WINANS V. BRYAN, 1928-NMSC-052, 33 N.M. 532, 271 P. 469 (S. Ct. 1928)

WINANS
vs.
BRYAN et al.

No. 3369

SUPREME COURT OF NEW MEXICO

1928-NMSC-052, 33 N.M. 532, 271 P. 469

October 10, 1928

Appeal from District Court, Eddy County; Richardson, Judge.

Action by G. M. Winans, assignee of First National Bank of Artesia, against W. A. Bryan and others. From an adverse order, defendants appeal. On plaintiff's motion to dismiss appeal.

SYLLABUS

SYLLABUS BY THE COURT

Where the complaint is not in the transcript, and it does not appear that judgment has been rendered on the merits, an appeal does not lie to an order striking a motion to vacate an order entering defendant's default and leaving the cause for hearing ex parte on plaintiff's proof.

COUNSEL

S. E. Ferree, of Artesia, for appellants Bryan.

J. H. Jackson, of Artesia, for appellee.

JUDGES

Watson, J. Parker, C. J., and Bickley, J., concur.

AUTHOR: WATSON

OPINION

*{*532}* **{1}** OPINION OF THE COURT In this cause, upon a return of service of summons and copy of complaint, and upon the clerk's certificate of nonappearance, an

order was made "that said defendants (appellants) and each of them are in default and that said cause proceed to final hearing ex parte as to said defendants and each of them upon plaintiff's proof." Appellants moved to vacate the order upon the objection to the return of service that, being made by a private person, it merely recited that such person was "of lawful age," and did not show that she was of the required age of 18 years. Code 1915, § 4093. Appellee *{*533}* moved to strike the motion on the grounds that the objection to the return was not good, and that the motion was frivolous and for delay. The court, holding appellants' motion not well taken, sustained the motion to strike. To this order the appeal is directed. Appellee moves to dismiss.

{2} Numerous grounds for dismissal are urged. We need consider but one. We think the order striking the motion to vacate the default order is not appealable. It is certainly not a final judgment. Appellants contend that it is an interlocutory order or judgment practically disposing of the merits of the action. Rule 2 of App. Proc. § 2. We do not think so. The merits of the action were not involved in the order appealed from, nor are they involved here. What the merits of the action may be the transcript does not inform us, since the complaint is not included. So far as we are advised, the merits of the action have not been decided. From the defaulting of appellants, it does not follow that final judgment will go against them. Appellee's evidence may fail to make his case. If the court erred in striking appellant's motion, it may be corrected when judgment has been rendered awarding some relief against appellants. Stephenson v. Co. Com'rs., 24 N.M. 486, 174 P. 739.

{3} The motion is therefore sustained, and the appeal will be dismissed. It is so ordered.