

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000054-MR

JUAN LEDEZMA AND
SHERRI ANN LEDEZMA

APPELLANTS

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 00-CI-00005

RAFORD RAMAGE;
LEONA V. RAMAGE; AND
RAMAGE LIVING TRUST

APPELLEES

AND: NO. 2001-CA-000055-MR

STEVEN R. BELT AND
CAROLINE A. BELT

APPELLANTS

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 00-CI-00003

RAFORD RAMAGE;
LEONA V. RAMAGE; AND
RAMAGE LIVING TRUST

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, MILLER AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Juan Ledezma and Sherri Ann Ledezma (hereinafter "Ledezma"), the appellants in appeal No. 2001-CA-000054-MR, and Steven R. Belt and Caroline A. Belt (hereinafter "Belt"), the appellants in appeal No. 2001-CA-000055-MR, have appealed from the Livingston Circuit Court's October 4, 2000, orders dismissing their respective actions and the December 11, 2000, orders denying their motions to vacate the orders of dismissal. Rford E. Ramage, Leona V. Ramage, and Ramage Living Trust (hereinafter "Ramage") were named as appellees in both appeals. Having considered the record, the parties' briefs, and the applicable case law, we affirm.

As the sequence of events occurring in these companion cases is important, we will briefly summarize these events.

January 5, 2000 - Ledezma and Belt file their respective complaints in Livingston Circuit Court seeking damages for faulty construction.

January 13, 2000 - Ramage files answers to the complaints.

May 18, 2000 - the circuit court denies Ledezma's and Belt's motions for temporary relief, schedules a trial second on the docket for October 30, 2000, and designates the cases for mediation.

June 19, 2001 - mediation held. Mediator C.A. Woodall, III, files his report on June 26, 2000, indicating that the parties were able to agree on a format for repair and payment for repairs and that "hopefully this agreement will be reduced to writing and lead to dismissal of the suit in the near future."

July 26 and 28, 2000 - counsel for Ramage serves notices of the depositions of Ledezma and Belt, files motions for inspection of the property, and serves interrogatories on trial counsel.

August 30, 2000 - counsel for Ramage cancels depositions scheduled for August 31, 2000, as the completed interrogatories were not filed within thirty days and files motions to compel discovery with the circuit court.

September 11, 2000 - hearing on motions to compel. Trial counsel for Ledezma and Belt does not file any response to the motions and does not appear at the hearing.

September 11, 2000 - circuit court grants the motions to compel and for inspection, and orders Ledezma and Belt to comply with the interrogatory requests by September 13, 2000.

September 26, 2000 - Ramage moves to dismiss the suits with prejudice for failure to comply with the discovery requests and for disregarding the order compelling discovery.

October 4, 2000 - hearing on motions to dismiss. Trial counsel for Ledezma and Belt does not file responses nor does he appear at the hearing.

October 4, 2000 - circuit court grants the motions to dismiss, citing plaintiffs' failure to appear in response to motions, to comply with discovery orders or provide discovery, or to prosecute the cases in a timely fashion.

Trial counsel for Ledezma and Belt moved the circuit court to vacate the orders of dismissal on October 13, 2000. In the written motions, counsel first noted that the parties had reached a settlement at the mediation, but upon receipt of the interrogatories and discovery requests on July 28, 2000, he promptly forwarded them to his clients. His clients were also prepared to attend the subsequently canceled depositions. After receiving the motions to compel and in an effort to conserve legal expenses, counsel drafted and mailed a letter to his clients on September 13, 2000, regarding the completion of the discovery responses. They did not return the responses prior to

the filing of the motion to dismiss, and counsel was unable to respond or appear at the hearing because the motion was received too late. He did not provide any other explanation as to why he was unable to respond or attend the hearing. Lastly, counsel stated that he relied upon Ramage's counsel's indication that he would be seeking a continuance in support of his failure to file the completed discovery responses.

At the hearing on the motions to vacate, trial counsel primarily argued that because the cases were settled, the discovery matters were irrelevant. He argued that the contract claim had superseded the tort claim when the cases were settled. Upon questioning by Judge Cunningham, counsel admitted that he had no excuse for failing to file any responses or to appear at the motion docket hearings.

