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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000816-MR

AUTO-SELECT, LLC — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIM BUNNELL, JUDGE
ACTION NO. 12-CI-05349

AUTO-OWNERS INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Auto-Select, LLC[1] appeals from an order denying its motion for findings of fact and to alter, amend or vacate dismissal of its civil complaint

[1] The style of an appeal is based upon the notice of appeal. The notice filed in this case identifies the appellant as "Auto-Select, LLC," although throughout the litigation in circuit court, it refers to itself as "Auto Select, LLC."

against its insurance carrier, Auto-Owners Insurance Company,[2] under CR[3] 41.02(1) for failure to prosecute. Having reviewed the record, the briefs and the law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Auto-Select experienced a burglary and theft at its car lot on June 14, 2011. Seeking to recoup $40,525.19 in losses, it made a claim against its carrier. When the claim was denied, Auto-Select filed a civil complaint against its carrier in Fayette Circuit Court on December 6, 2012, alleging bad faith. Auto-Owners answered the complaint on January 14, 2013. Thereafter, the case languished.

More than a year later, on April 2, 2014, the court generated a notice to dismiss for lack of prosecution. A hearing was set for May 16, 2014.

On May 5, 2014, Hon. David R. Marshall, Auto-Select's counsel, filed a written motion to continue the case, allow him to withdraw as counsel, and give Auto-Select thirty days to secure new counsel. When the motion was heard on May 16, 2014, defense counsel did not object to Marshall withdrawing from the case, but asked that the matter be removed from the active docket because plaintiff had done nothing to move the case along. Marshall explained Auto-Select's ownership had recently changed hands, the new owner had been indicted in federal court and had gone into seclusion. He stated there had not been a complete level of

[2] According to a motion to amend defendant's name filed by Auto-Select on February 20, 2015, the defendant's proper name is "Owner's Insurance Company." We will refer to appellee as Auto-Owner's Insurance Company based on the notice of appeal.

[3] Kentucky Rules of Civil Procedure.

cooperation between himself and the new owner, but argued it was inappropriate to dismiss the case and specifically asked that Auto-Select be given thirty days to act, stating, "[i]f they don't do anything in the next thirty days, then so be it, but they should be given that opportunity, I think."

From the bench, the court allowed Marshall to withdraw and gave Auto-Select thirty days to secure new counsel. The court stated it would allow the case to "remain on the docket for thirty days; if they do something fine, and if they don't, it'll be dismissed." Defense counsel asked whether Auto-Owners would be expected to file a motion to dismiss after thirty days; the court responded, "No." Marshall asked the court what it meant by "do something," to which the court stated, "move forward." Thereafter, on May 20, 2014, the trial court entered a written order confirming Marshall had been allowed to withdraw from his representation in the case and

> [Auto-Select] is granted a thirty (30) day period of time from the entry of this Order in which to obtain new counsel and do something to advance the case.

The Fayette Circuit Court Clerk served a copy of the order on Marshall, both the former and current owners of Auto-Select (at the same address), and counsel for Auto-Owners. The following day, May 21 2014, an Order to Remain on Docket was entered allowing the case to remain on the docket "60 days," even though this was twice the amount of time allowed in the oral ruling announced from the bench and the written order entered on May 20, 2014, and mailed to all counsel and Auto-Select's former and current owners. On June 27, 2014—more than thirty days

after the court's order—Hon. Gregory Kujawski entered his appearance[4] as Auto-Select's new counsel.

On February 16, 2015, the carrier moved to dismiss the complaint under CR 41.02(1) because since May 20, 2014, Auto-Select had "taken no action to prosecute its case." Four days later, on February 20, 2015, Kujawski moved for a pre-trial hearing to be scheduled and moved to amend Auto-Owners name. Five days later, on February 25, 2015, Kujawski responded to the carrier's motion to dismiss stating: he had received Marshall's complete file shortly after entering his appearance in the case on June 27, 2014; Marshall's file did *not* contain a copy of the court's order entered on May 20, 2014, giving Auto-Select thirty days to advance the case; and, Auto-Select's new owner did not receive a copy of that order either. Finally, citing *Ward v. Housman*, 809 S,W.2d 717 (Ky. App. 1991), and *Scarborough v. Eubanks,* 747 F.2d 871 (3rd Cir. 1984), on which *Ward* relies, Kujawski identified six factors a court must consider before granting a motion to dismiss pursuant to CR 41.02.

On February 27, 2015, the carrier's motion to dismiss was heard. Auto-Owners argued the case had been heard 283 days earlier on the court's show cause docket. At that time, the court gave Auto-Select thirty days to act, but nothing happened—no depositions; no correspondence; nothing. Counsel further

[4] While we know the date Kujawski entered his appearance in this case, we do not know the date on which he was hired. In an affidavit signed by Auto-Select's new owner, Mona Shalash, she admits knowing Marshall moved to withdraw based on a letter received from Marshall, but did not know there was a deadline for acting. Shalash did not attend any hearings in this matter.

argued it had been 813 days since filing of the complaint, and the only action taken by plaintiff since December of 2012 was Auto-Select's original attorney had moved to withdraw, prompting the court to give Auto-Select thirty days in which to advance the case. Auto-Owners argued it had been prejudiced and evidence from a loss incurred in 2011 could not be reconstructed in 2015. In response, Kujawski argued he believed he had gotten Marshall's entire file but the order entered on May 20, 2014, was not included. Kujawski admitted he had made a mistake by not coming to the courthouse to view the court's file containing the crucial order, and again listed the factors to be considered under *Scarborough.* Once the parties had stated their positions, the court noted "almost" nothing had occurred since filing of the complaint and she did not consider an attorney's entry of an appearance to be "activity" within the case. Based on inactivity and consideration of the factors mentioned, the court granted the motion to dismiss, as reflected in a written order of dismissal entered on March 20, 2015.

