

RENDERED: JUNE 15, 2001; 2:00 p.m.
 NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000781-MR

BORIS CHEN AND LINDA CHEN

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 92-CI-02672

E. DAVID MARSHALL, GORDON W.
MOSS, AND DEDDO G. GLENN,
D/B/A HAYS, MOSS & LYNN

APPELLEES

OPINION
AFFIRMING
*** * * * *

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Boris Chen and Linda Chen, husband and wife, appeal from a January 13, 2000, opinion and order of the Fayette Circuit Court dismissing their professional negligence claim against E. David Marshall, an attorney, Gordon W. Moss and Deddo G. Glenn, doing business as the law firm of Hays, Moss & Lynn. As a member of the firm, Marshall represented the Chens from September 1990 until about June 1992 in a series of lawsuits stemming from the failure of two closely held Kentucky corporations, Resource Management International, Inc., and Resource Land Development, Inc. In late July 1992, the Chens

filed suit against Marshall and the firm. Their amended complaint alleges that Marshall's negligent handling of the litigation resulted in the forfeiture of meritorious defenses and counter-claims and in substantial damages. In January 2000, the trial court dismissed the Chens' complaint for lack of prosecution. The Chens maintain that the dismissal unfairly deprives them of their right to a trial and thus constitutes an abuse of the trial court's discretion. Persuaded that the nearly seven-and-one-half-year delay, the Chens' repeated failure to advance the litigation, and the erosion of evidence amply justify the trial court's decision, we affirm.

As just noted, the Chens filed suit (*pro se*) in July 1992. The court dismissed the suit in January 2000, about seven and one-half years later. During the pendency of the action the Chens filed an amended complaint in October 1992; they acquired counsel that November; they responded in October 1993 to Marshall's motion for summary judgment; and in January 1995 they filed a second amended complaint. In the meantime, Mrs. Chen petitioned for bankruptcy, the parties engaged in limited discovery, and Mr. Chen began a series of treatments, both in the United States and in his native Taiwan, for heart disease.

Following Marshall's answer to the second amended complaint in February 1995, no further activity appears in the record until late August 1996, when, pursuant to CR 77.02, the trial court on its own motion issued an order for the Chens to show cause why their case should not be dismissed for lack of

prosecution.¹ The Chens assured the court that discovery was proceeding and that they still intended to bring the matter to trial. By order entered in November 1996, the court permitted the action to continue.

Thereafter, the record is without entry for almost another year until October 1997 when new counsel for the Chens moved for a pre-trial conference. The court held a conference in February 1998. As a result, during the next few months the parties filed witness lists and apparently attempted mediation. When mediation failed, however, the matter once again lapsed. In September 1999 (more than a year later and nearly three years after the trial court set aside its first show-cause order), the trial court issued a second CR 77.02 order again requiring the Chens to show cause why their claim should not be dismissed. Marshall seconded that order with a motion to dismiss pursuant to CR 41.02.² The Chens responded by claiming that they had been waiting (since May 1998) for Marshall to resume Mrs. Chen's deposition, and by asserting that ill health had forced each of

¹CR 77.02(2) provides that

[a]t 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.

²Section 1 of that rule provides that

[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

them to spend time away from Kentucky, Mr. Chen during November 1998 and Mrs. Chen during May 1999.

The trial court found these excuses less than compelling. The court noted that in more than seven years the parties had accomplished very little discovery.³ It further observed the uncontested fact that important evidence had become unavailable--documents and records had been lost or destroyed; one key witness had died; another was missing, perhaps living in Saudi Arabia; and others, although living in the United States, were outside Kentucky. From these circumstances, the trial court concluded that the matter could no longer be fairly tried and so should be brought to a close. The Chens, of course, disagree. They insist that they are prepared for trial and should be allowed to proceed. At least, they argue, they should be permitted to try those aspects of their claim unaffected by the erosion of evidence, such as their allegations that Marshall improperly prepared a mortgage and negligently subjected the Chens to a default judgment.

The Chens correctly observe that dismissal of a claim is an extreme remedy and that, in general, disputes are to be decided on their merits rather than on procedural grounds.⁴ Nevertheless, CR 41.02 and CR 77.02 recognize that the orderly administration of justice and the prevention of harassment require that complaints be prosecuted conscientiously and without

³The Chens, indeed, seem to have done little more than serve interrogatories upon Marshall. No deposition on their behalf appears in the record.

⁴Ward v. Housman, Ky. App., 809 S.W.2d 717 (1991); Polk v. Wimsatt, Ky. App., 689 S.W.2d 363 (1985).

unreasonable delay.⁵ The trial court is accorded discretion to balance these concerns, and this court will not disturb its decision absent a clear abuse thereof.⁶ In the exercise of that discretion, “[e]ach case must be considered in the light of the particular circumstances involved and length of time is not alone the test of diligence.”⁷ The reasons for the delay, the merits of the claim, and prejudice to the opposing party are other important considerations.⁸

We are not persuaded that the trial court abused its discretion by dismissing the Chens’ complaint. The seven-year duration of this case is relatively long,⁹ and the reasons proffered by the Chens do not adequately account for it. We do not doubt that some of the underlying issues were complex, that some of the evidence of the Chens’ involvement with the two corporations was hard to obtain, or that the Chens’ serious health problems occasionally interfered with the litigation. Notwithstanding these problems, the Chens have had ample opportunity to ready their case and bring it to trial. Repeatedly, however, they have allowed a year or more to pass

⁵Nall v. Woolfolk, Ky., 451 S.W.2d 389 (1970).

⁶Gill v. Gill, Ky., 455 S.W.2d 545 (1970).

⁷*Id.* at 546.

⁸Ward v. Housman, 809 S.W.2d at 719.

⁹*Cf. Jenkins v. City of Lexington*, Ky., 528 S.W.2d 729 (1975) (affirming dismissal after two years); *Gill v. Gill*, *supra* (reversing dismissal after nine-months); Modern Heating & Supply Company, Inc. v. Ohio Bank Building & Equipment Company, Ky., 451 S.W.2d 401 (1970) (affirming dismissal after three-and-one-half years); Nall v. Woolfolk, Ky., 451 S.W.2d 389 (1970) (affirming dismissal after four years).

without meaningful progress. Even after express notice that their lack of prosecution had become a concern, the Chens again allowed the litigation to lapse for fifteen months. Nor does the fact that Marshall and his firm may have been equally lax excuse the Chens. At all times both the responsibility to advance the litigation and the ability to do so were theirs.¹⁰

Neither party has addressed in any detail the merits of the Chens' claims, so we may regard that factor as neutral. As the trial court noted, however, significant prejudice to Marshall from the Chens' delay is patent. Not only have he and his firm been held under a cloud of litigation for more than seven years, but they now face the prospect of trial on diminished evidence, a circumstance tending to increase the risk of an arbitrary result. And while it may be true that this concern about eroded evidence bears on some of the Chens' claims more than it does on others, the difference is neither so certain nor so pronounced as to compel the sort of claim-by-claim analysis the Chens demand. All of their claims, after all, have been pending since at least January 1995. The Chens' long, inadequately justified delay in bringing them to trial, the significant likelihood of substantial prejudice to the opposing parties, and the absence of a meaningful showing that the claims are likely to succeed justify, we believe, the trial court's decision.

Accordingly, we affirm the January 13, 2000, opinion and order of the Fayette Circuit Court.

ALL CONCUR.

¹⁰Gill v. Gill, supra.

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