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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001253-MR

LINDA F. BROWN AND GARY P. BROWN — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 01-CI-02451

LOWE'S HOME CENTERS, INC.;
AMERICAN WOODS, INC.; AND
ON-SITE ASSEMBLY, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES

COMBS, CHIEF JUDGE: Linda and Gary Brown appeal from an order of the Fayette Circuit Court dismissing their lawsuit pursuant to the involuntary dismissal provisions of Kentucky Rules of Civil Procedure (CR) 41.02. After our review, we affirm.

We previously set forth the relevant background facts of this case in *Brown v. Lowe's Home Centers, Inc.*, No. 2004-CA-001006-MR, 2005 WL 2573438 (Ky.App.

Oct. 14, 2005). Some of the following pertinent portions of that opinion serve as a proper predicate for purposes of our discussion:

> The Browns[’] complaint, filed in June 2001, contends that they bought a swing from Lowe's Home Centers, Inc., but that when Linda sat on the swing following its delivery to her home, it collapsed, causing her to suffer “serious personal injuries.” The Browns then sued Lowe's; On-Site Assembly, Inc. (who allegedly assembled the swing); and American Woods, Inc. (who allegedly manufactured the swing).
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> In April 2002, Lowe's served a second set of interrogatories and requests for production of documents on the Browns. Dissatisfied with what it deemed to be incomplete responses, in September 2003, Lowe's filed a motion to compel further responses to these discovery requests. That motion to compel resulted in an agreed order, signed on September 18, 2003, which ordered the Browns to respond to the discovery requests by November 11, 2003.
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> In response to the trial Court's September 18 order, the Browns filed a “Motion for Order to Clarify Requested Discovery,” as well as a supplemental response to discovery, which, according to Lowe's, merely repeated the initial objections to the discovery. Lowe's counsel filed a response to the Browns' motion for clarification stating that Lowe's “respectfully requests that the Court require the Plaintiffs to respond fully to all outstanding discovery responses on or before December 19, 2003[,] or be subject to the sanction of dismissal.” In response to the parties' motions, the trial court signed an order on December 16, 2003, requiring Linda to respond to the outstanding interrogatories and requests for production of documents by January 16, 2004. Later in December 2003, the trial court granted Browns' counsel's motion to withdraw and further ordered Linda to “appear, either personally or through counsel, on January 30, 2004[,] at 10:30 a.m. to advise the Court of the status of this suit. Should Plaintiff be unrepresented and medically unable to attend on that date, she must provide a doctor's statement advising the Court that she will be unable to attend.”
>
> Despite the clear language of the trial court's December order, Linda neither appeared on January 30 nor did she submit a report from a physician advising the Court

> that she could not attend. Based on Linda's failure to comply with the Court's discovery orders, as well as the assertion that the Browns had taken only one affirmative action (filing discovery requests upon Lowe's in January 2003) to prosecute their case since its inception in 2001, Lowe's and the remaining defendants moved to dismiss the Browns' complaint with prejudice.
>
> The trial court granted Appellees' motion to dismiss on February 9, 2004. But in one final effort to prod the Browns to action, the trial court's February 9 order dismissed the action without prejudice, with the caveat that "[i]f no additional appropriate action is taken [by the Browns] within sixty (60) days, Defendants are directed to submit an order dismissing [the action] with prejudice." Despite the trial court's clear warnings, the Browns failed to take any substantive steps to prosecute their action (other than faxing a letter to the trial court judge outlining all of Linda's alleged health problems). So on April 20, 2004, the trial court dismissed the Browns' complaint with prejudice, after which the Browns filed the appeal at hand.

Brown, 2005 WL 2573438 at *1-2 (footnotes omitted). On appeal, we vacated the dismissal of the case and remanded the matter for further proceedings because the record did not reflect that the trial court had properly considered the involuntary dismissal factors set forth in *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991) and *Gill v. Gill*, 455 S.W.2d 545 (Ky. 1970). In doing so, we expressly declined to set forth our views on whether dismissal would ultimately be warranted. *Brown* at *2 n.26.

Upon remand, the appellees filed another motion to dismiss the Browns' claims on January 13, 2006, for the same reasons previously argued. Following a brief hearing on January 27, 2006, the trial court granted the motion in orders entered on May 17, 2006, and June 16, 2006. The court's order of dismissal provided as follows:

> This case is before the Court on the Defendant's Motion to Dismiss. On April 21, 2004, an order was issued from this Court dismissing this action. The Court of Appeals ordered this Court to enumerate its reasoning under the *Ward v. Houseman* [sic] factors: the extent of the party's personal responsibility; the history of dilatoriness; whether the attorney's conduct was willful and in bad faith; meritoriousness of the claim; prejudice to the other party; and alternative sanctions. *Ward v. Houseman* [sic], 809 S.W.2d 717, 719 (Ky.App. 1991).
>
> This Court granted Defendant's Motion to Dismiss based on Plaintiff's repeated failures to comply with discovery requests or to take any action whatsoever. Plaintiff filed this lawsuit in 2001 and in the nearly five (5) years since, has taken only one affirmative action to move this case forward. Most other actions, including repeatedly ignoring this Court's orders to Compel, appear to have been for the purposes of delay. Since the parties are representing themselves, it would appear that they are indeed *personally* responsible for the delays.[1] The Court even gave Plaintiff the option of providing a doctor's report of why she could not appear, which she failed to provide. Consequently, the Court can only conclude that such failure was willful and in bad faith. In this Court's order of February 6, 2004, the Court stated that if the Plaintiff did not take appropriate action within sixty (60) days, then the action would be dismissed with prejudice. Plaintiff took no action. The record is blatant as to how many opportunities Plaintiff was given to stay in this case. The Defendants should not be forced to continually defend a case that the Plaintiff has failed to prosecute in a timely manner, or even in *any* manner. Therefore, Defendant's Motion to Dismiss is GRANTED.

