

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000833-MR

BRYANT CANADA; DOROTHY CANADA; ERNEST
BRYANT CANADA; AND, LETTIE CANADA

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 88-CI-00721

KENTUCKY FARM BUREAU MUTUAL INSURANCE
COMPANY and JAMES COX (D/B/A TRI-COUNTY
CONSTRUCTION COMPANY)

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE, BUCKINGHAM, AND KNOX, JUDGES.

KNOX, JUDGE: Appellants, Bryant, Dorothy, Ernest, and Lettie Canada, appeal from a judgment of the Pulaski Circuit Court dismissing their complaint for failure to prosecute. We affirm.

On December 11, 1986, appellants' log home suffered extensive fire damage. Their insurer, appellee Kentucky Farm Bureau Mutual Insurance Company (Farm Bureau), hired a local contractor, appellee James Cox, to repair appellants' house. Appellants, however, were not satisfied with contractor Cox's

performance. On December 1, 1988, after negotiations between appellants and Farm Bureau yielded no results, appellants filed a lawsuit against both Farm Bureau and contractor Cox, claiming damages for failure to perform adequate restoration of their house, fraud and misrepresentation, outrageous conduct, and violations of the Consumer Protection Act and the Unfair Claims Settlement Practices Act.

Farm Bureau responded to appellants' complaint by moving for dismissal, for failure to state any valid claims. Meanwhile, the parties began discovery. In January 1990, responding to Farm Bureau's motion, the court dismissed several of appellants' claims, leaving only the issues of inadequate restoration of appellants' house and violation of the Unfair Claims Settlement Practices Act to be litigated. The case proceeded routinely for another three (3) to four (4) months. It appears, however, there were no formal pleadings filed from May 1990 until May 1991, at which time appellants moved for a pre-trial conference and a trial date. The court scheduled a trial on the matter for January 6, 1992.

Three (3) months prior to trial, in October 1991, the case was assigned to a special judge, shortly after which appellants moved the court for a new trial date, referencing the re-assignment of the case in support thereof. In response, the court moved the trial date from January 6, 1992, to August 17, 1992.

In mid-June 1992, two (2) months prior to trial, contractor Cox moved the court for a continuance, citing

appellants' failure to comply with the court's discovery deadlines. Specifically, appellants had submitted neither an expert witness list nor their itemized damages, both of which were overdue by nearly a month. As such, Cox had not yet been able to depose appellants' expert witnesses. In response, appellants promised to supply the information within ten (10) days, by late June 1992. Nonetheless, on July 8, 1992, the court continued the trial.

It appears from the record that appellants' ten (10) days turned into two (2) years. By mid-1994, appellants had not yet supplied Cox with the names of their expert witnesses. Contractor Cox then took affirmative steps, hiring new counsel whose first order of business was to take appellant Bryant Canada's deposition in order to ascertain the identity of appellants' expert witnesses. Shortly thereafter, appellants moved the court for yet another trial date. By way of pre-trial order entered in September 1994, trial was scheduled for August 14, 1995.

Just days prior to trial, on August 2, 1995, appellants' attorney moved to withdraw as counsel, stating that appellants had failed to: (1) cooperate with him; (2) furnish information and assistance which he had requested; and, (3) communicate with him concerning settlement terms proffered by both Farm Bureau and contractor Cox. In conclusion, counsel asked the court to place an attorney's lien on any proceeds obtained by either judgment or settlement, and to continue the trial in order that appellants have the opportunity to retain new

counsel. A notation on the clerk's docket establishes that the court heard counsel's motion on August 4, 1995, granted it, and continued the trial, noting that an order to such effect be entered. It is not clear from the record who was to prepare the order. Nonetheless, the order allowing withdrawal, and continuing the trial, was never entered.

Over the next two and one-half years, appellants took no steps whatsoever to move the case forward. Finally, on January 22, 1998, nine (9) years after appellants filed this action, contractor Cox moved the court to dismiss the complaint pursuant to CR 41.02(1), the pertinent portion of which states: "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action" Two (2) weeks later, new counsel for appellants entered his appearance in the action, activity which the court undoubtedly believed to be too little, too late. In dismissing the action, the court found that two (2) years and six (6) months had passed since appellants' original counsel had been relieved, and that such a delay would prejudice the interests of Farm Bureau and contractor Cox. The court concluded that appellants "failed to take such steps to prosecute [their] action as are reasonable under these circumstances." It is from this ruling that appellants appeal.

