

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001362-MR

ALTA KING

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 98-CI-00179

WAL-MART STORES

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Alta King appeals from an order entered pursuant to CR 77.02(2) dismissing her complaint, with prejudice, for failure to comply with a pretrial order and failure to prosecute. Dismissal pursuant to CR 77.02 was in error although it may have been proper under CR 41.02. Accordingly, we reverse and remand to the Boyle Circuit Court for reconsideration of defendant-appellee's motion under CR 41.02.

This case arose out of an alleged slip and fall by Alta King at the Danville, Kentucky Wal-Mart store on May 7, 1997,

resulting in injuries to her person. On May 4, 1998, King filed a complaint against Wal-Mart Stores, Inc. (Wal-Mart) as a result of the accident. Wal-Mart filed an answer, and served upon King interrogatories and requests for production of documents. On March 10, 1999, Wal-Mart filed a motion to compel, on grounds that it had not received answers to the aforementioned interrogatories nor responses to the requests for production of documents. Wal-Mart contended that it had served King with the interrogatories and requests for production of documents on May 21, 1998. King subsequently responded to the interrogatories and requests for production of documents. However, on April 29, 1999, Wal-Mart filed a second motion to compel, on grounds that King had provided incomplete responses to the interrogatories and requests for production of documents. On June 8, 1999, an agreed order was entered stating that King would have until June 19, 1999 in which to serve complete responses to Wal-Mart's interrogatories and requests for production of documents. On June 28, 1999, Wal-Mart filed a motion to dismiss pursuant to CR 37.02, on grounds that King had failed to comply with the June 8, 1999 order. Pursuant to the motion to dismiss, on July 22, 1999, the court entered an order finding that King had failed to provide the discovery requested by Wal-Mart, and giving King fifteen days from the date of the order to comply with the discovery or the case would be dismissed. On August 6, 1999, the required discovery was served upon Wal-Mart. On

June 5, 2000, Wal-Mart filed a motion for summary judgment and partial summary judgment.¹

A pretrial conference was scheduled for July 14, 2000. On this date, the court heard Wal-Mart's motion for summary judgment, after which the court asked Wal-Mart's counsel to draft an order granting its motion for partial summary judgment on punitive damages, and asked King's counsel to prepare an order denying Wal-Mart's motion for summary judgment on negligence.² The court additionally reopened discovery in order to give King an opportunity to complete discovery with her new counsel.³ At the conclusion of the pre-trial conference, the court instructed King's counsel that he needed to file a pretrial memorandum for the next scheduled pretrial conference.⁴

On November 8, 2000, the court held a status conference, at which it set the following deadlines: a discovery cutoff date of January 15, 2001, witness lists to be exchanged by February 28, 2001, a deposition cutoff date of March 16, 2001,

¹ King did not file responses to the motions for summary judgment. King also had not filed responses to the motions to compel or motion to dismiss. Wal-Mart contends, and the record indicates, that the only pleadings filed or served by King in this case were her complaint and her discovery responses.

² King's counsel failed to prepare this order.

³ King apparently had originally been represented in this action by her current counsel's father, and, following his death, her current counsel took over her representation.

⁴ Wal-Mart had filed its pretrial memorandum prior to this conference.

and motions to be filed by April 27, 2001.⁵ The court scheduled what was to be the second and final pretrial conference for May 9, 2001 from 3:00 to 3:30 p.m.

On April 4, 2001, the court entered an order setting the pretrial conference for May 9, 2001 at 3:00. The order included the requirement that both parties prepare a pretrial memorandum prior to this pretrial conference. On May 9, 2001, counsel for Wal-Mart was present at the appointed time. However, King's counsel did not appear and had not filed a pretrial memorandum. The court waited until approximately 3:18 to begin the conference. Wal-Mart moved to dismiss, and the court subsequently dismissed the case for failure of King to prosecute the action. At approximately 3:26, shortly after Wal-Mart's counsel had left the building, King's counsel arrived. The court advised King's counsel to file a motion to reconsider and set aside, and to file a pretrial memorandum at the same time.

In an order dated May 24, 2001, and entered May 25, 2001, the trial court dismissed King's case, with prejudice, pursuant to CR 77.02(2), finding that King had failed to comply with the court's April 4, 2001 pretrial order and had failed to prosecute her claim. Following the entry of the order, King did not file a motion to reconsider or set aside, as suggested by the trial court, but filed this appeal instead.

On appeal, King contends that the requirements of CR 77.02(2) were not met, and requests that the order of dismissal

⁵ Wal-Mart contends, and the record indicates, that King's counsel failed to file witness and exhibit lists, took no depositions, and conducted no discovery.

with prejudice be set aside. In its order of dismissal, the trial court stated that "[t]his court specifically finds that the plaintiff has failed to comply with this court's April 4, 2001 pre-trial order and has failed to prosecute this claim and, pursuant to CR 77.02(2), this case shall be dismissed with prejudice."

CR 77.02(2) is a "housekeeping" rule which permits the court to dismiss a case if no pretrial steps have been taken in the previous year by either party. Bohannon v. Rutland, Ky., 616 S.W.2d 46 (1981). Accordingly, in light of the aforementioned procedural history of this case, dismissal under CR 77.02(2) would be improper.

Interestingly, although the court cited CR 77.02(2) as the basis for its ruling, it made recitals appropriate for dismissal under CR 41.02. CR 41.02 provides, in relevant part:

(1) For 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.

. . .

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits. (emphasis added.)

The trial court is vested with broad discretion in deciding whether an action should be dismissed under CR 41.02 for failure to prosecute. Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equipment Co., Ky., 451 S.W.2d 401 (1970).

Other than the May 4, 1998, filing of the complaint, and service of her discovery responses, the record indicates that King took no action whatsoever with regard to the prosecution of her case. King filed no responses to Wal-Mart's motions to compel, motion to dismiss pursuant to CR 37.02, or motions for summary judgment. King conducted no discovery, despite being given a second chance to do so pursuant to the court's reopening of discovery, for her benefit, at the pretrial conference on July 14, 2000.

The record further indicates that King failed to comply with the court's April 4, 2001, order, including the failure to prepare a pretrial memorandum. In fact, despite the deadlines set forth at the November 8, 2000, status conference and requirements of the April 4, 2001, order, King took no action whatsoever on the case and offered no explanation for this inaction. When inquired of by the court at the May 9, 2001, conference as to why he hadn't filed a pretrial memorandum, King's counsel appears to reply "I just haven't done it." Further, despite the court's suggestion, King did not file a motion to reconsider or set aside the order dismissing the case.

However, since CR 41.02 was not cited as the basis for the court's ruling, we are constrained to reverse and remand for reconsideration under CR 41.02. Just as in the case at bar, in Bohannon, 616 S.W.2d at 47, the trial court dismissed under CR 77.02(2) instead of CR 41.02(1), and our Supreme Court reversed and remanded for reconsideration under CR 41.02.

For the reasons stated above, the order of the Boyle Circuit Court is reversed and remanded for reconsideration under CR 41.02.

ALL CONCUR.

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