Affirmed and Memorandum Opinion filed April 8, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00695-CV

SOUTHWELL INVESTMENTS GROUP, III, Appellant

V.

INDWELL RESOURCES, INC., CHIEF OPERATING COMPANY, PAN AMERICAN ENERGY, LLC AND BILL WOOD, INDIVIDUALLY, Appellees

On Appeal from the 506th District Court
Waller County, Texas
Trial Court Cause No. 04-11-17587

MEMORANDUM OPINION

Appellant Southwell Investments Group, III ("Southwell") contends the trial court abused its discretion by dismissing Southwell's case for want of prosecution, failing to hold an oral hearing on its motion to reinstate, and denying its motion to reinstate. We affirm.

I

On November 10, 2004, Southwell filed suit against appellees Indwell Resources, Inc. ("Indwell") and Bill Wood, as well as Chief Operating Company ("Chief") and Pan

American Energy, LLC ("Pan American"), for breach of contract, fraud, and other claims in connection with an oil, gas, and mineral lease in Waller County. Southwell served three of the four defendants by certified mail, but Pan American's citation was returned.[1] Indwell and Wood answered, but Chief did not. In 2006, Southwell's counsel filed a notice of change of address. Southwell did not initiate any discovery, request a trial setting or entry of a scheduling order, seek a default judgment against Chief, or take any other action in the case.

On April 9, 2008, after the case had been transferred to a another court, the trial court issued a notice of intent to dismiss the case for want of prosecution on June 24, 2008, if a motion to retain was not timely filed. On June 2, 2008, Southwell filed a motion to substitute counsel and to retain the case on the docket. After initially granting both motions, the trial court vacated the retention order and dismissed the case for want of prosecution on June 24, 2008.

On June 30, 2008, Southwell filed a motion to set aside the dismissal or in the alternative for a new trial. Southwell gave notice to Indwell, Wood, and Pan American that its motion would be submitted to the court for consideration and ruling without an oral hearing. On July 21, 2008, the trial court denied Southwell's motion to set aside the dismissal. By a separate order, the trial court also denied Southwell's motion for a new trial.

[1] The record shows that on January 25, 2005, Southwell's counsel requested a new citation for service on Pan American, with instructions to return the citation to him. After the trial court sent its notice of intent to dismiss the case for want of prosecution in 2008, Southwell's new counsel attempted to serve Pan American again, but was unsuccessful.

II

A

In its third issue, Southwell contends that the trial court abused its discretion by denying its motion to retain the case. A trial court's power to dismiss a case for want of prosecution stems from two sources: (1) Texas Rule of Civil Procedure 165a, entitled "Dismissal for Want of Prosecution"; and (2) the court's inherent authority. *See* Tex. R. Civ. P. 165a; *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). Rule 165a provides for a dismissal in cases in which a plaintiff fails to appear for any scheduled hearing, or when the case is not disposed of within the time periods set by the Texas Supreme Court. *See* Tex. R. Civ. P. 165a(1)–(2). In addition, under the common law, the trial court has the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute its case with due diligence. *Villarreal*, 994 S.W.2d at 630. Southwell contends Rule 165a(1) does not apply because it did not fail to attend any hearing, and Rule 165a(2) does not apply because neither the trial court's dismissal order nor the appellees' response in opposition to Southwell's motion to retain mentions Rule 165a(2) as a basis for the dismissal. Therefore, Southwell urges, the only applicable basis for dismissing the case is the trial court's inherent authority to dismiss a case that has not been prosecuted with due diligence. Because we can affirm on the basis of inherent authority, we need not consider the other possible bases for dismissal.

Factors generally considered by the trial court before dismissing a case include: (1) the length of time the case has been on file; (2) the extent of activity in the case; (3) whether a trial setting was requested; and (4) the existence of reasonable excuses for the delay. *Keough v. Cyrus USA, Inc.*, 204 S.W.3d 1, 5 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *Bilnoski v. Pizza Inn, Inc.*, 858 S.W.2d 55, 58 (Tex. App.—Houston [14th Dist.] 1993, no writ). We must look to the record in its entirety, and we will reverse the trial court only if that court clearly abused its discretion. *Bilnoski*, 858 S.W.2d at 58.

Southwell admits that the case was on file for more than three years and that little activity occurred on the case during that time. Southwell also admits that there was a delay in the prosecution of the case. Additionally, it is undisputed that Southwell never initiated any discovery or requested a trial setting, it did not seek a default judgment against Chief, and it made no further attempt to serve Pan American until after the court had issued its notice of intent to dismiss. Southwell's explanation below for this failure to prosecute its case is that it expected the trial court to set the case for trial or issue a docket-control order, but "[f]or some unexplainable reason neither was done." Southwell does not explain how the absence of a scheduling order shows that it exercised diligence in prosecuting its case. Nor does Southwell explain why it did not request the trial court to enter a docket-control order before the court issued its notice of intent to dismiss for want of prosecution.

