

RENDERED: December 31, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0099-MR

ROGER WHITAKER

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 93-CI-4820

RICHARD FREY (JAILER)

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON, and GUIDUGLI, Judges.

DYCHE, JUDGE. Roger Whitaker appeals from the dismissal of his civil action by the Jefferson Circuit Court for failure to prosecute. We affirm.

Whitaker, an inmate, filed a civil action on September 29, 1993, seeking damages for negligence in transporting him and for deliberate indifference regarding medical treatment. On November 25, 1996, appellee filed a motion to dismiss for failure to prosecute. The last action taken in the case by Whitaker was service of his motion for appointment of a guardian ad litem. This motion was denied on April 29, 1994. On December 16, 1996,

Whitaker filed a motion for summary judgment. On December 18, 1996, the trial court dismissed Whitaker's action for failure to prosecute.

First, Whitaker argues that the trial court committed error in failing to appoint a guardian ad litem pursuant to CR 17.04. He contends that a guardian ad litem must be appointed to defend a motion to dismiss, even if the action was instituted by a prisoner. We disagree.

If a prisoner fails to defend a civil action brought against him, a guardian ad litem must be appointed for him before judgment may be entered. CR 17.04; Davidson v. Boggs, Ky. App., 859 S.W.2d 662 (1993). However, CR 17.04 has no application where, as here, the action is brought by, rather than against, the prisoner.

May v. Coleman, Ky., 945 S.W.2d 426, 427 (1997). Whitaker filed the civil action and has no right to appointment of a guardian ad litem.

Whitaker next argues that the trial court erred in dismissing the case sua sponte, and that the order was entered without giving appellant time to respond. We disagree.

The trial court entered an order granting appellee's motion for dismissal for failure to prosecute on December 18, 1996, twenty-three days after the motion was filed on November 25, 1996. The order was not sua sponte and Whitaker had ample opportunity to respond.

The order of the Jefferson Circuit Court dismissing appellant's civil action for failure to prosecute is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE

Roger Wayne Whitaker
Lexington, Kentucky

BRIEF FOR APPELLEE

Jeffrey L. Freeman
Assistant Jefferson County
Attorney
Louisville, Kentucky