

Reversed and remanded and Memorandum Opinion filed January 26, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-01113-CV

PAULENE HONG DAO AND HUNG ANH LE, A/K/A/ HONG LE, Appellants

V.

MONG CONG LE, Appellee

**On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 793366**

MEMORANDUM OPINION

In this personal injury case, appellants Paulene Hong Dao and Hung Anh Le, a/k/a/ Hong Le, appeal from the trial court's order dismissing their case for want of prosecution. Concluding the trial court abused its discretion when it dismissed the case because appellants did not personally appear on the day of trial, we reverse and remand.

I. BACKGROUND

On December 31, 2001, appellee Mong Cong Le allegedly failed to yield the right of way at a stop sign and his vehicle collided with the vehicle in which appellants were riding. On May 10, 2003, appellants filed suit against appellee.

Between August 2004 and May 2008, the trial date was set and reset more than ten times. On May 20, 2008, appellants were not present for trial. The court reset the trial for August 25, 2008, and, over appellants' counsel's objection, stated, "If they do not show up for the next trial, I will dismiss their claims." Additionally, both appellants were subpoenaed to appear to testify at the trial on August 25.

On August 25, 2008, the case was again called to trial. Again, neither appellant personally appeared, and the court ordered the case "dismissed for want of prosecution." Plaintiffs' counsel objected, indicating he was prepared to present the case through appellants' depositions. The court subsequently issued a single conclusion of law, stating the case was "DISMISSED FOR PLAINTIFF'S [sic] FAILURE TO APPEAR TO PROSECUTE CASE on the day of Trial."

Appellants filed a verified motion to reinstate and request for a hearing and a motion for new trial. The motions were overruled by operation of law.

II. DISCUSSION

In a single issue, appellants contend the trial court erred in dismissing their case. Appellee argues the trial court did not abuse its discretion in dismissing the case for want of prosecution because (1) appellants failed to appear at trial, (2) the case was not disposed of within the Texas Supreme Court's time standards, and (3) appellants did not prosecute the case with due diligence.

In reviewing a dismissal for want of prosecution, we apply a clear-abuse-of-discretion standard. *See 3V, Inc. v. JTS Enters., Inc.*, 40 S.W.3d 533, 541 (Tex. App.—Houston [14th Dist.] 2000, no pet.). “A trial court abuses its discretion when it acts arbitrarily and unreasonably, or when it misapplies the law to the established facts of the case.” *CA Partners v. Spears*, 274 S.W.3d 51, 78 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

Appellants’ burden on appeal depends on whether the trial court specified the basis for the dismissal in its order. *See Rampart Capital Corp. v. Maguire*, 974 S.W.2d 195, 197 (Tex. App.—San Antonio 1998), *pet. denied*, 1 S.W.3d 106 (Tex. 1999). If the order is silent, appellants must negate all possible grounds for dismissal, including the three grounds listed by appellee in his appellate brief. *See id.* “If, however, the dismissal order lists a specific ground, the plaintiff seeking reinstatement must negate only the reason stated in the dismissal order.” *Id.*¹

In this case, the trial court’s conclusion of law specifies the ground on which the court dismissed the case. It follows that appellants’ burden is to negate only the ground specified in that conclusion of law, that is, failure to appear. This reasoning is implicitly supported by (1) the due process notice requirements regarding dismissals for want of prosecution;² and (2) references to requiring affirmance of a dismissal when a party *did not* request findings of fact or conclusions of law *and* the court *did not* specify the standard of dismissal used. *See Nichols v. Sedalco Const. Servs.*, 228 S.W.3d 341, 342–43 (Tex. App.—Waco 2007, pet. denied).

¹*See Valenzuela v. TDCJ-Institutional Division*, No. 14-98-01116-CV, 1999 WL 966550, at *1 (Tex. App.—Houston [14th Dist.] Oct. 21, 1999, no pet.) (per curiam) (not designated for publication) (stating, when dismissal order specifies ground for dismissal, review is limited to whether dismissal is proper on the ground specified by trial court).

² *See 3V, Inc.*, 40 S.W.3d at 543.

Because appellants’ counsel appeared on both May 20 and August 25, the court’s reference to “failure to appear,” necessarily means appellants’ failure to appear in person. Accordingly, this court cannot affirm the trial court’s dismissal of the case on any ground other than failure of appellants to appear in person for trial. *See Shook v. Gilmore & Tatge Mfg. Co.*, 951 S.W.2d 294, 297 (Tex. App.—Waco 1997, pet. denied). We therefore decline appellee’s invitation to consider other possible grounds for dismissal. *See id.*

The trial court’s requirement that appellants appear in person is contrary to Texas Rule of Civil Procedure 7, which provides, “Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.” Tex. R. Civ. P. 7; *see Rainwater v. Haddox*, 544 S.W.2d 729, 732 (Tex. Civ. App.—Amarillo 1976, no writ) (in context of deciding whether party waived right to jury trial by failing to appear personally, stating, “It long has been the principle in Texas that whatever a man *sui juris* may do for himself may be done by his attorney”). In misapplying the law, the trial court abused its discretion in the present case. *See CA Partners*, 274 S.W.3d at 78.

Finally, we note appellee refers several times to appellants’ failure to appear despite having been subpoenaed. Dismissal of a plaintiff’s case, however, is not a recognized means of enforcing a subpoena. *See Tex. R. Civ. P. 176.8.*

For the foregoing reasons, we sustain appellants’ sole issue. Accordingly, we reverse the order below and remand the cause to the trial court.

/s/ Kent C. Sullivan
 Justice

Panel consists of Justices Frost, Boyce, and Sullivan.