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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000846-MR

ERIC K. WEST; LUTHER C. CONNER, JR.; AND THE RUSSELL REGISTER, INC. — APPELLANTS

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 92-CI-00238

JEFFREY HOOVER, EXECUTOR OF THE ESTATE OF CHARLES DAFFRON; WADE DAFFRON; CLAREDON WILSON; DENVER WILSON; AND RUSSELL MEDIA, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Eric West, Luther C. Conner, Jr., and The Russell Register, Inc., appeal from the March 24, 2006 judgment of the Russell Circuit Court dismissing their complaint in this matter for lack of prosecution. Finding no error in the trial court's decision, we affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

The genesis of this action dates to 1991, when West, Conner and Wade Daffron entered into a business association for the purpose of publishing a weekly newspaper in Russell County, Kentucky. In order to effectuate their plans, Conner formed a corporation, Russell Register, Inc., for the sole purpose of publishing the newspaper that became known as *The Russell Register*. Approximately three months after publishing their first edition, Conner and West learned that Wade Daffron, Charles Daffron, Denver Wilson and Claredon Wilson (the "Appellees") had formed an alternative corporation under the name Russell Media, Inc. for the purpose of operating and managing *The Russell Register*. Conner and West also learned that they were not included in the new management structure and were no longer associated with the newspaper.

Believing that the Daffrons and the Wilsons had fraudulently converted or misappropriated the assets of Russell Register, Inc., for the benefit of Russell Media, Inc., Conner and West initiated a civil action in the Russell Circuit Court on October 3, 1992 seeking injunctive relief, recovery of the allegedly misappropriated assets and monetary damages. Between that date and March 24, 2006, the entry date of the trial court's dismissal order, little progress was made in prosecution of the lawsuit. Aside from a limited amount of written discovery, only one deposition was actually undertaken and it was never completed.

On December 19, 2005, the defendants in the action filed a motion to dismiss the suit for lack of prosecution, and, on March 24, 2006, over thirteen years after

the initiation of the action, the trial court dismissed it. Underlying the dismissal motion and now at issue in this appeal was the real question faced by the trial court, *i.e.,* who should bear the responsibility for the complete lack of progress in moving the action forward.

Kentucky Rule of Civil Procedure (CR) 41.02 provides, in pertinent part:

> (1) 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.
>
> . . .
>
> (3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The dismissal of an action upon the motion of a defendant is within the discretion of the court. *Jenkins v. City of Lexington,* 528 S.W.2d 729 (Ky. 1975); *Thompson v. Kentucky Power Co.,* 551 S.W.2d 815 (Ky. App. 1977). On review, unless the trial court abused its discretion in granting a dismissal motion, we will not interfere. *Modern Heating & Supply Co. v. Ohio Bank Building & Equipment Co.,* 451 S.W.2d 401 (Ky. 1970).

In *Ward v. Housman,* 809 S.W.2d 717, 719 (Ky. App. 1991), this Court noted several factors that a trial court should consider when deciding whether to order an involuntary dismissal. These factors are:

1) the extent of the non-moving 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.

Although the length of any period of inactivity is only one factor, dismissal for failure to prosecute has been held proper in cases involving dormancies of two years, *Jenkins v. City of Lexington, supra*; two and one-half years, *Nall v. Woolfolk,* 451 S.W.2d 389 (Ky. 1970); and three and one-half years, *Modern Heating & Supply Co. v. Ohio Bank Building & Equipment Co., supra*. Moreover, the desirability of an alternative sanction is lessened when the defendant is able to show prejudice as the result of the plaintiff's lack of prosecution. *Polk v. Wimsatt,* 689 S.W.2d 363 (Ky. App. 1985).

In its Order Dismissing, the trial court clearly placed the blame for the lack of progress in this action with the Appellants—the plaintiffs below. While our review of the record reveals that none of the parties was without blame, we believe that West and Conner exhibited sufficient dilatory conduct so as support the trial court's order and thus our conclusion that it did not abuse its discretion. As the trial court noted,

> [p]articularly noteworthy in this instance is that, for almost seven years, the [Appellants] have taken no substantive action to prosecute their claims. This lack of prosecution includes allowing the [Appellees'] Interrogatories to go unanswered for in excess of six (6) years.

West and Conner contend that though they made little progress in prosecuting their action during the thirteen and one-half years in which it was pending,

they were prevented from doing so by the conduct of the Appellees. For instance, they argue that their attempts to depose the Appellees were consistently thwarted. They further contend that a period of two years was consumed by the attempts of Denver Wilson and Wade Daffron to secure indictments against West and Connor for conduct arising from the same disputed matters that were at the center of the civil action.

It is true that, early in the proceedings, attempts by West and Conner to depose some of the defendants in their lawsuit were unsuccessful because of continuing health problems relative to parties they sought to depose. However, though this action was pending from 1992 through 2006, the record indicates that the last efforts by either West or Connor to depose any of the defendants occurred during the first four months of 1999. In fact, that same year, 1999, saw the last attempt by either of them to conduct *any* discovery in their Russell Circuit Court action. During the final seven years that this matter was pending, *nothing* occurred other than assignment of the case to a special judge, reassignment to a newly seated circuit judge, the disqualification of counsel for Charles Daffron and Wade Daffron, the substitution of Charles Daffron's estate as a party following his death, and an occasional status conference. While each of these occurrences could legitimately result in some delay in the proceedings, even when viewed cumulatively they simply cannot justify seven years of inactivity.

