

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00400-CV

HATEM EL-KHALIDI, Appellant

V.

ARABIAN AMERICAN DEVELOPMENT COMPANY, Appellee

On Appeal from the 88th District Court
Hardin County, Texas
Trial Cause No. 55018

MEMORANDUM OPINION

Hatem El-Khalidi appeals the dismissal of his suit against Arabian American Development Company (AADC).¹ In five issues, El-Khalidi contends that the trial court erred (1) by denying his request seeking the trial court's intervention to either delay his deposition to a date he could travel or to allow his deposition to be taken by remote electronic means; (2) by failing to test lesser sanctions before dismissing

¹ Arabian American Development Company is now known as Trecora Resources, Inc.

his suit; (3) by dismissing his suit for want of prosecution without first notifying him that his case could be dismissed and without conducting a hearing to allow him to be heard regarding the explanation he was entitled to offer to justify the delays that occurred in the prosecution of his suit; (4) by entering a judgment when insufficient evidence supports the express and implied findings required to support a decision to dismiss his case; and (5) by ruling on AADC's motion for sanctions before September 5, 2016, the date that AADC notified El-Khalidi that its motion would be submitted to the court to be decided without a hearing.

Background

El-Khalidi filed cause number 55018, the suit that is the subject of this appeal, in 2014, after having already filed an earlier suit involving the same subject matter. The trial court dismissed El-Khalidi's first case, cause number 52483, which he filed in 2011, for lack of prosecution. El-Khalidi appealed that order of dismissal, and we affirmed the order. *See 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).

El-Khalidi's 2014 suit was also dismissed for lack of prosecution. Although the claims that were dismissed concerned El-Khalidi's claims alleging that AADC had breached an agreement that it reached with him to get him to retire, his original

petition included claims for defamation. El-Khalidi had nonsuited his tort claims against AADC in April 2015. In June 2015, he moved for summary judgment on his breach-of-contract claims, which alleged that AADC had failed to pay him the benefits it agreed to pay him to get him to retire. El-Khalidi's motion was accompanied by two affidavits, one that he signed and one signed by a certified public accountant. In El-Khalidi's affidavit, El-Khalidi provided the trial court with the terms of the agreement that he claimed he reached with AADC in contemplation of his agreement to retire. The accountant's affidavit contains calculations showing the money that El-Khalidi claimed AADC owed him under the terms of the agreement he reached with AADC just before he retired.

After El-Khalidi moved for summary judgment, and to respond to the claims that El-Khalidi had made in his affidavit, AADC sought to secure El-Khalidi's deposition. By July 2015, having failed to secure El-Khalidi's agreement to give a deposition in Texas, AADC filed a combined motion seeking an order compelling El-Khalidi to give a deposition in Texas, to prevent El-Khalidi from proceeding on his own discovery requests to AADC until after submitting to a deposition, and motion for sanctions. AADC's combined motion relied, in part, on the efforts that it asserted it had made to obtain El-Khalidi's deposition in the earlier-filed case, cause number 52483, evidence showing that the trial court had ordered El-Khalidi to be

deposed in that cause, and the fact that the court had dismissed El-Khalidi's first case for want of prosecution in 2013. *Id.* at *2. Following a hearing on AADC's combined motion, the trial court ordered that El-Khalidi appear for a deposition at the offices of AADC's attorneys, which are in Beaumont, on January 26 and 27, 2016.

On January 20, 2016, El-Khalidi moved to reset the January 2016 court-ordered deposition. In his motion, he asserted that he had advised counsel that he had been unavoidably detained in Saudi Arabia, that he had not been able to conclude his affairs in Saudi Arabia, and that he was in the process of preparing to move to the United States. El-Khalidi's motion also asserts he was unable to travel due to "his health issues, advanced age, the problems with his residency visa in Saudi Arabia, and the inability to access his funds due to the freezing of his bank accounts[.]"

