

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002797-MR

MICHAEL W. TODD

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
ACTION NO. 95-CI-00440

ROBERT MILLER CRENSHAW

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, EMBERTON AND HUDDLESTON, JUDGES.

EMBERTON, JUDGE: This is an appeal from an order of dismissal for lack of prosecution.

On June 16, 1995, Michael W. Todd filed a complaint in the Henderson Circuit Court against Robert Miller Crenshaw to collect on four promissory notes executed in 1967 and 1995 to Henderson Implement Company, a defunct Kentucky corporation. In response, Crenshaw filed a motion to dismiss for lack of privity between the company and Todd. The motion was denied on November 15, 1995, and Crenshaw filed his answer denying liability on December 7, 1995.

There was no action taken in the case until November 1997, when the court placed it on the inactive docket and notified Todd to appear in court on December 23, 1997, to show cause why it should not be dismissed for want of prosecution. Following a hearing, the court permitted the case to remain on the active docket.

No action was taken on the case for one year, and on November 4, 1998, Todd was again given notice to appear for the court's inactive docket call. On December 22, 1998, the trial court struck the case from the docket but allowed leave to reinstate the case within six months conditioned upon a showing of "a good faith intention to prosecute the case."

Following the filing of the complaint, Todd filed for Chapter 7 bankruptcy. The appointed trustee learned of the dismissed court litigation and made a motion to reinstate the case. On July 14, 1999, the court granted the motion conditioned upon the trustee taking pretrial steps within thirty days, stating that if none were taken, the court would dismiss the action with prejudice.

On August 24, 1999, Crenshaw filed a motion to dismiss because of the failure of the trustee to take pretrial steps as required by the court's order. The hearing was set for August 30, 1999, and apparently because of an internal office error of the trustee, he did not appear. The trial court dismissed the action for failure to prosecute and comply with the court's July 14, 1999, order. Following a hearing, the trustee's motion to vacate the order of dismissal was denied.

Kentucky Rules of Civil Procedure (CR) 41.02 provides that an action may be involuntarily dismissed for failure of the plaintiff to prosecute, or to comply with the civil rules or orders of the court. The power of dismissal is inherent in the trial court and the court is vested with broad discretion in deciding whether to dismiss an action for lack of prosecution.¹

Although it is true that the failure to take any action to prosecute from 1995 through 1998 cannot be directly attributed to the trustee, as trustee he is in the same position as would be Todd who had already been warned on two occasions to go forth with the case or it would be dismissed with prejudice. Moreover, the trustee was aware of the need to proceed with this case when it successfully moved to have the case reinstated. The court unequivocally stated that pretrial steps must be taken within thirty days. Under the circumstances, we find that the trial court did not abuse its discretion in dismissing the case with prejudice.

The order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Russ Wilkey
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Dane Shields
Henderson, Kentucky

¹ Modern Heating and Supply Co. v. Ohio Bank Building and Equipment Co., Ky., 451 S.W.2d 401 (1970).