

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00136-CV

AVIS RENT A CAR SYSTEM, INC., Appellant

V.

MARIAN ADELA RENNELS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 06-10-09671 CV

MEMORANDUM OPINION

This appeal arises from the trial court's dismissal of a lawsuit for want of prosecution. After the trial court dismissed Avis Rent A Car System, Inc.'s case, Avis timely filed a verified motion to reinstate, and it also requested an oral hearing on its motion. The trial court, without conducting an oral hearing, denied Avis's motion to reinstate. Avis contends that the trial court erred in dismissing its case and in failing to grant its motion for reinstatement. We reverse the trial court's order dismissing Avis's case.

Background

On January 21, 2009, the trial court dismissed Avis's case for want of prosecution after both parties failed to appear at both a pre-trial hearing and a dismissal hearing to show cause why the case should not be dismissed from the trial court's docket. On January 26, 2009, the trial court faxed an order of dismissal for want of prosecution to Avis's counsel, Thomas Scott, but faxed the order to a law firm where Scott no longer worked. Scott's former firm then forwarded the order of dismissal to Scott.

Avis contends that its counsel, Scott, provided his correct contact information "on all court pleadings and correspondence as well as the court's required information and filing sheet." While Scott acknowledges that he eventually received the order of dismissal from his former firm, Avis contends that the trial court never provided Scott notice of the trial court's intent to dismiss Avis's lawsuit or notice of the dismissal hearing. Avis concludes that the trial court "either failed to send any notice at all or sent notice to an incorrect address or facsimile number."

Avis timely filed a motion to reinstate. In its motion to reinstate, Avis argues that it had no notice of the court's intention to dismiss its case or notice of the dismissal hearing and that it was necessary that it be provided with notice and an opportunity to be heard before the trial court could dismiss its case. Although Avis requested the trial court to set its motion for an oral hearing, the trial court responded by requesting that Avis "re-fill out the hearing request form and set it for submission, not oral, before 2/20/2009 and

fax it in to us.” As a result, the trial court subsequently denied Avis’s motion to reinstate without conducting an oral hearing. Avis then filed a motion to reconsider its verified motion to reinstate, but the court never ruled on it.

Standard of Review

Where a trial court has dismissed a case for want of prosecution because an attorney fails to appear for a hearing, and then refuses to reinstate the case, we review the trial court’s decision under an abuse of discretion standard. *Smith v. Babcock & Wilcox Const. Co., Inc.*, 913 S.W.2d 467, 467 (Tex. 1995) (per curiam). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or when it acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Analysis

Texas Rule of Civil Procedure 165a(3) provides that upon the filing of a timely verified motion to reinstate, the judge “shall set a hearing on the motion as soon as practicable” and “[t]he court shall notify all parties or their attorneys of record of the date, time and place of the hearing.” TEX. R. CIV. P. 165a(3). The Supreme Court has held that “it is clear that an oral hearing is required on *any* timely filed motion to reinstate under rule 165a.” *Thordson v. City of Houston*, 815 S.W.2d 550, 550 (Tex. 1991) (quoting *Gulf Coast Inv. Corp. v. NASA I Bus. Ctr.*, 754 S.W.2d 152, 153 (Tex. 1988)). A trial court abuses its discretion when it fails to hold an oral hearing on a party’s

timely filed motion to reinstate. *Thordson*, 815 S.W.2d at 550. Therefore, we conclude that the trial court abused its discretion by failing to conduct an oral hearing on Avis's timely filed motion to reinstate.

Additionally, Avis complains that the trial court failed to provide it with proper notice of the trial court's intention to dismiss its case or of the dismissal hearing. Rule 165a(1) requires a trial court to notify a party of the "court's intention to dismiss and the date and place of the dismissal hearing" TEX. R. CIV. P. 165a(1). A trial court's failure to provide adequate notice of its intent to dismiss for want of prosecution requires reversal. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999).

The record supports Avis's claim that the trial court used an incorrect address for Avis's counsel, Scott, despite the fact that Scott provided the trial court with his correct contact information. We conclude that the trial court either failed to send Scott any notice at all or sent the notices to an incorrect facsimile number. Because Avis was not provided with notice of the trial court's intent to dismiss, nor did its attorney of record receive notice of the dismissal hearing, Avis did not receive the notices that are contemplated by Rule 165a(1). *See* TEX. R. CIV. P. 165a(1).

A trial court has the inherent power to dismiss "independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence." *Villarreal*, 994 S.W.2d at 630. Because Avis's case was on the trial court's docket for over twenty-seven months, we also address whether the trial court, under the

circumstances here, might have exercised its inherent common law power to dismiss Avis's case.

A trial court must provide a party with notice and an opportunity to be heard before it can dismiss a case for want of prosecution, whether it chooses to dismiss a case based upon its discretionary power granted by the rules of procedure or its inherent common law powers. *Id.* Therefore, even though Avis's case had been on the trial court's docket for over twenty-seven months at the time of the January pre-trial hearing, the law still requires the trial court to give Avis notice of its intent to dismiss for want of prosecution. *See id.* "While some courts have indicated that due process concerns over what suffices for sufficient notice are satisfied by providing a party with the order of dismissal and then subsequently giving the party an opportunity to address the merits of the dismissal at a hearing, no comparable opportunity to be heard occurred here." *Durbin v. Muchow*, No. 09-09-00133-CV, 2010 Tex. App. LEXIS 2285, at **5-6 (Tex. App.—Beaumont, April 1, 2010, no pet.); *see also Keough v. Cyrus USA, Inc.*, 204 S.W.3d 1, 5 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("Even assuming for the sake of argument that no notice was sent and that we properly may raise the issue sua sponte, a trial court does not abuse its discretion by denying a motion to reinstate if the movant (a) receives notice of the actual order of dismissal in time to file a motion to reinstate, and (b) has an opportunity to be heard on the motion.") In this case, the record shows that

Avis did not receive notice before the court dismissed the case, nor did Avis receive a subsequent hearing on its motion to reinstate, despite its request for one.

We conclude that Avis was entitled to receive notice of the trial court's intent to dismiss its case before the trial court entered an order of dismissal. Because Avis did not receive notice of the trial court's intent to dismiss before the trial court dismissed its case, we reverse the trial court's order of dismissal and we remand the case to the trial court with instructions to reinstate the case.

REVERSED AND REMANDED.

HOLLIS HORTON
Justice

Submitted on April 28, 2010
Opinion Delivered June 24, 2010
Before McKeithen, C.J., Gaultney and Horton, JJ.