The record does not show that El-Khalidi requested a hearing on his motion to postpone his deposition scheduled on January 26. Moreover, the trial court's order compelling El-Khalidi to submit to the deposition in Beaumont states that the deposition was not subject to being changed absent the mutual agreement of the parties or absent the court decision to postpone the deposition, which had to be obtained before the date the deposition was scheduled to occur. When El-Khalidi

failed to appear for his January 2016 deposition, AADC filed a motion for sanctions and motion to dismiss his case. In its motion, AADC noted that the language in the court's order prevented El-Khalidi from unilaterally changing the date the court had ordered El-Khalidi to submit to a deposition in Beaumont. In response to these motions, El-Khalidi filed a motion requesting that the trial court allow his deposition to "be taken according to a new schedule and by remote live broadcast," arguing that due to his age and worsening heart condition, he could not "safely travel to the United States at this time."

In response to El-Khalidi's offer to make himself available for a deposition by "remote live broadcast," AADC argued that El-Khalidi's request should be denied because his problems were of "his own making." According to AADC, El-Khalidi had persistently failed to comply with efforts that it had made over a period spanning five years to obtain his deposition. AADC also questioned El-Khalidi's claim that he was too ill to travel, noting that he had recently traveled to Jordan even while claiming he was too ill to travel. AADC noted that El-Khalidi's response to its motion failed to explain why traveling to the United States would place him at any greater risk than he had faced when he chose to travel to Jordan.

On August 4, 2016, AADC filed a notice of submission, indicating that its combined motions would be decided without a hearing on September 5, 2016. On

September 1, 2016, the trial court granted AADC's motion, dismissing El-Khalidi's cause of action with prejudice. Subsequently, El-Khalidi filed a motion to reconsider. In his motion to reconsider, El-Khalidi complained that he was not notified that AADC's motions would be decided prior to September 5, 2016.

Approximately five weeks after the trial court dismissed cause number 55018, it provided the parties with written findings of fact. The findings state:

1. Plaintiff Hatem El Khalidi originally filed suit against AADC on March 21, 2011 in Dallas County, Texas, and agreed to transfer venue to this Court.
2. On June 18, 2012, this Court first ordered El Khalidi to appear for deposition on August 7, 2012. Although the Order stated that the date could be changed "only upon good cause shown to this Court in advance of these dates, or upon mutual agreement" of the parties, El Khalidi did not appear for deposition.
3. On September 11, 2012, Defendant filed a Motion for Sanctions, Motion to Compel, Special Exceptions, and Motion to Strike Portions of Plaintiff's Pleadings as Frivolous.
4. On November 1, 2012, this Court conducted a conference in chambers and ordered El Khalidi to appear for deposition by January 31, 2013. El Khalidi again failed to appear for deposition.
5. On April 29, 2013, Defendant filed a Second Motion for Sanctions, Motion to Compel, Special Exceptions and Motion to Strike Portions of Plaintiff's Pleadings as Frivolous, and Motion to Dismiss for Want of Prosecution.
6. On July 24, 2013, the Court entered an Order granting Defendant's Motion to Dismiss for Want of Prosecution.

7. The Ninth Court of Appeals affirmed the dismissal order on May 22, 2014, and the Texas Supreme Court denied El Khalidi's Petition for Review.

8. During the pendency of the appeal, El Khalidi filed the *same* action against AADC in the 365th Judicial Court of Hardin County, Texas on May 1, 2014. On Defendant's motion, the 365th Judicial Court transferred the case back to this Court.

9. After repeated attempts to obtain El Khalidi's deposition, Defendant filed a Motion to Compel and Motion for Sanctions on July 31, 2015.

10. On November 2, 2015, the Court entered an Order compelling El Khalidi to appear for deposition on January 26 and 27, 201[6]. The Court's Order states, "these dates may be changed only upon good cause shown to this court in advance of these dates, or upon mutual agreement." El Khalidi again failed to appear for deposition.

11. On February 4, 2016, Defendant filed a Second Motion for Sanctions and Motion to Dismiss.

12. On April 13, 2016 the Court entered an Order compelling El Khalidi to appear for deposition in Hardin County (or an alternative location agreed upon by the parties) on or before August 1, 2016. El Khalidi again failed to appear as ordered.

