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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000047-MR

DONNA HUNTER, F/K/A ADKINS

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 07-CI-00574

DAVID STEFANIC AND
SUZANNE STEFANIC

APPELLEES

AND

NO. 2009-CA-001511-MR

NEIL E. DUNCLIFFE

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 07-CI-00574

DONNA ADKINS AND WILLIAM S. WATTS

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: This case arises out of a lawsuit brought in the Scott Circuit Court by Donna Hunter (fka Adkins) against David and Suzanne Stefanic. The Stefanics subsequently brought a counterclaim against Hunter. In April 2008, the Scott Circuit Court granted the Stefanics' summary judgment on their counterclaim against Hunter, and they subsequently have attempted to execute on that judgment. In September 2008, the court dismissed Hunter's claims and denied her motion to alter, amend, or vacate the dismissal. Hunter now appeals the dismissal of her claims against the Stefanics in appeal number 2009-CA-000047-MR. Attorney Neil Duncliffe separately appeals the Scott Circuit Court's imposition of sanctions in appeal number 2009-CA-001511-MR. The court imposed sanctions against the Stefanics and Duncliffe for attempting to intervene in the pending divorce action between Hunter and her husband. After careful review, we affirm the Scott Circuit Court's rulings in both cases.

Hunter filed the complaint in appeal number 2009-CA-000047-MR on August 3, 2007, and an answer and counterclaim was filed on September 17, 2007. On November 8, 2007, Hunter's counsel filed a motion to withdraw as counsel, which was granted on December 6, 2007. The Scott Circuit Court's order provided

¹ Senior Judge Michael L. Henry 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.

that Hunter should retain new counsel within thirty days. After allowing the allotted time to elapse, the Stefanics served a notice of deposition setting the deposition of Hunter's husband, Glenn Adkins, whose deposition was taken on February 25, 2008. Mrs. Hunter did not appear personally or through counsel, and no substitution of counsel was ever noticed upon the Scott Circuit Court.

On March 11, 2008, the Stefanics filed a motion for summary judgment on their counterclaim, which was sustained on April 16, 2008. The order recited that it was final and appealable, and it was served on Hunter by the clerk of the Scott Circuit Court. On May 12, 2008, the Stefanics noticed Hunter's deposition and served a subpoena upon her. Hunter did not appear for the deposition.

In August, the Stefanics took several steps to collect the judgment entered on their counterclaim, and all notices were served upon Hunter. On August 22, 2008, the Stefanics filed a motion to dismiss, and a copy was again served upon Hunter. The Stefanics argued that Hunter had abandoned her case and had failed to respond to any of the steps they had taken. Hunter did not file any response or objection, and she failed to appear at the hearing on the motion to dismiss. On September 4, 2008, the Scott Circuit Court granted the motion and entered an order dismissing Hunter's remaining claims.

On September 15, 2008, Attorney Watts entered an appearance on Hunter's behalf and filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter or vacate the dismissal of the claims. After a hearing on November 6,

2008, the Scott Circuit Court denied the motion to vacate. An order adopting the oral findings made at that hearing was entered on November 10, 2008. On November 20, 2008, the Stefanics filed a motion to amend the November 10, 2008, order to set out in more detail the findings which had been made. Hunter then filed a motion for an evidentiary hearing.

The Scott Circuit Court entered a more detailed order on December 11, 2008, finding that based on the factors set forth in *Stapleton v. Shower*, 251 S.W.3d 341 (Ky. App. 2008), Hunter had failed to prosecute her case and had an extensive history of dilatoriness. The court noted that Hunter had not offered any justification for her failure to appear at motions and depositions in 2008 and concluded that her actions were willful and in bad faith. The court held that the Stefanics had been clearly prejudiced by having to defend the action, and in light of these facts, dismissal was appropriate under CR 41.02. Hunter now appeals from this order.

As Kentucky case law has long held, we review a trial court's dismissal under CR 41.02 for lack of prosecution by an abuse of discretion standard. *Jaroszewski v. Flege*, 297 S.W.3d 24, 32 (Ky. 2009). "There is no absolute right to dismissal for a plaintiff's failure to prosecute and no exact rule can be laid down as to when a court is justified in dismissing a case for the plaintiff's failure to prosecute or for delay in prosecuting his or her action; each case must be looked at with regard to its own peculiar procedural history and the situation at the time of dismissal." *Id.* (Internal citations and footnotes omitted).

