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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000960-MR

JAMES A. ELLIS & ASSOCIATES,
ARCHITECTS, PSC — APPELLANT

v. — APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 97-CI-00369

PHILLIP DAMRON — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: In May 1997, James Ellis, president of James A. Ellis & Associates, Architects, P.S.C., brought suit in his corporate capacity against Phillip Damron, an attorney, claiming that Damron's negligent representation of Ellis & Associates had subjected it to unwarranted liability. By order issued December 16, 1999, the Floyd Circuit Court dismissed the suit for failure to prosecute. Although technically the dismissal was without prejudice pursuant to CR 77.02, the statute of limitations apparently bars the suit's reinstatement. In March 2000, Ellis & Associates moved to have the order dismissing its suit set aside.

The trial court denied the motion by order entered April 3, 2000. Ellis & Associates contends that the dismissal, or at least the refusal to set it aside, amounts to an unduly harsh sanction and an abuse of the trial court's discretion. We affirm.

Attorney Damron answered the complaint and filed a counterclaim at the end of June 1997. Ellis & Associates answered the counterclaim that August. Although the parties may have engaged in limited discovery, the next item in the record is a motion to withdraw by Ellis & Associates' counsel. Counsel filed the motion in April 1998. In its May 11, 1998, order permitting the withdrawal, the trial court gave Ellis & Associates sixty days to obtain new representation. There the matter stood, as far as the record reflects, until September 22, 1999. At that point, in accordance with CR 77.02, the trial court on its own motion ordered Ellis & Associates to show cause why the suit should not be dismissed for lack of prosecution. Ellis & Associates did not appear at the November 12, 1999, show-cause hearing and did not otherwise respond to the notice of dismissal. Accordingly, on December 16, 1999, the trial court dismissed the suit.

On March 17, 2000, Ellis & Associates filed a motion for relief pursuant to CR 60.02. In its memorandum supporting the motion, Ellis & Associates averred that it had not succeeded in finding new representation, despite diligent efforts to do so, until about the beginning of March 2000. It further averred that it had only become aware of the notice of dismissal and the order dismissing at about that same time, when new counsel had

inspected the record. These facts, Ellis & Associates contended--its long search for willing counsel and its lack of notice of the dismissal proceedings--excused both its failure to respond in a timely manner to the CR 77.02 show-cause order and its failure for many months to advance the litigation. The trial court disagreed.

Although not addressing Ellis & Associates' assertion that it had contacted more than seventy lawyers, law firms, and lawyer referral services before finally finding new counsel, the court rejected Ellis & Associates's contention that either the lack of notice or the lack of counsel excused its failure to respond to the show-cause order. Ellis & Associates had been under duties, the court explained, to inform the court of its problems finding representation and to check the record periodically to keep itself abreast of any developments. Its breach of these duties, the court believed, disqualified it for CR 60.02 relief.

It is true, as the trial court noted, that CR 60.02, which provides for relief from a final judgment, creates an extraordinary remedy, one that is to be cautiously applied.[1] It is also true that this court reviews CR 60.02 rulings deferentially according to an abuse-of-discretion standard.[2] No less important, however, is the policy underlying this state's civil rules that, whenever possible, disputes are to be decided

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[1]Board of Trustees of Policemen's & Firemen's Retirement Fund of the City of Lexington v. Nuckolls, Ky., 507 S.W.2d 183 (1974).

[2]Bethlehem Minerals Company v. Church and Mullins Corporation, Ky., 887 S.W.2d 327 (1994); Wright v. Transportation Cabinet, Ky. App., 891 S.W.2d 412 (1995).

on their merits and not on the basis of procedural default.[3] Indeed, one of the fundamental considerations guiding the trial court's discretion under CR 60.02 should be "whether the moving party had a fair opportunity to present his claim at the trial on the merits. . . ."[4]

Because dismissal, the ultimate sanction for delay or other misconduct, precludes that opportunity, the trial court must take care to determine that dismissal (whether pursuant to CR 77.02, CR 41.02, or some other rule) is an appropriate sanction in the circumstances.[5] Different courts have recommended various factors as germane to that determination, but most of the lists include "the gravity of the misconduct, the prejudice if any to the defendant, and whether the suit has any possible merit . . . ."[6] Except in cases of egregious misconduct, moreover, a trial court should not resort to dismissal without due warning to the plaintiff or without considering less severe alternatives.[7]

With regard to warning, CR 77.02, a housekeeping measure whereby trial courts are both obliged and authorized to

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[3]Perry v. Central Bank & Trust Company, Ky. App., 812 S.W.2d 166 (1991) (citing Dressler v. Barlow, Ky. App., 729 S.W.2d 464 (1987)); *see also* Ready v. Jamison, Ky., 705 S.W.2d 479 (1986).

[4]Bethlehem Minerals Company, *supra,* 887 S.W.2d at 329.

[5]Gill v. Gill, Ky., 455 S.W.2d 545 (1970); Ward v. Housman, Ky. App., 809 S.W.2d 717 (1991); Hertz Commercial Leasing Corporation v. Joseph, Ky. App., 641 S.W.2d 753 (1982).

