N.W.2d 214, 217 (Iowa 2004).

III. Merits

A. Klein asserts his case should not have been dismissed under rule 1.944 because it had been assigned a trial date on March 22, 2005, after the automatic dismissal date of January 1, 2005.

A similar issue was discussed in *Ray v. Merle Hay Mall, Inc*., 621 N.W.2d 696, 698-99 (Iowa Ct. App. 2000), as follows:

> A request for a trial date, without further comment, can be granted as a ministerial function of the court. In contrast, a request for a continuance under rule [1.944], requires a party to set forth reasons why a case should be given a longer life than intended under the declared policy of the rule.
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> Ray failed to present her reasons to the court as to why she should be granted a continuance. The scheduling order Ray relies on did not satisfy the requirements under the rule. Other than containing the date the petition was filed, there was no indication in the scheduling order alerting the judge that the case was subject to imminent dismissal. Simply agreeing on a trial date without including "grounds for continuance" circumvents the requirements under rule [1.944]. Ray had the burden of keeping her case alive and avoiding an automatic dismissal under rule [1.944]. Accordingly, the stipulation as to a trial date does not save her case from automatic dismissal under rule [1.944].

(Citations omitted.) *See also Greif v. K-Mart Corp.*, 404 N.W.2d 151, 154 (Iowa 1987) ("[A] case may not be continued after a [1.944] notice has been given without an order of court upon application and notice."); *Gold Crown Props. v. Iowa Dist. Court*, 375 N.W.2d 692, 693 (Iowa 1985) (noting continuance order specifically stated action would not be dismissed under rule 1.944).

Klein's motion for continuance, filed on October 1, 2004, did not mention the case would be dismissed if not tried prior to January 1, 2005, and gave no reasons "why the case should be given a longer life than intended under the declared policy of the rule." *Ray*, 621 N.W.2d at 698. The motion simply requested a continuance past the then-scheduled trial date of October 19, 2004, in order to complete discovery. In addition, in assigning a new trial date of March 22, 2005, the order for continuance did not address the operation of rule 1.944. The order for continuance did not operate to remove the case from the mandate of rule 1.944. We conclude the district court did not err in ruling the case had been automatically dismissed on January 1, 2005.

B. Rule 1.944(6) provides, "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." Klein's first application to reinstate, filed on May 31, 2005, did not give any reasons to show the dismissal was the result of oversight, mistake, or other reasonable cause, nor did it refer to any factors that may have justified relief under the discretionary authority granted by the rule. *See Sladek v. G & M Midwest Floor Cleaning, Inc.*, 403 N.W.2d 774, 778 (Iowa 1987) (stating both the mandatory and discretionary options in the rule require a showing of reasonable diligence); *see also O'Brien v. Mullapudi*, 405 N.W.2d 815, 819 (Iowa 1987) (noting application to reinstate was not verified nor accompanied by affidavits); *Tiffany v. Brenton State Bank of Jefferson*, 508 N.W.2d 87, 90-91 (Iowa Ct. App. 1993) (applicant has burden of proof to establish basis for reinstatement). The

unverified application stated only that the case had not been heard on March 22, 2005, due to family health matters. By March 22, 2005, however, the case had already been automatically dismissed. We find no error in the district court's order overruling the application to reinstate because the motion did not cite any of the grounds contemplated by rule 1.944(6).

C. The ruling on the first application to reinstate provided the application was "overruled, without prejudice to resubmit a motion compliant with the rule within the time frames required by the rule." Klein filed a second application to reinstate on August 15, 2005. Rule 1.944(6) provides an application for reinstatement must be made within six months from the date of dismissal. The district court determined the second application was untimely because it was filed more than six months after the case had been dismissed on January 1, 2005. *Green v. Tri-County Cmty. Sch. Dist*., 315 N.W.2d 779, 781 (Iowa 1982) (holding court has no discretion to reinstate without a timely application). We affirm the district court's ruling on this issue.

D. Klein claims application of rule 1.944 under the circumstances of this case is contrary to equity, justice, and basic fairness. The supreme court has stated, "The rule is of uniform application throughout the state and is not harsh or unfair. It is a rule necessary to expedite the trial of cases brought to court." *Talbot v. Talbot*, 255 Iowa 337, 341, 122 N.W.2d 456, 459 (1963). The purpose of rule 1.944 "is to promote the expeditious trial of cases on the merits by clearing the docket of dead cases and assuring the 'timely and diligent

prosecution of those cases that should be brought to a conclusion.'" *Duder*, 689 N.W.2d at 218 (citations omitted).

Furthermore, application of rule 1.944 is mandatory. *Id.* The district court does not have discretion to avoid application of the rule based on principles of equity, justice, or basic fairness. *See Green,* 315 N.W.2d at 781; *Windus v. Great Plains Gas*, 254 Iowa 114, 123, 116 N.W.2d 410, 415 (1962) ("The operation of the rule is not discretionary with the trial court.").

We affirm the decision of the district court.

AFFIRMED.