

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001189-MR

AUDREY LOGSDON,
ADMINISTRATRIX OF THE
ESTATE OF JAMES LOGSDON,
DECEASED

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 94-CI-006315

PHILIP M. ROSENBLOOM, M.D.

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, DYCHE, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from an order of the Jefferson Circuit Court dismissing a medical malpractice complaint for failure to prosecute in a timely manner. Finding no abuse of discretion, we affirm.

The procedural history of this action is relevant to this appeal and is not in dispute. The appellant, Audrey Logsdon, as administratrix of the estate of James Logsdon, filed a complaint in Jefferson Circuit Court on December 1, 1994. The complaint alleged that the appellee, Dr. Philip Rosenbloom,

committed medical malpractice in rendering treatment to the deceased, James Logsdon. Rosenbloom filed his answer to the complaint on December 19, 1994, generally denying liability. Interrogatories and requests for production of documents were propounded by Rosenbloom to Logsdon on December 16, 1994. On May 16, 1995, Rosenbloom filed a motion to compel responses to the discovery request. The trial court sustained the motion and ordered that Logsdon respond to the discovery requests on or before June 26, 1995. Rosenbloom subsequently filed a motion to dismiss on August 1, 1995, in light of Logsdon's failure to respond. However, the motion was apparently withdrawn after Logsdon filed discovery responses on August 10, 1995.

On August 16, 1996, the trial court, on its own motion, noted that no affirmative steps had been taken in the action during the proceeding six months.¹ The court assigned the matter for a status conference on September 23, 1996, and directed the parties to show cause why the action should not be dismissed for want of prosecution. On the day of the hearing, Rosenbloom filed a motion for summary judgment pursuant to CR 56.03, citing to Logsdon's failure to identify an expert witness in support of her claim for medical malpractice. In response, Logsdon stated that she identified Drs. Rahman, Deshmukh, and Cottrell as her expert witnesses in her response to the interrogatories. The trial court denied the motion for summary judgment, finding that Logsdon had adequately identified her expert witnesses, and

¹ See CR 77.02 (2).

noting that summary judgment is not appropriate as a sanctioning tool to punish discovery violations.

Prior to the entry of the trial court's order denying the motion for summary judgment, Rosenbloom filed a motion to compel Logsdon to come forward with affidavits from her expert witnesses which would affirm the representations made in Logsdon's response to the motion for summary judgment. The trial court sustained the motion to compel, and ordered Logsdon to submit the affidavits by January 24, 1997. On March 24, 1997, Rosenbloom filed a motion to exclude the previously named expert witnesses because Logsdon had failed to comply with the court's order to submit affidavits. The trial court denied the motion to exclude on October 8, 1997.

On December 19, 1997, a notice of rehabilitation and an order staying the proceedings was filed on behalf of Rosenbloom. Rosenbloom's liability insurance carrier, the PIE Mutual Insurance Company, had been placed into liquidation by the Ohio Department of Insurance. By order of the Court of Common Pleas of Franklin County, Ohio, all proceedings in which an insured was a party were stayed for a period of 90 days.²

Apparently, the stay expired of its own accord, as there is no additional mention of it in the record. On June 25, 1998, Rosenbloom filed notices to take the depositions of Logsdon's experts. Rosenbloom subsequently canceled the depositions, and re-noticed the depositions on August 31, 1998.

² The stay ordered by the Ohio court was applicable to the present litigation pursuant to KRS 304.33-170(1).

The record does not indicate that any depositions were taken, but Logsdon's brief states that they were again canceled by Rosenbloom.

On January 21, 1999, Rosenbloom filed a motion to dismiss for failure to prosecute the claim.³ Rosenbloom specifically noted Logsdon's failure to comply with the trial court's order of January 14, 1997, requiring production of affidavits from her expert witnesses. By order entered on February 15, 1999, the trial court denied Rosenbloom's motion, but directed that Logsdon submit the affidavits within fifteen days.⁴ No affidavits were forthcoming, and Rosenbloom filed a renewed motion to dismiss on March 10, 1999. The record does not indicate that any response to the motion was filed. However, in her brief on appeal, Logsdon states that the named physicians refused to provide the affidavits. On April 19, 1999, the trial court entered its order dismissing the action for failure to prosecute, and this appeal followed.

Logsdon argues that the trial court abused its discretion in dismissing her complaint. A court may dismiss an action for failure of a plaintiff to prosecute or to comply with the civil rules or with any order of the court. CR 41.02(1). Application of this rule is a matter for the discretion of the court. Thompson v. Kentucky Power Co., Ky. App., 551 S.W.2d

³ CR 41.01(1).

⁴ Prior to November 23, 1998, the proceedings in this action were before Hon. William E. McAnulty, Jr. Following Judge McAnulty's election to this Court, Hon. Lisabeth Hughes Abramson was appointed as his successor in February 1999.

815, 816 (1977). However, because of the grave consequences of a dismissal with prejudice, a dismissal pursuant to CR 41.02 should be resorted to only in the most extreme cases, and this Court should carefully scrutinize the trial court's exercise of discretion in doing so. Polk v. Wimsatt, Ky. App., 689 S.W.2d 363, 364-65 (1985).

Each case must be considered in the light of the particular circumstances involved and length of time is not alone the test of diligence. Gill v. Gill, Ky., 455 S.W.2d 545, 546 (1970). Where the motion is based upon a party's failure to comply with discovery orders, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial. Ward v. Housman, Ky. App., 809 S.W.2d 717, 719 (1991). Adopting the federal test of Scarborough v. Eubanks, 747 F.2d 871 (3rd Cir. 1984), the Court in Ward sets forth standards to apply to the circumstances of each case to determine if a less severe sanction would be warranted:

- 1) the extent of the party's personal responsibility;
- 2) the history of dilatoriness;
- 3) whether the attorney's conduct was willful and in bad faith;
- 4) meritoriousness of the claim;
- 5) prejudice to the other party; and
- 6) alternative sanctions.

Id., pp. 875-878.

We find that the trial court acted within its reasonable discretion in dismissing Logsdon's complaint. Logsdon argues that Rosenbloom had a duty to take the depositions of her expert witnesses to determine the basis for their opinions.

However, the trial court denied Rosenbloom's 1996 motion for summary judgment based upon Logsdon's representation that Dr. Rahman, Deshmukh, and Cottrell would testify as expert witnesses on her behalf. However, the court's order of January 14, 1997, directed Logsdon to obtain affidavits from her expert witnesses verifying that they had been contacted and had agreed to be expert witnesses for her in the litigation, and summarizing the basis for their opinions that Rosenbloom violated an applicable standard of care. We conclude that Rosenbloom was not obligated to take the depositions of the physicians until Logsdon complied with the court's order and confirmed that the expert witnesses had agreed to testify on her behalf.

The trial court gave Logsdon ample opportunity to comply with this order, but she failed to do so. Without the expert testimony, it is unlikely that Logsdon could have prevailed on the merits of her claim. Furthermore, even discounting the time lost under the stay, Logsdon had failed to move forward on her complaint for nearly two years at the time the trial court dismissed the action. We agree with the trial court that the delay was unreasonable and worked to Rosenbloom's prejudice. Under the circumstances, we find no abuse of discretion.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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