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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000760-MR

DAVID WILKINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-02640

GLENN BROWN; MARLENA TROWELL;
MICKEY PITTS; MARY HESTER;
TERESA ISSAC; REBECCA LANGSTON;
WALTER SKIBA; RONALD BISHOP;
DONALD L. LEACH II, AND
LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, MAZE, AND VANMETER, JUDGES.

MAZE, JUDGE: David Wilkins appeals from an order of the Fayette Circuit Court dismissing his employment discrimination claims against the Lexington-Fayette Urban County Government and individual defendants Glenn Brown,

Marlena (Maulana) Trowell,¹ Mickey Pitts, Mary Hester, Teresa Issac, Rebecca Langston, Walter Skiba, Ronald Bishop, and Donald L. Leach, II (collectively, the Appellees). He argues that the trial court's dismissal for lack of prosecution was improper because he had taken steps to within the previous year, because the trial court failed to make specific findings that dismissal was appropriate, and because there were issues of fact concerning whether several of the individual defendants had waived service. Finding no abuse of discretion, we affirm.

On May 30, 2008, Wilkins filed a complaint against the Appellees for sexual harassment, employment discrimination and retaliation in violation of the Kentucky Civil Rights Act, KRS² 344.040. Wilkins obtained service on most, but not all of the Appellees. Following filing of an answer, Wilkins propounded interrogatories and requests for production of documents to the Appellees. No further filings appear in the record until January 14, 2011, when the trial court issued an order pursuant to CR³ 77.02 directing the parties to show cause why the action should not be dismissed for lack of prosecution. Although Wilkins did not appear at the hearing, his counsel contacted the court and requested more time for the case to remain on the docket. The trial court entered an order on March 23, 2011, allowing the case to remain on the docket for thirty days.

¹ Wilkins's complaint lists the name as "Marlena Trowell." But in her deposition, she spelled her name "Maulana Trowell." The notice of appeal lists both spellings, with "Marlena" listed first as reflected in the caption of this case.

² Kentucky Revised Statutes.

³ Kentucky Rules of Civil Procedure.

On April 21, 2011, Wilkins filed notices to take the depositions of two of the individual Appellees. Although the depositions were scheduled, Wilkins later cancelled and his counsel did not appear. On August 15, 2011, the Appellees filed a motion to dismiss for failure to prosecute pursuant to CR 41.02. Wilkins raised concerns about his health, and the trial court allowed the case to remain on the docket. Thereafter, Wilkins took the deposition of one Appellee, Mickey Pitts.

On May 10, 2013, the Appellees filed another motion to dismiss pursuant to CR 41.02 based on the lack of progress in the case. Around the same time, the trial court issued a second CR 77.02 notice. Wilkins responded with several new motions to take depositions. Based on this activity, the trial court allowed the action to remain on the docket for an additional ninety days.

Over the next twenty-one months, Wilkins took one deposition and his counsel contacted the Appellees' counsel to discuss scheduling of two others. Based on this inactivity, the trial court issued a third CR 77.02 notice, and the Appellees filed another motion to dismiss pursuant to CR 41.02. Wilkins blamed the delays on difficulties in obtaining service of process and in locating non-party witnesses. Wilkins's counsel also stated that he had difficulties communicating with his client, but that Wilkins had recently moved back to Kentucky and would be more readily available. He also filed a motion asking for a pre-trial conference for the purpose of fixing a trial date.

On March 2, 2015, the trial court entered an order dismissing Wilkins's action without prejudice. Thereafter, Wilkins filed a motion to alter,

amend or vacate the dismissal pursuant to CR 59.05. On April 20, 2015, the trial court denied the motion, and this appeal followed.

CR 77.02(2), also known as the “housekeeping rule,” states 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.

The purpose of the rule is to expedite the removal of stale cases from the court's docket. *Honeycutt v. Norfolk Southern Ry. Co.*, 336 S.W.3d 133 (Ky. App. 2011). 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). Consequently, a dismissal under CR 77.02 is committed to the sound discretion of the trial court, and we will not disturb that discretion except for abuse. *Toler v. Rapid Am.*, 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)

Wilkins notes that, while the trial court dismissed his action without prejudice, the statute of limitations has passed on his underlying claim.

