

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Hans L. Markland,
Appellant-Plaintiff,

v.

New Holland of Logansport,
Inc.,
Appellee-Defendant.

November 22, 2022

Court of Appeals Case No.
22A-CT-1654

Appeal from the Cass Superior
Court

The Honorable Lisa Swaim, Judge

Trial Court Cause No.
09D02-1912-CT-42

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Plaintiff, Hans L. Markland (Markland), appeals the trial court's dismissal of his Complaint against Appellee-Defendant, New Holland of Logansport (New Holland), pursuant to Indiana Trial Rule 41(E).
- [2] We affirm.

ISSUE

- [3] Markland presents this court with one issue on appeal, which we restate as: Whether the trial court abused its discretion when it dismissed Markland's Complaint pursuant to [Indiana Trial Rule 41\(E\)](#) for failure to prosecute his civil claims.

FACTS AND PROCEDURAL HISTORY

- [4] On December 18, 2019, Markland filed his Complaint against New Holland, contending that the agricultural equipment Markland had purchased from New Holland was defective and had resulted in a damaged corn crop and low yield. The Complaint brought claims sounding in breach of contract, fraud, negligence, and breach of implied warranty of merchantability and/or fitness, and sought compensation, punitive damages, attorney fees, and costs. On February 26, 2020, New Holland filed its Answer.
- [5] On July 6 and 16, 2020, New Holland filed a notice with the trial court, informing the court that it had sent Markland a request for production of documents and that it had responded to Markland's first request for production

of documents. On April 29, 2021, New Holland subpoenaed Markland for a deposition set for May 12, 2021. In addition to an exchange of discovery documents, the parties deposed Markland and two individuals associated with New Holland. The following day, May 13, 2021, Markland sent a subpoena to a nonparty, Ag Direct. On December 6, 2021, Markland filed a motion for an order from the trial court, directing Ag Direct to respond to his subpoena, which was granted by the trial court on December 16, 2021. Markland received Ag Direct's discovery in January 2022.

[6] On March 22, 2022, the trial court, on its own motion, set the matter for an Indiana Trial Rule 41(E) hearing for June 9, 2022, which was rescheduled to June 30, 2022. On May 13, 2022, Markland filed a motion to vacate this hearing, which was denied by the trial court. On June 13, 2022, Markland filed a pre-hearing brief, arguing against the dismissal of his Complaint; New Holland filed its own brief on June 23, 2022. On June 30, 2022, the trial court conducted an evidentiary hearing. By the time of the hearing, Markland was eighty-one years old and a longtime farmer. He testified he had suffered from COVID-19 and had hearing difficulties, making phone communication with his attorney difficult. His attorney's office was forty miles away, a distance which made it hard for him to visit. Markland informed the trial court that it was problematic to meet with his attorney for three months in the spring and two or three months each fall—during planting and harvesting season.

[7] Markland argued that the only relevant period of delay was the ninety-six-day period between the trial court's December 16, 2021, Order, directing Ag Direct

to respond to discovery and the court's March 22, 2022, motion setting the [Trial Rule 41\(E\)](#) hearing. He contended that these delays were not unreasonable as the litigation was complex and involved not only New Holland, but also a lender, a manufacturer, and a fertilizer distributor, with the possibility of out-of-state depositions and expert witnesses. At the conclusion of the evidence, the trial court entered its Order of Dismissal, finding that no sufficient cause was shown to continue the case, concluding:

I have no indication that any work has been done in months on this case with Notice of the [c]ourt that it must be done. In a case where you are claiming this is a complex litigation although [counsel for New Holland] is disagreeing with that, just the fact that you're telling me this is a complex litigation, then you should have a series, a list of things, you could have, I mean, told me all the things that you have actually done instead of making multiple excuses and only a couple of those excuses would even show a, the reason for a short delay. It's a poor showing. It's actually almost no showing that you've worked on this. If you had come in and shown me that you've done work in the last few months when you had the Notice that this was going to be important, I would have allowed you to continue with this case. Absolutely. Because I do think it's important to allow cases to go forward on the merits, but when a party refuses to develop those merits, refuses to work with opposing counsel on, on moving a case forward, does not actually conduct discovery that it says it needs, has a written Notice from the [c]ourt that the [c]ourt is concerned about it, and since that time has done nothing except ask the [c]ourt to dismiss the, the hearing. I find no, no reason, no justifiable basis for, to allow you to continue with the case based on your actions.

(Transcript Vol. II, pp. 28-29).

[8] Markland now appeals. Additional facts will be shown if necessary.

DISCUSSION AND DECISION

[9] Markland contends that the trial court abused its discretion in dismissing his Complaint pursuant to Indiana Trial Rule 41(E) for failure to prosecute. We will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the trial court's decision is against the logic and effect of the facts and circumstances before it. *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*.

[10] Indiana Trial Rule 41(E) provides in pertinent part:

[W]hen no action has been taken in a civil case for a period of [60] sixty days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

“The purpose of this rule is to ensure that plaintiffs will diligently pursue their claims. The rule provides an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution.”

