

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002596-MR

DIANE WOOD

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 97-CI-01001

BEN S. WOOD, III and
BEN S. WOOD, III, EXECUTOR
OF THE ESTATE OF BEN S. WOOD

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, SCHRODER AND TAYLOR, JUDGES.

BARBER, JUDGE: Diane Wood appeals from an order of the Christian Circuit Court that dismissed her action with prejudice against Ben S. Wood III, Individually, and as Executor of the Estate of Ben S. Wood for lack of prosecution. We vacate and remand.

In September of 1964 Ben S. Wood executed a promissory note to his daughter, Diane Wood (Diane), that was in the

principal amount of \$11,565.36. The note is payable on demand and carries an interest rate of 5% per annum. Ben S. Wood died and his son, Ben S. Wood III (Ben), was appointed executor of his estate. Diane filed a claim with the estate in August of 1997 for payment of the promissory note. Ben disallowed the claim and Diane filed suit October 31, 1997, in circuit court to collect.

After Diane filed suit no steps were taken to prosecute the case for a period of time. In January of 2000 Ben moved to dismiss the case for lack of prosecution. That motion was denied, and, thereafter, Diane did promulgate interrogatories and participate in taking and giving depositions. These pretrial steps concluded in November of 2000. It appears that no further steps were taken in the case until October 31, 2002, when Diane's counsel moved to withdraw from the case. Nor was the case ever placed on the court's trial docket.

Although Diane's counsel withdrew its motion to be relieved of the case, Ben filed a second motion to dismiss for lack of prosecution in November 2002. That motion was granted as noted on the court's motion docket of November 27, 2002, and as embodied in its written order entered December 10, 2002. This appeal followed.

On appeal Diane argues that the circuit court should not have dismissed her case for failure to prosecute because she took substantial steps toward resolving the case; that it failed to consider the appropriate factors and less drastic remedies before dismissing, and because Ben has unclean hands.

The dismissal in this case was granted under CR 41.02(1) which provides:

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.

While the standard for review of a dismissal for lack of prosecution is whether the trial court abused its discretion, Kentucky's appellate Courts have consistently held that the trial court must take care to consider certain relevant factors before employing such a drastic remedy. See Jenkins v. City of Lexington, Ky., 528 S.W.2d 729, 730 (1975)(standard of review is abuse of discretion); Nall v. Woolfolk, Ky., 451 S.W.2d 389, 390 (1970)(power of court to dismiss for want of prosecution is inherent power of the court); Modern Heating & Supply Co. v. Ohio Bank Building & Equip. Co., Ky., 451 S.W.2d 401, 403-404 (1970)(unless trial court abuses its discretion by dismissing appellate court will not intervene).

Relevant factors for the circuit court to consider before employing its power to dismiss for lack of prosecution

include the particular facts and circumstances of the case such as whether the case has been placed on the circuit court's trial docket, and the reasons for the delay since delay alone is not the test of due diligence. Gill v. Gill, Ky., 455 S.W.2d 545, 546 (1970). The court should also consider whether less drastic measures would remedy the situation especially where there has not been any prejudice shown to the party asking for dismissal. Polk v. Wimsatt, Ky. App., 689 S.W.2d 363, 364-365 (1985).

Further factors to bear in mind are:

- 1) the extent of the party's personal responsibility;
- 2) the history of dilatoriness;
- 3) whether the attorney's conduct was willful and in bad faith;
- 4) meritoriousness of the claim;
- 5) prejudice to the other party, and
- 6) alternative sanctions.

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

From the record in this case it appears that the trial court did not consider any of the above factors before granting Ben's motion to dismiss for lack of prosecution. Whether Diane took substantial steps to prosecute her claim and what effect, if any, Ben's alleged unclean hands should have on the case are matters to first be considered by the trial court. Since it is not this Court's role to make findings, we vacate the ruling and remand to the Christian Circuit Court for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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