

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Keith Seymour et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 18AP-207
 : (C.P.C. No. 16CV-3239)
 Fedadu Weldesilasse, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on September 25, 2018

On brief: *Sam S. Law*, for appellants. **Argued:** *Sam S. Law*.

On brief: *Law Offices of Craig S. Cobb, and Joseph V. Erwin*, for appellee. **Argued:** *Joseph V. Erwin*.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiffs-appellants, Keith Seymour and Darlene Seymour ("Seymours"), appeal from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of defendant-appellee, Fedadu Weldesilasse. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} In August 2013, the Seymours initiated an action against Weldesilasse alleging that he negligently operated a motor vehicle on July 7, 2011, resulting in injury to Keith Seymour (Franklin C.P. No. 13CV-8681). In May 2014, the trial court granted a motion to compel discovery filed by Weldesilasse because the Seymours failed to timely respond to Weldesilasse's discovery requests. In April 2015, the Seymours voluntarily dismissed their complaint against Weldesilasse pursuant to Civ.R. 41(A)(1)(a).

{¶ 3} In April 2016, the Seymours refiled their complaint against Weldesilasse. Pursuant to the original case schedule, the dispositive motions deadline was set for January 9, 2017, and trial was set for May 1, 2017. In April 2017, the trial court reset the dispositive motions deadline for May 12, 2017, and trial for August 28, 2017. Then on August 9, 2017, the trial court rescheduled the dispositive motions deadline for November 15, 2017, and trial for March 20, 2018. The trial court stated that "[n]o further continuances of these dates will be permitted because this is a re-file and because of the significant extension being granted herein." (Aug. 9, 2017 Order Amending Original Case Schedule at 1.)

{¶ 4} On August 18, 2017, Weldesilasse filed another motion to compel discovery pursuant to Civ.R. 37. On September 7, 2017, the trial court granted Weldesilasse's motion to compel and ordered Keith Seymour to provide "comprehensive" discovery responses by September 21, 2017. (Sept. 7, 2017 Order at 1.) During the first week of October 2017, Weldesilasse filed a motion to dismiss the Seymours' refiled complaint, asserting the Seymours had failed to comply with the court's order requiring them to produce comprehensive discovery by September 21, 2017. In November 2017, the trial court denied Weldesilasse's motion to dismiss but warned the Seymours "that any additional failure to follow Court orders or proactively participate in this case may result in sanctions up to and including dismissal." (Emphasis omitted.) (Nov. 16, 2017 Decision Denying Def.'s Mot. to Dismiss at 2.)

{¶ 5} On January 17, 2018, Weldesilasse filed a second motion to dismiss the Seymours' refiled complaint, arguing in part that the Seymours failed to either respond to his request for production of documents or identify any expert witness. On February 23, 2018, the trial court granted the motion, which it construed as a motion to dismiss for failure to prosecute pursuant to Civ.R. 41(B), based on its finding that the Seymours demonstrated a "pattern of consistent disregard for the Court's orders and for the efficient administration of justice." (Feb. 23, 2018 Decision Granting Def.'s Second Mot. to Dismiss at 3.)

{¶ 6} The Seymours timely appeal.

II. Assignment of Error

{¶ 7} The Seymours assign the following error for our review:

The trial court erred in dismissing the complaint for failure to prosecute.

III. Discussion

{¶ 8} In their sole assignment of error, the Seymours assert the trial court erred in dismissing their complaint for failure to prosecute. Pursuant to Civ.R. 41(B)(1), "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." A dismissal under this rule "operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." Civ.R. 41(B)(3).

{¶ 9} "The decision to dismiss a complaint for failure to prosecute [pursuant to Civ.R. 41(B)(1)] is within the sound discretion of the trial court, and an appellate court's review of such a dismissal is confined solely to the question of whether the trial court abused its discretion." *Jones v. Hartranft*, 78 Ohio St.3d 368, 371 (1997). However, "although reviewing courts espouse an ordinary 'abuse of discretion' standard of review for dismissals with prejudice, that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits." *Id.* at 372. Factors to consider in a Civ.R. 41(B)(1) dismissal with prejudice "include the drawn-out history of the litigation and evidence that a plaintiff is deliberately proceeding in dilatory fashion." *533 Short N. LLC v. Zwerin*, 10th Dist. No. 16AP-490, 2017-Ohio-9194, ¶ 21.

{¶ 10} Here, on November 16, 2017, and after the trial court had issued multiple orders compelling the Seymours to comply with discovery, the trial court expressly warned the Seymours that any additional noncompliance could result in the dismissal of the lawsuit. In January 2018, Weldesilasse alleged the Seymours continued not to respond to his request for production of documents and that they still had not identified any expert witness, either pursuant to the court's schedule or in response to interrogatories. In response to Weldesilasse's January 2018 motion to dismiss, the Seymours did not address Weldesilasse's argument that they had failed to identify any expert witness. However, on the day the Seymours filed their response, a subpoena was issued, at the Seymours' counsel's direction, to Dr. Gunwant S. Mallik at "Nerves LLC," directing this medical provider to appear on the day of trial and to bring "all examination notes, medical records and invoices."

{¶ 11} On appeal, the Seymours seek to minimize the significance of medical records as part of their case, even suggesting they never asserted Keith suffered nerve damage as a result of the automobile collision. However, the record belies these assertions. Their complaint specifically alleges Weldesilasse's negligence caused a "neurological problem with [Keith's] left hand." (Compl. at 2.) And consistent with this allegation, at his deposition on January 3, 2018, Keith testified that an unnamed doctor treated him for nerve issues in his arm. Moreover, as reflected by the subpoena issued to Dr. Mallik, the Seymours demonstrated an intent to call this medical provider at trial, even though the Seymours previously had not disclosed Dr. Mallik as a witness during the four and one-half years the matter had been litigated. Thus, the trial court reasoned that the subpoenaed medical records from "Nerves LLC" pertained to a central issue in the case considering Keith's testimony at his deposition and the fact that the Seymours had subpoenaed Dr. Mallik to testify at trial. The Seymours' dilatory conduct prevented Weldesilasse from being able to depose Dr. Mallik and timely review pertinent medical records before the scheduled trial.

{¶ 12} Based on these circumstances, the trial court reasonably concluded that the Seymours consistently failed to comply with discovery requirements and the court's directives regarding the case schedule, and that they proceeded in a manner that disregarded the efficient administration of justice. Because the trial court did not err in granting Weldesilasse's motion to dismiss for failure to prosecute, we overrule the Seymours' sole assignment of error.

IV. Disposition

{¶ 13} Having overruled the Seymours' sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and BRUNNER, J., concur.