On March 30, 2015, Kujawski filed a written motion alleging the trial court had abused its discretion in dismissing the action without discussing all the factors mentioned in *Scarborough* and *Ward* and moved the court to make findings of fact and alter, amend or vacate the order of dismissal. Auto-Owners responded that rather than considering the six factors, the proper approach under *Jaroszewski v. Flege*, 297 S.W.3d 24, 33 (Ky. 2009) was consideration of the totality of the circumstances.

The motion was heard April 24, 2015. The court confirmed the case had begun in December 2012, followed by the filing of an answer in January 2013. For the next fifteen months, nothing happened. Upon close inspection of the record, the court noted on July 21, 2014, the court should have automatically generated an order of dismissal, but inexplicably, it did not. Kujawski maintained he never knew about the requirement of action within thirty—or sixty—days, depending on which order was followed; he did not deem the case to be of an emergency status as were the other two cases he had accepted from Marshall for the same client. The court noted, "all you had to do was file a motion for a pre-trial—it's not like you had to do a lot—file, you know, submit one interrogatory—advance the case—do something." Thereafter, the court stated it was satisfied with its prior order, there was no need for additional findings, and no change would be forthcoming. It is from this order that Auto-Select appeals and we affirm.

ANALYSIS

> In determining whether the trial court abused its discretion in dismissing a case under CR 41.02, appellate courts must be able to assess whether a trial court considered all relevant facts and circumstances. Motivated by the need for a clear written record of the facts and circumstances that moved the trial court to dismiss a case for lack of prosecution, the Court of Appeals developed precedent beginning with *Ward* that suggests or requires the trial court to analyze certain listed factors. While *Ward* has been useful by particularly encouraging the trial court to make specific findings on the record, and while this precedent undoubtedly gives trial courts some guidance about what to consider, we hesitate to embrace a formulaic approach where certain listed factors must always be discussed,

> and other relevant factors may not be discussed. Since the issue of whether a case must be dismissed for lack of prosecution is inherently fact-specific, demanding that a rigid list of factors must be addressed by the trial court in each case is inconsistent with the traditional "totality of the circumstances" approach.
>
> In fact, perhaps *Ward* is sometimes misunderstood as clearly holding that trial courts must always explicitly analyze the six particular factors listed in it in ruling on a motion to dismiss for want of prosecution. Conversely, this precedent is also misunderstood to suggest that the trial court's dismissal order is unassailable on appeal if it recites and attempts to analyze each of the six listed factors. In contrast to this misunderstanding, we hold that the propriety of the trial court's ruling does not necessarily hinge on its discussing the six particular factors listed in *Ward.* Rather, to rule properly on a motion to dismiss for lack of prosecution, the trial court must assess all factors relevant to that particular case, which might include some or all factors listed in *Ward* and may include other factors.

Jaroszewski, 297 S.W.3d at 32–33 (internal citations and footnotes omitted). It appears Auto-Select has fallen prey to the misunderstanding referenced above. While at least six factors have been identified as potentially bearing on a motion to dismiss under CR 41.02, there is no requirement that all six items be considered in every case. As noted, the inquiry is fact- and case-specific and all six factors may not be relevant to the facts and circumstances of every case.

Here, the court plainly placed responsibility for lack of prosecution on the client, not on anything *counsel* did or did not do—thus, consideration of whether counsel's "conduct was willful and in bad faith," a factor identified in *Ward,* 809 S.W.2d 719, had no relevance to this case. In contrast, two other

factors mentioned in *Ward,* "the party's personal responsibility" and "prejudice to the other party" were highly relevant and both were considered. *Id.* Additionally, the court was particularly troubled by lengthy periods of time with no activity, and the fact that action by Auto-Select was triggered only when the court issued a notice to dismiss or the defendant filed a motion to dismiss.

> Prosecution means
>
> > "pursu[ing] the case diligently toward completion" or, in other words, actually working to get the case resolved—not just keeping it on a court's docket or occasionally working on the file without actively attempting to resolve matters in dispute.

Jaroszewski, 297 S.W.3d at 32. From the face of the record before us, we see no evidence Auto-Select actively worked toward resolution. Auto-Select faults the trial court for not imposing a milder sanction, but fails to suggest what that less onerous sanction might have been.

While severe, dismissal under CR 41.02 is an option for the trial court to consider. Under these facts, imposing it was not an abuse of discretion. Nothing about the court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Wildcat Property Management, LLC, v. Reuss,* 302 S.W.3d 89, 93 (Ky. App. 2009) (citation omitted).

For the foregoing reasons, we affirm.

KRAMER, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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