

RENDERED: September 13, 2002; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001806-MR

JOHN E. STEPHENS; AND  
EVERREADY RAILROAD CONTRACTING, INC.

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE DANNY P. CAUDILL, JUDGE  
ACTION NO. 92-CI-00262

FIRST COMMONWEALTH BANK OF PRESTONSBURG,  
KENTUCKY; C. DOUGLAS TURNER; TERRY GIESE;  
AND RIVERFRONT CORPORATION

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: John E. Stephens and Everready Railroad Contracting, Incorporated<sup>1</sup> have appealed from an order entered by the Floyd Circuit Court on April 5, 2000, which dismissed their

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<sup>1</sup>The names of Stephens and his corporation, Everready, will be used interchangeably in this Opinion.

claim pursuant to CR<sup>2</sup> 77.02 for want of prosecution.<sup>3</sup> On August 1, 2000, Stephens filed a motion pursuant to CR 60.03 seeking "entry of an Order Setting Aside the June 19, 2000[, ] Order of the Court, reinstating this case on the active docket, and setting the same for a trial or a pretrial conference on a date certain." Stephens's CR 60.03 motion was denied by an order entered on December 7, 2000. Having concluded that the trial court did not abuse its discretion by dismissing this action for want of prosecution and by denying relief on the CR 60.03 motion, we affirm.

In 1988, Stephens and his brother formed a partnership, Everready Railroad Contracting, for the purpose of constructing railroad tracks. At the time, C. Douglas Turner was employed as a vice-president and loan officer at First Commonwealth Bank of Prestonsburg (the bank). Allegedly, Turner promised to help Everready obtain construction contracts and bank loans in exchange for a one-third interest in the partnership's profits.

Turner was terminated by the bank in March 1989, and he was indicted on criminal charges in regard to matters arising out of his employment. Meanwhile, Stephens's brother left the partnership. In December 1989, Turner and Stephens incorporated Everready, but in the summer of 1991, they reached an impasse regarding the corporation's management. The corporation was

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<sup>2</sup>Kentucky Rules of Civil Procedure.

<sup>3</sup>Stephens filed a motion to set aside the April 5, 2000, order on April 14, 2000. The motion to set aside was denied by an order dated July 19, 2000, and entered on July 21, 2000.

dissolved in November 1993.<sup>4</sup>

On April 8, 1992, the bank commenced the present action by filing a complaint against Stephens and obtaining the issuance of a summons. The bank sought to enforce the terms of three unpaid promissory notes, which were secured by various personal property and equipment, and to obtain a judgment against Stephens. This case has a long and convoluted procedural history, which we will attempt to summarize in chronological order.

In response to the original complaint, Stephens entered into a loan modification agreement with the bank on May 12, 1992. The modification agreement essentially consolidated the three unpaid promissory notes referenced in the original complaint. After Stephens defaulted on the modified loan agreement, the bank filed an amended complaint on July 8, 1993. On October 14, 1993, the bank filed a motion for a default judgment. On November 3, 1993, the bank's motion for a default judgment was denied, and Stephens was granted an extension of time of 20 days in which to file an answer.

Finally, on December 6, 1993, Stephens responded to the bank's complaint. Along with his answer, Stephens filed a counterclaim against the bank, wherein he alleged that one of its agents, Turner, had fraudulently induced him to enter into various transactions with the bank. Stephens also filed a third-

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<sup>4</sup>The preceding facts were from an earlier non-published opinion of this Court in John E. Stephens & Everready Railroad Contracting, Inc. v. C. Douglas Turner, 1997-CA-001220-MR.

party complaint against Terry Giese and Riverfront Corporation,<sup>5</sup> alleging that the proceeds from the defaulted loans were used to meet obligations arising from a contract between Giese and Stephens and that Giese had breached his contract with Stephens by failing to pay the agreed-upon price for work performed by Stephens's company. Stephens claimed that Giese's breach of his contract with Stephens had caused Stephens to default on the loans with the bank.