13. El Khalidi is a United States citizen.

14. El Khalidi has traveled outside of Saudi Arabia in recent months for other purposes (such as to visit his sister in Jordan), indicating an ability to travel despite his advanced age.

[15.] It would be ineffective and highly prejudicial to require Defendant to conduct El Khalidi's deposition by remote, electronic means in a foreign country.²

[16.] Any further delay of Plaintiff's deposition will prejudice Defendant, particularly given El Khalidi's advanced age.

[17.] The present lawsuit has not been brought to final disposition within eighteen months from Defendant's appearance date.

The trial court also provided the parties with written conclusions of law. The conclusions state:

1. Defendant's Second Motion for Sanctions and Motion to Dismiss is meritorious and therefore granted. El Khalidi's claims against Defendant are dismissed with prejudice.

2. Death penalty sanctions are appropriate because El Khalidi has exhibited a pattern and practice of egregious discovery abuse by failing to comply with multiple discovery orders of this Court.

3. The Court previously dismissed El Khalidi's lawsuit *without prejudice* in connection with his failure to appear for deposition. However, the Court's prior dismissal without prejudice did not promote compliance with the Court's subsequent Orders compelling El Khalidi to appear for deposition. No lesser sanction would promote El Khalidi's compliance with the Court's discovery orders.

4. El Khalidi's repeated failure to appear for deposition justifies the presumption that his claims lack merit.

5. El Khalidi's lawsuit is alternatively dismissed for want of prosecution. The Court has authority under Texas Rule of Civil Procedure 165a(2) to dismiss a lawsuit that is not disposed of within

² The trial court failed to correctly number its findings, as it labelled two of its findings with the number fourteen. El-Khalidi refers to the second of these two findings as finding fifteen; we do so as well.

the time limits promulgated by the Texas Supreme Court's Rules of Judicial Administration Rule 6.1(b) of the Rules of Judicial Administration provides that civil jury cases (other than family law) should be brought to trial or final disposition "within 18 months from appearance date." El Khalidi's lawsuit has not been disposed of timely.

6. The Court also has the inherent authority to dismiss because El Khalidi has failed to prosecute his case with due diligence by delaying discovery for years without reasonable excuse.

7. El Khalidi's Motion to Reset Mediation and Deposition Schedule, and all supplements and amendments thereto, lack merit and are denied because El Khalidi has presented no valid and compelling reason for his failure to appear for deposition for more than five years.

Request for Accommodation

In issue one, El-Khalidi argues the trial court violated the Americans with Disabilities Act by refusing to accommodate his requests to reschedule his deposition to a date that he could travel, or to require AADC to depose him in Saudi Arabia by remote electronic means. *See generally* 42 U.S.C. §§ 12101-12213. For the purposes of this appeal, we will assume that the Americans with Disabilities Act governs a Texas trial court's application of the Texas Rules of Civil Procedure, but we note that we expressly do not decide whether the Act imposes any obligations on Texas trial judges in resolving discovery disputes because deciding that question is not necessary to determine whether the trial court had the power to dismiss El-Khalidi's case based on the trial court's findings and on the facts that are presented here.

The trial court clearly had the discretion to order AADC to take El-Khalidi's deposition by remote electronic means, but was not required to do so. Under the Texas Rules of Civil Procedure, a party may take a deposition in a foreign jurisdiction for use in Texas proceedings if the deposition is taken by notice, agreement of the parties, or by court order. Tex. R. Civ. P. 201.1(a). The Rules also provide that depositions in foreign jurisdictions "may be taken by telephone, videoconference, teleconference, or other electronic means under the provisions of Rule 199." Tex. R. Civ. P. 201.1(g).

Nonetheless, the question in this case is whether the trial court abused its discretion by refusing El-Khalidi's request to require that AADC take his deposition in Saudi Arabia by remote electronic means. Resolving that question turns on whether the evidence that was before the trial court conclusively proved that El-Khalidi could not travel during the period of time that AADC sought to secure his testimony. In our opinion, the facts before the trial court allowed the trial court to reject El-Khalidi's claim that he was not healthy enough to travel to Texas.

