Affirmed and Memorandum Opinion filed March 17, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00927-CV

ULRIKA BJORKSTAM AND JOSEPH DANIEL DRAY, Appellants

V.

WOODWARD, INC., Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2010-31214

M E M O R A N D U M O P I N I O N

Appellants Ulrika Bjorkstam and Joseph Daniel Dray appeal the dismissal of their claims against Woodward, Inc. for want of prosecution. We affirm.

I. BACKGROUND

Appellants, a Finnish national and a French national, were injured when a Learjet airplane crashed in Mexico City. They sued various defendants in Illinois state court in November 2009, including Learjet, Inc. and Woodward. In May

2010, appellants also filed the instant suit in Harris County against Learjet and other defendants, including the Mexican company Centros de Servicios de Aviation Ejecutiva S.A. de C.V. (Centros).

On December 10, 2010, the Illinois court granted Woodward and others' motion to dismiss for forum non conveniens. The court ordered that if appellants sued any of the dismissed defendants in Harris County within six months, the defendants had to accept service of process from the Texas court and waive any statute of limitations defense, pursuant to Illinois law. In March 2011, appellants filed an amended petition in the Texas suit and added Woodward as a defendant.

It is undisputed that appellants did not serve Woodward until January 31, 2013.[1] Woodward answered and promptly filed a motion to dismiss for want of prosecution based on the trial court's inherent authority. After a hearing, the trial court granted the motion. This appeal followed.

II. DISMISSAL FOR WANT OF PROSECUTION

In two issues that appellants argue together, appellants contend the trial court abused its discretion by granting Woodward's motion to dismiss.

A. Standard of Review and Legal Principles

A trial court may dismiss a case for want of prosecution based on the court's common law inherent power when a plaintiff fails to prosecute the case with due diligence. *See Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). We review the trial court's dismissal under a "clear abuse of discretion standard." *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997). A trial court abuses its discretion if it acts without reference to any guiding rules or

[1] We discuss the events occurring between March 2011 and January 2013 in greater detail below.

principles or acts in an arbitrary or unreasonable manner. *Risley v. Alvarez*, No. 14-10-00015-CV, 2011 WL 397948, at *3 (Tex. App.—Houston [14th Dist.] Feb. 8, 2011, pet. denied) (mem. op.).

"[T]he central issue is whether the plaintiffs exercised reasonable diligence." *MacGregor*, 941 S.W.2d at 75. When reviewing a trial court's dismissal, "we look at the entire history of the case and perform a fact intensive, case-by-case determination." *Risley*, 2011 WL 397948, at *3. "A trial court generally considers four factors before dismissing a case for want of prosecution: (1) the length of time a case has been on file; (2) the extent of activity in the case; (3) whether a trial setting was requested; and (4) the existence of reasonable excuses for the delay." *Gantt v. Getz*, No. 14-10-00003-CV, 2011 WL 1849085, at *6 (Tex. App.—Houston [14th Dist.] May 12, 2011, no pet.) (mem. op.) (citing *Keough v. Cyrus USA, Inc.*, 204 S.W.3d 1, 4–5 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)).

B. The Record and Arguments

Appellants address the facts of this case in light of the four factors identified above.

1. Length of Time Case Was on File

Appellants acknowledge that their Texas claims were on file almost three years by the time Woodward filed its motion to dismiss. In fact, the case was on file in Texas against Woodward for about twenty-two months before appellants arranged for service of citation. Woodward timely answered and promptly filed its motion to dismiss.

2. Extent of Activity in the Case

Appellants point to the following activity that occurred in this case, evidenced by documents attached to its response to Woodward's motion (or documents elsewhere in the Clerk's Record):

- Woodward, through counsel, attended a mediation with the parties in November 2011;[2]
- When Woodward's counsel moved offices, it served all parties with a notice of change of address in November 2012;
- Centros was served through the Hague Convention;[3]
- Some of the defendants filed a motion to apply Mexican law in February 2013, and the trial court held a hearing in May;
- Woodward's counsel attended three depositions in April 2013; and
- After the trial court granted Woodward's motion to dismiss, appellants took a default judgment against Centros.

3. Whether a Trial Setting Was Requested

Although appellants initially had a trial setting scheduled for June 2011, appellants and the non-Woodward defendants moved for a continuance in May 2011. One of the bases was that Woodward had not been served. A year later in May 2012, appellants and the non-Woodward defendants sought and obtained an amended docket control order setting trial in October 2013.

[2] Appellants conceded in the trial court that Woodward informed appellants at the mediation that Woodward had not been served with citation.

[3] Although appellants argue that Centros had not been served by May 2011, appellants do not state when Centros ultimately was served. Further, appellants did not present the trial court with any evidence indicating when Centros was served, although appellants argued to the trial court that they received the return of citation in "late 2011." Woodward refers to a document in the Clerk's Record suggesting that Centros was served in March 2011. When exactly Centros was served in 2011 is not dispositive to this appeal.