On May 9, 1994, Stephens made his first discovery request, a request for production of documents from the bank.<sup>6</sup> On August 19, 1994, without any of the parties having conducted any further discovery, Stephens moved the trial court for a trial date. The trial court denied Stephens's motion by an order entered on September 20, 1994, on the grounds that discovery had not been completed. The trial court stated "that all Parties have 120 days from the date of this Order in which to complete their discovery and all other proof that they intend to take by deposition and at that time any Party may request a new Pre-Trial Conference."

On November 28, 1994, Giese moved for either a dismissal of Stephens's third-party complaint or, in the alternative, a summary judgment against Stephens. On that same

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<sup>5</sup>As with Stephens and Everready, we will use Giese and Riverfront interchangeably in this Opinion.

<sup>6</sup>The request was for one document--"Copy of settlement agreement as between 1st Commonwealth, Terry Geise [sic] and Riverfront Corporation."

day, Giese moved the trial court for leave to file a fourth-party complaint against Turner, alleging fraud.<sup>7</sup> On November 30, 1994, Stephens filed a second motion seeking a trial date. On December 1, 1994, Stephens filed a response to Giese's motion for summary judgment and his own motion for summary judgment against Giese.

While the above-mentioned motions were pending, Giese filed a notice on March 2, 1995, to take Stephens's deposition on April 6, 1995. On May 31, 1995, Turner filed a motion to dismiss the fourth-party complaint for failure to state a claim upon which relief can be granted.<sup>8</sup> On September 26, 1995, Turner filed a motion for summary judgment on the fourth-party complaint. On December 4, 1995, Stephens filed his third motion for a trial date.

On April 2, 1996, the trial court granted Turner's motion for summary judgment and dismissed Giese's fourth-party complaint against him. On May 2, 1996, Giese appealed from this order. Turner filed a motion to dismiss the appeal, and on September 24, 1996, this Court granted Turner's motion to dismiss the appeal since it was not from a final and appealable order.<sup>9</sup> On October 9, 1996, Stephens filed a request for production of documents requesting that the bank produce copies of various cancelled checks involving businesses owned by him. Also, on

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<sup>7</sup>CR 13.08 and 14.01; see also Penker Construction Co. v. Finley, Ky., 485 S.W.2d 244 (1972).

<sup>8</sup>CR 12.02(f).

<sup>9</sup>The Order Dismissing Appeal was entered on September 24, 1996, in case no. 1996-CA-001277-MR.

October 9, 1996, Stephens filed his fourth motion to set trial. Almost eight months later, on May 30, 1997, Stephens filed his fifth motion to set trial.<sup>10</sup>

From the filing of this action in April 1992, to its dismissal for want of prosecution in April 2000, over a period of eight years, only minimal discovery was conducted. Other than procedural posturing, the parties have taken few steps to actually litigate the dispute. In fact, May 30, 1997, marked the last action by Stephens and an October 9, 1997,<sup>11</sup> order marked the last action by the trial court prior to the notice to dismiss for lack of prosecution filed on May 3, 1999,<sup>12</sup> pursuant to CR 77.02(2).<sup>13</sup>

After more than one year had passed following the CR 77.02(2) notice and with the trial court having received no

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<sup>10</sup>Stephens's fifth motion to set a trial date is erroneously titled "Sixth Renewed Motion to Set for Trial."

<sup>11</sup>The trial court's order was dated October 9, 1997, and entered on October 13, 1997. The order denied Giese's motion for partial summary judgment.

<sup>12</sup>The notice stated that the action would be dismissed unless the parties responded on or before June 4, 1999.

