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TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001518-MR

INDIAN RIDGE PROPERTIES, INC.;  
AND CHARLES L. WALLER, JR.

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 01-CI-006767

SCHWARTZ, LLC NO. 1; DAVID  
W. NICKLIES; AND FULTZ  
MADDOX HOVIOUS & DICKENS PLC<sup>1</sup>

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

TAYLOR, CHIEF JUDGE: Indian Ridge Properties, Inc., and Charles L. Waller,

Jr. (collectively referred to as appellants) bring this appeal from a May 5, 2010,

order and a July 15, 2011, amended order of the Jefferson Circuit Court dismissing

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<sup>1</sup> On June 18, 2007, appellee Tachau Maddox Hovious & Dickens PLC, amended its Articles of Organization to legally change its name to Fultz Maddox Hovious & Dickens PLC.

their action pursuant to Kentucky Rules of Civil Procedure (CR) 41.02(1). We affirm.

The procedural history surrounding this case is complex; thus, we recite only those procedural facts necessary to disposition of this appeal.

Appellants filed the instant action (01-CI-006767) in the Jefferson Circuit Court, Division Nine, on October 2, 2001, against Schwartz, LLC No. 1, David W. Nicklies, and the law firm of Tachau [now Fultz] Maddox Hovious Dickens, PLC (collectively referred to as appellees). Therein, appellants asserted the claims of fraud, slander of title, and interference with contractual relations as pertains to a property transaction between the parties that originated in 1995. Before appellees filed an answer, the parties sought to hold the action in abeyance pending resolution of an appeal then pending in the Court of Appeals in a companion action. In that action, Schwartz, LLC No. 1 sued Indian Ridge Properties, Inc., in the Jefferson Circuit Court, Division Five, (00-CI-006370) regarding the same property transaction and the decision was appealed to this Court in Appeal No. 2001-CA-000348-MR.

By order entered November 7, 2001, the circuit court placed the instant action (01-CI-006767) in abeyance. It specifically ordered:

By agreement, matter held in abeyance pending final disposition of appeal 2001-CA-000348-MR, all issues, defenses (including disqualification) reserved.

Subsequently, the Court of Appeals rendered an opinion affirming in Appeal No. 2001-CA-000348-MR on April 5, 2002. Thereafter, a timely motion for

discretionary review was filed with the Supreme Court. By order entered February 12, 2003, the Supreme Court denied discretionary review.

In our case (01-CI-006767), the action was still in abeyance, and no activity occurred in the circuit court from November 7, 2001, until March 2, 2010. On March 2, 2010, appellees filed a motion to dismiss for lack of prosecution under Kentucky Rules of Civil Procedure (CR) 41.02. Two days later, appellants filed a motion to remove the action from abeyance. The court granted the motion and removed the action from abeyance on March 9, 2010. Ultimately, the circuit court dismissed the action without prejudice pursuant to CR 41.02 for failure to prosecute same. This appeal follows.

Appellants contend that the circuit court erroneously dismissed the action under CR 41.02. Appellants raise three grounds for relief:<sup>2</sup>

- I. The circuit court erred in not finding that the appeal in Division 5 was not concluded until that court denied the motion for judgment against the surety on the supersedeas bond.
- II. The court erred in finding that the defendants were prejudiced.
- III. Dismissal under CR 41.02 is not appropriate in a situation in which the parties agree to hold a case in abeyance.

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<sup>2</sup> In their reply brief, Indian Ridge Properties, Inc., and Charles L. Waller, Jr. (appellants) attempt to raise new allegations of error not contained in the appellants' brief. Kentucky Rules of Civil Procedure (CR) 76.12(4)(e) clearly states that "[r]epley briefs shall be confined to points raised in the briefs to which they are addressed[.]" In this appeal, it would be manifestly unfair to consider appellants' new allegations of error contained in the reply brief as appellees had no opportunity to respond to same. Thus, we disregard any allegations of error raised for the first time in the reply brief.

Appellant's Brief at iii. For the reasons hereinafter explained, we conclude that the circuit court did not err by dismissing this action pursuant to CR 41.02.

CR 41.02 provides, in 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.

