IN THE COURT OF APPEALS OF IOWA

No. 7-702 / 07-0088
Filed October 24, 2007

STACY STEWART,
Plaintiff-Appellant,

vs.

TIMOTHY BONE, TERRY ELOS, HARVEY HOYER, ORIGINAL CONCRETE PUMPING SERVICE, INC., and GENERAL CASUALTY COMPANIES, d/b/a GENERAL CASUALTY COMPANY OF WISCONSIN, and GENERAL CASUALTY COMPANY OF ILLINOIS,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Plaintiff appeals from the district court's order denying her application for a continuance pursuant to Iowa Rule of Civil Procedure 1.944(2). **AFFIRMED.**

Kyle T. Reilly of Thomas J. Reilly Law Firm, P.C., Des Moines, for appellant.

Douglas Haag and Harry Perkins III of Patterson Law Firm, L.L.P., Des Moines, for appellee General Casualty Companies.

Jeffrey M. Margolin of Hopkins & Huebner, P.C., Des Moines, for appellees Harvey Hoyer and Original Concrete Pumping Service, Inc.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Stacy Stewart appeals from the district court's order denying her application for a continuance pursuant to Iowa Rule of Civil Procedure 1.944(2). We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

On August 31, 2004, Stewart filed a lawsuit against the defendants arising out of a motor vehicle accident. General Casualty Companies d/b/a General Casualty Company of Wisconsin and General Casualty Company of Illinois (General Casualty) filed an answer in December 2004, and Hoyer and Original Concrete Pumping Service, Inc. filed an answer in January 2005.[1]

On January 21, 2005, Stewart's attorney, Daniel Northfield, an associate in the Thomas J. Reilly Law Firm, P.C., withdrew from the case, and Thomas J. Reilly entered an appearance on Stewart's behalf. Defendants propounded discovery to Stewart, which she answered in May 2005, and deposed her in June 2006. The parties engaged in settlement negotiations through September 2006. On July 10, 2006, a notice that the case would be automatically dismissed under rule 1.944 unless it was tried before January 1, 2007, was mailed to Northfield, Stewart's former attorney.

On November 17, 2006, an order setting a scheduling conference was issued at Stewart's request. The scheduling conference was held on December 18, 2006. That same day, Stewart filed an "Application for IRCP 1.944 Continuance" requesting the district court continue the rule 1.944 automatic dismissal date and allow the case to be tried after January 1, 2007.

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[1] Defendants Timothy Bone and Terry Elos did not file answers to Stewart's petition.

Following a hearing held on December 28, 2006, the district court entered an order finding the arguments asserted by Stewart for a continuance of the rule 1.944 dismissal date were not "satisfactory reasons for want of prosecution." The court accordingly denied Stewart's application for a continuance and ordered the "dismissal date of January 1, 2007 . . . shall take effect."

Stewart appeals. She claims the district court erred in denying her application for a continuance pursuant to rule 1.944(2) because (1) the clerk did not issue a notice of a trial-setting conference pursuant to rule 1.906, (2) Thomas Reilly's health contributed to "counsel's oversight that a trial date had not been scheduled," and (3) the parties had engaged in discovery and settlement negotiations.[2]

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[2] Although not stated as an issue, Stewart argues in part in her original brief that her application for continuance should have been granted because the clerk of court "did not send a notice of a try-or-dismiss deadline to counsel of record" as required by rule 1.944(2). Stewart attempts to set out this argument as an additional issue in her reply brief. However, it is established that we will not consider an issue raised for the first time in a reply brief. *See Harrington v. Univ. of N. Iowa*, 726 N.W.2d 363, 366 n.2 (Iowa 2007). Moreover, this argument was not presented to or ruled upon by the district court. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). We therefore find error was not preserved as to this argument. *See Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000) (stating in the interest of preserving judicial resources the court on appeal can consider whether error was preserved "despite the opposing party's omission in not raising" such an argument).

We also note Stewart's counsel admits he received the rule 1.944 dismissal notice despite the clerk's error in sending the notice to Stewart's former counsel. *See Dudar v. Shanks*, 689 N.W.2d 214, 219 (Iowa 2004) (holding the clerk of court's mailing of the "try-or-dismiss notice and the subsequent actions of the plaintiff's counsel consistent with receipt of the notice" supported the district court's finding the notice was served as required by rule 1.944). Finally, Stewart makes this argument under rule 1.944(6), which allows for reinstatement of a case following dismissal "upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause." This subsection does not apply to this case as Stewart was requesting that the case be continued before it was automatically dismissed pursuant to rule 1.944(2). For all of these reasons, we reject this argument by Stewart.

