



1 of 2 DOCUMENTS

KAREN MCPETERS, Appellant v. MONTGOMERY COUNTY, TEXAS, Appellee

NO. 09-09-00451-CV

COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT

2010 Tex. App. LEXIS 4132

April 15, 2010, Submitted
 May 27, 2010, Opinion Delivered

PRIOR HISTORY: [*1]

On Appeal from the 9th District Court, Montgomery County, Texas. Trial Cause No. 07-09-09142 CV.

DISPOSITION: REVERSED AND REMANDED.**CASE SUMMARY:**

PROCEDURAL POSTURE: Appellant sought review of an order from the 9th District Court, Montgomery County (Texas), which denied her motion to reinstate after dismissing her action against appellee county for want of prosecution.

OVERVIEW: The trial in appellant's case was set for September 14, 2009. On August 11, 2009, the trial court inadvertently signed an order dismissing the case for want of prosecution. On September 8, 2009, appellant filed a motion to vacate the dismissal order, and she also requested that the trial court reinstate her case. The trial court granted appellant's motion to vacate the dismissal order and also granted her motion to reinstate. Then, after reinstating the case, the trial court again dismissed her case for want of prosecution. The trial court denied her motion to reinstate the case. On appeal, the court found that the record showed that appellant failed to appear for trial on September 14 because her attorney mistakenly believed the trial court could act no further in her case in light of its prior entry of an order of dismissal. Even if her attorney deliberately decided not to appear, the failure to appear was sufficiently otherwise reasonably explained as a mistake of law to come within *Tex. R. Civ. P. 165a(3)*. The record provided nothing to indicate that appellant was personally responsible for or even

aware of her attorney's decision not to appear for trial on September 14.

OUTCOME: The court reversed the judgment of the trial court and remanded the case to the trial court with instructions to reinstate the case. Once the case was reinstated, the trial court could further consider the parties' requests for additional discovery as it might allow or as might be required.

LexisNexis(R) Headnotes

Civil Procedure > Dismissals > Involuntary Dismissals > Appellate Review

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN1] Where a trial court has dismissed a case for want of prosecution because an attorney failed to appear for trial, and then refuses to reinstate the case, an appellate court reviews the trial court's decision under an abuse of discretion standard. 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.

Civil Procedure > Dismissals > Involuntary Dismissals > Motions

Civil Procedure > Judgments > Relief From Judgment > General Overview

[HN2] See *Tex. R. Civ. P. 165a(3)*.

Exhibit "7"

Defendant The Honorable Frederick E.
 Edwards's Motion To Dismiss
 Plaintiff's Second Amended Complaint
 Under Rules 12(b)(6), 12(b)(1), and 9(b)

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute

Civil Procedure > Dismissals > Involuntary Dismissals > Motions

Civil Procedure > Pretrial Judgments > Default > Relief From Default

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview

[HN3] *Tex. R. Civ. P. 165a(3)* contemplates that a party's case should be reinstated if the failure to appear was due to an accident, a mistake, or is otherwise reasonably explained. The operative standard is essentially the same as that for setting aside a default judgment.

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > Mistake

[HN4] A failure to appear is not intentional or due to conscious indifference within the meaning of *Tex. R. Civ. P. 165a(3)* merely because it is deliberate; it must also be without adequate justification. Proof of such justification, accident, mistake, or other reasonable explanation, negates the intent or conscious indifference for which reinstatement can be denied. A mistake of law is a sufficient excuse to negate intent or conscious indifference.

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

Governments > Courts > Authority to Adjudicate

[HN5] A court maintains plenary power to modify, correct, or reform its judgment. *Tex. R. Civ. P. 329b(d)*.

Civil Procedure > Dismissals > Involuntary Dismissals > Motions

Civil Procedure > Judgments > Relief From Judgment > General Overview

Governments > Courts > Authority to Adjudicate

[HN6] When a plaintiff files a verified motion to reinstate, the motion serves to extend the trial court's plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first. *Tex. R. Civ. P. 165a(3)*.

Civil Procedure > Dismissals > Involuntary Dismissals > Motions

Civil Procedure > Judgments > Relief From Judgment > General Overview

[HN7] *Tex. R. Civ. P. 165a(3)* requires a motion to reinstate to be decided by a "signed written order."

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

Civil Procedure > Sanctions > General Overview

[HN8] A court imposing a sanction of dismissal must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both.

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

Civil Procedure > Sanctions > General Overview

[HN9] A party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation.

COUNSEL: For appellant: Robert L. Mays, Jr., San Antonio.