Southwell also points out that (1) its counsel updated the court with its new firm name and address in 2006, (2) its counsel was mistaken as to how the original court handled its trial docket, (3) its representative sold his business and failed to give his counsel new contact information, (4) Southwell did not intend to conduct any discovery, (5) it secured new counsel who moved to substitute and announced ready for trial, (6) Southwell filed a motion to retain, (7) the trial court initially issued a docket-control order setting the case for trial, (8) Southwell requested a jury trial in its original petition, (9) it did not fail to appear for any hearings or trial, and (10) it timely filed a motion to reinstate the case.

But Southwell's limited contact with the court for over three and one-half years and the loss of contact between Southwell and its counsel during that time likewise do not provide a reasonable explanation for Southwell's lack of diligence in prosecuting the case. Southwell knew that it had filed a lawsuit, but took no steps to stay in contact with its attorney. Southwell also did not obtain new counsel until after the trial court sent out its notice of intent to dismiss for want of prosecution. Similarly, many of the other

actions it points to were taken only after the trial court's notice of its intent to dismiss in an effort to retain the case on the trial court's docket. As for requesting a jury in its original petition, Southwell fails to explain why it did not pay a jury fee until after the case was dismissed. Considering the entire history of the case, including the length of time it was on file, the lack of activity, the lack of discovery, and the failure to request a docket-control order or a trial setting for over three and one-half years, we cannot say the trial court abused its discretion by dismissing Southwell's case for want of prosecution. *See Frenzel v. Browning-Ferris Indus., Inc.*, 780 S.W.2d 844, 845 (Tex. App.—Houston [14th Dist.] 1998, no writ) (holding failure to initiate discovery during forty-one months case was on docket clearly constituted lack of due diligence); *City of Houston v. Robinson*, 837 S.W.2d 262, 265 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding trial court did not abuse its discretion when there was no activity on case for a year and appellants merely asserted that they wished to pursue their case).

Southwell also argues that it announced ready for trial and by dismissing the case Southwell was prevented from having its day in court and that amounts to a "drop-dead" sanction. The record does not support Southwell's argument that the dismissal of its case amounted to a death-penalty sanction. First, Southwell cites no authorities and makes no argument to support this assertion; therefore, it is waived. *See Nyugen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Second, the trial court's order was clearly a dismissal for want of prosecution, and did not implicate the considerations applied to death-penalty sanctions for discovery abuse as stated in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917–18 (Tex. 1991). Third, our supreme court has declined to apply the *TransAmerican* analysis when it found no abuse of discretion in dismissing the case for want of prosecution. *See MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997) (per curiam).

We therefore overrule Southwell's third issue.

B

In its first issue, Southwell contends the trial court abused its discretion by not granting an oral hearing on Southwell's motion to reinstate. Southwell cites *Cabrera v. Cedarapids, Inc.*, 834 S.W.2d 615, 618 (Tex. App.—Houston [14th Dist.] 1992), *writ denied*, 847 S.W.2d 247 (Tex. 1993), in which this court held that the trial court did not err in failing to set a hearing on a motion to reinstate when the movant did not request a hearing.

Southwell contends it requested an oral hearing and the appellees requested a submission date. The record, however, does not support Southwell's contention. Although Southwell submitted a proposed order for an oral hearing along with its motion to set aside the dismissal, the blanks for the date and time were not filled in. Further, Southwell itself filed a "Notice of Submission" informing the appellees that its motion would be submitted to the trial court for consideration and ruling without an oral hearing within ten days after the notice was filed. The record does not show that Southwell ever objected to submitting the motion without an oral hearing, nor does it show that the trial court denied a request from Southwell for an oral hearing.

Even presuming for the sake of argument that the trial court erred in failing to set a hearing, Southwell still would not be entitled to relief. A party may not lead a trial court into error and then complain about it on appeal. *Kelly v. Cunningham*, 848 S.W.2d 370, 371 (Tex. App.—Houston [1st Dist.] 1993, no writ). When a movant sets a motion to reinstate on the trial court's submission docket, effectively requesting the court to rule without conducting an oral hearing, the movant is estopped from complaining on appeal that the trial court erred in ruling on the motion to reinstate without conducting an oral hearing. *Solomon v. Parkside Med. Servs. Corp.*, 882 S.W.2d 492–93 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *see also Keough*, 204 S.W.3d at 6 n.3 ("Before trial court error can be found in the failure to set a hearing on a motion to reinstate, the movant must request a hearing.").

We therefore overrule Southwell's first issue.

C

In its second issue, Southwell contends the trial court abused its discretion by denying Southwell's motion to reinstate as required by Texas Rule of Civil Procedure 165a. We review the trial court's denial of a motion to reinstate for abuse of discretion. *Keough*, 204 S.W.3d at 3.

