IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ABDI MUSSE, *Plaintiff/Appellant*,

v.

PAUL STEEN, *Defendant/Appellee*.

No. 1 CA-CV 16-0740
FILED 2-27-2018

Appeal from the Superior Court in Maricopa County
No. CV2012-016039
CV2012-094937
(Consolidated)
The Honorable Robert H. Oberbillig, Judge, *Retired*

AFFIRMED

COUNSEL

Law Offices of Kenneth P. Bemis, Phoenix
By Kenneth P. Bemis
Counsel for Plaintiff/Appellant

Law Office of Angelo Patane, Phoenix
By John H. Ishikawa
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Peter B. Swann and Judge James P. Beene joined.

T H O M P S O N, Judge:

¶1 Abdi Musse appeals from the superior court's dismissal of his personal injury case, with prejudice, for lack of prosecution. Finding no abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2010, Musse and Paul Steen were involved in a rear-end collision at 3rd Street and Osborn Road in Phoenix. Thereafter, Musse filed a complaint in superior court against Steen and his wife, Lois Cohan (defendants), alleging that he sustained injuries in the accident.[1]

¶3 A surgeon from Nashville, Tennessee, Dr. Colin Looney, performed two separate surgeries on Musse's knee and shoulder. According to Musse, Dr. Looney believed the "injuries and the resulting medical care were probably caused" by the 2010 accident.

¶4 The superior court initially scheduled trial for April 6, 2015. Two weeks before trial, Musse moved the court for permission to take a videotaped deposition of Dr. Looney for use at trial, and the court granted his motion. Before the deposition took place, Musse's counsel attempted to (1) limit Defendants' time for cross-examination and (2) require Defendants to pay Dr. Looney's fee for any time beyond forty-five minutes. In response, Defendants sought a protective order. At the status conference scheduled to address the protective order, Musse moved to continue trial. The court agreed and continued the trial for four months to August 11, 2015.

¶5 Again, Musse waited until two weeks prior to trial to notice Dr. Looney's deposition, and Defendants sought another protective order. The court vacated the trial a second time, resetting it for November 30, 2015. The court ordered that if Dr. Looney "cannot appear in person for trial, his

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[1] During the pendency of this case, Steen passed away. His estate was substituted in as named defendant.

deposition shall be taken by video at a location convenient to the witness and to both sides, including the witness." Although Musse now had three additional months to complete Dr. Looney's deposition, he failed to do so.

¶6 One week prior to the third scheduled trial, Musse's counsel moved to (1) withdraw as counsel and (2) continue the trial. The court granted both motions and rescheduled trial for a fourth time for October 31, 2016. In its order, the court warned that it would "not grant any further continuance on the basis that Dr. Looney is unavailable to testify at the time of trial." Musse now had eleven additional months to complete Dr. Looney's deposition.

¶7 Musse waited until one month before the fourth scheduled trial to notice Dr. Looney's deposition for October 21, 2016, just ten days before trial. Defendants again sought a protective order. At oral argument on Defendants' motions, Musse's counsel moved to continue trial for a fifth time, explaining that his client had finally procured the funds necessary to pay Dr. Looney's fee.

¶8 The superior court granted the protective order and denied the requested continuance, explaining:

> THE COURT FINDS that Plaintiff's expert witness Dr. Looney[,] once again is not available for trial and once again his taped deposition was not scheduled in a timely manner pursuant to previous Court orders and admonitions as set forth in previous minute entries going back two years.
>
> THE COURT FURTHER FINDS that Dr. Looney's unwillingness to travel to Arizona to testify at trial, as well as Plaintiff's inability until just recently to come up with the fee for Dr. Loon[e]y's deposition, created additional delay beyond that permitted by the Court's previous rulings. The Court finds Plaintiff lacks sufficient good cause to continue to trial.

¶9 When asked by the superior court if he wished to proceed to trial without Dr. Looney's testimony, Musse's counsel responded no. Accordingly, the court dismissed the case with prejudice for failure to prosecute. Musse timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2018).

DISCUSSION

¶10 The superior court has the inherent power to dismiss a case on its own motion "if the case has not been diligently prosecuted." *Cooper v. Odom*, 6 Ariz. App. 466, 469 (1967) (citation omitted). We review a dismissal for failure to prosecute for an abuse of discretion. *Id.* "An abuse of discretion occurs when there is no evidence to support a holding or the court commits an error of law when reaching a discretionary decision." *Dowling v. Stapley*, 221 Ariz. 251, 266, ¶ 45 (App. 2009) (citations omitted).

¶11 The plaintiff has a duty "to see that his case is brought up for trial within a reasonable time." *Price v. Sunfield*, 57 Ariz. 142, 148 (1941). If the plaintiff abandons his case or causes delay that prejudices a party not responsible for the delay, then dismissal is proper. *Id*. Although Arizona courts prefer to decide each case on its merits, "there is a limit to which judicial leniency can be stretched." *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984). Based on our review of the record, the superior court here justifiably reached that limit.

¶12 Although Musse argues he diligently prosecuted his case, the record belies his assertion and reflects that Musse was responsible for the delay in bringing this case to trial within a reasonable time. The superior court set the case for trial four separate times. Each time, Musse had an opportunity to timely notice and conduct the deposition of Dr. Looney, his key witness. Musse repeatedly failed to avail himself of this opportunity and thus failed to diligently prosecute his case.

¶13 Musse next argues that dismissal was improper because "no party requested" the dismissal. We disagree. The superior court has inherent power to dismiss a case on its own motion. *See Old Republic Nat'l Title Ins. Co. v. New Falls Corp.*, 224 Ariz. 526, 531, ¶ 22 (App. 2010) (citing *Cooper*, 6 Ariz. App. at 469).

¶14 Musse also relies on *Lund v. Donahoe*, 227 Ariz. 572 (App. 2011) to argue that the superior court should have conducted a "culprit hearing" before dismissing the case. A "culprit hearing," is a hearing "to determine whether a party, as opposed to that party's counsel, is responsible for a disclosure or discovery violation," and whether the party should be protected from sanctions. *Marquez v. Ortega*, 231 Ariz. 437, 444, ¶ 26 (App. 2013) (citing *Lund,* 227 Ariz. at 581, ¶¶ 33–34). The court here did not sanction Musse or his counsel for a disclosure or discovery violation; therefore, a culprit hearing was not required.

¶15 Finally, we note that Musse had ample notice that the court would not grant further continuances based on his inability to secure Dr. Looney's testimony, and he had the choice to proceed to trial without Dr. Looney's testimony but declined. In summary, the record contains ample support for the superior court's dismissal of Musse's case.

CONCLUSION

¶16 Finding no abuse of discretion, we affirm. We award costs to appellee upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA