

STATE OF MICHIGAN
COURT OF APPEALS

GKC MICHIGAN THEATRES, INC.,

Plaintiff-Appellant,

v

GRAND MALL,

Defendant-Appellee,

and

DDJN ENTERPRISES, INC.,

Intervening Plaintiff-Appellee.

UNPUBLISHED
December 2, 2003

No. 242407
Genesee Circuit Court
LC No. 91-010796-CH

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

In this action for slander of title and declaratory relief arising from defendant's attempted termination of an easement, plaintiff appeals as of right from the trial court's order denying its motion for a trial date or reinstatement of its slander of title claim. We reverse and remand.

This case is before this Court for the third time. In *GKC Michigan Theatres, Inc v Grand Mall*, unpublished opinion per curiam of the Court of Appeals, issued April 28, 1994 (Docket No. 148491), this Court held that an easement that was previously granted to plaintiff was valid and perpetual, and that the notice of termination filed by defendant should be stricken from the records. Later, in *GKC Michigan Theatres, Inc v Grand Mall*, 222 Mich App 294, 296-300; 564 NW2d 117 (1997), this Court reversed the trial court's grant of summary disposition in favor of defendant and remanded the case to the trial court, holding that there were questions of fact concerning whether the invalid notice of termination was a substantial factor in causing plaintiff's damages. On remand, the parties failed to proceed, and the case was apparently dismissed for lack of progress. Plaintiff's subsequent motion for reinstatement was denied by the trial court.

On appeal, plaintiff argues that its slander of title claim was erroneously dismissed because: (1) dismissal was in derogation of this Court's remand order; (2) the trial court failed to set a trial date; (3) the trial court failed to provide advance notice of its intent to dismiss the case;

and (4) the trial court failed to weigh relevant factors. Additionally, plaintiff argues that the trial court erred in denying its motion for reinstatement. We agree that the trial court improperly dismissed this case without notice to plaintiff and, therefore, erred in denying plaintiff's motion for reinstatement. In light of our decision, we need not address plaintiff's remaining arguments.

A trial court's decision concerning whether to reinstate an action that has been dismissed for lack of progress is reviewed for an abuse of discretion. *Wickings v Artic Enterprises, Inc*, 244 Mich App 125, 138; 624 NW2d 197 (2000). The construction of a court rule is a question of law to be reviewed de novo. *Id.* at 133.

MCR 2.502 provides:

(A) Notice of Proposed Dismissal.

(1) On motion of a party or on its own initiative, the court may order that an action in which no steps or proceedings appear to have been taken within 91 days be dismissed for lack of progress unless the parties show that progress is being made or that the lack of progress is not attributable to the party seeking affirmative relief.

(2) A notice of proposed dismissal may not be sent with regard to a case

(a) in which a scheduling order has been entered under MCR 2.401(B)(2) and the times for completion of the scheduled events have not expired,

(b) which is set for a conference, an alternative dispute resolution process, hearing, or trial.

(3) The notice shall be given in the manner provided in MCR 2.501(C) for notice of trial.

(B) Action by Court.

(1) If a party does not make the required showing, the court may direct the clerk to dismiss the action for lack of progress. Such a dismissal is without prejudice unless the court specifies otherwise.

(2) If an action is not dismissed under this rule, the court shall enter orders to facilitate the prompt and just disposition of the action.

(C) Reinstatement of Dismissed Action. On motion for good cause, the court may reinstate an action dismissed for lack of progress on terms the court deems just. On reinstating an action, the court shall enter orders to facilitate the prompt and just disposition of the action.

This Court has held that

one or more of the following factors may be relevant to determining [whether there is] good cause to reinstate an action: (1) procedural or technical error in dismissing the case for lack of progress, (2) the movant's actual diligence before dismissal, (3) justification for the movant's failure to make progress before dismissal, (4) the movant's diligence in attempting to settle the case or a prompt motion to reinstate following dismissal, and (5) potential prejudice to the nonmovant if the action is reinstated. [*Wickings, supra* at 142.]

See also *Heaney v Verson Allsteel Press Co, Inc*, 64 Mich App 597, 599-601; 236 NW2d 155 (1975).

In this case, it is clear that the trial court failed to notify plaintiff that it was contemplating dismissal of the case for lack of progress, contrary to MCR 2.502.¹ Rather, the court apparently believed that the case was “dead” due to the parties’ failure to make progress after remand. Moreover, although the trial court entered an order denying plaintiff’s motion for reinstatement, no order of dismissal appears in the lower court file.

“Generally, due process in civil cases requires notice of the nature of the proceeding” being scheduled. *Vicencio v Ramirez*, 211 Mich App 501, 504; 536 NW2d 280 (1995). “In any proceeding involving notice, due process requires that the notice given be reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 504. In *Vicencio*, this Court held that a plaintiff did not have proper notice of trial where she received a Notice of Settlement Conference that specifically stated that it was not a notice of trial. *Id.* at 504-506. Because the plaintiff did not have notice of the action being contemplated, the trial court erred in dismissing her claims as a sanction for failure to appear at trial. *Id.* at 504-506.

Similarly, in *Wickings, supra* at 139, relying on *Gerbig v White Motor Credit Corp*, 165 Mich App 372, 375; 418 NW2d 468 (1987), this Court stated that “if dismissal for lack of progress was inappropriate for technical or procedural reasons, then that party might be entitled to have the action reinstated.” Moreover, the Court observed that “a number of older cases confirm that technical defects in the dismissal, such as the court’s failure to notify the parties of the potential for dismissal, are sufficient grounds to reinstate the action.” *Wickings, supra* at 141; see also *Hoad v Macomb Co Circuit Judge*, 298 Mich 462, 469; 299 NW 146 (1941).

Finally, in *Laidler v Nat’l Bank of Detroit*, 133 Mich App 85, 93; 348 NW2d 42 (1984), this Court held that where a trial court neglected to send a notice that the case had been placed on the no progress docket, its order of dismissal was improper. In this circumstance, this Court

¹ We find no merit to defendant’s argument that the trial court’s 1995 order granting summary disposition to defendant, which was reversed on appeal by this Court, was sufficient to serve as the requisite notice.

concluded that the trial court “was *without discretion to deny reinstatement* since such was a matter of right.” *Laidler, supra* at 93 (emphasis added).

Because the trial court in the present case failed to notify the parties that it intended to dismiss the action for lack of progress, plaintiff was entitled to have the case reinstated. Therefore, we reverse the trial court’s order denying plaintiff’s motion for reinstatement.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Richard Allen Griffin

/s/ Michael R. Smolenski