IN THE COURT OF APPEALS OF IOWA

No. 9-803 / 09-0181
Filed November 12, 2009

STEPHEN C. LEONARD,
Plaintiff-Appellant,

vs.

DANA WOLTMAN, VERNON FICK,
THE CITY OF CHEROKEE, IOWA,
JARYL GRAUER, et al.,
Defendants-Appellees.

Appeal from the Iowa District Court for Cherokee County, Frank B. Nelson, Judge.

Stephen C. Leonard appeals from the district court order granting the defendants' motions to dismiss. **AFFIRMED.**

Stephen C. Leonard, Anamosa, appellant pro se.

G. Daniel Gildemeister of Gildemeister & Keane, L.L.P., Sioux City, for appellees Woltman, Fick, and City of Cherokee.

George W. Wittgraf of Sayre, Wittgraff & Meloy, Cherokee, for appellee Grauer.

John Wibe, Cherokee, and Mark Cozine, Cherokee, appellees pro se.

Considered by Doyle, P.J., Mansfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

DOYLE, P.J.

Stephen Leonard appeals from the district court order granting the defendants' motions to dismiss. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

On January 14, 2008, Stephen Leonard filed a "Civil Rights Complaint" at law in the district court against the City of Cherokee (City); Cherokee police officers Dana Woltman and Vernon Fick; and the officers' informant, Jaryl Grauer, pursuant to Iowa Code section 1.301 (2007) et seq., 42 U.S.C. § 1983, and "pendent state law claims." Leonard alleged the informant illegally trespassed upon his property on January 26, 1995, which led to a search warrant that was executed at his residence the same day and the seizure of 156 items of Leonard's property. Additionally, Leonard asserted the officers violated his rights when they allegedly prepared and executed a search warrant that lacked probable cause. Leonard also alleged the City failed to train its police officers on the correct procedures for preparation of search warrants, violating his rights. Leonard sought monetary damages from each defendant.

Leonard's complaint asserted he was never made aware of the application or the execution of that search warrant or the seizure of his property. He maintained he did not learn that the search warrant had been executed until August 2007. Based upon these claims, Leonard asserted his complaint was brought under Iowa Code section 614.4, which provides an action for fraud, mistake, or trespass does not accrue until the action has been discovered.

The City and its police officers filed a motion to dismiss the complaint on the grounds that the action was barred by the statute of limitations pursuant to

Iowa Code section 614.1(2) (claims in Iowa founded on injuries to the person or reputation, whether based on contract or tort, must be filed within two years). The informant filed a separate motion to dismiss on the grounds that the action was barred by the statute of limitations pursuant to section 614.1(4) (claims in Iowa founded on injuries to property must be filed within five years). All defendants argued the discovery rule set out in section 614.4 was inapplicable to Leonard's claims.

After the informant filed his motion to dismiss, Leonard filed his application for entry of default judgment. Thereafter, Leonard filed resistances to the defendants' motions. He also filed a motion to strike the informant's motion to dismiss, alleging the informant's motion was untimely and noting that Leonard had already filed his "Intent and Application for Entry of Default Judgment."

Following a telephonic hearing on August 11, 2008, the district court granted the defendants' motions to dismiss "on the statute of limitations arguments as set out in said motions." Leonard now appeals.

***II. Scope and Standards of Review*.**

A motion to dismiss may be granted based on the statute of limitations. *Clark v. Miller*, 503 N.W.2d 422, 424 (Iowa 1993). "The party asserting an exception to a limitations period has the burden of proving the exception." *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 410 (Iowa 1993). "We review the district court's order dismissing the action for errors at law." *Clark*, 503 N.W.2d at 424; *see also* Iowa R. App. P. 6.907; *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 585-86 (Iowa 2004).

***III. Discussion*.**

Leonard contends the district court abused its discretion in granting the defendants' motions to dismiss and asserts he was denied a "full and fair" hearing on his application for entry of default judgment. We address his arguments in turn.

***A. Statute of Limitations*.**

"Iowa Code section 614.1 sets forth both general and specific provisions limiting the time periods in which actions may be brought." *Bob McKiness Excavating*, 507 N.W.2d at 408 (citations omitted). "[S]ection 1983 actions are subject to the appropriate state statutes of limitations governing actions 'for an injury to the person or reputation of any person.'" *Callahan v. State*, 464 N.W.2d 268, 273 (Iowa 1990) (citation omitted). Under Iowa law, actions founded on injuries to the person or reputation, whether based on contract or tort, or for a statute penalty, must be brought within two years. Iowa Code § 614.1(2). Actions for injuries to property and for relief on the ground of fraud must generally be brought within five years. *Id.* § 614.1(4). "The general provisions of section 614.1 establish a limitations period that begins to run when the cause of action accrues." *Bob McKiness Excavating*, 507 N.W.2d at 408.

