Opinion issued August 2, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00540-CV

ANITA RENFRO, Appellant

V.

LAURI DAVIS, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2020-23367

MEMORANDUM OPINION

Appellant, Anita Renfro, challenges the trial court's order dismissing her suit against appellee, Lauri Davis, for negligence. In four issues, Renfro contends that

the trial court erred in dismissing her suit for want of prosecution, failing to reinstate her case, and denying her motion for new trial.[1]

We reverse and remand.

Background

On April 14, 2020, Renfro filed her petition, alleging that she sustained severe injuries as the result of a car collision involving Davis. According to Renfro, on June 8, 2018, she was driving southbound on a highway, with Davis driving behind her and "not paying attention." Davis "failed to control her speed, failed to keep an appropriate lookout, failed to leave an assured safe distant between her [car] and the [car] in front of her, and rear-ended" Renfro, "causing the collision." Renfro brought suit against Davis for negligence.

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[1] Although Renfro asserts on appeal that the trial court erred in dismissing her suit for want of prosecution, Renfro does not request that this Court reverse the trial court's dismissal order. Instead, Renfro requests that this Court reverse the trial court's order denying her motion to reinstate, reverse the trial court's denial of her motion for new trial, order that her suit be reinstated, and remand the case to the trial court for further proceedings. Thus, we do not review whether the trial court erred in dismissing Renfro's suit for want of prosecution. *See Jay Petroleum, L.L.C. v. EOG Res., Inc.*, 332 S.W.3d 534, 538 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (appellate court cannot grant relief that party did not request); *see also Zaidi v. Shah*, 502 S.W.3d 434, 446 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (appellate courts "cannot grant more relief that requested").

On September 3, 2020, Renfro moved for service by publication,[2] and the trial court granted her motion. Davis filed her answer on May 3, 2021, generally denying the allegations in Renfro's petition and asserting certain defenses.

On May 25, 2021, the trial court sent a letter to the parties notifying them that the case had been set for a case management conference on "June 12st, 2021 [sic]"[3] and requiring the parties to "prepare and efile an agreed docket control order listing [their] agreed trial date [and] other dates relating to [their] case," including a deadline for alternative dispute resolution. (Emphasis omitted.) The trial court's letter also warned the parties that "if [an] agreed docket control order [was] not efiled" by 9:00 a.m. on "June 21, 2021" the case was "subject to receive a dismissal by the [trial] court." (Emphasis omitted.)

Renfro neither filed an agreed docket control nor attended a case management conference in June 2021. On July 12, 2021, the trial court signed an order dismissing Renfro's suit against Davis for want of prosecution, citing Renfro's "[f]ailure to appear at court ordered [c]ase [m]anagement [c]onference on June 21, 2021" and "[f]ailure to submit [a] scheduling order." (Emphasis omitted.)

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2 *See* TEX. R. CIV. P. 109.

3 Because June 12, 2021 was a Saturday, this date appears to be a typographical error in the trial court's letter.

Renfro timely filed a verified motion to reinstate her suit,[4] asserting that "[d]ue to clerical and calendaring errors, [her trial counsel] was unaware of the [o]rder requiring attendance at the hearing on June 12 or June 21, or the requirement to file a proposed [a]greed [d]ocket [c]ontrol [o]rder." According to Renfro, her trial counsel's "e-service email address on file" with the trial court "d[id] not reveal" that he had received electronic notice of the trial court's letter "prior to the deadline" and at the time the trial court sent the letter, Renfro's trial counsel's "entire staff was out of the office" "due to a positive COVID-19 diagnosis and subsequent testing and quarantining."[5] Thus, "[n]otice of the intent to dismiss was either not sent to [Renfro's trial counsel], or at least not received by [him]." Renfro also asserted that her trial counsel's "[f]ailure to appear" at the case management conference and "failure to submit the agreed docket control order" "were not intentional acts" or "the result of conscious indifference."[6]

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4 *See* TEX. R. CIV. P. 165a(3).

5 *See Kim v. Ramos*, 623 S.W.3d 258, 261 n.5, 266 & n.13 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (explaining "COVID-19 is a disease caused by a novel coronavirus" and noting "the country is in the middle of a pandemic due to the virus known as COVID-19" (internal quotations omitted)); *see also See United States v. Briggs*, No. 2:07-CR-2063-LRS-1, 2020 WL 7265850, at *3 (E.D. Wash. Dec. 10, 2020) (order) ("The [Center for Disease Control] recommends that those who test positive for COVID-19 stay home, quarantine, and monitor symptoms.").

6 *See* TEX. R. CIV. P. 165a(3).