Appellants argue that a significant period of delay is attributable to Appellees and occurred for reasons not apparent on the face of the record. It is true that between 1999 and 2001, Denver Wilson filed a criminal complaint against Conner arising

out of the same subject matter upon which the civil action was based. However, because the local Commonwealth's Attorney, Robert Bertram, was representing the Appellees in the civil action, he was disqualified from prosecuting the matter. As a result, a special prosecutor from the Attorney General's Office of Special Prosecutions (OAG), Jim Navarre, was appointed to handle the matter. After Navarre presented the evidence relating to Wilson's complaint, the grand jury refused to issue an indictment. Apparently unhappy with the results of the first grand jury proceeding, Wilson subsequently filed a second complaint against Conner, this time adding Navarre with an allegation of misconduct pertaining to his failure to previously acquire the indictment against Wilson. By this time, Navarre was no longer with the OAG. Not relying on a prosecutor, Wilson presented the matter himself and the grand jury indicted both Conner and Navarre. The OAG moved to dismiss the indictments on the ground that they were frivolous and not supported by the evidence. The Russell Circuit Court denied the motion. Subsequent to the denial, the circuit judge recused himself when Wilson sought permission to seek yet another indictment against the judge himself. After assignment of a special judge, Wilson successfully obtained a further indictment against Conner and against Conner's defense counsel. However, the special judge dismissed both indictments for lack of evidence.

On appeal, this Court reversed and remanded the criminal action. In an Opinion rendered May 4, 2001, we held that the circuit court abused its discretion when it failed to dismiss the original indictments against Conner and Navarre because both were

clearly the result of retaliatory action by Wilson—action against Conner to gain an advantage in the civil matter, and action against Navarre for revealing to the grand jury that separate investigation by the OAG and the Kentucky State Police found no criminal conduct on Conner's part.

Clearly, Wilson's efforts to secure criminal indictments against Conner, among others, during the two-year period of 1991-2001 were, at a minimum, disruptive of the proceedings in this matter and likely the cause of delay during this period of time. However, there is nothing in the record before us indicating that West was the target of Wilson's efforts. As a result, the trial court was correct when it stated in its Order Dismissing that "the Plaintiffs could have easily pressed forward with other discovery and in other ways."

Despite this, even if we were to agree with the Appellants that a complete lack of progress in this matter during the period that the criminal matters were pending was justified by Wilson's conduct, we would still find the lack of effort to prosecute this matter during the subsequent five-year period sufficient to justify the trial court's decision to dismiss the action. As briefly noted above, from the date of this Court's 2001 Opinion to the trial court's dismissal order, there was *no* substantive progress in the prosecution of this matter. The following represents a summary of the major events during this period of time.

- December 14, 2002: status hearing;

- February 26, 2003: order entered certifying need for appointment of special judge due to trial judge's recusal;
- March 12, 2003: special judge assigned;
- August 4, 2003: case reassigned to newly seated circuit judge;
- November 3, 2003: status hearing;
- May 15, 2005: status hearing;
- August 11, 2005: order disqualifying Robert Bertram from representing the defendants;
- October 7, 2005: status hearing;
- November 22, 2005: order substituting estate of Charles Daffron as a party following death of Daffron;
- March 24, 2006: entry of order dismissing action.

From this, it is clear that the Appellants made little, if any, effort to advance this matter during the final five years preceding dismissal. This is especially evident given that *nothing was accomplished* during an eighteen month period from November 2003 through May 2005. Aside from an occasional status conference, there were no efforts during these five years to depose any witnesses or conduct any discovery. Likewise, there is no record of any dispositive motion being filed prior to the Appellee's motion seeking dismissal for failure to prosecute. Conversely, however, after the many years during which this action remained pending without moving forward, two of the key witnesses on behalf of the defendants, Charles Daffron and Jan Daffron, died. Because their testimony was neither sought nor preserved, it has been lost to the Appellees.

On this record, we agree with the Appellants that at least some of the Appellees, for reasons both within and outside of their control, contributed to the difficulties encountered by the Appellants in their efforts to advance their action. However, this neither explains nor excuses their own dilatory conduct including their failure to respond to written discovery for a period of years. While a defendant in a lawsuit has no duty to press a case forward to trial or see to it that some other disposition is achieved, *Gill v. Gill,* 455 S.W.2d 545 (Ky. 1970), a plaintiff does lest he be subject to having his case dismissed. CR 41.02. Thus, while the Appellees are not without some degree of responsibility, the record simply does not support a conclusion that they are at fault for the Appellants' failure to prosecute this action. Rather, what the record does reveal is that, especially during the last several years preceding the trial court's dismissal order, the Appellants failed to conduct, or even attempt, any discovery. Likewise there is nothing demonstrating that they attempted in any way to move this action forward to a final disposition either through trial or otherwise. These facts, taken in conjunction with the prejudice suffered by the Appellees through the loss of two witnesses, compels a finding that the trial court did not abuse its discretion by dismissing the action. Accordingly, we affirm the Russell Circuit Court's March 24, 2006 judgment.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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