RENDERED: June 18, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003192-MR

LARRY SINKHORN and
PAM SINKHORN — APPELLANTS

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS HOPPER, JUDGE
ACTION NO. 93-CI-00314

PARKWAY OIL CO., INC. d/b/a
SUPER STOP 1 — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, DYCHE, and GARDNER, Judges.

COMBS, JUDGE: The appellants, Larry and Pam Sinkhorn, appeal from an order of the Knox Circuit Court which dismissed with prejudice their complaint against Parkway Oil Company, Inc., for failure to prosecute. After thoroughly reviewing the record and applicable authorities, we affirm.

On July 12, 1993, Larry and Pam Sinkhorn filed a complaint against Parkway Oil Co., Inc., d/b/a Super Stop 1 (Parkway Oil), alleging negligence based upon an incident at a car wash owned by Parkway Oil. On July 12, 1992, while using the car wash, the "sun visor" and "bug shield" were dislodged from

Larry's vehicle during the automatic washing process. Upon leaving his vehicle to remove these items that were blocking his exit path, he fell three times on the slick interior surface of the car wash.

In his complaint, Larry alleged that Parkway Oil had negligently maintained its car wash and that its negligence caused his injuries. Additionally, his wife, Pam, asserted a claim for loss of consortium. This complaint was originally filed in Bell Circuit Court but was subsequently transferred to Knox Circuit Court.

On October 11, 1994, the court gave the parties notice that it was dismissing the action without prejudice pursuant to CR 77.02(2). In response to the notice of dismissal, the Sinkhorns filed a motion to set a date for trial, and a pretrial conference was scheduled for January 31, 1995.

Shortly before the pretrial conference, the court allowed State Farm Automobile Insurance Company (State Farm) to file an intervening complaint; Federated Insurance Company (Federated) was named as an intervening defendant. The trial court held a pretrial conference as scheduled and set the trial for October 12, 1995. The Sinkhorns filed a motion to continue on September 14, 1995, stating that a continuance was needed to allow them to obtain the deposition of an expert medical witness. The court entered an agreed order continuing trial, which recited that the trial date was "to be set later."

The record shows that over the next two (2) years, the Sinkhorns failed to take <u>any</u> additional action with regard to

their claim. The only pretrial steps reflected in the record during that time were those taken by State Farm, Federated, and Parkway Oil. During the six months that immediately preceded the court's order dismissing the action, there were no pretrial steps taken by any party.

On September 25, 1997, Parkway Oil and Federated filed a joint motion to dismiss for lack of prosecution. Neither the Sinkhorns nor State Farm filed a response to this motion. Subsequently, on October 27, 1997, the court granted the motion and ordered that the action be dismissed with prejudice for lack of prosecution.[1] This appeal by the Sinkhorns followed.

The Sinkhorns argue on appeal that the trial court's dismissal of the action for lack of prosecution was an abuse of discretion. They contend that pretrial steps were taken in the year preceding the court's dismissal of the action. Additionally, the Sinkhorns assert that the court should have set a trial date instead of dismissing the action. They further contend that under the circumstances, the dismissal with prejudice was a clear abuse of discretion by the trial court. We disagree.

CR 41.02(1) provides as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

[1] Although the court's order does not cite the rule underlying the dismissal, we have deduced that it relied upon CR 41.02.

The Commonwealth's appellate courts have consistently held that the authority to render such a dismissal rests within the sound discretion of the trial court. This Court may not interfere with that discretion unless a clear abuse has occurred. Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., Ky., 451 S.W.2d 401 (1970). We have found no indication that the trial court abused its discretion in this case.

Reviewing courts have often enunciated factors for the trial court to weigh in the exercise of its discretion. In Gill v. Gill, Ky., 455 S.W.2d 545 (1970), this court held that the length of time during which a plaintiff fails to move forward with the action is one of several factors to be considered by the trial court under CR 41.02(1). In the present case, a period of more than four years had passed since the complaint was filed. Although the Sinkhorns contend that pretrial activity occurred within the year immediately preceding the dismissal, they fail to point out that those actions were taken by the other parties involved. While time alone is not the test for diligence, it should be considered along with the other circumstances of the case.

When reviewing a dismissal for lack of prosecution under the abuse-of-discretion standard, appellate courts also consider whether the case was ever scheduled for trial. Id. The Sinkhorns maintain that the court should have scheduled a trial date rather than dismissing the action.

A trial date of October 12, 1995, had first been set by the court. The Sinkhorns filed a motion to continue on September

14, 1995, which the court granted. In seeking the continuance, the Sinkhorns asserted that Larry had not yet reached "maximum medical improvement." Therefore, they contended that it was not possible to obtain the deposition of a necessary expert medical witness. Parkway Oil argued (and we believe correctly) that "maximum medical improvement" was not relevant to this case. Nevertheless, the court did grant the continuance.

That motion was the only step taken by the Sinkhorns for the next two years preceding the dismissal. The Sinkhorns could have made a motion to set another trial date; they did not. In fact, they did nothing. They cannot now allege abuse of discretion for the court's electing to dismiss rather than to practice their case for them by setting a new trial date *sua sponte*. "The law demands the exercise of due diligence by the client as well as his attorney in the prosecution or defense of litigation." Modern Heating & Supply Co., supra at 403, quoting Gorin v. Gorin, Ky., 167 S.W.2d 52, 55 (1942).

The power to dismiss an action for lack of prosecution is an inherent function of the trial court, and its preservation is essential to the judicial process. Nall v. Woolfolk, Ky., 451 S.W.2d 389 (1970). Having reviewed the totality of the circumstances, we conclude that the court did not abuse its discretion in dismissing this action with prejudice.

For the foregoing reasons, the order of the Knox Circuit Court dismissing the action with prejudice is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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