4. Existence of Reasonable Excuses for Delay

On appeal, appellants suggest there were as many as five purported excuses for delay:

- Additional time was needed to serve Centros through the Hague Convention;
- Additional time was needed to serve Woodward and two other defendants who were added after the Illinois dismissal, and Woodward refused to accept service through counsel unlike the other defendants;
- Appellants served Woodward one day before the deadline in the amended docket control order for the service of new parties;
- The non-Woodward defendants moved to apply Mexican law to the issue of damages in February 2013; and
- The defendants were "slow to produce witnesses and documents relevant to Plaintiffs' liability theories."

C. Analysis

Appellants do not cite any decisions where an appellate court has held that a trial court abused its discretion for dismissing a case under its inherent power. Our review of the case law suggests the trial court did not abuse its discretion here.

First, we note that the activity in the case and appellants' related excuses occurring ***after*** the filing of the motion to dismiss do not affect the analysis of whether appellants exercised reasonable diligence in prosecuting their case. *See Harrison v. Emps. Ret. Sys. of Tex.*, No. 03-09-00259-CV, 2010 WL 2629893, at *3 (Tex. App.—Austin July 1, 2010, no pet.) (mem. op.) (affirming dismissal after there was no activity for twenty-seven months, and reasoning that evidence of the plaintiff's diligence after the filing of the motion to dismiss did "not explain or alleviate the lack of diligence prior to the motion to dismiss"); *see also Preslar v. Garcia*, No. 03-13-00449-CV, 2014 WL 824201, at *1 (Tex. App.—Austin Feb.

26, 2014, no pet.) (mem. op.) (affirming dismissal after there was no activity for twenty-one months even though the plaintiff served discovery and attempted to schedule a deposition after the defendant filed its motion to dismiss). In other words, a trial court does not abuse its discretion merely because the plaintiff tries to cure its lack of diligence after the defendant moves to dismiss. *Cf. Edison v. Houston Police Dep't*, No. 01-06-00552-CV, 2007 WL 1633911, at *2 n.2 (Tex. App.—Houston [1st Dist.] June 7, 2007, no pet.) (mem. op.) ("[Plaintiff]'s last-ditch, unsuccessful effort to serve the defendants after receiving notice of the trial court's intent to dismiss his case does not absolve him of the duty to prosecute it with diligence from the date it was filed."). Thus, we find unavailing appellants' arguments concerning the choice of law issue, Woodward's attendance at depositions in April 2013, or appellants' default judgment against Centros.

Further, Woodward's conduct such as notifying the parties of its change of address has no bearing on whether appellants diligently prosecuted their case. The focus is on the appellants' diligence, not the extent of Woodward's participation. *See MacGregor*, 941 S.W.2d at 75; *see also El-Khalidi v. Arabian Am. Dev. Co.*, No. 09-13-00394-CV, 2014 WL 2152101, at *3 (Tex. App.—Beaumont May 22, 2014, pet. denied) (mem. op.) (affirming dismissal when "almost all of the activity in the case consisted of the [defendants'] efforts to mediate the case, to obtain written discovery from [the plaintiff], to obtain sanctions against [the plaintiff], and to take [the plaintiff's] deposition").

Ultimately, the only activity in this case relied upon by appellants that informs the analysis of diligence is (1) Centros was served in 2011; and (2) a mediation was held in November 2011 that Woodward attended. The trial court could have considered that virtually no activity occurred for over a year since the mediation in November 2011 until appellants served Woodward in January 2013.

Such a long lapse of time places this case squarely within the trial court's discretion to dismiss. *See Risley*, 2011 WL 397948, at *4 ("Failure to procure the issuance and service of citation upon [defendants] for over nine months shows that [the plaintiff] did not exercise diligence in prosecuting his case; therefore, the trial court acted within its discretion dismissing [the plaintiff's] case for want of prosecution."); *Edison*, 2007 WL 1633911, at *2 (affirming dismissal because the case was on file for about a year and the plaintiff failed to provide the clerk with correct information for service of the citation); *Stone v. Cunningham*, No. 05-06-01151-CV, 2007 WL 1206677, at *2 (Tex. App.—Dallas Apr. 25, 2007, pet. denied) (mem. op.) (affirming dismissal after the defendant had not been properly served after less than four months even though the plaintiff requested a trial setting, filed a motion for default judgment, and filed a "notice of citation" with the district clerk to inform the defendant he had been sued); *Fox v. Wardy*, 225 S.W.3d 198, 200 (Tex. App.—El Paso 2005, pet. denied) (affirming dismissal when the plaintiff waited seven months before having the defendant served); *Allen v. Rushing*, 129 S.W.3d 226, 231 (Tex. App.—Texarkana 2004, no pet.) (affirming dismissal after thirteen months when the plaintiff failed to arrange for service in compliance with the rules); *see also El-Khalidi*, 2014 WL 2152101, at *3 (affirming dismissal of claims against two defendants who had appeared when there was minimal activity in the case for over a year).

Even if appellants were more active earlier in the case (although there is scant evidence of such activity), such a fact would not prevent the trial court from exercising discretion to dismiss after such a long period of inactivity. *See Harrison*, 2010 WL 2629893, at *3 (affirming dismissal because even though the plaintiff had been reasonably diligent in prosecuting his case through the administrative process, his diligence ceased after filing his petition).