Consequently, he is now time-barred from re-filing his complaint. Given these

consequences, he argues that a dismissal for lack of prosecution should be resorted to in only the most extreme cases, and in circumstances involving a conscious and intentional failure to diligently pursue an action. *Toler*, 190 S.W.3d at 351. *See also Polk v. Wimsatt*, 689 S.W.2d 363, 364–65 (Ky. App. 1985). Wilkins further argues that the length of time alone is not the test of diligence. Rather, the trial court must also consider: (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) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions. *Id.*, citing *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky. App. 1991).

However, in *Jaroszewski v. Flege*, 297 S.W.3d 24 (Ky. 2009), the Kentucky Supreme Court held that these factors apply only to dismissals with prejudice under CR 41.02(1), and not to a dismissal without prejudice under CR 77.02.⁴ *Id.* at 31. Moreover, CR 41.02 and CR 77.02 serve different functions and thus have different and distinct requirements. *Manning v. Wilkinson*, 264 S.W.3d 620, 624 (Ky. App. 2007). Consequently, our analysis is limited to whether the

⁴ In an unpublished opinion, in *Bradley v. Creech*, No. 2011-CA-002289-MR, 2013 WL 3237697 (Ky. App. 2013), a panel of this Court held that the trial court must make findings on the *Ward v. Housman* factors when a dismissal without prejudice would extinguish the plaintiff's cause of action due to the expiration of the statute of limitations. However, the holding in *Bradley* turned on the application of a local rule which required the trial court to address these factors for dismissals under CR 77.02. In the absence of a local rule, a dismissal under CR 77.02 is always without prejudice, and the court is not required to consider ramifications not brought to its attention in the form of "good cause shown." *Cooper v. Towner*, No. 2014-CA-001805-MR, 2016 WL 2893959, at *4 (Ky. App. 2016) (Acree, Judge, Concurring).

trial court abused its discretion in finding that Wilkins failed to show good cause for the lack of activity in his case.

Furthermore, the plain language of CR 77.02 requires trial courts to review their dockets at least once a year and to dismiss those in which no pre-trial steps have been taken in the preceding year unless good cause is shown. *Id.* at 623. We are also mindful that the Administrative Office of the Courts regularly advises trial courts of stale cases and encourages trial courts to use CR 77.02 to clear such cases from their dockets. Given these obligations, this Court is unwilling to impose additional requirements on the trial court that are not required either by the clear language of the rule or by procedural due process.

Wilkins also argues that his actions in filing a response to the show-cause motion and his motion for a pre-trial hearing were constituted a substantial pre-trial step sufficient to preclude dismissal under CR 77.02. But as used in the rule, the phrase “no pretrial step” encompasses situations in which no action of record has been taken by either party during the year preceding the judges’ review of the docket. *Bohannon v. Rutland*, 616 S.W.2d 46, 47 (Ky. 1981). Wilkins’s filings following the CR 77.02 notice would not be sufficient by themselves to interrupt the previous period of inactivity.

In this case, the trial court had sent out two prior CR 77.02 notices, each time placing Wilkins on notice that he needed to move his actions forward. Wilkins made only sporadic and intermittent efforts to do so. Prior to the filing of the third notice, Wilkins’s most recent activity in this action occurred on

November 21, 2013, when he took Trowell's deposition. Merely filing a notice for a pre-trial hearing and a trial date, in response to a CR 77.02 notice, does not constitute a significant pre-trial step in light of the extended period of inactivity which occurred in this case. And while Wilkins claims to be "ready to try his case," he provided no new information about how this would be possible considering the minimal discovery conducted up to the date of dismissal. Wilkins failed to show good cause why his action should not be dismissed for lack of prosecution.

Finally, Wilkins argues that dismissal was inappropriate because there was a question whether several of the defendants had waived service of process. We conclude that this issue was not relevant to the matters relating to the CR 77.02 dismissal. At the time of the dismissal, Wilkins had not served the complaint on three of the individual defendants, Glenn Brown, Maulana Trowell and Mary Hester. Regardless of whether they waived service of process, a dismissal of the action without prejudice would not affect the rights of these defendants, nor would it have any bearing on whether Wilkins has shown good cause to preclude the dismissal of his action.

Accordingly, we affirm the order of the Fayette Circuit Court dismissing Wilkins's action.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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