

RENDERED: AUGUST 31, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000775-MR

NATASHA HARRIS-JOHNSON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 12-CI-00318

AUTO CLUB PROPERTY-CASUALTY
INSURANCE COMPANY; IMPERIAL
INSURANCE RESTORATION AND
REMODELING, INC.; INDEPENDENT
MITIGATION & CLEANING CONSERVATION
NETWORK, INC.; AND EMERGENCY
RESTORATION & CONTRACTING, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, J. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Natasha Harris-Johnson appeals from the McCracken
Circuit Court order dismissing her claims against the four named appellees, as well

as the order denying Harris-Johnson's motion to alter, amend, or vacate the order of dismissal. We affirm.

On March 24, 2011, the home of Harris-Johnson sustained damage after a small fire which was caused by her son leaving a lit candle unattended in his bedroom.¹ The Paducah Fire Department reported that the fire was extinguished with less than two gallons of water and that the damage was minor. However, Harris-Johnson claimed that the smoke and water damage was extensive; numerous contractors were employed subsequently to repair and clean the property and its contents. Harris-Johnson and her family returned to the premises in October 2011.

On March 22, 2012, Harris-Johnson filed the within complaint against the four appellees² in this action as well as two other parties³ which have since settled the claims Harris-Johnson filed against them. Harris-Johnson's complaint included claims for breach of contract, negligence, common law bad faith, and violations of Kentucky's Unfair Claims Settlement Practices Act (Kentucky Revised Statutes (KRS) 304.12-230), the Consumer Protection Act (KRS 367.170

¹ According to the appellant's deposition testimony, her son blew the candle out before leaving the house, but embers from the candle sparked a fire in a nearby clothes basket. The fire damage was confined to the son's bedroom, but the water and smoke damage was alleged to be throughout the home.

² Harris-Johnson's homeowners insurance policy was with Auto Club Property-Casualty Insurance Company (Auto Club); contractors employed by Auto Club were Emergency Restoration & Contracting, Inc. (Emergency); Imperial Restoration and Remodeling, Inc. (Imperial); and Independent Mitigation and Cleaning Conservation Network, Inc. (IMCCN).

³ The two parties that settled were Durham Restoration, Inc., d/b/a ServPro of Paducah, and Nu Yale Cleaners; Harris-Johnson had employed those contractors independently, not through Auto Club.

and 367.220), and the Uniform State Building Code (KRS 198B.130); she alleged damages from improper restoration, loss of personal property she asserted was stolen or not returned during the cleanup period, and medical expenses (past and future). Harris-Johnson also sought punitive damages, attorney fees, and costs.

Over the course of the next several years, there were multiple orders compelling compliance with discovery. As the circuit court wrote, “[m]otions to compel plaintiff to answer discovery were granted on September 12, 2012, April 18, 2014, and September 2, 2014.” Another order for Harris-Johnson to complete answers to interrogatories and respond to requests for production of documents was entered on September 22, 2015. There was no compliance with that order. The circuit court recounted other dilatory aspects of Harris-Johnson’s case: Failure to attend hearings (September 15, 2015, and October 2, 2015), failure to disclose expert witnesses pursuant to Kentucky Rule of Civil Procedure (CR) 26.02, and failure to respond properly to the January 15, 2016, motions to dismiss.⁴

In its March 3, 2016, order dismissing Harris-Johnson’s claims, the McCracken Circuit Court cited CR 37.04, 37.02, and 41.02(1), as well as *R.T. Vanderbilt Co. v. Franklin*, 290 S.W.3d 654 (Ky. App. 2009); *Stapleton v. Shower*, 251 S.W.3d 341 (Ky. App. 2008); and *Baltimore O.R. Co. v. Carrier*, 426 S.W.2d 931, 938 (Ky. 1968). Harris-Johnson’s CR 59.05 motion to alter, amend, or vacate

⁴ There the circuit court found the plaintiff’s response “generic.” The circuit court further found that Harris-Johnson’s attorney had “blamed his failure to comply with the Court’s discovery orders on his health and the defendants’ failure to permit him to take depositions. His father entered his appearance as co-counsel but did nothing to comply with discovery.”

was denied for failing to “state with particularity the grounds therefore” (CR 7.02) on April 22, 2016.