The trial court could have concluded, further, that this long period of inactivity was not alleviated by any reasonable excuses for delay. Although appellants contend that defendants were slow to produce witnesses and documents relevant to appellants' theories of liability, there is no evidence in the record to support that assertion, let alone any evidence that appellants requested such discovery. *See Keough*, 204 S.W.3d at 4–5 (affirming dismissal even though the plaintiff claimed delay resulted from her counsel's disbarment; although "successor counsel asserted [the plaintiff] had no knowledge of the trial setting or the disciplinary proceedings, [the plaintiff] offered no evidence supporting these contentions").[4] Appellants also claim that additional time was necessary to serve Centros, but the parties agree that Centros was served in 2011, well before appellants served Woodward in January 2013. Appellants claim that another excuse for delay was Woodward's refusal to accept service through counsel. But appellants concede that Woodward informed appellants at the November 2011 mediation that Woodward had not been served, and appellants do not explain how Woodward's insistence that appellants follow the Texas Rules of Civil Procedure resulted in a delay of more than a year. Accordingly, the trial court could have concluded that appellants did not offer a reasonable excuse for this extended delay in serving Woodward and proceeding with the case.

[4] As support, appellants cite to a page of Woodward's counsel's argument during the hearing on the non-Woodward defendants' motion to apply Mexican law to the issue of damages. Appellants do not argue that we should treat these statements as testimonial evidence. *See Khan v. Valliani*, 439 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("Normally, an attorney must be under oath for his statements to be considered testimonial."). Even if counsel's statements were treated as evidence, the statements do not support appellants' argument. The statements were about Woodward's difficulty in obtaining access to the wreckage in Mexico. The statements were not made in the context of Woodward's motion to dismiss, and the statements did not refer to any discovery about appellants' theories of liability. The statements do not support appellants' argument that they should have been excused from serving Woodward and prosecuting their case for nearly two years.

Finally, appellants note that they served Woodward on the day before the deadline for serving "new parties" set in the amended docket control order. But Woodward was not a new party at that time—appellants knew that Woodward had been a party since March 2011 when appellants named Woodward as a defendant. *See Zanchi v. Lane*, 408 S.W.3d 373, 378 (Tex. 2013) (holding that a person is a party to the suit when named in a filed pleading, regardless of whether the person is served); *see also* Tex. R. Civ. P. 79.[5] Regardless of the docket control order's deadline, the trial court could have concluded that appellants offered no reasonable excuse for delaying until January 2013 to serve Woodward and failing to prosecute the case in the meantime. *See In re Conner*, 458 S.W.3d 532, 534 (Tex. 2015) (orig. proceeding) (granting mandamus and directing the trial court to dismiss the suit for want of prosecution; "It has long been the case that a delay of an unreasonable duration . . ., if not sufficiently explained, will raise a conclusive presumption of abandonment of the plaintiff's suit. This presumption justifies the dismissal of a suit under either a court's inherent authority or Rule 165a of the Texas Rules of Civil Procedure." (alteration in original, quotation omitted)). To hold otherwise, we would be promulgating a rule that a trial court divests itself of the power to dismiss a case for lack of diligence by setting a deadline for service in a docket control order. We decline to go so far and interfere with the trial courts' "considerable discretion when it comes to managing their dockets." *Id.*

In summary, the trial court reasonably could have concluded: (1) the case was on file for a significant period of time; (2) there was very little activity in the case; (3) although appellants requested a trial setting, appellants delayed the case

[5] This deadline, of course, had been extended because appellants and the non-Woodward defendants sought and obtained a continuance in May 2011 and an amended docket control order in May 2012, which further evidences appellants' lack of diligence. *See Keough*, 204 S.W.3d at 4–5 (noting that the trial court could have dismissed the case for want of prosecution in part because the plaintiff requested multiple continuances of the trial setting).

by requesting a continuance and amended docket control order; (4) after adding Woodward as a party, appellants waited twenty-two months before serving Woodward with citation, and appellants did not serve Woodward until over a year after Centros was served and Woodward notified appellants that it had not been served; and (5) appellants provided no reasonable excuse for the delay—in particular, the delay occurring after the November 2011 mediation. The trial court did not act unreasonably, arbitrarily, or without reference to guiding rules or principles. The trial court did not abuse its discretion.

Appellants' first issue is overruled.

III. CONCLUSION

Having overruled appellants' dispositive first issue, we affirm the trial court's judgment.[6]

/s/ Sharon McCally
Justice

Panel consists of Justices Jamison, McCally, and Wise.

[6] Appellants' second issue concerns the trial court's granting of Woodward's motion "on the ground of purported prejudice." Because the trial court's order does not specify the ground for granting Woodward's motion, and we hold that the trial court acted within its discretion by dismissing for want of prosecution under its inherent authority, we do not address Woodward's second issue. *See Risley*, 2011 WL 397948, at *3 ("If the dismissal order does not specify a particular reason for the dismissal, we will affirm if any proper ground supports the dismissal."); *see also* Tex. R. App. P. 47.1.