The Court in *Jaroszewski* went on to clarify the role of appellate courts in evaluating a trial court's dismissal under CR 41.02 and ultimately concluded that a trial court must not detail every factor listed in *Ward v. Houseman*, 809 S.W.2d 717 (Ky. App. 1991). However, the Court held that “[t]rial courts must make explicit findings on the record so that the parties and appellate courts will be properly apprised of the basis for the trial court's rulings; and the appellate courts can assess whether the trial court properly considered the totality of the circumstances in dismissing the case.” *Id.* at 36.

In the instant case, the trial court detailed its written findings in its order entered December 11, 2008. Those findings are supported by the record, and thus we find no abuse of discretion by the court in dismissing Hunter's claims against the Stefanics. In particular, the Scott Circuit Court found that in all pleadings and documents before the court Hunter's address remained the same, and Hunter was still the record owner of that property. Thus, there was proof in the record that Hunter was receiving court documents, motions, pleadings, and notices to appear before the court from August 2007 through dismissal in September 2008 and ignored such pleadings.

In her motion to vacate, Hunter argued that she had sought out new counsel in her separate divorce proceedings and that her understanding was that such counsel had agreed to represent her in the current civil proceedings. However, we note that Hunter did not argue this before the court at the hearing on the original motion to dismiss but instead failed to appear at that hearing. The trial

court found that Hunter failed to obtain new counsel and that even if she had relied on counsel to represent her in the instant action, the continued receipt of pleadings, motions, and notices put Hunter on notice that counsel had not filed an appearance in this matter and that her interests were *not* being represented.

The court determined that Hunter had not offered any reasonable justifications for her failure to appear at motions and depositions and that her conduct was willful and was evidence of bad faith. The court concluded that it could not determine the merit of Hunter's claim because she had failed to prosecute her claim. Similarly, the Kentucky Supreme Court in *Jaroszewski* stated "So, in a typical case, the meritorious nature of a plaintiff's case may be difficult to assess and of minimal value because even a meritorious case may be dismissed under CR 41.02 if the totality of the circumstances shows that the plaintiff is not actively prosecuting the case." *Jaroszewski* at page 39. Finally, the trial court found that the Stefanics had been prejudiced by having to continue to defend the lawsuit.

Based on the trial court's explicit written findings detailing the basis for its dismissal under CR 41.02, it is clear the trial court considered the totality of the circumstances in this case. The trial court considered the fact that Hunter was receiving mail at her registered address and had not adequately hired another attorney to represent her interests. The court made the factual determination that Hunter was in fact receiving numerous pleadings and was ignoring them in bad faith. Furthermore, the trial court determined that the Stefanics were prejudiced by

the delay in action. Accordingly, the trial court's reasons for dismissing were supported by the evidence and as such, there was no abuse of discretion. Absent such an abuse, we will not overturn the trial court's ruling on appeal.

Attorney Neil Duncliffe appeals separately, arguing that the Scott Circuit Court erred in imposing CR 11 sanctions against him for attempting to collect a judgment on behalf of David and Suzanne Stefanic. Because we find no error by the Scott Circuit Court in imposing CR 11 sanctions, we affirm the trial court's May 15, 2009, order.

As stated above, Hunter's complaint was dismissed for lack of prosecution on September 4, 2008. Meanwhile, on April 16, 2008, the Stefanics obtained a judgment in the amount of \$19,641.00 plus interest against Hunter on their counterclaims. Hunter did not post a supersedeas bond, leaving the Stefanics free to collect their judgment.

Upon obtaining the judgment against Hunter, Duncliffe issued a garnishment upon marital funds held by attorney John Dutra in Hunter's collateral dissolution of marriage action which is still pending in Scott Circuit Court/Family Division (Civil Action No. 06-CI-254 styled *In the Marriage of Donna Adkins (now Hunter) and Glenn Adkins*). Dutra held \$132,662.78 in marital funds remaining from the sale of the Adkins/Hunter marital residence. Dutra executed an affidavit indicating that Donna Hunter's portion of the escrow account exceeded the Stefanics' judgment amount of \$19,641.00 plus interest.

Accordingly, on August 18, 2008, Duncliffe served a garnishment on Dutra, seeking payment of \$19,641.00 plus interest to satisfy the Stefanics' judgment. When Dutra did not respond, the Stefanics moved to collect their judgment via enforcement of the garnishment served upon Dutra. On December 4, 2008, the Scott Circuit Court, Civil Division I ordered the Stefanics to obtain a ruling on whether they were permitted to garnish the marital funds from the Family Division of the Scott Circuit Court, where the divorce petition was pending.

On January 7, 2009, the Stefanic's motion to intervene into the dissolution action was heard, but the Family Division deferred ruling on the motion. On February 5, 2009, with no ruling from the Family Division on their motion to intervene and with Hunter posting no supersedes bond, the Stefanics again moved again to enforce their judgment in the Civil Division. The Civil Division of the Scott Circuit Court again declined to rule, awaiting an order from the Family Division.

