

RENDERED: OCTOBER 26, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001990-MR

ROBERT LEE KEMPER, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 05-CI-009592

EDWARD L. ALVEY;
AND BENITA ALVEY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Robert Lee Kemper, Jr., brings this *pro se* appeal from a September 27, 2010, Order of the Jefferson Circuit Court dismissing Kemper's action for lack of prosecution. We affirm.

On November 8, 2004, Kemper allegedly sustained a fall while a guest at Cardinal Mobile Home Park in Louisville, Kentucky. As Kemper was

leaving a friend's mobile home, he apparently stepped on a loose manhole cover and fell into the manhole sustaining injury. The manhole was located in a grassy area between the mobile home Kemper was visiting and the park's driveway.

On November 4, 2005, Kemper filed a *pro se* complaint in the Jefferson Circuit Court against Edward L. Alvey and Benita Alvey (collectively referred to as the Alveys), as owners of Cardinal Mobile Home Park. Therein, Kemper alleged the Alveys negligently maintained the manhole cover leading to his injury. The Alveys filed an answer and also propounded interrogatories and request for production of documents. On February 21, 2006, Liddell Vaughn entered an appearance as counsel on behalf of Kemper. And, on March 9, 2006, Kemper, by counsel, answered written discovery requests. Vaughn subsequently filed a motion to withdraw as counsel. Over Kemper's *pro se* objection, Vaughn was permitted to withdraw by order entered December 4, 2006; however, the court gave Kemper thirty days to obtain new counsel.

Over the next thirteen months, no activity of record occurred in the action. Consequently, on January 2, 2008, the circuit court caused a Notice to Dismiss for Lack of Prosecution pursuant to Kentucky Rules of Civil Procedure (CR) 77.02(2) to be entered and served upon the parties.¹ In response, Kemper

¹ Kentucky Rules of Civil Procedure (CR) 77.02(2) provides:

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.

filed a *pro se* “Affidavit in Response to CR 77.02(2) Notice to Dismiss for Lack of Prosecution.” Therein, Kemper alleged that he was unable to pursue the litigation because of poor health and requested additional time to pursue the action. By order entered February 11, 2008, the court ordered:

THE ABOVE STYLED CASE SHALL
CONTINUE AND THAT: PLAINTIFF SHALL
NOTIFY THE COURT IN WRITING WITHIN TEN
DAYS OF HIS BEING RELEASED FROM THE CARE
OF HIS SURGEON AND FAMILY DOCTOR AND
UPDATE THE COURT ON HIS CONDITION EVERY
SIX MONTHS UNTIL SUCH TIME.²

Subsequently, Kemper filed notices of his medical condition on August 5, 2008, February 18, 2009, and August 18, 2009. In each of these three notices, Kemper asserted that he was still being treated by medical providers and was too ill to pursue the action.

More than a year after Kemper filed the last notice on August 18, 2009, the Alveys filed a motion to dismiss for lack of prosecution under CR 41.02.³ Kemper, by counsel, filed a response to the motion to dismiss.⁴ By Order entered

² The order entered February 11, 2008, was signed by Judge Kathleen Voor Montano.

³ CR 41.02(1) 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.

⁴ Although no entry of appearance was filed by counsel, Dawn R. Elliot filed a response to the Alvey’s motion to dismiss for lack of prosecution on behalf of Kemper.

September 27, 2010, the court granted the Alveys' motion and dismissed Kemper's complaint with prejudice. This appeal follows.

Kemper contends the circuit court erred by dismissing his complaint for lack of prosecution.⁵ Kemper specifically asserts that the circuit court erroneously failed to identify whether the complaint was being dismissed pursuant to CR 77.02 or CR 41.02 and that the Alveys improperly failed to identify either CR 41.02 or CR 77.02 as the basis for their motion to dismiss. Alternatively, if dismissal was under either CR 77.02 or CR 41.02, Kemper argues that the circuit court's dismissal was, nevertheless, improper.

In this case, a review of the record reveals that the Alveys' memorandum in support of their motion to dismiss plainly sought dismissal of Kemper's complaint under CR 41.02. In their memorandum, the Alveys specifically state:

Pursuant to CR 41.02(1), "for failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him." Perhaps no case could be more of a textbook example of lack of prosecution than this case. Accordingly, it should be dismissed.

As the Alveys were seeking dismissal pursuant to CR 41.02, we, likewise, conclude the circuit court's dismissal was pursuant to CR 41.02. Thus, we think the circuit court dismissed the action under CR 41.02. We now address Kemper's argument that such dismissal was improper.

⁵ Kemper has filed a *pro se* brief with this Court. It is difficult to discern Kemper's precise arguments, but we will employ our best efforts to do so.

Under CR 41.02(1), an action may be dismissed for a plaintiff's failure to prosecute said action. The purpose of CR 41.02(1) is to provide a mechanism for: (1) protecting a defendant from "the prejudice of being a defendant in a lawsuit for a protracted period" and (2) preserving "the integrity of the judicial system by encouraging quick resolution of cases." *Jaroszewski v. Flege*, 297 S.W.3d 24, 36 (Ky. 2009) (citations omitted).

We review a circuit court's dismissal for lack of prosecution under the abuse of discretion standard. *Jaroszewski*, 297 S.W.3d 24. To assess whether a trial court abused its discretion by dismissing an action for lack of prosecution under CR 41.02, we must determine whether the circuit court has taken "into account all relevant factors" and has considered "the totality of the circumstances." *Id.* at 36. Our review proceeds accordingly.

The record reflects that Kemper had not taken any affirmative steps toward resolution of the action since he answered written discovery requests on March 9, 2006, almost four years before the motion to dismiss was filed. While we are cognizant that Kemper filed three notices of his medical condition with the circuit court (August 5, 2008, February 18, 2009, and August 18, 2009), these notices do not constitute affirmative steps toward resolution of the case. And, it appears that Kemper had not timely filed the latest six-month notice with the circuit court. Moreover, the circuit court previously docketed dismissal of the action under CR 77.02 for lack of prosecution, but generously gave Kemper additional time to pursue the action. While we are certainly sympathetic to Kemper's medical

situation, we cannot say the circuit court abused its discretion by dismissing Kemper's complaint under CR 41.02.

Kemper also argues that the circuit court erred by allowing Liddle Vaughn to withdraw as counsel in December 2006 and then dismissing his action for lack of prosecution. It must be pointed out that the circuit court permitted Vaughn to withdraw some four years before the action was finally dismissed under CR 41.02. Consequently, Kemper had four years to retain new counsel. Under these circumstances, we do not believe the circuit court erred by granting the motion of Kemper's counsel to withdraw.

Kemper finally maintains that Judge Irv Maze should have recused as circuit court judge from the action. However, the record is clear that Kemper never sought recusal of the judge and only raised the issue on appeal. Nevertheless, an examination of the record fails to reveal any basis for the recusal of Judge Maze under Kentucky Revised Statutes 26A.015 or Supreme Court Rule 4.300. *See Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky. 2007).

In sum, we believe the circuit court properly considered the totality of the circumstances and did not abuse its discretion by dismissing Kemper's complaint for lack of prosecution under CR 41.02(1). *Jaroszewski*, 297 S.W.3d 24 (Ky. 2009). And, we view any remaining contentions of error to be without merit.

For the foregoing reasons, the Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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