In response, counsel for Ramage argued that the cases were not settled at the mediation, and that plaintiffs' trial counsel did not respond to telephone calls or motions nor did he appear at hearings. Significantly, trial counsel for Ledezma and Belt had never moved to enforce the purported settlement agreement and had not used the claim that the cases had been settled as an answer to the previously filed motions. The circuit court denied the motions to vacate by written order entered December 11, 2000. He based this decision on the lack of response to the motions to dismiss and the subsequent dismissals. These consolidated appeals, filed and perfected by new counsel, followed.

Although it is unclear whether the motions to dismiss were filed and orders of dismissal were entered pursuant to CR 37.02, dealing with failure to comply with an order, or CR 41.02, dealing with involuntary dismissals, it is well established in this Commonwealth that the standard of review in those situations is whether the trial court abused its discretion. Midwest Mutual Insurance Co. v. Wireman, Ky.App., 54 S.W.3d 177 (2001); Ward v. Houseman, Ky.App., 809 S.W.2d 717 (1991). Similarly, the standard of review regarding rulings on motions to vacate is also abuse of discretion. Bethlehem Minerals Co. v. Church & Mullins Corp., Ky., 887 S.W.2d 327 (1994); Schott v. Citizens Fidelity Bank and Trust Co., Ky., 692 S.W.2d 810 (1985); Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957). Therefore, the rulings will not be reversed unless it is established that the circuit court abused its discretion in granting the motions to dismiss and denying the motions to vacate.

Ledezma and Belt rely upon the decision of the Court of Appeals in Ward v. Houseman, Ky.App., 809 S.W.2d 717 (1991), to support their argument that the circuit court abused its discretion. In Ward, which involved an allegation of medical malpractice, counsel for the plaintiff furnished the name of the expert witness months after it was due. The defendant filed a motion to limit the plaintiffs' proof or for a continuance because of the surprise expert. The trial court's ruling on the motion essentially prevented the plaintiff from relying on any expert testimony and would not allow her to maintain her claim beyond the directed verdict stage. The plaintiffs' motion for

reconsideration was denied, and the action was later dismissed by summary judgment. This Court reversed, reasoning that the result was more than the defendant asked for and that the dismissal was improvident for a one-time dilatory act of counsel without consideration of alternative sanctions. Ledezma and Belt urge this Court to apply the six factors set forth in the Ward case and hold that the circuit court did not adequately address these factors in their respective cases.

Ramage, on the other hand, directs our attention to the case of Jenkins v. City of Lexington, Ky., 528 S.W.2d 729 (1975). In that case, Jenkins petitioned the circuit court for injunctive relief in 1972. After the answer was filed, no further action was taken until City of Lexington filed a motion to dismiss for lack of prosecution in 1974. Although counsel for both sides signed an order scheduling a hearing on the matter, counsel for Jenkins did not make an appearance at the hearing. The circuit court later dismissed the action. The former Court of Appeals affirmed the decision, reasoning that a two year delay in an action and counsel's failure to attend the hearing on the motion to dismiss provided an adequate basis for the circuit court's decision.

A review of the record in the present cases clearly establishes that the circuit court did not abuse its discretion in dismissing the actions and denying the motions to vacate. We agree with Ramage that the Jenkins case more closely matches the factual pattern in the present cases as trial counsel's actions did not constitute a one time dilatory act as did the action of

the attorney in the Ward case. Trial counsel for Ledezma and Belt did not comply with the discovery requests by timely filing the interrogatory answers and did not comply with the orders compelling discovery. In fact, it appears that the discovery responses have never been filed. He did not respond in writing to either the motions to compel or the motions to dismiss, nor did he appear at the hearings on either of the motions. It was clearly within the circuit court's discretion to grant the motions to dismiss when no written responses were filed and trial counsel did not make an appearance to orally respond and voice any objection to the motions. Only after the cases had been dismissed did trial counsel make any action.

For the same reasons, the circuit court did not abuse its discretion in denying the subsequent motions to vacate. Both in the motions and at the hearing, trial counsel did not offer any type of explanation as to why he did not respond to the earlier motions, communicate with the court or opposing counsel, or attend the previous motion dockets, other than the late receipt of the motions to dismiss. Because trial counsel failed to respond or appear at the prior hearings, the circuit court did not abuse its discretion in denying the motions to vacate.

For the foregoing reasons, the orders of the Livingston Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS IN BOTH
APPEALS:

Brad Goheen
Paducah, KY

BRIEF FOR APPELLEES:

William F. McGee, Jr.
Smithland, KY

