

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001555-MR

INDIAN CREEK RESORTS, INC

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 92-CI-00676

BANK OF DANVILLE AND TRUST COMPANY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: HUDDLESTON, KNOPF AND TACKETT, JUDGES.

KNOPF, JUDGE: Indian Creek Resorts, Inc. (ICR), appeals from an order of Pulaski Circuit Court dismissing its cross-claim against Bank of Danville and Trust Company. Following resolution of the primary foreclosure action, the trial court suspended the entire action. Subsequently, the trial court denied ICR's motion to reinstate its cross-claim, and it dismissed the action in its entirety. ICR argues that the order dismissing the foreclosure action did not clearly apply to its cross-claim. As a result, ICR argues that the trial court erred when it refused to reinstate its cross-claim. We find that the trial court abused its discretion when it refused to reinstate and then dismissed

the action. Hence, we reverse and remand for further proceedings.

The underlying facts of this action are not in dispute. On August 1, 1991, ICR's president Robert Gardiner (Gardiner) executed a promissory note in favor of First and Farmers Bank of Somerset, Kentucky (FFB), in the amount of \$226,022.50. The note was secured by real property in Keno, Kentucky, which ICR owned. In addition to the real property, the note was personally guaranteed by Berry Kessler (Kessler). At that time, Kessler was a business associate of Gardiner's and a principal in ICR.

A short time after the note was executed, Kenneth Germain (Germain) went to the Bank of Danville & Trust Company (BDTC) seeking a loan. Germain represented to BDTC that ICR had authorized him to obtain the loan. However, Germain was never employed by ICR, nor was he authorized to act on its behalf. In December of 1991, BDTC loaned Germain \$100,000.00. The loan was secured by a second mortgage on the Keno property.

In the next few months, ICR became delinquent on its promissory note with FFB. On September 1, 1992, FFB filed a foreclosure action against ICR, BDTC, Gardiner, Kessler, and several others. During the foreclosure action, Kessler contacted BDTC and told them that ICR did not authorize Germain to use the Keno property as security for his loan. After filing its amended answer to FFB's foreclosure action, ICR filed a cross-claim against BDTC and a third-party claim against Germain. Both claims alleged fraud, slander of title and negligence arising out

of transactions between Germain and BDTC for the second mortgage on the Keno property.

On August 6, 1993, BDTC filed its answers to ICR's cross-claim. Germain filed his answer to the third-party complaint on September 23, 1993. During this period, FFB began to file discovery requests and notices for depositions. In November 1994, Germain filed a motion to dismiss ICR's third-party claim against him for failure to prosecute. Both ICR's counsel and substitute counsel failed to appear at the hearing on the motion, and the trial court dismissed the third-party complaint. On December 16, 1994, ICR moved to set aside the order of dismissal. ICR's counsel explained that his absence was due to a family emergency and a mistake by substitute counsel. In an order entered on January 12, 1995, the trial court set aside its prior order dismissing. However, the trial court made its order reinstating the third-party complaint contingent upon ICR's payment of Germain's attorney's fees and costs associated with the motion.

Also in early 1995, Frances Del Spina (Del Spina) purchased all the interests of FFB and negotiated settlements with several defendants in the foreclosure action. The trial court permitted Del Spina to intervene in the action. Eventually, BDTC released its mortgage in the Keno property, allowing the Master Commissioner to sell the property to Del Spina. The court entered an order confirming the sale on March 9, 1995. On March 15, the court entered an additional order

distributing the proceeds of the sale. On April 6, 1995, it entered another order, which provided in part as follows:

IT IS HEREBY ORDERED AND ADJUDGED that the above-styled action be stricken from the docket of this Court, unless the Court is advised in writing within ten (10) days of the date of this order of reasons showing good cause why it should remain on the docket.