In response to Renfro's motion to reinstate, Davis asserted that Renfro had not prosecuted her case with due diligence. Davis set out a timeline of events in the case, noting that after Renfro filed her original petition in April 2020, she "did not attempt service on [Davis] until June 26, 2020." Renfro then filed a motion for service by publication on September 3, 2020, which the trial court granted a day later. Yet Renfro "did not publish service until January 22, 2021," as shown on the citation by publication Renfro filed in the trial court on March 24, 2021.

Davis observed that on May 3, 2021, she filed her answer, special exceptions, and jury demand, and she propounded discovery on Renfro. Although Renfro responded to Davis's written discovery requests on June 2, 2021, neither she nor her trial counsel attended the case management conference or filed an agreed docket control order either on June 12, 2021 or June 21, 2021. Davis asserted that the timeline of events showed that Renfro did not exercise "due diligen[ce] in prosecuting [her] case." And according to Davis, Renfro, in her motion, "fail[ed] to provide any evidence elaborating how or why there was a 'clerical and calendaring error' or other contextual information," such as details about Renfro's trial counsel's "business practices relating to [the] processing [of] mail and calendaring."

The trial court signed an order denying Renfro's motion to reinstate on August 2, 2021. On September 1, 2021, Renfro filed a motion for new trial. The trial court did not rule on that motion.[7]

Standard of Review

We review a trial court's dismissal of a suit for want of prosecution under an abuse-of-discretion standard. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997); *Fox v. Wardy*, 225 S.W.3d 198, 199–200 (Tex. App.—El Paso 2005, pet. denied). We employ the same standard in reviewing the denial of a motion to reinstate. *Franklin v. Sherman Indep. Sch. Dist.*, 53 S.W.3d 398, 401–02 (Tex. App.—Dallas 2001 pet. denied) (denial of motion to reinstate reviewed for abuse of discretion). A trial court abuses its discretion when it acts in an arbitrary and unreasonable manner, without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *Fox*, 225 S.W.3d at 200. A trial court abuses its discretion in denying a motion to reinstate when an attorney's explanation for the failure to appear is reasonable. *Mack v. Retirement Hous. Found.*, 627 S.W.3d 391, 394 (Tex. App.—Dallas 2021, no pet.); *Rava Square Homeowners Ass'n v. Swan*, No. 14-07-00521-CV, 2008 WL 4390437, at *2 (Tex. App.—Houston [14th Dist.] Sept. 30, 2008, no pet.) (mem. op.).

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[7] *See* TEX. R. CIV. P. 329b(a) (providing deadline to file motion for new trial).

Motion to Reinstate

In her first issue, Renfro argues that the trial court erred in denying her motion to reinstate the case because she provided a reasonable explanation for her failure to appear at the case management conference and file an agreed scheduling order.

The trial court's authority to dismiss a case for want of prosecution stems from two sources: (1) Texas Rule of Civil Procedure 165a and (2) the court's inherent power. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). Under rule 165a, a trial court may dismiss a civil suit for want of prosecution when a party seeking affirmative relief fails to appear for a hearing or trial of which the party had notice or when the case is not disposed of within the time standards prescribed by Texas Supreme Court. *See* TEX. R. CIV. P. 165a(1), (2); *Villarreal*, 994 S.W.2d at 630. The trial court also has the inherent authority to dismiss a civil suit when a plaintiff fails to prosecute her case with due diligence. *See Villarreal*, 994 S.W.2d at 630; *Fox*, 225 S.W.3d at 199. This authority stems from the trial court's power to control its docket. *Maida v. Fire Ins. Exch.*, 990 S.W.2d 836, 839 (Tex. App.—Fort Worth 1999, no pet.).

Reinstatement after a dismissal for want of prosecution is governed by Texas Rule of Civil Procedure 165a(3), which requires a motion to reinstate to be verified; to set forth the grounds for reinstatement; and, in most circumstances, to be filed within thirty days of the order of dismissal. TEX. R. CIV. P. 165a(3). If a compliant

motion is filed, then the trial court "shall reinstate the case upon finding after a hearing that the failure of the party or h[er] attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." *Id.* This rule requires proof of an adequate justification, such as an accident, mistake, or other reasonable explanation, to negate the intent or conscious indifference for which reinstatement can be denied. *Smith v. Babcock & Wilcox Constr. Co.*, 913 S.W.2d 467, 468 (Tex. 1995). Conscious indifference is more than mere negligence. *Id.*; *E&M Plumbing Ltd. v. W. Houston Winnelson Co.*, No. 01-17-00601-CV, 2018 WL 3542916, at *2 (Tex. App.—Houston [1st Dist.] July 24, 2018, no pet.) (mem. op.). In this context, "[s]ome excuse, not necessarily a good one, is sufficient." *Seigle v. Hollech*, 892 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1994, no writ) (internal quotation omitted). If a party's motion satisfies this showing and otherwise meets Texas Rule of Civil Procedure 165a's requirements, the trial court must reinstate the suit. *See* TEX. R. CIV. P. 165a(3); *Smith*, 913 S.W.2d at 468; *E&M Plumbing*, 2018 WL 3542916, at *2; *see also Kenley v. Quintana Petroleum Corp.*, 931 S.W.2d 318, 321 (Tex. App.—San Antonio 1996, writ denied) (trial court abuses its discretion in denying reinstatement following dismissal for want of prosecution when attorney's uncontroverted explanation for failure to appear is reasonable).