Initially, Southwell argues that we should review the court's denial of its motion to reinstate by applying the standard set out in Rule 165a(3), regardless of whether the trial court dismissed the case under Rule 165a or whether it dismissed the case under its inherent authority. *See Cappetta v. Hermes*, 222 S.W.3d 160, 164–67 (Tex. App.—San Antonio 2006, no pet.) (en banc) (surveying split of authority in appellate courts and holding that that Rule 165a(3) standard applies to all dismissals for want of prosecution, whether rule-based or inherent-power-based); *Brown v. Howeth Invs., Inc.*, 820 S.W.2d 900, 902–03 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (applying Rule 165a standard to determine whether trial court abused its discretion in refusing to reinstate case). Under Rule 165a, the court must reinstate the case if it is shown that "the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." Tex. R. Civ. P. 165a(3).

Unlike the *Cappetta* and *Brown* courts, this court has applied a different standard to review the denial of a motion to reinstate when the trial court dismisses a case under its inherent authority. We have explained that when a trial court relies on its inherent authority to dismiss a case and denies a motion to reinstate, we consider whether the trial court abused its discretion in determining that the plaintiff did not prosecute its case with due diligence. *See, e.g.*, *Keough*, 204 S.W.3d at 4–5; *Polk v. Sw. Crossing Homeowners Ass'n*, 165 S.W.3d 89, 95–97 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). On

these facts, however, the result would be the same under either analysis. The trial court did not abuse its discretion in refusing to reinstate Southwell's case.

In its motion to reinstate, Southwell attached no evidence, but relied on the arguments and affidavits presented in support of its motion to retain. On appeal, Southwell argues that the facts enumerated above negate a finding that its failure was intentional or the result of conscious indifference. To support this conclusion, Southwell cites *Brown v. Howeth Investments, Inc.*, 820 S.W.2d at 902. But *Brown* is distinguishable. In that case, the court concluded there was nothing in the record to suggest that the plaintiff intentionally ignored his suit for sixteen months or intentionally failed to respond to the notice of intent to dismiss, when he had become dissatisfied with his first lawyer's failure to prosecute the suit, took steps to retain new counsel, and had substituted new counsel just after the notice of intent to dismiss was sent to his first lawyer. *See id.* at 902. The court stated that "the plaintiff should not be precluded from reaching the merits of his suit because of the unfortunate timing of the notice to substitute." *Id.*

Here, Southwell did not argue below that its lawyer failed to diligently prosecute the case, and the record does not show that Southwell expressed any dissatisfaction with its counsel before the trial court issued its notice of intent to dismiss for want of prosecution. Southwell's stated reason for obtaining new counsel was that its first lawyer was unwilling to continue handling the case on a contingent-fee basis. Moreover, Southwell failed to keep in contact with its lawyer for over three years, providing some evidence of its own lack of diligence and conscious indifference. And, unlike the situation in *Brown*, Southwell's motion to substitute counsel was not filed until two months after the trial court issued its notice of intent to dismiss. Therefore, *Brown* does not support a conclusion that the trial court abused its discretion by refusing to reinstate Southwell's case.

Other explanations in Southwell's motion to reinstate are not supported by the record or tend to undermine its contention that its failure to prosecute the case was not intentional or the result of conscious indifference. For example, Southwell alleged that the case was ready for trial in January 2005, even though it was filed on November 10, 2004, and the original petition a requested Level 2 discovery schedule. Southwell also alleged that it intended to non-suit defendants Chief and Pan American at trial, but it sought to have citation served on Pan American for a second time on June 18, 2008. Southwell also does not explain why it did not take a default judgment against Chief after it was served in November 2004 and did not answer. Further, Southwell requested a jury trial in its original petition, but it did not pay a jury fee until June 30, 2008, after the case was dismissed for want of prosecution. Southwell also attempts to blame the original trial court for not issuing a scheduling order or setting the case for trial, while at the same time asserting that it and its counsel "were occupied with other matters" and the case "dropped through the cracks."

As discussed above, on these facts we cannot say the trial court abused its discretion by dismissing Southwell's case for want of prosecution. For the same reasons, we cannot say the trial court abused its discretion in denying Southwell's motion to reinstate, whether we review its ruling under its inherent authority or Rule 165a(3). *See Keough*, 204 S.W.3d at 4–5 (holding trial court did not abuse its discretion in denying appellant's motion to reinstate for failing to diligently prosecute her case); *Polk*, 165 S.W.3d at 97 (affirming trial court's denial of motion to reinstate when evidence supported appellant's lack of diligence in prosecuting her case); *Ballantyne v. Johnson*, No. 04-08-00185-CV, 2008 WL 5181927, at *4 (Tex. App.—San Antonio Dec. 10, 2008, no pet.) (mem. op.) (affirming trial court's denial of appellant's motion for reinstatement under Rule 165a when appellant failed to reset the case after a continuance and little activity occurred in case for five years); *Rad v. Black*, No. 03-07-00574-CV, 2008 WL 2777320, at *2–8 (Tex. App.—Austin July 17, 2008, no pet.) (mem. op.) (affirming trial court's denial of motion to reinstate under Rule 165a(3) when there had been no filings in

case for three years and eight months, and no further activity occurred after appellant filed a motion to substitute counsel).

We therefore overrule Southwell's second issue.

* * *

Having overruled Southwell's issues, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Frost, and Brown