For appellee: David K. Walker, County Attorney, Rayborn C. Johnson, Jr., Assistant County Attorney, Conroe.

JUDGES: Before Gaultney, Kreger, and Horton, JJ.

OPINION BY: HOLLIS HORTON

OPINION

MEMORANDUM OPINION

This appeal concerns whether the trial court abused its discretion in failing to reinstate a case after it had been dismissed for want of prosecution.

In her appeal, Karen McPeters raises seven issues. McPeters's first five issues raise various complaints that relate to the trial court's dismissal of her case for want of prosecution and her last two issues concern discovery rulings. In her fifth issue, McPeters requests that we reverse the trial court's order refusing to reinstate her case. We reverse the trial court's order dismissing the case, and we remand the case to the trial court with instructions to reinstate the case. As we have ordered the case reinstated, we need not address McPeters's other issues, as they afford her no greater relief. *TEX. R. APP. P. 47.1*.

Background

The trial court had set McPeters's case for trial on June 8, 2009, but then postponed the trial until September 14, 2009, due to a scheduling conflict. On August 11, 2009, the trial court inadvertently signed an order dismissing [*2] McPeters's case for want of prosecution,

but it failed to first provide the parties with notice of its intent to dismiss. On August 31, 2009, the trial court, attempting to correct its mistake, caused the word "VACATED" to be written across the face of the order it previously had entered dismissing McPeters's case, but the document does not include an additional signature by the trial court judge or his initials evidencing that the judge approved vacating the court's August 11 order of dismissal.

On September 8, 2009, McPeters filed a motion to vacate the August 11 dismissal order, and she also requested that the trial court reinstate her case. On September 9, 2009, the court coordinator informed McPeters's counsel, Robert L. Mays, Jr., that the trial court would consider the matter "on the submission docket for September 25, 2009," and further advised that on that date "no one needs to appear." Since the case was on the court's trial docket for a September 14 trial, and because the case had been dismissed as of August 11, on September 11, 2009, Mays notified the court coordinator that neither he nor McPeters would appear for trial on September 14. The court coordinator informed Mays [*3] that the court would probably dismiss the case again if he failed to appear.

On September 14 Mays and McPeters did not appear for trial. On that same date, the trial court granted McPeters's motion to vacate the August 11 dismissal order and also granted her motion to reinstate. Then, after reinstating the case, the trial court again dismissed McPeters's case for want of prosecution.

After she learned that the trial court had again, as of September 14, dismissed her case, McPeters filed a timely motion to reinstate. The trial court conducted a hearing on the motion, and following the hearing, the trial court made written findings of fact and conclusions of law. In its findings, the trial court concluded that McPeters's failure to appear for trial had been "intentional and was the result of conscious indifference, was without adequate justification, and was not due to an accident or mistake and . . . [had] not been otherwise reasonably explained." The trial court denied McPeters's motion to reinstate her case.

Standard of Review

[HN1] Where a trial court has dismissed a case for want of prosecution because an attorney failed to appear for trial, and then refuses to reinstate the case, we review [*4] 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. Aquama-*

rine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985).

Analysis

In her fifth issue, McPeters argues that trial courts are required to reinstate cases when the party's failure to appear "has been otherwise reasonably explained." See *TEX. R. CIV. P. 165a(3)*. Mays explained the reasons for his failure to appear for the September 14 trial at a hearing that occurred on October 2, 2009. At that hearing, Mays explained that he believed that McPeters's case "had been dismissed since August 11, 2009," and that the dismissal had "eliminated everything[.]" Mays further explained that he thought that "the dismissal of a case vacate[ed] a trial setting[.]" In his brief, Mays argues that "McPeters did not appear for the September 14, 2009 purported trial setting, because there cannot be a trial in a dismissed lawsuit[.]"

There was also evidence at the hearing that the court [*5] coordinator contacted Mays about the September setting, and that Mays advised her that he would not be there because he did not think that the unsigned order vacating the August 11 dismissal order was sufficient to reinstate the case on the docket. Relying on *Rule 165a' of the Texas Rules of Civil Procedure* and case law, McPeters also advances an argument about the effectiveness of the trial court's attempt to vacate the August dismissal order, arguing that to be effective, the order of reinstatement had to be signed. See *Emerald Oaks Hotel/Conference Ctr., Inc. v. Zardenetta*, 776 S.W.2d 577, 578 (Tex. 1989) (holding that an order of reinstatement must be written and signed during the period of the trial court's plenary power and jurisdiction).