[6]Bolt v. Loy, 227 F.3d 854, 856 (7th Cir. 2000); Ward v. Housman, *supra*.

[7]Gill v. Gill, *supra;* Ward v. Housman, *supra. Cf.* Stough v. Mayville Community Schools, 138 F.3d 612 (6th Cir. 1998); Harmon v. CSX Transportation, Inc., 110 F.3d 364 (6th Cir. 1997); Ball v. City of Chicago, 2 F.3d 752 (7th Cir. 1993).

remove abandoned cases from their dockets and to prod slumbering litigants into activity, requires that

> [n]otice 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.

This court has characterized this notice requirement as mandatory,[8] and much of the discussion in this case, both by the parties and by the trial court, has been devoted to debating the significance of the apparent fact that Ellis & Associates, who at the time did not have an attorney of record, did not receive warning of the impending dismissal. If there is no attorney of record, must the court give notice directly to the about-to-be-dismissed plaintiff? Naturally Ellis & Associates contends that it must and that its failure to do so here voids the order of dismissal or at least constitutes an excellent reason to set it aside. Just as naturally, Damron and the trial court insist that this is not what the rule says. They contend that the trial court gave the notice (to all attorneys of record) mandated by the letter of the rule. As a result, Damron asserts that Ellis & Associates has only itself to blame if its failure either to find an attorney or to let the court know that it was having trouble doing so thwarted CR 77.02's notice mechanism.

We are not persuaded that a lack of actual notice to Ellis & Associates renders the order of dismissal void. Often the party on the receiving end can, through evasion or

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[8]Hertz Commercial Leasing Corporation v. Joseph, *supra.*

carelessness, prevent actual notice from occurring. Lest those attempting to give notice be thus easily frustrated by unwilling or careless recipients, due process itself usually requires only that the notice be reasonably certain in the circumstances to achieve its purpose.[9] One attempting notice under a formal procedure must comply with the procedure, of course,[10] but having done so he or she generally need do nothing more.[11]

We believe the trial court's sending notice to the attorneys of record satisfied the requirements of CR 77.02. It may well be that those requirements would extend to a party officially proceeding *pro se,* because such a party is, in effect, the attorney of record.[12] But where, as in this case, there is no attorney of record, whether licensed counsel or *pro se* party, and no explanation for the attorney's absence, CR 77.02 does not (although some other source of obligation may) require the court to give any notice at all.[13]

Of course, to say that the order of dismissal is not void under CR 77.02 is not to say that it was proper. The lack

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[9]*Cf.* Cox v. Rueff Lighting Company, Ky. App., 589 S.W.2d 606 (1979) (discussing notice requirements under the long-arm statute).

[10]Foremost Insurance Company v. Whitaker, Ky. App., 892 S.W.2d 607 (1995); Hertz Commercial Leasing Corporation v. Joseph, *supra.*

[11]Cox v. Rueff Lighting Company, *supra.*

[12]Ellis & Associates not only had not arranged to proceed *pro se,* but, as a corporation, it could not have done so. *See* Flynn v. Songer, Ky., 399 S.W.2d 491 (1966).

[13]*Cf.* Link v. Wabash Railroad Company, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962) (holding that the federal due-process clause does not require prior notice of a dismissal provided the circumstances should have made the possibility of dismissal apparent to the dismissed party, and provided that there is a meaningful opportunity for post-dismissal review).

of prior notice is just one of several disturbing aspects of this case. We also find troubling the fact that the record gives no indication that the trial court considered the likely merits of Ellis & Associates' claim, the validity of its proffered excuse, or the suitability of an alternative sanction. As discussed above, these are among the factors that should guide the trial court in the exercise of its discretion. Where the court neglects, or seems to neglect, such guidance, it risks giving the impression of arbitrariness. Nevertheless, we are mindful that the trial court's discretion in this area is broad,[14] and that a plaintiff's particularly egregious behavior can sometimes merit dismissal even without warning or prior sanction.[15] Here, Ellis & Associates failed by more than a year-and-a-half to comply with the court's order to obtain new counsel. Worse, it failed to request an extension of the original sixty-day deadline or even to apprise the court of the trouble finding counsel it claims to have been experiencing. This complete and prolonged disregard of the court's order not only amounted to a failure to prosecute the case, but can legitimately be regarded as "stubbornly disobedient and willfully contemptuous. It is, in short, a clear record of delay and contumacious conduct."[16] Although a different court might have responded more leniently than this one did to Ellis & Associates' alleged difficulties, we are not persuaded that this court's strict response unfairly deprived Ellis & Associates of a

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[14]Wright v. Transportation Cabinet, *supra.*

[15]*Cf.* Harmon v. CSX Transportation, Inc., *supra.*

[16]Harmon v. CSX Transportation, Inc., *supra*, 110 F.3d at 368.

trial on the merits or otherwise amounted to an abuse of discretion. Accordingly, we affirm the April 3, 2000, order of the Floyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Bobby Rickey King Rick King, PSC Pikeville, Kentucky	Matthew W. Breetz Stites & Harbison Louisville, Kentucky