<sup>13</sup>CR 77.02(2) states:

At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

response from any of the parties, the trial court entered an order dismissing the action for want of prosecution on April 5, 2000. Stephens responded on April 14, 2000, with a motion to set aside the order and for a pre-trial conference. On July 21, 2000, the Floyd Circuit Court denied Stephens's motion to set aside the order. On August 1, 2000, Stephens filed a motion to reconsider pursuant to CR 60.03. The trial court denied this motion on December 7, 2000. This appeal followed.

"The purpose of CR 77.02(2) is to afford trial judges a means by which they may periodically review their dockets and purge them of cases which have lapsed into inactivity."<sup>14</sup> By the terms of CR 77.02(2), such dismissals are without prejudice. In Sublett v. Hall,<sup>15</sup> our Supreme Court set forth six factors to consider prior to entering an order dismissing an action without prejudice:

1. What preparation has [sic] the opposing parties and their counsel made for trial?
2. What was the lapse of time between the filing of the complaint and the date of the motion to dismiss?
3. Will a dismissal without prejudice be prejudicial to the opposing parties?
4. Will the dismissal without prejudice act as an adjudication of the issues made by the pleadings?
5. Should the order of dismissal contain terms and conditions?
6. Would any term or condition attached to the order prejudice the movant?

The Court went on to state that emphasis should be placed on the

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<sup>14</sup>Bohannon v. Rutland, Ky., 616 S.W.2d 46, 47 (1981).

<sup>15</sup>Ky., 589 S.W.2d 888, 893 (1979).

third factor--"whether the opposing party will suffer some substantial injustice or be substantially prejudiced."<sup>16</sup>

Applying the above factors to the case sub judice, we find that the trial court did not abuse its discretion in dismissing the action pursuant to CR 77.02(2). Despite his repeated requests for the setting of a trial date, Stephens has taken few steps to prosecute his counterclaim. He has conducted very limited discovery, and he has filed few substantive motions with the trial court. The original complaint was filed over eight years prior to the dismissal, and there have been significant time lapses throughout the litigation when no activity occurred.

While Stephens claims he would be severely prejudiced by a dismissal, he has failed to convincingly argue this claim. Stephens was listed as the original defendant in the action, having defaulted on three promissory notes, and a dismissal would apparently absolve him of the bank's claims.<sup>17</sup> Stephens was idle in prosecuting his claims from May 30, 1997, to April 14, 2000, and he took nearly a year to respond to the trial court's notice of dismissal. Such long periods of inactivity and delay easily justify the trial judge's decision.<sup>18</sup>

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<sup>16</sup>Id.

<sup>17</sup>The bank alleges in its brief that it "has forfeited collection of the sum of \$55,836.84" plus interest due from Stephens.

<sup>18</sup>See Jenkins v. City of Lexington, Ky., 528 S.W.2d 729, 730 (1975) (holding that a two-year period of inactivity was  
(continued...)

We also hold that the trial court properly denied Stephens's motion to reconsider pursuant to CR 60.03. Stephens's CR 60.03 motion was filed in response to the trial court's April 5, 2000, dismissal of the action for failure to prosecute; it alleged mistake and lack of notice as grounds for Stephens's failure to respond to the April 1999 notice of dismissal. However, we note that the record indicates that Stephens was sent notice to his last known address contained in the record. Throughout the litigation, Stephens had listed this address as his address of record and there was no reason for the trial court to know whether Stephens had a change of address. Additionally, the notice was sent to Stephens's counsel at his address of record. While counsel denied receiving the notice of dismissal at this address; he acknowledged that he received the order of dismissal at this same address. The onus would have been on Stephens or his counsel to notify the trial court of an address change of either or them and to supplement the record accordingly. Thus, we cannot say that the trial court abused its discretion by denying Stephens relief on his CR 60.03 motion based on a claim of mistake and lack of notice.

For the foregoing reasons, the orders of the Floyd Circuit Court are affirmed.

ALL CONCUR.

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<sup>18</sup> (...continued)  
sufficient grounds under CR 41.02(1) for a dismissal for failure to prosecute).

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE, FIRST  
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