On appeal, Harris-Johnson argues that she was denied her constitutional right to a jury trial and that the circuit court abused its discretion in ordering her case involuntarily dismissed.

We first cite the applicable Rules of Civil Procedure. CR 37.04(1)(b) states, in pertinent part that, after a party fails “to serve answers or objections to interrogatories submitted under Rule 33, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (a), (b) and (c) of Rule 37.02(2).”

CR 37.02(2) provides the sanctions available to the circuit court:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30.02(6) or 31.01(2) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting

him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

And CR 41.02(1) allows that “a defendant may move for dismissal of an action or any claim against him” if the plaintiff fails “to prosecute or to comply with these rules or any order of the court[.]

“Dismissals for lack of prosecution pursuant to CR 41.02 and CR 77.02 are reviewed under an abuse of discretion standard.” *Toler v. Rapid American*, 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)(quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Wildcat Prop. Mgmt., LLC v. Reuss, 302 S.W.3d 89, 93 (Ky. App. 2009).

The *Stapleton*, *supra*, Court enumerated the six factors to consider when determining whether to grant a motion to dismiss under CR 41.02, namely: “(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.* at 343 (citing *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky. App. 1991)). However, the Kentucky Supreme Court has since stated: “**Explicit consideration of each individual factor listed in *Ward* is**

not required, although we encourage trial courts to address any factors listed in *Ward* that are relevant for consideration in that particular case.” *Jaroszewski v. Flege*, 297 S.W.3d 24, 36 (Ky. 2009) (emphasis ours).

The McCracken Circuit Court duly considered the factors enumerated in *Ward*, finding that “at least four of the six factors . . . support dismissal.” We quote from the circuit court’s order:

Here, the history of dilatoriness is legend. The Court has issued at least five prior motions to compel discovery; the plaintiff has consistently failed to respond to motions and on September 18, 2015, plaintiff’s counsel failed to attend a hearing on Emergency Restoration’s motion to compel. In this Court’s September 22, 2015 order, plaintiff was both sanctioned for failing to comply with the Court’s scheduling order and further ordered to answer Emergency Restoration’s interrogatories by October 12, 2015. Despite the sanction, plaintiff has yet to comply with that order. Plaintiff’s counsel failed to attend the status conference held on October 2, 2015. While the Court is sympathetic to plaintiff’s counsel’s health problems, this pattern of dilatoriness has existed from the beginning, suggesting a “conscious and intentional failure to comply with the provisions of the civil rules.” *R.T. Vanderbilt Co. v. Franklin*, 290 S.W.3d 654, 661-61 (Ky. App. 2009). Emergency Restoration claims it has been prejudiced by plaintiff’s dilatory conduct, citing two significant witnesses believed to be now deceased and other witnesses’ whereabouts unknown. Finally, plaintiff has already been sanctioned before for discovery violations; it is unlikely an additional sanction would be any more effective in remedying the situation. For these reasons, dismissal of the complaint against all defendants is proper under CR 37.02(2) and CR 41.02(2).

We fail to see how the circuit court did not consider the directives of *Ward* and *Jaroszewski*. Not only was it not required to analyze each of the six

factors, but, had it done so, a finding of all six factors would have been supported by the voluminous record (which we have examined, including the depositions and videotaped proceedings over the course of the nearly four years this case was in active litigation). We find no abuse of discretion in the order of dismissal.

Wildcat Prop. Mgmt., supra at 93.

Nor did the circuit court err in denying Harris-Johnson's motion pursuant to CR 59.05. "Under our rule governing motions generally, CR 7.02, motions must "state with particularity the grounds therefor[.]'" *Kentucky Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814, 817 (Ky. 2015). Harris-Johnson's CR 59.05 motion stated in its entirety: "Comes Plaintiff/Counterclaim Defendant Natasha Harris-Johnson, by counsel, and, pursuant to Kentucky Rules of Civil Procedure, moves this Court to enter the attached Order to Alter, Amend, or Vacate the motion for Summary Judgment and to further order a briefing schedule and a hearing on the matter. Extenuating circumstances require a hearing or Plaintiff will suffer irreparable harm." No specific grounds were stated in the motion, in the attached proposed order, or at the April 22, 2016 hearing. There was no substantial compliance with CR 7.02. The CR 59.05 motion was properly denied.

The orders of the McCracken Circuit Court are affirmed.

ALL CONCUR.

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