On March 13, 2009, the Family Division of the Scott Circuit Court entered an order denying the Stefanic's motion to intervene. That order stated that the Stefanics had no standing to intervene and found that the Stefanics had no interest that would be affected because they already had a judgment against Hunter, which they could execute upon immediately or after the disbursement of the marital assets.

On March 17, 2009, Duncliffe initiated a conference call between himself and attorneys Dutra and Prewitt, the attorneys for Donna and Glenn Hunter

in their divorce petition, to sort out the meaning of the Family Division's order. According to Duncliffe, Dutra believed the Family Court order allowed him to release the funds held in escrow immediately. However, Prewitt believed that the Family Court order did not permit Dutra to honor the garnishment.

On April 2, 2009, after no resolution from the conference call, Duncliffe moved the Scott Circuit Court Civil Division to resolve the conflicting interpretations of the Family Court order and to enforce the garnishment originally served eight months earlier. At this time, the Civil Division denied enforcement of the garnishment and imposed CR 11 sanctions in the amount of \$1,225.00 in fees and costs in an order entered May 15, 2009. From this order, Duncliffe now appeals. The Stefanics do not separately appeal the imposition of sanctions and attorney's fees.

“When reviewing a trial court's issuance of CR 11 sanctions, we review the trial court's findings of fact under a clearly erroneous standard, the ultimate determination that a violation occurred under a de novo standard, and the ‘type and/or amount of sanctions’ under an abuse of discretion standard.”

Lattanzio v. Joyce, 308 S.W.3d 723, 726 (Ky. App. 2010) (citing *Clark Equip. Co., Inc. v. Bowman*, 762 S.W.2d 417, 421 (Ky. App. 1988)).

Findings of fact are not clearly erroneous if they are supported by substantial evidence. *Hallum v. Commonwealth*, 219 S.W.3d 216, 220 (Ky. App. 2007). Substantial evidence constitutes facts that a reasonable mind would accept as sufficient to support a conclusion. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky.

2003). In its May 15, 2009, order the Scott Circuit Court's factual findings mirror the facts as presented in Duncliffe's brief. Given that Duncliffe and the Scott Circuit Court's versions of the facts are the same, the facts in the instant case are clearly supported by substantial evidence and are not clearly erroneous.

CR 11 provides, in pertinent part, as follows:

[t]he signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A trial court is authorized to impose sanctions against any party or attorney who violates this rule. CR 11 ("If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . .").

In *Clark Equip. Co., Inc. v. Bowman*, 762 S.W.2d 417 (Ky. App. 1988), this Court explained that the imposition of CR 11 sanctions should be reserved for "exceptional circumstances." *Id.* at 420. "The test to be used by the trial court in considering a motion for sanctions is whether the attorney's conduct, at the time he or she signed the allegedly offending pleading or motion, was reasonable under the circumstances." *Id.*

In the instant case, the Scott Circuit Court ruled that the Stefanics and Duncliffe had “continually failed out of haste to recognize what this Court has instructed them on two prior occasions. The family court’s Order unmistakably states that the Defendants already have a judgment against the Plaintiff in this case, and therefore, there is no need for them to intervene in that case.” The court went on to note that the Family Court’s order was *clear* that based upon the Stefanics’ judgment against Hunter, they had the legal means to execute upon any property to collect their debt but *could not* obtain any interest in Hunter’s marital funds until they were disbursed. Given Duncliffe’s repeated pursuit of the matter in light of the clear language in the Family Court’s order, his actions were not “reasonable under the circumstances,” and the Civil Division was justified in imposing sanctions under CR 11. Accordingly, even under a *de novo* standard of review, sanctions were appropriate as a matter of law.

Finally, we review the type and/or amount of sanctions for an abuse of discretion. *Lattanzio, supra* at 726. In the instant case, the Civil Division of the Scott Circuit Court imposed attorney’s fees and costs for the second and third motions filed by the Stefanics in their “ill-fated and ill-conceived attempt to get a disbursement from the Dutra Escrow Account.” Those fees totaled \$1,225.00 and were tailored specifically to the costs incurred in the unnecessary attempts by Duncliffe and the Stefanics to intervene and seek out marital funds. Thus, they were reasonable in light of the court’s finding that sanctions were proper in this

case. Accordingly, we find no abuse of discretion by the Civil Division in the amount and/or type of sanctions imposed.

For the foregoing reasons, we affirm the December 11, 2008, order of the Scott Circuit Court dismissing Hunter's claims. Further, we affirm the May 15, 2009, order imposing CR 11 sanctions.

ALL CONCUR.

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