

RENDERED: JULY 18, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000553-MR

GREG CARTER

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE DANNY CAUDILL, JUDGE  
ACTION NO. 98-CI-00396

CASE CORPORATION

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Greg Carter appeals a decision of the Floyd Circuit Court dismissing his products liability claim against Case Corporation for failure to prosecute. Carter argues that the trial court erred in two ways: (1) he should not be held responsible for the mistakes of his previous attorney; and (2) he was not

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<sup>1</sup> 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 KRS 21.580.

the only party to violate discovery orders and was unfairly sanctioned. We disagree with both arguments. We find the trial court's decision reasonable and not an abuse of discretion, and therefore, we affirm.

On May 15, 1997, Greg Carter was injured when the 580C crawler (bulldozer) that he was driving repeatedly rolled over after Carter attempted to climb a steep hillside. Carter maintains that a bolt installed in the roof struck his head causing a brain injury. He claims that the method of bolt installation was a defect in the crawler's design.

On May 14, 1998, he filed suit in Floyd Circuit Court against Case Corporation, the manufacturer of the crawler, and Wilson Equipment Company, the owner of the crawler. Case Corporation and Carter exchanged discovery, but very little activity occurred after that initial exchange. In 1999, Carter updated his medical records and unsuccessfully defended a summary judgment motion filed by Wilson Equipment Company. In 2000, Carter's co-counsel withdrew from the case. At the end of 2003, almost four and a one-half years after the claim was filed, Case filed its first motion to dismiss for lack of prosecution. The motion was denied. However, the trial court warned Carter that he must move the case along.

In efforts to prepare for trial, Case filed a second set of requests for production of documents and interrogatories in February 2004. Carter never replied to these requests. In April 2005, Case filed a motion to compel Carter to provide responses to discovery requests made more than a year before. The trial court granted this motion in May 2005. Seventeen months later, Carter had yet to

produce the requested discovery. Case then filed a renewed motion to dismiss, contending that Carter's delay in prosecution prejudiced Case because key witnesses and evidence were no longer available.

Carter provided no explanation for the delay, but he claimed that Case had not been prejudiced by the missing witnesses and evidence. Carter also claimed that he had provided discovery and that Case failed to provide requested discovery. The court granted Case's motion to dismiss in December 2006, eight years after the suit was filed.

We must now decide whether the trial court abused its discretion in dismissing the suit for failure to prosecute. "The test for abuse of discretion is whether the court's actions were arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We find the court's actions to be sound.

CR 41.02 permits a court to dismiss an action for failure to prosecute, failure to comply with the civil rules, or failure to comply with other court orders. *Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970). However, "in ruling on a motion for involuntary dismissal, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial." *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky. App. 1991). Courts should consider the totality of the circumstances when deciding whether to involuntarily dismiss a case for failure to prosecute and in particular the following factors: "(1) the extent of

the party's personal responsibility; (2) the history of dilatoriness; (3) prejudice to the other party; and (6) alternative sanctions." *Id.* at 719.

Case argues that, in light of *Ward*, Carter grossly mishandled his claim. However, Carter claims that the trial court erred in its examination of these factors. He argues that the dismissal was unfair because the delay was attributable to his attorney's negligence and Case's discovery violations. Although the trial court did not specifically mention the *Ward* factors in the order, we conclude that the circumstances of the case justified the dismissal.

Over the course of the suit, there were long periods of inactivity. At one time, the case lay practically dormant for four and one-half years. During this time, several motions to dismiss were filed by Case. Even while facing dismissal, Carter failed to show that he took any steps to progress his case toward trial. Case established that it had been prejudiced by the delay due to unavailable witnesses and lost evidence. Carter did not rebut this evidence. Further, Carter failed to even argue that the merits of his case deserved to be heard. Carter may have had a valid claim, but his procrastination warranted the trial court's ruling.

Carter alleges that his attorney's disciplinary proceedings before the Kentucky Bar Association rendered him ineffective. He argues that he should not be held responsible for the neglect of his attorney because he was unaware that his attorney faced a possible suspension from the Kentucky Bar Association. We disagree. Carter presented no evidence that he was deprived of his right to communicate with his attorney. Carter does not even suggest how his attorney's

bar disciplinary proceedings were related to his handling of the case. Further, Carter does not provide evidence of why he did not take action to find an attorney to oversee the litigation more competently.

In *Gorin v. Gorin*, 167 S.W.2d 52, 55 (Ky. App. 1942), this Court held that “a litigant may not employ an attorney and then wash his hands of all responsibility.” The law demands the exercise of due diligence by the client as well as by his attorney in the prosecution or defense of litigation. *Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co.*, 451 S.W.2d 401,403 (Ky. 1970). The United States Supreme Court in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962), concluded:

[t]here is certainly no merit to the contention that dismissal of petitioner’s claim because of his counsel’s unexcused conduct imposes an unfair penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have “notice of all facts, notice of which can be charged upon the attorney.”

Because Carter, as well as his attorney, took very few steps to prosecute the claim, we affirm the decision of the trial court.

As for Carter’s complaint that Case committed discovery violations, Carter is incorrect. Although Carter filed a motion to compel additional discovery from Case, the trial court never heard or ruled upon that motion. Instead, the trial court granted Case’s motion to dismiss, which was pending simultaneously. Thus,

when Carter requested the additional discovery, Case was not in violation of any court orders. In contrast, Carter failed to comply with discovery orders for seventeen months and allowed the case to remain dormant for almost five years.

We find that the trial court's dismissal was not arbitrary, unreasonable or unfair. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Instead, the trial court allowed Carter ample time to prepare and litigate his case, and it acted reasonably by dismissing the case when Carter failed to do so. Accordingly, the order of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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