II. SCOPE AND STANDARDS OF REVIEW.

Our standard of review of the district court's order denying Stewart's application for a continuance pursuant to rule 1.944(2) is for abuse of discretion. *Miller v. Bonar*, 337 N.W.2d 523, 527 (Iowa 1983).

III. MERITS.

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 purpose of the rule is to "promote 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.'" *Dudar*, 689 N.W.2d at 218 (citations omitted). The terms of the rule are "positive, definite, and mandatory, and its operation is not discretionary with the court." *Id.* However, the district court does have discretion to grant continuances for just cause upon timely applications. *Id.* We will not interfere with the district court's decision absent a showing that the court's "discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Glenn v. Farmland Foods, Inc.*, 344 N.W.2d 240, 243 (Iowa 1984) (citation omitted).

Stewart claims the district court abused its discretion in denying her application for continuance. She first argues a continuance should have been granted because the clerk of court did not send notice of a rule 1.906 trial-setting conference to the parties. Our supreme court rejected a similar ground in *Windus v. Great Plains Gas*, 255 Iowa 587, 592, 122 N.W.2d 901, 904 (1963), because it is not the duty of the clerk of court to "assign the case for trial, or to

see that it is tried." Instead, 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). Parties who receive the "try-or-dismiss" notice, as Stewart did here, are "charged with protecting their rights." *Windus*, 255 Iowa at 592, 122 N.W.2d at 904. It was therefore Stewart's duty, not the clerk of court's, to ensure that her case was scheduled for trial. *Id.* at 592-93, 122 N.W.2d at 904-05. We consequently reject this argument.

Stewart next argues satisfactory reasons exist for her failure to prosecute the case because the ill health of her counsel, Thomas Reilly, contributed to the "oversight that a trial date had not been scheduled in this case." While it does appear from the record that Thomas suffered from serious medical problems during the pendency of this case, we do not believe his medical condition hindered the prosecution of the action. It is clear from the record that Thomas was seldom, if ever, involved in the case. An associate in Reilly's firm, Northfield, initially handled the case. Although Thomas filed an appearance after Northfield withdrew, Kyle Reilly, another associate in the firm, took charge of the case from that point forward. Based on these facts, we conclude the district court did not abuse its discretion in declining to continue the action on the basis of Thomas's medical problems. *See, e.g., Greif*, 404 N.W.2d at 155 (stating few cases would be dismissed "if oversight were to be the justification for the failure" to prosecute the case).

Finally, Stewart argues adequate grounds existed for a continuance because her counsel was "very active in pursuing [the] case" as evidenced by the "discovery exchanges, deposition of plaintiff and a series of settlement

negotiations." *See Lundy, Butler & Lundy v. Bierman*, 398 N.W.2d 212, 213-14 (Iowa Ct. App. 1986) (affirming the district court's finding that "unsuccessful settlement negotiations" constituted adequate grounds for a continuance to avoid dismissal). However, the evidence presented at the hearing in this matter shows the parties were not close to a mutually acceptable settlement agreement. Furthermore, Stewart's last settlement demand was issued in September 2006. Thus, it does not appear the parties were engaging in any settlement negotiations in the months preceding Stewart's request for a trial scheduling conference. Nor does it appear Stewart was actively prosecuting the case because, as the district court noted, "virtually nothing else [was] done" following the answers filed by General Casualty in December 2004 and Hoyer and Original Concrete in January 2005 until the dismissal notice issued in July 2006. *See Greene v. Tri-County Cmty. Sch. Dist.*, 315 N.W.2d 779, 781 (Iowa 1982) ("It is in the public interest that cases not tried or settled within a reasonable time should be dismissed."). Thus, the district court did not abuse its discretion in denying Stewart's application for a continuance based on the discovery and settlement negotiations conducted in the case.

IV. CONCLUSION.

Stewart has not shown the district court exercised the discretion it is afforded in ruling on an application for continuance under rule 1.944 on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *See id.* at 782 (stating, in a case involving an application for reinstatement under rule 1.944(6), that although "[w]e might, on a de novo review, reach a conclusion

opposite that of the trial court . . . we cannot say there was an abuse of discretion"). The judgment of the district court is therefore affirmed.

AFFIRMED.