Although all counsel of record received notice of the order, no party filed a response to the order. Nevertheless, additional proceedings continued in the action. In particular, on July 24, 1995, ICR filed a motion requesting that the trial court set the amount of attorney's fees incurred by Germain as set out in the court's January 12 order. Shortly thereafter, Germain's counsel withdrew from the litigation, and the trial court directed him to obtain new counsel within 60 days.

On November 27, 1995, ICR filed a motion for default judgment on its cross-claim against Germain. Simultaneously, ICR tendered interrogatories to BDTC. In response, BDTC argued that the trial court's April 6, 1995, order dismissed all pending claims in the action, including ICR's cross-claim. ICR filed a response to BDTC's argument and requested a hearing on the matter.

On April 9, 1996, ICR filed a renewed motion for a hearing on the issue and on its request for a default judgment against Germain. The court scheduled a hearing, but once again it declined to enter any orders. No further pleadings were filed until April 14, 1997, when ICR re-filed the motion that it had submitted a year earlier. Since Germain had not responded to any

of the motions, the trial court granted ICR's motion for a default judgment against him on April 3, 1998. Finally, on March 8, 2000, the trial court entered an order finding as follows:

The order of this Court dated April 6, 1995, striking this matter from the docket of this Court has not been modified, and the claim of Indian Creek Resorts, Inc., against the Bank of Danville and Trust Company have [sic] not been reinstated.

Accordingly, the trial court overruled ICR's motion to reinstate its claim against BDTC and dismissed the action. Thereafter, the trial court denied ICR's motion to reconsider,¹ and this appeal followed.

The nature and purpose of the trial court's April 6, 1995, order present some unusual questions for review. BDTC argues that the April 6, 1995, order resolved the entire action and effectively amounted to a dismissal of ICR's cross-claim. We do not agree. First, a judgment of the court must be interpreted and read in the light of what was before it.² With regard to the cross-claim and third-party claim, no party had a pending motion to dismiss and the trial court did not give notice to the parties that it was considering the issue *sua sponte*. Indeed, the trial court had reinstated ICR's claims just three months earlier.

Furthermore, the April 6 order on its face does not address any of the other claims pending in the action. The order specifically refers only to the foreclosure action. The style of the order refers only to FFB (as the original plaintiff), Del

¹ CR 59.05

² Hays v. Madison Co., 274 Ky., 116, 118 S.W.2d 197, 199 (1938).

Spina (as the intervening plaintiff), and ICR (as the defendant). By its own terms, the April 6 order did not purport to resolve the issues raised in ICR's cross-claim and third-party claim.

In addition, the April 6 order does not actually dismiss any portion of the action. Rather, the order states that the action "will be stricken from the docket" in ten days. Even had the trial court intended the order to resolve all of the pending claims in the action, it never took the required step of issuing a final order doing so. Indeed, the trial court recognized that the April 6, 1995, order was not a final and appealable judgment when it formally dismissed the action in its order of March 8, 2000. Consequently, the April 6 order was not a final and appealable judgment, and the action remained pending before the circuit court.

Finally, the terminology used in the April 6 order does not support an inference that the trial court intended to dismiss the action. Indeed, the practice of "striking" a case from the docket is not recognized under the Civil Rules.³ Even in older cases where the practice was followed, our courts recognized that an order striking a case from the docket was not the equivalent

³ Under CR 77.02, the trial court shall review all pending actions at least once a year. The court shall provide notice to each counsel of record in 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. Similarly, CR 41.02 permits the trial court to dismiss an action for failure to prosecute. The purpose of these rules is to allow the trial court to remove stale cases from its docket. Hertz Commercial Leasing Corp. v. Joseph, Ky. App., 641 S.W.2d 753, 755 (1982) (*citing* 7 W. Clay, Kentucky Practice, CR 77.02, Comment (3rd ed.,1981)). The practice of indefinitely suspending stale cases from the docket without dismissal is at odds with the purpose of these rules.

of a dismissal. Rather, such an order merely removed the case from the active docket, and thereafter it could be reinstated and further proceedings in the case could be seasonably taken.⁴

At most, the April 6 order merely suspended ICR's cross-claim and third-party claim until further notice of the court. CR 60.02 was not implicated because the April 6 order was not a final judgment. Therefore, when ICR attempted to resume its prosecution of the action in November 1995, it did not bear the burden to show good cause.