The record shows that in November 2015, the trial court ordered El-Khalidi to appear for his deposition in Beaumont on January 26 and 27, 2016. Subsequently, on January 20, 2016, El-Khalidi filed a motion requesting that his deposition be rescheduled "to a future date," alleging that his doctors had "strongly advised" him

not to travel any great distances.” However, the record does not show that El-Khalidi obtained a hearing on this motion before the date his deposition was scheduled to occur. In April 2016, El-Khalidi filed a motion supported by his affidavit that represented he was committed to being in Texas by June 30, 2016, at the latest, so that he could be deposed. Following a hearing on El-Khalidi’s motion to postpone his January 2016 court-ordered deposition, which occurred approximately two months after the deposition was scheduled to occur, the trial court ordered that El-Khalidi “appear for deposition in Hardin County, Texas (or an alternative location mutually agreed upon by the parties) on or before August 1, 2016.” Therefore, it appears the trial court accommodated El-Khalidi’s requests by postponing his deposition to a date that he proposed would allow him sufficient time to travel to Texas.

Additionally, on this record, El-Khalidi did not conclusively prove that he was too ill to travel. A doctor’s report, dated October 2015, which El-Khalidi used to support his motion to postpone his deposition, does not indicate that no arrangements were possible that would allow El-Khalidi to travel; instead, the report states that El-Khalidi suffers “from coronary heart disease [,]” that he had been treated for the condition since October 2014, and that given his condition, El-Khalidi had been “strongly advise[d]” not to travel. Thus, while the evidence shows that El-Khalidi

had a pre-existing heart condition, El-Khalidi was aware of that condition before he represented to the trial court that he would be in Texas within the four months of the hearing so that he could be deposed.³ Even though a doctor had advised El-Khalidi not to travel, the evidence shows that El-Khalidi thought he was not too sick to travel. As a result, the trial court delayed El-Khalidi's deposition until August 2016, accommodating El-Khalidi's requested postponement. We further note that El-Khalidi's request to require AADC to obtain his deposition by videoconference was a request that was made as an alternative to the request that the deposition be postponed.

On April 7, 2016, the trial court considered "issues surrounding the deposition of . . . El-Khalidi." The record before us in the appeal does not include a reporter's record from the April hearing. Subsequently, the trial court ordered El-Khalidi to "appear for deposition in Hardin County, Texas (or an alternative location mutually agreed upon by the parties) on or before August 1, 2016." Thus, because the trial

³ In a supplemental brief supporting El-Khalidi's request seeking to postpone his January 2016 deposition, El-Khalidi represented that he would "submit to deposition, unconditionally, the week of July 25th, 2016 under penalty of Voluntary Dismissal with Prejudice of All Claims pending in this action, If Plaintiff does not appear, unless of course, Plaintiff can show a VERY GOOD REASON (i.e. Cause) FOR HIS NONAPPEARANCE." Emails that El-Khalidi attached to this brief show that El-Khalidi was planning to travel to Savannah, Georgia in June 2016.

court agreed to El-Khalidi's proposal delaying his deposition until a date after June 30, 2016, the trial court granted El-Khalidi's request seeking an accommodation under the American with Disabilities Act by postponing the deposition to a date when El-Khalidi represented that he would be in the state and could be deposed.

On August 1, 2016, El-Khalidi did not appear for his deposition. Subsequently, AADC filed a motion in which it complained that El-Khalidi had not complied with the trial court's April 2016 order. In its motion, AADC noted that El-Khalidi had represented to the court that he would dismiss his claims should he fail to appear for the deposition, as postponed. With respect to notifying El-Khalidi about when the trial court would act on its motion, AADC filed a notice of submission that provides the motion to dismiss would be submitted to the trial court, without hearing, on September 5, 2016.

