

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001553-MR

RYDER INTEGRATED LOGISTICS, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 01-CI-006244

BRASHEAR ENTERPRISES, INC.  
D/B/A SNELLING PERSONNEL  
SERVICES; SNELLING AND SNELLING,  
INC.; AND ADVANCED PROCESSING  
SYSTEMS, INC., D/B/A SNELLING  
PERSONNEL SERVICES

APPELLEES

OPINION  
REVERSING

\*\* \*\* \* \* \*

BEFORE: ACREE, GUIDUGLI, AND HENRY, JUDGES.

HENRY, JUDGE: Ryder Integrated Logistics, Inc. ("Ryder")  
appeals from a Memorandum Order of the Jefferson Circuit Court  
dismissing its case against Brashear Enterprises, Inc., Snelling  
and Snelling, Inc., and Advance Processing Systems, Inc.  
pursuant to the "housekeeping rule" set forth in Kentucky Rule  
of Civil Procedure ("CR") 77.02(2). Upon review, we reverse and  
remand.

The background of this case is as follows: Ryder is in the business of providing warehousing and logistics services for manufacturers at various locations across the United States, including Jefferson County. Ryder contracted with the appellees, who are in the business of providing personnel and staffing services, for the provision of temporary dock support personnel. Among the employees provided by the appellees was a man named Earl Crawford, who was placed at a security-sensitive facility in Louisville belonging to Samsung International Inc. ("Samsung"). On or about June 8, 2001, Crawford - who has an extensive criminal record in Jefferson County - participated in the theft of over \$136,000.00 in Samsung products from the facility. As a result of this act, Ryder was forced to reimburse Samsung for the cost of the stolen product. On September 12, 2001, Ryder filed suit against the appellees in the Jefferson Circuit Court, contending that they were negligent in the hiring and placement of Crawford and in failing to advise Ryder of his criminal history.

According to Ryder, since the filing of its complaint, the parties have expended much time, energy, and expense in litigating this case, including engaging in substantial discovery and submitting a number of pleadings for the circuit court's review. Ryder specifically notes that the parties have taken well over 400 pages of depositions, with one deposition

including 2,408 pages of attached exhibits. A hiatus in activity occurred, however, when Ryder's original counsel, William B. Owsley, resigned from his position at Wyatt, Tarrant & Combs, LLP's Lexington office in August 2004. After Owsley's departure, Ryder requested that Wyatt continue to prosecute the action, and the files were transferred to the firm's Louisville office to be reviewed by K. Gregory Haynes. According to Ryder, in the following months, Haynes and his associate, Kathryne B. Raines, familiarized themselves with the case and attempted to pursue settlement talks with the appellees. When these talks failed, Ryder filed a Notice of Substitution of Counsel on February 14, 2005.

Just three days later, on February 17, 2005, the circuit court issued a Notice, pursuant to CR 77.02(2), advising Ryder to show good cause as to why no steps of record had been taken for more than one year or its case would be dismissed for want of prosecution. Ryder responded by filing an affidavit from Haynes setting forth the abovementioned reasons as to why a delay in the prosecution of the case had occurred. Nevertheless, on March 29, 2005, the circuit court entered an order dismissing the case for lack of prosecution.

On April 7, 2005, Ryder filed a motion asking the court to reconsider its order of dismissal. The appellees filed a response taking no position on the matter. On July 8, 2005,

the court entered an order denying Ryder's motion. That order reads as follows:

**FACTS**

This case was filed September 12, 2001. It has never had a pre-trial conference or trial date. Plaintiff indicates it has been proceeding with the due diligence, and the file does indicate three depositions taken on October 6, 7, and 13 of 2003.

The file reflects that all parties were before the Court by November 2001. In July, 2002 notices were sent for deposition. In December 2002, an Agreed Confidentiality Order was tendered. In July, 2003 Defendant, Snelling, filed a motion for a Judgment on the Pleadings or Summary Judgment, Plaintiff responded in August 2003. In October 2003, Plaintiff moved to amend the Complaint to include punitive damages, to which the Defendant, Snelling objected.