Because Leonard's claims are premised upon alleged actions that occurred in 1995, the statute of limitations has clearly run under both sections 614.1(2) and (4). Leonard seeks to avoid the statutory bars, asserting section 614.4 and the doctrine of fraudulent concealment apply to his claims because he allegedly did not discover defendants' 1995 actions until 2007. We disagree.

***1. Section 614.4*.**

Section 614.4 provides, in relevant part:

> In actions for relief on the ground of fraud . . . and those for trespass to property, the cause of action shall not be deemed to have *accrued* until the fraud . . . or trespass complained of shall have been *discovered* by the party aggrieved.

(Emphasis added.) Generally, section 614.4 does not apply to actions at law for money damages. *See Bob McKiness Excavating*, 507 N.W.2d at 410-11; *Pride v. Peterson*, 173 N.W.2d 549, 554-55 (Iowa 1970). "If the action is at law or the remedy is concurrent, the section [predecessor of section 614.4] has no application." *Birks v. McNeill*, 185 Iowa 1123, 1136, 170 N.W. 485, 490 (1919). Here, Leonard's complaint was filed at law and sought monetary damages on all of the claims. Thus, section 614.4 would not apply.

***2. Fraudulent Concealment*.**

For the first time, Leonard on appeal argues the doctrine of fraudulent concealment applies to estop the defendants from asserting a statute of limitations defense. *See Christy v. Miulli*, 692 N.W.2d 694, 701 (Iowa 2005) (noting fraudulent concealment is separate and distinct from the discovery rule and "does not affect the running of the statutory limitations period; rather, it estops a defendant from raising a statute-of-limitations defense"). However, "[i]t 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 2006). Thus, we conclude error was not preserved on this argument.

***B. Default Judgment*.**

Leonard also argues that the district court abused its discretion when it allegedly denied him "a full and fair hearing on his application for entry of default judgment" against the informant. We disagree.

Leonard's application for entry of a default judgment was heard on August 11, 2008, along with the defendants' motions to dismiss. Leonard argued his position on the application, and during the hearing the court found the informant had filed a resistance adequately responding to Leonard's application. The court did not deny him a full and fair hearing on his application.

Moreover, a party seeking a default judgment must follow the requirements of Iowa Rule of Civil Procedure 1.972(2) "by giving the required ten-day written notice before seeking the default and by filing with the application for default the required certification that notice was given." *Dolezal v. Bockes Bros. Farms, Inc.*, 602 N.W.2d 348, 352 (Iowa 1999). A copy of a notice of intent to file written application for default must be mailed to the party claimed to be in default. Iowa R. Civ. P. 1.972(3)(*a*). In his application for entry of default judgment, Leonard asserts he "filed" a notice of intent on June 30, 2008.[1] The rule gives a party a ten-day period of time to respond to the notice and avoid default. *See Baltzley v. Sullins*, 641 N.W.2d 791, 792 (Iowa 2002). Within ten days of the date of the notice, on July 10, 2008, the informant filed a motion to dismiss under rule 1.421 asserting the court lacked subject matter jurisdiction

[1] The record before us does not indicate when Leonard mailed the notice to the informant. We assume it was mailed on or after June 30, but before July 7, as Leonard asserts the informant called the penitentiary (where Leonard is incarcerated) on July 7, 2008, and told prison authorities that he did not want correspondence from Leonard and requested the staff to withhold any mail Leonard addressed to him.

because Leonard's suit was time barred by the applicable statute of limitations. The informant's motion cured the default within the period allowed, and Leonard's application for entry of default judgment was therefore mooted before it was filed on July 14, 2008. With the default having been timely cured, the court properly considered the informant's motion to dismiss. In sustaining defendants' motions to dismiss, the court properly concluded its ruling made consideration of other pending motions, including Leonard's application for entry of default judgment, unnecessary. For these reasons, we conclude Leonard's claim is without merit and the district court did not abuse its discretion.

***IV. Conclusion*.**

Because we conclude the district court did not abuse its discretion in granting the defendants' motions to dismiss, and Leonard's claim that he did not receive a full and fair hearing on his application for entry of default judgment is without merit, we affirm the judgment of the district court.

AFFIRMED.