El-Khalidi responded to AADC's renewed request to dismiss his case by renewing his claim that he had various problems, his age, his health, and problems with his visa, that prevented him from returning to the United States to be deposed. El-Khalidi supported his response with the medical report of Dr. Ahmed Badra, a cardiologist who practices in Saudi Arabia. This report is dated August 11, 2016, and it states: "Hatem El[-]Khalidi is a 92 years old male patient with chronic atrial fibrillation complaining of persistent cough with colored expectorant, the patient had

history of recurrent CCU admissions.” The report identifies El-Khalidi’s current medications, and indicates that, in Dr. Badra’s opinion, “[t]he patient needs continuous monitoring and not advised to travel for long destinations.” The medical report does not reflect whether Dr. Badra was aware of the extent to which El-Khalidi had traveled outside Saudi Arabia. Additionally, El-Khalidi had represented to the trial court that he would be returning to the United States in June 2016 regardless of what he told Dr. Badra.

The trial court’s written findings implicitly reject El-Khalidi’s claims that he had been too ill to travel, as they note that El-Khalidi had traveled outside Saudi Arabia “in recent months for other purposes (such as to visit his sister in Jordan), indicating an ability to travel despite his advanced age.” Additionally, it is apparent that the trial court knew that El-Khalidi had represented to the court that he would be in the United States after June 30, 2016, and given that El-Khalidi had traveled outside Saudi Arabia, it was within the trial court’s discretion to view the medical reports with skepticism. Given the trial court’s dismissal of El-Khalidi’s case, we must imply that the trial court found the excuses that El-Khalidi offered in his motions as insufficient to justify why he had not appeared for his deposition as the trial court had required in two separate court orders. *See generally* Tex. R. Civ. P. 298.

With respect to El-Khalidi's current case, which concerns cause number 55018, the record from the trial court shows that the cause was on file twenty-eight months before the trial court ordered the cause dismissed. The record also shows that the court's attempts to move the case along had been frustrated by El-Khalidi's failure to comply with the court's orders. The trial court made reasonable efforts to accommodate El-Khalidi's requests for delay. Given the trial court's inherent right to control its docket, as well as the trial court's broad discretion in determining whether the evidence El-Khalidi offered to support his excuses for violating the trial court's orders amounted to good cause for the delays, we hold the trial court did not abuse its discretion by refusing to accommodate El-Khalidi's request that his deposition should be further delayed or by refusing to agree to El-Khalidi's request asking to require AADC to take his deposition by remote electronic means. *See* Tex. R. Civ. P. 199.1(b) (depositions by telephone or other remote electronic means). We overrule issue one.

Dismissal for Want of Prosecution

In issue three, El-Khalidi argues that the trial court abused its discretion by dismissing his claims for want of prosecution under Rule 165a, and that the trial court abused its discretion by dismissing his case under its inherent power to control its docket. According to El-Khalidi, he did not have notice or an opportunity to be

heard on the question of the dismissal of his case before the trial court dismissed his case. El-Khalidi contends that had he had the opportunity to be heard, he could have provided the trial court with a reasonable explanation about why delays had occurred in his prosecution of his claims. Nonetheless, the excuses that El-Khalidi points to in support of issue three are the same excuses that the trial court rejected when it dismissed El-Khalidi's case.

In his argument, El-Khalidi largely seeks to avoid the fact that the trial court order reflects several independent grounds on which it based its decision to dismiss El-Khalidi's case. And to avoid the fact that the trial court's order included findings that the dismissal was based on the court's inherent authority to control its docket, he argues that Rule 165a(2) provides the exclusive rule that governs the dismissal of cases for want of prosecution. *See generally* Tex. R. Civ. P. 165a(2) ("Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket."). We disagree that Rule 165(a)(2) is an exclusive rule controlling a trial court's authority over how it chooses to handle a dismissal of a case from its docket. In addition to power given trial courts to dismiss cases under Rule 165a, trial courts may also dismiss cases based on the court's inherent authority to control their dockets. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). In *Villarreal*, the Texas Supreme Court

explained that “[T]he common law vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence.” *Id.*

