

RENDERED: JANUARY 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000037-MR

LAWRENCE FROMAN

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 07-CI-00065

JAMES ELDRIDGE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Lawrence Froman appeals from an order of the Hardin Circuit Court which dismissed his original action without prejudice pursuant to Kentucky Rules of Civil Procedure (CR) 77.02. The question on

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

appeal is whether the trial court abused its discretion and violated Froman's due process rights in dismissing his will contest action for lack for prosecution.

Froman became reacquainted with an old friend, James Elliott England, while the two men were incarcerated at the Kentucky State Reformatory. After England's death on March 29, 2006, Froman produced a will purportedly executed by England and dated November 19, 2003, which left the bulk of England's considerable estate to Froman.² Meanwhile, England's son, James Eldridge,³ who was appointed the executor of his father's estate, submitted a will to probate. This will was dated January 13, 1997, and left nothing to Froman. Froman filed a motion to contest the 1997 will in the Hardin District Court. The district court denied the motion, explaining in its order that it was not the proper forum in which to contest a will and advising Froman to file an original action in circuit court. Froman filed an appeal of this order in the Hardin Circuit Court, which after holding a hearing denied the appeal on the ground that he should have contested the matter by original action. Froman finally filed an original action in the Hardin Circuit Court in January 2007. On April 17, 2008, Froman filed the 2003 will with the court, and began to initiate discovery proceedings. According to Froman, the action stagnated into a stalemate, with the appellee refusing to

² Froman also filed another will purportedly executed by England on November 17, 2003, which contained the signatures of three witnesses.

³ James Eldridge is referred to as "James Eldridge England" in the circuit court record; "James Eldridge" was the name of the appellee given in the notice of appeal.

provide requested documents in discovery and the trial court refusing to direct the appellee to comply with the orderly rules of discovery.

On October 17, 2008, the trial court sent notice to the parties that the action was subject to dismissal for lack of prosecution pursuant to CR 77.02(2). At the time he received the notice, Froman (who was still incarcerated) was in segregation and did not have in his possession the legal documents pertinent to the case. He moved the trial court to hold the matter in abeyance for at least sixty days until such time as he was able to access the file and make a proper showing why the matter should not be dismissed. The trial court nonetheless entered an order of dismissal on December 2, 2008. This appeal followed.

Froman argues that the trial court abused its discretion and violated his substantive and procedural due process rights in dismissing his action. He further argues that the trial court's dismissal on procedural grounds pursuant to CR 77.02(2) operated to bring into effect all of the inferences that govern a CR 56 motion for summary judgment, and that the trial court was therefore required to accept his factual allegations as true.

CR 77.02 is often referred to as the "housekeeping" rule as it allows trial courts to purge their dockets of stale cases. *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753, 755 (Ky. App. 1982). It states in pertinent part as follows:

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.

CR 77.02(2).

A dismissal without prejudice under CR 77.02(2) is reviewed under an abuse of discretion standard. *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.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

The record shows that Froman filed a motion for discovery pursuant to CR 26.01 on April 20, 2007. The trial court denied the motion on May 8, 2007, because it was not a procedure authorized by the Civil Rules for discovery in a civil matter. Froman then filed a motion on July 18, 2007, to grant CR 5.06 filings. The record shows that the last action taken by Froman in this lawsuit (prior to the trial court’s entry of the notice to dismiss for lack of prosecution) occurred on August 8, 2007, when he filed his first discovery motion and a set of written interrogatories. The trial court’s notice to dismiss for lack of prosecution was entered more than fourteen months later, on October 17, 2008.

Froman argues that the trial court was required to conduct an inquiry into which document was in fact the last will and testament of James Elliot England, and that he was repeatedly denied his right to be heard due to his

incarceration and the fact that he was proceeding pro se. Although Froman explained that he was in segregation at the time the notice to dismiss was entered, he did not explain why he allowed more than a year to pass, after he filed his discovery requests, in which he made absolutely no efforts to pursue the lawsuit. He attributes much of the delay to the appellee's failure to comply with those discovery requests, but this allegation was never brought to the circuit court's attention until after the notice to dismiss was entered. Under the express terms of CR 77.02(2), the circuit courts are required to review their pending dockets on an annual basis, and may not allow cases to languish. *See Manning v. Wilkinson*, 264 S.W.3d 620, 624 (Ky. App. 2007). "The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process." *Nall v. Woolfolk*, 451 S.W.2d 389, 390 (Ky. 1970). Under the circumstances of this case, the trial court did not abuse its discretion in dismissing the action, particularly as dismissals under this rule are without prejudice.

As to Froman's argument that the circuit court's dismissal on a procedural ground operated to bring into effect all of the inferences that govern a CR 56 motion for summary judgment, he appears to be confusing a dismissal under CR 77.02(2) with a dismissal for failure to state a claim under CR 12.02. Under CR 12.02, a motion to dismiss is converted to a motion for summary judgment if the court considers matters outside the pleadings. *See* CR 12.02;

McCray v. City of Lake Louisville, 332 S.W.2d 837, 840 (Ky. 1960). Froman's action was not dismissed under CR 12.02 and his argument that the circuit court failed to observe the summary judgment standard is therefore moot.

The order of the Hardin Circuit Court is affirmed.

NICKELL, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE

OPINION.

THOMPSON, JUDGE, CONCURRING: I concur with the majority only because the form order dismissing was without prejudice for lack of prosecution pursuant to CR 77.02(2).

Eldridge filed a brief with this Court and argued that he was not served with process. A review of the docket demonstrates that Eldridge was unable to be located by the clerk for service of court orders and for the service of certified mail and, therefore, was never served with summons or process. The complaint was filed on January 10, 2007, with the will as an exhibit. Certified letters and orders were mailed by the clerk and returned as undelivered on May 23, 2008, October 21, 2008, October 30, 2008, and November 17, 2008. How Eldridge filed a brief with this Court is another question.

The inmate, Lawrence Froman, produced a document that is a purportedly notarized will by the decedent. The will details why the decedent desired to change his will and Eldridge's behavior toward him after incarceration.

Because the dismissal is without prejudice, even with my concerns for Froman's disability caused by his incarceration, I concur.

BRIEF FOR APPELLANT:

Lawrence Froman, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Michael A. Pike
Radcliff, Kentucky