In its order, the trial court dismissed Renfro's suit based on its findings that Renfro failed to appear at the case management conference and failed to submit a scheduling order as required by the trial court in its May 25, 2021 letter to the parties. Renfro, in her verified motion to reinstate, stated that her trial counsel never received the trial court's letter and thus "was unaware of the [o]rder requiring attendance at the hearing on June 12 or June 21, or the requirement to file a proposed [a]greed [d]ocket [c]ontrol [o]rder." She explained that the letter was not received "[d]ue to clerical and calendaring errors," because at the time the trial court sent the letter, her trial counsel's entire staff was out of the office for several weeks "due to a positive COVID-19 diagnosis and subsequent testing and quarantining."[8]

At the time those events occurred, the Texas Supreme Court's Thirty-Eighth Emergency Order Regarding the COVID-19 State of Disaster, in which the supreme court acknowledged the "imminent threat" of the COVID-19 pandemic and allowed all other Texas courts to take reasonable actions to protect court staff, parties, attorneys, jurors, and the public from exposure to COVID-19, was in effect. *See*

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[8] To the extent that Renfro asserts, as an alternate ground for nonreceipt, that the trial court never sent the letter, we need not consider it. Further, we note that the record shows that the trial court clerk had Renfro's trial counsel's correct email and mailing addresses, and neither Renfro nor her trial counsel had any personal knowledge of whether the letter was sent. *See Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 849–50 (Tex. 2004) (explaining "clerk has an affirmative duty under [Texas] Rule [of Civil Procedure] 165a to give notice, but no duty to affirmatively show in the record that such notice was given"; thus, "mere silence as to whether notice was sent does not establish that notice was not sent").

Supreme Court of Texas, Thirty-Eighth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 21-9060, 629 S.W.3d 900 (Tex. 2021). Renfro's trial counsel described the disruption in his office caused by the exposure of his staff to someone who had tested positive for COVID-19. His entire staff was out of the office for several weeks while they quarantined and tested for COVID-19, all in an apparent effort to protect themselves, the firm's clients, and others from potential exposure to the virus. And because of the staff's absence from Renfro's trial counsel's office, "clerical and calendaring errors" occurred that caused Renfro's trial counsel not to receive the trial court's May 25, 2021 letter.

Based on the foregoing, we conclude that Renfro's explanation, which was uncontroverted, is a reasonable one. *See Jackson v. Thurahan, Inc.*, No. 14-02-00308-CV, 2003 WL 1566386, at *2 (Tex. App.—Houston [14th Dist.] Mar. 27, 2003, no pet.) (mem. op.) (trial court erred in denying motion to reinstate where plaintiff's counsel attested that trial court's setting was not docketed on his trial schedule and he was unaware of trial setting until he received a notice of court's intent to dismiss case); *Asplundh Tree Expert Co. v. City of Garland*, No. 05-02-00694-CV, 2003 WL 187428, *1 (Tex. App.—Dallas Jan. 29, 2003, no pet.) (mem. op.) (holding plaintiff's counsel's failure to appear for trial was not result of conscious indifference where counsel understood mediator would contact court to resolve conflict between trial setting and parties' agreed date for resuming

mediation, mediator instead sent letter informing plaintiff's counsel that he would need to file motion for continuance, but because of "staffing problems," plaintiff's counsel never saw letter); *see also Smith*, 913 S.W.2d at 468 (holding trial court erred in denying motion to reinstate where plaintiff's counsel failed to appear because he was in trial in another county and mistakenly believed trial court would grant continuance for that reason and observing even if counsel "was not as conscientious as he should have been, his actions did not amount to conscious indifference"). Thus, we hold that the trial court erred in denying Renfro's motion to reinstate her suit.

We sustain Renfro's first issue.[9]

Conclusion

We reverse the trial court's order denying Renfro's motion to reinstate and remand the case to the trial court with instructions to reinstate the case and for further proceedings consistent with this opinion.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Countiss and Farris.

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[9] Due to our disposition of Renfro's first issue, we need not address her remaining issues. *See* TEX. R. APP. P. 47.1.