Although courts possess the inherent authority to dismiss cases for lack of prosecution, due process requires that a party be given notice and an opportunity to be heard before a case is dismissed. *Id.* El-Khalidi contends that he was not notified that the trial court was considering AADC’s motion to dismiss. However, the record shows otherwise. AADC filed its motion to dismiss on February 4, 2016. The motion details facts showing that El-Khalidi had not appeared at two separate court-ordered depositions. The motion notified El-Khalidi that AADC was seeking to dismiss El Khalidi’s lawsuit both under Rule 165(a)(2) and pursuant to the Court’s inherent power to control its docket, which it possesses at common law. On August 4, 2016, AADC notified El-Khalidi that the trial court would consider its motion without a hearing, and the notice states that the trial court would act on the motion, without hearing, on September 5. While the court may have acted prematurely by ruling on the AADC’s motion on September 1, the record shows that El-Khalidi did have notice that the court would be considering AADC’s motion before the motion was granted.

Under Texas law, a “dismissal for want of prosecution may be obtained by motion of the trial court or on motion of any party to the suit.” *Dueitt v. Arrowhead Lakes Prop. Owners, Inc.*, 180 S.W.3d 733, 738 (Tex. App.—Waco 2005, pet. denied). Ordinarily, a trial court should grant a party’s motion to dismiss a suit for want of prosecution if the record in the case shows that there are unmitigated and unexplained delays extending beyond the periods that are provided in the Rules of Judicial Administration for the disposition of cases. *See In re Conner*, 458 S.W.3d 532, 534-35 (Tex. 2015); *see also* Tex. R. Jud. Admin. 6.1(b)(1) (requiring civil cases that are to be tried to a jury to be brought to trial or final disposition within eighteen months of the date the defendant appears).⁴

El-Khalidi also argues that he was entitled to an oral hearing on AADC’s motion under Rule 165a. However, the record does not show that El-Khalidi ever asked for an oral hearing on the motion to dismiss. Instead, it shows that El-Khalidi responded to AADC’s motion by filing exhibits and requesting the Court to “take notice of the filing of the attached exhibits for consideration in connection with . . . Defendant’s Second . . . Motion to Dismiss[.]” AADC renewed its motion to dismiss

⁴ The record shows that El-Khalidi requested a jury and paid a jury fee upon the filing of his original petition. The record also shows that AADC first appeared in the suit on May 23, 2014. Consequently, El-Khalidi’s suit was dismissed well past the eighteen-month deadline that is in the Rules of Judicial Administration. Tex. R. Jud. Admin. 6.1(b)(1).

El-Khalidi's suit on August 1, 2016, and attached supplemental exhibits to its request. The record also does not show that before the trial court ruled on the motion to dismiss, that El-Khalidi objected to AADC's request that its motion be decided without an oral hearing.

The record also shows that the trial court heard and considered El-Khalidi's excuses for failing to prosecute his case to conclusion within a reasonable period of time. On August 22, 2016, El-Khalidi filed a supplemental brief. In it, he presented various arguments explaining why he claimed his case should not be dismissed. For example, he suggested that the delays that occurred were due to limitations that his health placed on his ability to travel and restrictions on his travel imposed on him by the government of Saudi Arabia.

El-Khalidi had another opportunity to be heard on his arguments after the trial court acted on AADC's motion. After the case was dismissed, El-Khalidi filed a motion to reconsider. In his motion to reconsider, El-Khalidi did not complain that the court had ruled on AADC's motion without conducting an oral hearing. Because the record shows that El-Khalidi never asked for a hearing, we hold that he failed to preserve his complaint that the trial court did not conduct an oral hearing on AADC's motion for our review on appeal. *See* Tex. R. App. P. 33.1.

The record also shows that the trial court considered and rejected El-Khalid's excuses for the delays that occurred in his prosecution of his claims. The trial court's order expressly reflects that the court considered the "arguments of the parties[,]" and the court's express and implied findings reflect that it considered and rejected El-Khalidi's claim that he was too ill to travel to Texas for his deposition.