1 *Rule 165a(3)* provides, in pertinent part: [HN2] "In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by *Rule 306a*, the motion shall be deemed overruled by operation of law."

From the trial judge's comments at the hearing, it is apparent that the trial court felt that Mays's failure to appear had been intentional. [*6] At the conclusion of the hearing on McPeters's motion to reinstate, the trial court stated: "So you've done this to yourself. Either you overthought this or you think you know more than anybody else about how things should be done. You were aware of the trial setting. I am not reinstating this case. This matter is over with."

Nevertheless, [HN3] *Rule 165a(3)* contemplates that a party's case should be reinstated if the failure to appear was due to an accident, a mistake, or is otherwise reasonably explained. *TEX. R. CIV. P. 165a(3)*. "The opera-

tive standard is essentially the same as that for setting aside a default judgment." *Smith*, 913 S.W.2d at 468; see *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939). [HN4] "A failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification." *Smith*, 913 S.W.2d at 468. "Proof of such justification—accident, mistake or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied." *Id.* (citing *Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex. 1992)). A mistake of [*7] law is a sufficient excuse to negate intent or conscious indifference. See *Bank One*, 830 S.W.2d at 84.

Although deliberate, it appears that Mays's decision not to appear for the September 14 trial setting was based on Mays's mistaken belief about a court's power to make further rulings on a case after entering an *interlocutory* order of dismissal. It is clear that Mays's mistake was in his failure to consider that [HN5] a court maintains plenary power to modify, correct, or reform its judgment. See *TEX. R. CIV. P. 329b(d)*. In this case, the trial court voided the August order of dismissal in its written order of September 14, 2009. [HN6] As McPeters had filed a verified motion to reinstate, her motion served to extend the trial court's plenary power to reinstate the case "until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first." *TEX. R. CIV. P. 165a(3)*. Thus, on September 14, 2009, the date the trial court signed the written order reinstating McPeters's case, the trial court had plenary power to correct its prior August 11, 2009 order and to reinstate the case as of September 14. *TEX. R. CIV. P. 329b(d)*.

The [*8] record reflects that the trial court's attempt to withdraw its order of dismissal without signing a written order of dismissal contributed to Mays's confusion about whether he was required to appear for the trial setting of September 14. While it may have been clear to the trial court that having the word "VACATED" written on the order of dismissal was effective, [HN7] *Rule 165a(3)* requires a motion to reinstate to be decided by a "signed written order." *TEX. R. CIV. P. 165a(3)*; see also *Wallingford v. Trinity Universal Ins. Co.*, 253 S.W.3d 720, 726 (Tex. App.—Amarillo 2007, *pet. den'd*) (holding that an oral pronouncement on motion to reinstate, printed docket entry, submission of proposed order, and conduct of parties after hearing "are not a substitute for the rule's requirement of a signed written order").

We conclude that the record demonstrates that McPeters failed to appear for trial on September 14 because her attorney, Mays, mistakenly believed the court could act no further on her case in light of its prior entry of an order of dismissal. Even if Mays deliberately decided not to appear, we conclude that McPeters's failure to appear was sufficiently "otherwise reasonably explained" [*9] as a mistake of law to come within *Rule 165a(3)*. See *TEX. R. CIV. P. 165a(3)*; see also *Bank One*, 830 S.W.2d at 84. While the trial court might have considered sanctions against Mays because he mistakenly believed the trial court no longer had any power to enter further orders on McPeters's case, [HN8] a court imposing a sanction of dismissal "must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both." *Trans-American Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917, 918-19 (Tex. 1991) (finding that trial court's dismissal with prejudice was unjust where party failed to appear for its deposition).

The record before us provides nothing to indicate that McPeters was personally responsible for or even aware about Mays's decision not to appear for trial on September 14. The trial court's action in dismissing McPeters's case on the same date it was reinstated cannot be affirmed on this record as a just sanction for McPeters's failure to appear because [HN9] "a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation." *Id.* at 917.

Conclusion

Because [*10] the record demonstrates that McPeters's failure to appear on September 14 was otherwise reasonably explained, we reverse the order of the trial court denying McPeters's motion to reinstate and remand the case to the trial court with instructions to reinstate the case. Once the case is reinstated, the trial court can further consider the parties' requests for additional discovery as it may allow or as may be required under the provisions of *Rule 190.5 of the Texas Rules of Civil Procedure*. *TEX. R. CIV. P. 190.5* (Modification of Discovery Control Plan).

REVERSED AND REMANDED.

HOLLIS HORTON

Justice

Submitted on April 15, 2010

Opinion Delivered May 27, 2010