BDTC also argues that the trial court had the discretion to dismiss ICR's cross-claim for failure to prosecute. A court may dismiss an action for failure of a plaintiff to prosecute or to comply with the civil rules or with any order of the court.⁵ Application of this rule is a matter for the discretion of the court.⁶ However, because of the grave consequences of a dismissal with prejudice, a dismissal pursuant to CR 41.02 should be resorted to only in the most extreme cases, and this Court should carefully scrutinize the trial court's exercise of discretion in doing so.⁷ Each case must be considered in the light of the particular circumstances involved

⁴ Van Arsdale v. Caswell, Ky., 311 S.W.2d 404, 407 (1958); Taylor v. Commonwealth, Ky., 246 S.W.2d 981, 984 (1951); Goff v. National Rubber & Leather Co., 249 Ky. 363, 60 S.W.2d 944, 945 (1933).

⁵ CR 41.02(1).

⁶ Thompson v. Kentucky Power Co., Ky. App., 551 S.W.2d 815, 816 (1977).

⁷ Polk v. Wimsatt, Ky. App., 689 S.W.2d 363, 364-65 (1985).

and length of time is not alone the test of diligence.⁸ The trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial.⁹

In this case, the trial court gave no grounds for dismissing ICR's complaint. Although ICR was not particularly diligent in pursuing its claim, there is no indication in the record that the trial court considered the extent of ICR's responsibility for the delay, its history of dilatoriness, whether its conduct was willful and in bad faith, the meritoriousness of its claim, the prejudice to BDTC, or the availability of alternative sanctions.¹⁰ Furthermore, after BDTC objected to ICR's discovery requests in November 1994, the trial court failed to rule for more than four years. The record shows that IRC renewed its motions for a ruling on the issue in April of 1996 and 1997. ICR is not responsible for any delay during this period because the trial court would not allow discovery to go forward.

The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.¹¹ The trial court's order of March 8, 2000, simply says that the April 6 order has not been

⁸ Gill v. Gill, Ky., 455 S.W.2d 545, 546 (1970).

⁹ Ward v. Housman, Ky. App., 809 S.W.2d 717, 719 (1991).

¹⁰ Id. (citing Scarborough v. Eubanks, 747 F.2d 871 (3rd Cir. 1984)).

¹¹ Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000); Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

modified and the cross-claim has not been reinstated. The court gave no reasons for its refusal to reinstate the claim or for its decision to dismiss the action entirely. A dismissal of an action under these circumstances should be accompanied by some articulation on the record of the trial court's resolution of the factual, legal, and discretionary issues presented. When such a severe sanction is imposed, values of consistency and predictability, reviewability, and deterrence, outweigh the values of economy and efficiency that may be promoted by allowing unexplained decisions.¹² Given the lack of any findings on this issue, we conclude that the trial court's refusal to allow ICR to resume the prosecution of its cross-claim against BDTK was not supported by the record or by sound legal principles. Although we do not condone ICR's less-than-diligent approach to the prosecution of its cross-claim, the trial court made no findings which would justify dismissal of the action.

Accordingly, the order of the Pulaski Circuit Court dismissing the cross-claim is reversed and the case remanded back for further proceedings on the merits of ICR's claim.

HUDDLESTON, JUDGE, CONCURS.

TACKETT, JUDGE, DISSENTS.

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¹² Greathouse v. American National Bank and Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990); *citing* Taylor v. Medtronics, Inc., 861 F.2d 980, 986 (6th Cir.1988).

