

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002693-MR

JESSE R. GREEN

APPELLANT

V. APPEAL FROM McCracken Circuit Court
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 94-CI-289

AMERICAN COMMERCIAL BARGE LINE
CO. AND/OR AMERICAN COMMERCIAL
LINES, INC.

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; DYCHE and KNOX, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a dismissal order entered by the McCracken Circuit Court. Appellant contends that the trial court abused its discretion by ordering his action dismissed for lack of prosecution, and by failing to grant his motion to "reconsider" the order. We disagree with both contentions. Hence, we affirm.

Appellant allegedly was injured on May 10, 1991, while working for appellee American Commercial Barge Line Company. He filed the underlying Jones Act action on April 13, 1994, and various proceedings and investigations followed. Around July 1996, appellant allegedly began suffering medical problems which

rendered him unable to participate in relevant litigation proceedings. On July 2, 1996, appellant filed a "Response to Defendants' Second Request for Production of Documents." However, no other pleadings or documents were filed in the record until August 7, 1997, when the court caused a notice to dismiss the action for lack of prosecution to be served pursuant to CR 77.02(2), indicating that the action would be dismissed "unless good cause be shown in writing why said action should remain on the docket." Appellant filed a response and requested the court not to dismiss the action but, rather, to set it for trial. Meanwhile, appellees requested the court to compel appellant to appear for a supplemental deposition. On September 19, after a hearing, the court orally announced and entered a written order dismissing the action for lack of prosecution. Some twenty days later, on October 9, 1997, appellant filed a motion, memorandum and supporting affidavits asking the court to "reconsider" its dismissal order and to grant his request for an expedited trial. However, the court denied appellant's motion because it was not filed within ten days of the date of entry of the dismissal order. This appeal followed.

First, appellant contends that the trial court abused its discretion by dismissing his action for lack of prosecution. We disagree.

The court dismissed appellant's action pursuant to CR 77.02(2), which provides that:

At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last

year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

Clearly, a trial court possesses broad discretion in determining whether to dismiss an action for lack of prosecution. See Modern Heating & Supply Co. v. Ohio Bank Building & Equipment Co., Ky., 451 S.W.2d 401 (1970); Nall v. Woolfolk, Ky. App., 451 S.W.2d 389 (1970).

Here, the record shows that appellant's alleged injury occurred nearly three years before this action was filed, and more than six years before the action was dismissed. Moreover, the record shows that the parties filed no pleadings during the thirteen months preceding the court's service of notice of its intent to dismiss the action, and the parties made no showing that they otherwise took any steps to prosecute the action during that period. Given the foregoing facts, we simply cannot say that the court abused its broad discretion by dismissing the action for lack of prosecution. See Modern Heating, supra; Nall, supra. Further, the record provides no basis for concluding that a different result is compelled by appellant's alleged medical problems, or by the fact that the action is now barred by limitations. Certainly, the cases cited by appellant do not compel a different result.

Next, appellant contends that the trial court erred by failing to consider his motion to "reconsider" the dismissal order. We disagree.

As noted above, on October 9, 1997, which was some twenty days after the court dismissed this action, appellant filed a motion which stated in pertinent part:

3. That one of plaintiff's attorneys appeared for a hearing on this notice, and this Court indicated it was dismissing this action for want of prosecution. Defense counsel was to submit a written proposed order. To date, plaintiff's counsel has not received a copy of a proposed order or an order signed by the Court.

Eight days later, appellant's counsel filed an affidavit indicating that as a result of the circuit court clerk's error in failing to timely mail copies of the dismissal order, counsel did not receive a copy of the order until October 4.

Although appellant described his October 9 motion as one to "reconsider" the court's order, the Kentucky Rules of Civil Procedure do not provide for the "reconsideration" of a trial court's final order. Instead, a party may file a motion to alter, amend or vacate a trial court's ruling pursuant to CR 59.05 or, in certain instances, a party may file a motion for relief pursuant to CR 60.02.

CR 59.05 specifically requires a motion to alter, amend or vacate a judgment to be "served not later than 10 days after entry of the final judgment." (Emphasis added.) A judgment or order is "entered" when, in accordance with CR 79.01, a notation is made in the civil docket that a judge's signed judgment or order has been received. CR 58(1). It follows, therefore, that regardless of when counsel was served with or received a copy of the September 19 dismissal order, any motion to alter, amend or vacate that order was required to be served within ten days of

September 19. Hence, service of appellant's October 9 motion was not timely for purposes of CR 59.05.

Further, we find no merit in appellant's argument regarding his alleged entitlement to relief pursuant to CR 60.02(a) or (f). Not only did we find nothing in appellant's motion or in the record to suggest that appellant requested CR 60.02 relief, but after reviewing the record we are not persuaded that he would in any event be entitled to such relief, especially since it is uncontroverted that appellant's counsel was aware of the court's adverse oral ruling by the end of the September 19 hearing. Hence, we conclude that the trial court did not err by failing to vacate the September 19 order.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gail G. Renshaw
Wood River, IL

Rodger W. Lofton
Paducah, KY

BRIEF FOR APPELLEES:

Raymond L. Massey
James W. Erwin
St. Louis, MO

W. Pelham McMurray
Stephen E. Smith, Jr.
Paducah, KY