Next, we turn to El-Khalidi's argument that he established good cause sufficient to justify the delays which resulted in the trial court's dismissal of his case. When a court exercises its inherent power to dismiss a case for lack of prosecution, courts are allowed to "look at the entire history of the case, including the length of time the case has been on file, the extent of activity or inactivity, whether a trial setting has been requested, and the reasons for not prosecuting the case." *Cotten v. Briley*, 517 S.W.3d 177, 183 (Tex. App.—Texarkana 2017, no pet.). On appeal, "[w]e review a dismissal for want of prosecution under a clear abuse of discretion standard; the central issue is whether the plaintiffs exercised reasonable diligence." *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997).

El-Khalidi argues the trial court's action was unjustified given the length of time his case had been on file and the efforts that he made to move the case along before the case was dismissed. He points to the discovery that he conducted and his filing of a motion for summary judgment as evidence showing that he was diligently

prosecuting his claims. He argues that the trial court should not have considered the facts surrounding the dismissal of cause number 52483 in deciding whether to dismiss cause number 55018. However, in our opinion, the trial court was entitled to consider that it dismissed a prior case involving the same claims when it dismissed cause number 55018. *See Cotten*, 517 S.W.3d at 183. Additionally, even though El-Khalidi filed a motion for summary judgment, his filing of that motion does not conclusively demonstrate that he was diligently prosecuting his claims given evidence showing that he frustrated AADC's efforts to respond to his motion by refusing to appear for two separate court-ordered depositions.

Since El-Khalidi's motion for summary judgment relied largely on his affidavit to support his claim that AADC breached an agreement to pay him benefits upon his agreement to retire, securing El-Khalidi's deposition was clearly a reasonable, if not necessary stage in the process needed to resolve the merits of the claims that El-Khalidi was making against AADC in the suit. Consequently, it is not surprising that the trial court refused to hear the motion for summary judgment before AADC had the opportunity to depose El-Khalidi to explore the basis of his claims.⁵ Rule 191.1 of the Texas Rules of Civil Procedure allows trial courts to

⁵ The trial court issued a written order prohibiting El-Khalidi from obtaining a hearing on his motion for summary judgment until 30 days after El-Khalidi was deposed.

control the order of discovery. *See generally* Tex. R. Civ. P. 191.1 (allowing a trial court to modify the discovery procedures in a case for good cause). El-Khalidi does not argue that the trial court did not have the power to control the order in which discovery occurred, and given the trial court's reluctance to proceed with El-Khalidi's motion for summary judgment until he was deposed, the trial court could reasonably conclude El-Khalidi willfully refused to be deposed in an effort to delay the case. In our opinion, the trial court could reasonably find on this record that El-Khalidi's willful failure to comply with the court's orders was the cause of the delays that prevented the trial court from bringing cause number 55018 to conclusion in a reasonable period of time.

The trial court was not required to conclude that the evidence showing that El-Khalidi was in poor health proved conclusively that El-Khalidi could not travel to Texas for his deposition. The first medical report El-Khalidi filed to support his claim that he could not travel is dated October 3, 2015. It states that "Mr. Hatem El Khalidi is suffering from coronary heart disease and he is currently undergoing treatment at Al-Khalidi Hospital and Medical Center since Oct 2014 till this present day. Due to his medical condition we strongly advise that Mr. Hatem El Khalidi not to travel." The letter is conclusory because it fails to explain why El-Khalidi's health would be adversely affected by traveling to Texas to attend to a lawsuit that he had

filed in a Texas court. The second medical report that El-Khalidi relies on is dated August 11, 2016. It states that “Hatem ElKhalidi (sic) is a 92 years old male patient with chronic atrial fibrillation complaining of persistent cough with colored expectorant, the patient had history of recurrent CCU admissions” and “[t]he patient needs continuous monitoring and not advised to travel for long destinations.” While these reports somewhat explain delays in September 2015 and July 2016, they do not squarely address whether El-Khalidi’s health was so poor that he could not have traveled to Texas at any time in the approximately ten months between November 2015 and August 2016, the period in which AADC had attempted to secure his testimony so that it could respond to El-Khalidi’s pending motion for summary judgment.

