

RENDERED: SEPTEMBER 1, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001469-MR

KALTUMO JIMALE, INDIVIDUALLY AND AS
MOTHER AND GUARDIAN OF A.M., F.S., J.S. AND
M.S., MINORS

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 13-CI-004329

NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Kaltumo Jimale, individually and as mother and guardian of A.M., F.S., J.S. and M.S., minors, appeals from an Opinion and Order of the Jefferson Circuit Court dismissing the action pursuant to Kentucky Rules of Civil Procedure (CR) 77.02 for lack of prosecution. Jimale argues that the circuit court

abused its discretion in dismissing the action because it improperly failed to apply the factors set out in *Jaroszewski, infra*. We find no error, and AFFIRM the Opinion and Order on appeal.

On August 29, 2013, Jimale, et al., filed the instant action against Nationwide Mutual Fire Insurance Company in Jefferson Circuit Court seeking personal injury protection (“PIP”) benefits. The action arose from what the circuit court described as a low-speed, low-impact collision between two vehicles, after which Jimale, et al., sought PIP benefits for chiropractic treatment. The matter proceeded in Jefferson Circuit Court, whereupon motions for Declaratory Relief and Summary Judgment were filed in mid-2014. On June 11, 2014, the court denied both motions by way of an Opinion and Order.

The matter remained dormant for almost one year. On June 4, 2015, the court gave notice pursuant to CR 77.02 that the action would be dismissed for lack of prosecution unless good cause was shown. Jimale responded by filing a Motion for a pretrial conference and trial date. The court denied the Motion, but gave Jimale the opportunity to show good cause for the lack of prosecution as required by CR 77.02. Jimale responded that no steps had been taken during the preceding year as she was attempting to resolve third-party claims related to the accident, and was in pursuit of a ruling from the Court of Appeals on an unrelated matter which counsel believed would impact Jimale’s position in the present case.

After considering Jimale’s Response and Nationwide’s Reply, the court determined that Jimale failed to show good cause pursuant to CR 77.02. On

August 25, 2015, the court rendered an Opinion and Order dismissing the action.

In support of the dismissal, the court stated,

Insofar as there is a long-standing practice and preference in the Courts of Kentucky to resolve disputes based on the substantive merit of the parties' respective claims, the Court is neither looking for nor anxious to find cause that the Plaintiffs have failed to show good cause as to why their case should not be dismissed. Be that as it may, such is the case in the instant case.

This appeal followed.

Jimale, through counsel, now argues that the Jefferson Circuit Court abused its discretion in dismissing the action pursuant to CR 77.02. She contends that her actions during the year in question, which she claims include waiting for third-party claims to be resolved and the pursuit of a ruling on an unrelated matter, meet the Kentucky Supreme Court's definition of active prosecution as set out in *Vescio v. Darnell*, 2016 WL 354339 (Ky. App. 2016), and are sufficient to meet her burden under CR 77.02. Jimale also directs our attention to other cases which remained dormant for extended periods yet survived multiple CR 77.02 notices before dismissal. Finally, she points out that though her action was dismissed without prejudice, she would be unable to resurrect it in the future because the statute of limitations has run. In sum, Jimale argues that the Jefferson Circuit Court abused its discretion in dismissing the action for lack of prosecution, and she seeks an Opinion reversing the Order and remanding the matter for further proceedings.

CR 77.02 states that,

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.

By its plain language, the application of CR 77.02 is mandatory (“trial courts shall review”). In applying this housekeeping rule, a trial court is vested with “wide discretion” in removing stale cases from the docket, *Honeycutt v. Norfolk Southern Railway Company*, 336 S.W.3d 133, 135 (Ky. App. 2011), and dismissals for lack of prosecution are reviewed under an abuse of discretion standard. *Wildcat Property Management, LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky. App. 2009). “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) (footnote omitted). The question for our consideration, then, is whether the Jefferson Circuit Court abused its discretion in dismissing Jimale’s action.

In response to the court’s CR 77.02 notice, Jimale failed to show good cause why her action should not be dismissed for failure to prosecute. Rather, Jimale responded by moving for a pretrial conference and a trial date. Nationwide properly argues that the Jefferson Circuit Court would have been justified in dismissing the action at this point, as it is uncontroverted that no good cause – or any cause – was shown. Instead, the court gave Jimale another chance and again

directed Jimale to show good cause for her inaction. Jimale then responded that she was seeking to resolve third-party claims. These third-party claims, however, were not a part of the instant proceeding, and Nationwide had received no contact from Jimale between May 14, 2014, and the issuance of the court's CR 77.02 notice.

Jimale directs our attention to *Vescio, supra*, and *Jaroszewski v. Flege*, 297 S.W.3d 24 (Ky. 2009), in support of the proposition that settlement negotiations, and attempts at resolution and discovery may keep an action viable when it otherwise appears to be dormant. In the matter before us, Jimale does not assert that she engaged in settlement negotiations or attempts at resolution and discovery. *Arguendo*, even if Jimale did engage in such activities during the period in question, they would represent reasons that the court *could*, but not necessarily *must*, find that good cause was shown.

We cannot conclude that the Jefferson Circuit Court abused its discretion in dismissing the action pursuant to CR 77.02. The action lay dormant for one year, and Jimale's initial response to the court's CR 77.02 notice failed to offer any cause for the inaction. When Jimale did respond, the court properly exercised its discretion in concluding that the cause offered was insufficient to answer the notice. We find no error.

For the foregoing reasons, we AFFIRM the Opinion and Order of the Jefferson Circuit Court.

ALL CONCUR.

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