Although an AOC 280 apparently was not filed for pending motions, the Court entered an order dated December 17, 2003, denying Defendant's motion for Judgment of Dismissal.

No pleadings were filed during the entirety of 2004. On February 14, 2005, Plaintiff filed notice of a change of counsel within the same firm. On February 17, 2005, a sua sponte notice pursuant to CR 77.02 was sent out addressed to Plaintiff's original counsel. On March 1, 2005, Plaintiff filed a response to the CR 77.02 motion. By order entered March 29, 2005, the Court after considering Plaintiff's affidavit, dismissed the complaint per the rule.

The Plaintiff then asked the Court to alter or amend its order on March 29.

**CONCLUSIONS**

In the motion to reconsider, the Plaintiff contends the previous counsel left the firm in August of 2004, and, there was the brief hiatus from that date until

February 14, 2005, while new counsel became familiar with the file. Plaintiff points out that the order of substitution was filed three days before the entry of the sua sponte motion. The reality is that the sua sponte notice was in all probability signed by the Court at the first of the month as part of an annual review of all pending actions, before the Plaintiff's substitution was filed, but not entered until later. Nonetheless, the Court does not consider a substitution of counsel, which is the only pleading filed by the parties in more than fifteen months, a substantial step that would avoid a 77.02 dismissal.

This case was forty months old when the Court sent out its notice. It is not a complicated proceeding.

**ORDER**

Accordingly, the Plaintiff's motion to alter or amend the Court's order of March 29, 2005 is **DENIED**.

This is a final and appealable order.

This appeal followed.

On appeal, Ryder contends that the circuit court erred in dismissing its case because pretrial steps had occurred in the year prior to the court's issuance of its CR 77.02(2) notice, and because it demonstrated good cause for any delay in activity. CR 77.02(2) reads as follows:

At least once each year trial courts shall review all pending actions on their dockets. Notice 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. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

CR 77.02(2) provides a mechanism whereby a circuit court may remove stale cases from its docket and is often referred to as a "housekeeping" rule. Hertz Commercial Leasing Corp. v. Joseph, 641 S.W.2d 753, 755 (Ky.App. 1982). The rule's phrase "no pretrial steps" has been construed "to encompass situations in which no action of record has been taken by either party during the year next preceding the judges' review of the docket." Bohannon v. Rutland, 616 S.W.2d 46, 47 (Ky. 1981). Dismissals for lack of prosecution pursuant to CR 77.02 are reviewed under an abuse of discretion standard. Toler v. Rapid American, 190 S.W.3d 348, 351 (Ky.App. 2006). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004). "The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process." Nall v. Woolfolk, 451 S.W.2d 389, 390 (Ky. 1970).

As noted by the circuit court, prior to Ryder's filing its Notice of Substitution of Counsel on February 14, 2005, the last item in the record was a December 17, 2003 order denying the appellees' motion for summary judgment. What the circuit court failed to acknowledge, however, is that Haynes' affidavit reflects that Ryder and the appellees had been engaging in

settlement negotiations in the months prior to the CR 77.02(2) notice, with those negotiations being terminated by the appellees in a January 14, 2005 letter. The appellees do not deny these facts. Despite being advised of this by Ryder, the court still found that CR 77.02(2) dismissal was appropriate. In Bohannon v. Rutland, supra, our Supreme Court indicated that settlement negotiations constituted a "pretrial step" for purposes of CR 77.02(2). Bohannon, 616 S.W.2d at 46-47. Consequently, as such negotiations occurred here in the year before the circuit court reviewed the docket and issued its CR 77.02(2) notice, the court's decision to dismiss Ryder's case under this rule was erroneous and an abuse of discretion. We therefore need not address Ryder's other arguments.

Accordingly, the decision of the Jefferson Circuit Court is reversed, and this case is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

K. Gregory Haynes  
Matthew A. Williams  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Elizabeth Ullmer Mendel  
Louisville, Kentucky