Pursuant to CR 41.02(1), a circuit court may dismiss an action for a party's failure to prosecute same. When so doing, the circuit court must consider the totality of the circumstances and all relevant factors, including those factors specifically set forth in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991). *Jaroszewski v. Flege*, 297 S.W.3d 24 (Ky. 2009). The *Ward* factors are:

- 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 (citation omitted). It must be emphasized that a decision to dismiss under CR 41.02(1) should be based upon the totality of the circumstances and not simply upon the *Ward* factors. *Jaroszewski*, 297 S.W.3d 24. In the final analysis, a CR 41.02(1) dismissal is within the sole discretion of the

circuit court and will not be disturbed absent a clear abuse of that discretion.

*Jaroszewski*, 297 S.W.3d 24.

In the instant case, the circuit court outlined the facts supporting its decision to grant a dismissal pursuant to CR 41.02(1):

Plaintiffs argue the Division 5 appellate process was not complete until the dismissal of the action February 26, 2010. They reason the appeal was not final until issues surrounding the sufficiency of the supersedeas bond and judgment against the surety were adjudicated. They point to the delay in ruling on those issues to justify inaction in this case. The Court disagrees with this line of reasoning.

The Plaintiffs bear responsibility for moving this litigation forward. The record is devoid of an effort to apprise this Court of the appellate process or any other issues related to the abeyance order. Plaintiffs cite other activities occurring outside the record as evidence they were not dilatory. Plaintiffs were contacted twice, by separate counsel, regarding settlement possibility. On both occasions Plaintiffs furnished an itemization of damages, but were not able to settle their claims.

One of Plaintiffs, Dr. Waller, filed personal bankruptcy sometime in 2005. (Footnote omitted.) The record is silent regarding this pertinent fact. Plaintiffs' belief that a stay would have been in place regardless of the appellate outcome in Division 5 is not sufficient to protect its claim in this Court.

Defendants contend the two cases are not intertwined. Although the facts giving rise to the Division 5 case are the foundation for this case, it is a tort action alleging slander of title, interference with contractual relations and fraud. The Division 5 case was filed as a Declaration of Rights by Schwartz, LLC No. 1 against Indian Ridge; the law firm was not a party to the suit.

Further, the Defendants cite the prejudice they will suffer since memories of events have faded, documents may no longer be available and discovery taken in the Division 5 case is not germane to these proceedings. In fact, Defendants have not filed an Answer to the Complaint. Their ability to launch an aggressive defense is now limited.

The Court finds the case was held in abeyance pending the final disposition of the appeal in Division 5, not the final disposition of the case before the Circuit Court. The Plaintiffs knew the motion for discretionary review was denied on February 12, 2003. At that point, it was incumbent upon the Plaintiffs to notify this Court of the outcome of the appeal; the Plaintiffs failed to do so.

The Court further finds Defendants would suffer extreme prejudice if they are now forced to defend an action that was inactive seven years longer than necessary. There are no alternative sanctions that can cure fading memories and missing documents necessary to defend against Plaintiffs' claim.

Having reviewed the record, the circuit court's order of dismissal, and the totality of the circumstances, we cannot conclude that the court abused its discretion. When the circuit court held the underlying action in abeyance, the order specifically provided that such abeyance was "pending final disposition of Appeal 2001-CA-000348-MR." The record indicates that the appeal was rendered final by an order of the Supreme Court denying discretionary review on February 12, 2003.<sup>3</sup> Despite appellants' arguments to the contrary, it was incumbent upon appellants, as plaintiffs, to timely pursue their claims against appellees. More than seven years lapsed between the finality of the appeal and appellants' motion to

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<sup>3</sup> Pursuant to CR 76.30(2)(b), an "opinion becomes final immediately upon denial of the motion" under CR 76.20 (discretionary review).

remove the action from abeyance. And, no good cause is advanced by appellants for their dilatoriness. Appellants were clearly aware of the Supreme Court's order denying discretionary review, and their argument that the appeal was not final as proceedings were pending in the circuit court upon the supersedeas bond is specious, as that action was also dismissed for failure to prosecute under CR 41.02(1). Moreover, the circuit court's finding of prejudice in the face of a seven-year delay cannot be considered clearly erroneous.

In sum, we conclude that the circuit court did not abuse its discretion by dismissing the action pursuant to CR 41.02(1).

For the foregoing reasons, the order and amended order of the Jefferson Circuit Court is affirmed.

ACREE, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: Respectfully, I dissent. The plaintiffs appear to have been litigating the supersedeas bond in the Division Five case, the parties had agreed to an order holding the instant case in abeyance, the judges in Division Five were changed due to retirement. Under all the circumstances, in my view, the trial court abused its discretion in dismissing the case.

BRIEFS AND ORAL ARGUMENT  
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