RENDERED: JULY 11, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000178-MR

JOHN J. SIEGEL, JR. and
PUMA ENERGY CORPORATION — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 94-CI-005719

JOHN P. GALLO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

KNOPF, SENIOR JUDGE: John J. Siegel, Jr. and Puma Energy Corporation appeal the November 29, 2006, opinion and order dismissing their counterclaim of tortious interference of business relations against John P. Gallo. We affirm.

In 1991, the parties entered into an agreement whereas Flaget Fuels, Inc., a company owned and operated by Gallo would loan $4,000,000.00 to Puma, a company owned and operated by Siegel, to begin mining operations in Eastern Kentucky. Only $1,000,000.00 of the loan was ever paid to Puma. On October 31, 1994, Gallo filed a complaint against Siegel, in Jefferson Circuit Court, alleging breach of contract and fraud arising out of the 1991 agreement. On December 20, 1994, Siegel and Puma filed their answer and counterclaim, in which they alleged that Gallo, in attempting to collect the $1,000,000.00 that had been lent, had tortiously interfered with their business relations.

On September 25, 1996, Siegel and Gallo entered into a consent agreement. Puma was not a party to the consent judgment. Exactly ten years later, on September 25, 2006, Puma filed a motion to dismiss Gallo's complaint for lack of prosecution under CR[2] 41.02. Puma's motion was granted on September 27, 2006. On October 25, 2006, Gallo filed a motion to dismiss the counterclaim of Siegel and Puma, under CR 41.02 and CR 41.03, for failure to prosecute. Siegel filed a response on November 9, 2006, to which Gallo filed a reply on November 20, 2006. The matter was set for oral argument on January 22, 2007, but before the arguments could take place, the court entered an opinion and order granting

[2] Kentucky Rules of Civil Procedure.

Gallo's motion and dismissing the counterclaim on November 29, 2006. Siegel and Puma then filed a motion to reconsider on December 7, 2006. That motion was denied on December 28, 2006, and this appeal followed.

On appeal, Siegel and Puma argue that the trial court abused its discretion in granting Gallo's motion to dismiss their counterclaim. They argue that they were not under an affirmative duty to prosecute their claims against Gallo and that any order of dismissal for lack of prosecution should be without prejudice absent extraordinary circumstances.

CR 41.02 is typically initiated when a defendant moves for dismissal of an action because of the plaintiff's failure to prosecute. The rule reads in 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.

Dismissals for lack of prosecution pursuant to CR 41.02 are reviewed under the standard of abuse discretion. *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." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); see also *Toler*, 190 S.W.3d at 351. Although the courts are vested with an inherent power to dismiss for lack of prosecution, such discretion is to be exercised with care.

> . . . dismissal of a case pursuant to CR 41.02 or CR 77.02 "should be resorted to only in the most extreme cases" and we must "carefully scrutinize the trial court's exercise of discretion in doing so." *Polk v. Wimsatt*, 689

> S.W.2d 363, 364-65 (Ky.App.1985). The rule permitting a court to involuntarily dismiss an action "envisions a consciousness and intentional failure to comply with the provisions thereof." *Baltimore & Ohio Railroad Co. v. Carrier*, 426 S.W.2d 938, 940 (Ky.1968). Since the result is harsh, "the propriety of the invocation of the Rule must be examined in regard to the conduct of the party against whom it is invoked." *Id.* At 941.

Toler, 190 S.W.3d at 351.

CR 41.03 reads, in part "[t]he provisions of Rule 41 apply to the dismissal of any *counterclaim*, cross-claim, or third-party claim" (emphasis added). In its order dismissing, the trial court stated, in part:

> Mr Siegel opposes this motion, arguing that he, as a [d]efendant, has no legal duty to bring about the trial of a case, and that the [p]laintiff is the party against whom due diligence to pursue a case must be charged. In support, he cites two cases from California and Pennsylvania. The [c]ourt is not convinced by this argument for several reasons: first, there is no indication that the cited cases involved ten-year old matters which could be described, at best, as stagnant. Second, the law in Kentucky clearly provides that dismissal for lack of prosecution is applicable to counterclaims as well as initial complaints. Finally, Mr. Siegel, as a [c]ounterclaimant, is, in effect if not in name, a [p]laintiff ostensibly pursuing his own cause of action against Mr. Gallo. He and Puma Energy have made absolutely no effort to pursue their [c]ounterclaim against Mr. Gallo, and the [c]ourt finds its dismissal is indeed warranted.

We agree with the trial court's analysis in its entirety. CR 41.02 clearly applies to counterclaims through the imposition of CR 41.03. Siegel and Puma argue that their failure to prosecute the counterclaim for the ten years in which the case sat

stagnant in the trial court was due to their reluctance to "stir the pot." While this may be true, it does not support a holding of abuse of discretion.

CR 41.02(3) provides:

> 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.

This is easily interpreted to mean that without a notation by the trial court to the contrary, i.e. "without prejudice" or "with leave to re-file," any dismissal, other than a dismissal for lack of jurisdiction, improper venue, lack of prosecution under CR 77.02(2), or failure to join a party under CR 19, results in an adjudication upon the merits. *Polk v. Wimsatt*, 689 S.W.2d 363 (Ky.App. 1985). Siegel and Puma argue that the trial court's failure to include such language was an abuse of discretion. We disagree. The parties failed to prosecute their counterclaim for over ten years. We have reviewed the record and we have found no indication that any steps have been taken towards moving the case along during the ten year period of inactivity. There is no evidence in the record that, during that ten year period, they were preparing their case in any manner. Therefore, we do not believe that the trial court's failure to dismiss the case without prejudice was an abuse of discretion.

For the foregoing reasons, the November 29, 2006, order and opinion of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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