"The trial court [is] vested with a broad discretion in determining the question of whether the action should be dismissed for want of diligent prosecution. Unless that discretion is abused this court will not intervene." Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., Ky., 451

S.W.2d 401, 403-04 (1970). We note that there were two (2) lengthy periods during which appellants failed to take steps to move this case forward, the first spanning July 1992 to July 1994, and the second spanning August 1995 to February 1998, when their new counsel of record responded to contractor Cox's motion to dismiss. These periods of time total four and one-half years. Notably, in February 1998, it was actually contractor Cox who took steps to move the case forward, albeit to dismiss the case, appellants' having thereafter merely responded to contractor Cox's attempt to put an end to this litigation.

Appellants argue that the order allowing their original counsel to withdraw was never entered of record, nor were they ever advised to retain new counsel. However, nowhere in their argument have they apprised this Court they did not know about the order. In fact, they were served a copy of their counsel's motion to withdraw, and were well aware of the proceedings. In any event, even had appellants not been aware of their counsel's withdrawal from the case, they nonetheless had the duty to diligently move the case forward: "'A litigant may not employ an attorney and then wash his hands of all responsibility. The law demands the exercise of due diligence by the client as well as by his attorney in the prosecution or defense of litigation.'" Modern Heating & Supply, 451 S.W.2d at 403. (Quoting Gorin v. Gorin, 292 Ky. 562, 167 S.W.2d 52, 55 (1942)).

Appellants further argue that appellees are to blame for the lengthy delays in this case. However, we see no such attempt on appellees' part to hinder the progression, or delay

the resolution, of this case. Notably, we glean from the pleadings in the record that appellants were uncooperative in this matter, even with their own counsel, and failed, evidently more than once, to comply with discovery requests in a timely manner.

Finally, appellants maintain that it was appellees' responsibility to move the case forward, in the absence of any activity on appellants' part, and that appellees' failure to do so renders them somehow conniving and underhanded. Appellants state in their brief:

No order was entered directing plaintiffs to obtain substitute counsel. Defendants remained quiet and voiced no objections to the case remaining dormant. Instead, defendants lurked like a snake in high weeds awaiting the opportunity to strike. After two and one-half years elapsed, defendants filed their motion to dismiss.

Defendants knew that plaintiffs' attorney had withdrawn. Defense counsel knew that no order had been entered regarding withdrawal of plaintiffs' counsel. Defense counsel[,] therefore, knew that the customary order directing plaintiffs to obtain new counsel had not been entered.

Why did Cox's counsel not move for a trial date or a motion to require plaintiff to obtain counsel if defendant was being prejudiced? Defendants did not want a trial. Defendants wanted to take the chance that an unrepresented plaintiff would not promptly secure [a]new another attorney and request a trial date. Defendant, Cox's, plan to stay silent and move for a dismissal was ultimately successful.

As we noted above, appellants were to exercise due diligence in moving this case forward. We do not observe such diligence on appellants' part, their having failed to bring the

case to trial within nine (9) years after they filed their complaint. Further, we disagree with appellants that the burden fell on appellees to bring this case to trial. "Though it has been suggested that there was some obligation on the part of the defendant to bring the case to trial or other disposition, the law is to the contrary." Gill v. Gill, Ky., 455 S.W.2d 545, 546 (1970) (citations omitted).

We believe the trial court wisely exercised its discretion in this matter. Thus, for the reasons stated above, we affirm the judgment of the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Thomas E. Carroll
Lance W. Turner
Monticello, Kentucky

BRIEF FOR KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY:

Charles C. Adams
Somerset, Kentucky

BRIEF FOR JAMES COX, D/B/A/
TRI-COUNTY CONSTRUCTION
COMPANY:

Lee Kessinger, III
Lexington, Kentucky