Belcaster, 785 N.E.2d at 1167. The burden of moving the litigation forward is upon the plaintiff, not the court. *Id.* “It is not the duty of the trial court to contact counsel and urge or require him to go to trial, even though it would be within the court's power to do so.” *Id.* “Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be

considered. [The adverse party] should not be left with a lawsuit hanging over his head indefinitely.” *Id.*

[11] In Indiana, courts must balance nine factors when determining whether to dismiss a case for failure to prosecute: “(1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff’s part.” *Id.* “The weight any particular factor has in a particular case appears to depend upon the facts of that case.” *Id.* “However, a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay.” *Id.* Although Indiana does not require trial courts to impose lesser sanctions before applying the ultimate sanction of dismissal, we view dismissals with disfavor, and dismissals are considered extreme remedies that should be granted only under limited circumstances. *Caruthers v. State*, 58 N.E.3d 207, 211 (Ind. Ct. App. 2016).

[12] Several of these factors favor the trial court’s dismissal of Markland’s Complaint—most notably, the length of the delay. The evidence reflects that

the current proceedings are characterized by several periods of inactivity or minimal activity. Examining Markland's actions alone, we note that 719 days passed from the filing of the Complaint until his request for court assistance regarding discovery to Ag Direct. Rather, the only action that was taken during this period was propelled by New Holland with three discovery requests and the pursuit of Markland's deposition. Thereafter, a period of 158 days elapsed from the trial court's order directing Ag Direct to participate in discovery until Markland's request to vacate the trial court's *sua sponte* Trial Rule 41(E) hearing and have a case management conference instead. A further period of 100 days passed from the trial court setting the dismissal hearing until the date of the hearing, with the docket revealing no discovery activity during this period. Indiana Trial Rule 41(E) permits the trial court or a party to file a motion to dismiss after a mere sixty days of inaction in a case. Here, Markland delayed the case well beyond that requirement. Suffice it to say that the length of the delay weighs heavily in favor of dismissal. *See Belcaster*, 785 N.E.2d at 1168 (holding that a ten-month delay was unreasonable); *Smith v. Harris*, 861 N.E.2d 384, 385 (Ind. Ct. App. 2007) (holding that a five-month delay was excessive).

[13] The next factor is the reason for the delay. Markland claims that the delay was attributable to the Covid-19 pandemic. While Markland is correct that the pandemic resulted in restrictions on jury trials, that does not negate the fact that Markland took no action in the case for months, not even to set a trial date at some point in the future. The fact that a trial date might have been delayed due to Covid-19 restrictions did not relieve him of the burden of moving forward

with the prosecution of his claims. This factor does not weigh in favor of Markland.

[14] Next, we consider the degree of personal responsibility on the part of Markland, as the plaintiff, and the degree to which Markland will be charged for the acts of his attorney. Markland contends that communication with his counsel had been difficult because the unusually wet spring season had “double[d] or triple[d]” his workload. (Tr. Vol. II, p. 20). However, despite the increased workload, Markland acknowledged that during these rainy days he could have contacted and met with his attorney. When questioned by the trial court, Markland admitted to having met with his attorney “between three to five times,” yet could not recall the dates. (Tr. Vol. II, p. 20).

[15] The amount of prejudice to the defendant caused by the delay is our next consideration. Any delay in a proceeding causes some cost to the defendant and courts disfavor the notion that a defendant would have a lawsuit hanging over it indefinitely. *See Allstate Ins. Co. v. Kepchar*, 592 N.E.2d 694, 698 (Ind. Ct. App. 1992) (holding, in the context of the failure to give notice to an insurer of an accident, that prejudice can be presumed from an unreasonable delay); *see also McMahan v. Deutsche Bank AG*, 892 F.3d 926, 932 (7th Cir. 2018) (“An unreasonable delay [in failure to prosecute] gives rise to a presumption of prejudice.”).

[16] There was also a history of proceeding in a dilatory fashion. Markland waited 207 days after his issuance of a subpoena to Ag Direct before seeking the trial

court's assistance in compelling Ag Direct's response. Although Markland informed the trial court of the complexity of the case and his need to seek out-of-state depositions and expert witnesses, he admitted during the dismissal hearing that he had yet to initiate this process. It is blatant that even the threat of dismissal could not stir Markland into action, as he readily conceded not to have moved forward on this case after the receipt of the trial court's Trial Rule 41(E) hearing.

[17] The only factors that can be said to weigh in favor of Markland are the desirability of deciding the case on the merits and the existence of sanctions less drastic than dismissal. Given Markland's length of delay in prosecution, the reason for the delay, his history of proceeding in a dilatory fashion, and the fact that defendant, New Holland, was the only party prosecuting the case, the trial court was well within its discretion to dismiss Markland's action for failure to prosecute.

CONCLUSION

[18] Based on the foregoing, we hold that the trial court did not abuse its discretion by dismissing Markland's Complaint pursuant to Indiana Trial Rule 41(E) for failure to prosecute his civil claims.

[19] Affirmed.

[20] Bailey, J. and Vaidik, J. concur