This appeal followed.

On appeal, the Browns again argue that the trial court erred in dismissing their action. CR 41.02(1) governs the involuntary dismissal of civil actions. It provides

[1] We note that at the time of this order, the Browns were no longer proceeding *pro se* but were represented by counsel. From the context of the order as a whole, however, it is clear that the court is referencing to events that took place prior to the first dismissal.

that "[f]or 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." Dismissals for lack of prosecution pursuant to CR 41.02 are reviewed under the standard of abuse of discretion. *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky.App. 2006). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); *see also Toler*, 190 S.W.3d at 351. In considering the Browns' appeal, we must bear in mind that trial courts are vested with an inherent power to dismiss for lack of prosecution in order to preserve the integrity and management of the judicial process. Nonetheless, we note that such discretion is to be exercised with care:

> … dismissal of a case pursuant to CR 41.02 or CR 77.02 "should be resorted to only in the most extreme cases" and we must "carefully scrutinize the trial court's exercise of discretion in doing so." *Polk v. Wimsatt*, 689 S.W.2d 363, 364-65 (Ky.App. 1985). The rule permitting a court to involuntarily dismiss an action "envisions a consciousness and intentional failure to comply with the provisions thereof." *Baltimore & Ohio Railroad Co. v. Carrier*, 426 S.W.2d 938, 940 (Ky. 1968). Since the result is harsh, "the propriety of the invocation of the Rule must be examined in regard to the conduct of the party against whom it is invoked." *Id.* at 941.

Toler, 190 S.W.3d at 351. A trial court must consider each case in light of its unique circumstances without relying upon the passage of time as solely indicative of a lack of due diligence. *Gill*, 455 S.W.2d at 546.

We originally remanded this matter to the trial court for appropriate consideration of the factors set forth in *Ward v. Housman*, *supra*. In *Ward*, we adopted the guidelines set forth in *Scarborough v. Eubanks*, 747 F.2d 871 (3d Cir. 1984), for determining whether a case should be dismissed for dilatory conduct under Rule 41(b) of the Federal Rules of Civil Procedure -- the counterpart to our CR 41.02(1). We directed that the following factors should be considered:

> (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.

Ward, 809 S.W.2d at 719; *see also Toler*, 190 S.W.3d at 351.

The Browns argue that the trial court's decision to dismiss their case was improper because alternative sanctions were available. For example, they argue that since the primary subject of the discovery dispute has been Linda's claim of lost wages, an appropriate sanction would have been to dismiss only that claim. Although dismissal of this claim alone might have been an appropriate sanction, we as an appellate court are limited to reviewing a court's dismissal of a party's claims pursuant to CR 41.02 pursuant to an abuse-of-discretion standard. While we may have acted otherwise, we may not usurp the discretion of a trial court by substituting our judgment.

After reviewing the record, we cannot conclude that the trial court abused its discretion in failing to utilize alternative sanctions. As the court pointed out in its

order of May 17, 2006, the Browns were given numerous opportunities to comply with court orders as to discovery and as to moving the case along. The record also reflects that the court actually did implement alternative sanctions against the Browns before it finally resorted to dismissing their case. We recognized as much in our previous opinion when we stated that "the trial court clearly considered the efficacy of alternative sanctions, as evidenced by the fact that it first dismissed the action without prejudice." *Brown*, 2005 WL 2573438 at *2. We particularly note the trial court's finding upon dismissing the case *without* prejudice. The court urged the Browns to take some sort of action within sixty (60) days to save it from being dismissed *with* prejudice; yet they still failed to act. Therefore, we cannot conclude that the trial court abused its discretion in failing to employ alternative sanctions against the Browns after the remand that granted them a second chance.

The Browns next raise a general argument that the court once again failed to consider the *Ward v. Housman* factors properly before dismissing their case. However, after reviewing the court's May 16, 2006 order of dismissal, we do not agree. The order details directly and clearly the Browns' personal responsibility as to the numerous delays and inactivity that have plagued the case. It also expresses the court's opinion that their conduct was willful and in bad faith. We are satisfied that the trial court adequately considered the *Ward v. Housman* factors in deciding to dismiss those claims with prejudice. We find no error on this ground.

The Browns finally argue that another remand is appropriate because we have vacated and remanded a number of similar cases since our first opinion was rendered in October 2005. We disagree. The cases cited by the Browns were remanded only because the trial courts failed to take into account the requisite *Ward v. Housman* factors. We did not consider the actual merits of dismissal in any of those cases. *See Jaroszewski v. Flege*, 204 S.W.3d 148, 150 (Ky.App. 2006); *Toler*, 190 S.W.3d at 351-52.

We conclude that the trial court gave proper consideration to the *Ward v. Housman* factors in its decision to dismiss and that the court did not abuse its discretion in ordering dismissal. Therefore, another remand is not required.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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