The record also shows that in face of medical advice that he should not travel, El-Khalidi did travel for family reasons outside Saudi Arabia in December 2015. In that month, the evidence before the trial court reflects that he traveled to Jordan. Additionally, the trial court could reasonably question whether El-Khalidi’s heart condition prevented him from traveling, as El-Khalidi filed an affidavit to support his motion to postpone his deposition indicating that he was planning to be in Texas after June 30, 2016. Given that El-Khalidi did travel with his diagnosed condition of congestive heart failure, and his representation that he would be in Texas after June

30, the trial court could reasonably conclude that the medical reports did not constitute conclusive evidence to prove that El-Khalidi could not travel. The medical reports in the record also fail to provide significant detail about the extent of El-Khalidi's heart condition, and they fail to explain why El-Khalidi's heart condition was so significant that he could not travel at any time between November 2015 and August 2016 to be deposed.

The trial court could also reasonably reject El-Khalidi's claims that his bank accounts were frozen and that problems with his visa prevented him from traveling outside Saudi Arabia. Other than El-Khalidi's affidavit, the record contains no other evidence supporting his claims that his bank account was frozen or that he had problems with his visa.

We conclude the record before the trial court allowed that court to conclude that El-Khalidi failed to justify all of the periods of delay that occurred in cause number 55018 and to conclude that the delays were attributable to El-Khalidi's willful conduct. We hold that the record does not support El-Khalidi's claim that the trial court abused its discretion by dismissing his suit by using its inherent authority to control its docket.⁶ We overrule issue three.

⁶ El-Khalidi argues, "On its face [the order] appears to *not* be an order dismissing for want of prosecution because it dismisses the claims 'with prejudice,' which is erroneous when dismissing for want of prosecution." However, the trial

Failure to Test Lesser Sanctions

In issue two, El-Khalidi argues that the trial court abused its discretion by imposing a “death penalty” sanction of dismissal before testing a lesser sanction. According to El-Khalidi, only two discovery orders that were violated were issued by the trial court, one on November 2, 2015, and the second on April 13, 2016. El-Khalidi suggests that because the orders did not include any sanction for his failure to appear, the trial court was required to test a lesser sanction in an effort to secure his deposition testimony in the case before it could dismiss his case.

However, we have already explained that the trial court had the right to dismiss the case by using its inherent authority to control its docket, and we need not decide whether the dismissal was also justified as a death penalty sanction. *See WMC Mortg. Corp. v. Starkey*, 200 S.W.3d 749, 753 (Tex. App.—Dallas 2006, pet. denied) (concluding that because the trial court properly dismissed the case under its inherent power, it is unnecessary to address whether the suit was properly dismissed under

court’s findings of fact and conclusions of law explicitly state that the trial court dismissed the case for want of prosecution. El-Khalidi does not argue that the order dismissing the case for want of prosecution should be modified to dismiss the suit without prejudice. *See* Tex. R. App. P. 43.2(b). In his brief, El-Khalidi informs the Court that he “refiled his suit against AADC on the eve of the expiration of the four year statute of limitations governing his contract claims.” Thus, it appears from El-Khalidi’s statement that his claims are stale even had the trial court’s order dismissed his claims without prejudice.

Rule 165a)) We conclude that we need not resolve issue two to dispose of El-Khalidi's case on appeal. Tex. R. App. P. 47.1 (allowing an appellate court's opinion to address only those issues that are necessary to a final disposition of the appeal).

Challenges to Findings and Conclusions

In issue four, El-Khalidi challenges some of the trial court's findings of fact and the validity of one of the trial court's conclusions of law. Specifically, El-Khalidi challenges the trial court's first seven findings, which refer to his earlier-filed case, cause number 52483. According to El-Khalidi, the trial court should not have considered the circumstances leading to the dismissal of cause number 52483 because that case was concluded when it was dismissed. Additionally, El-Khalidi argues that findings fourteen and fifteen, findings that suggest he could travel, are unsupported by the evidence that was before the court. Finding fourteen states: "El Khalidi has traveled outside of Saudi Arabia in recent months for other purposes (such as to visit his sister in Jordan), indicating an ability to travel despite his advanced age." Finding fifteen states: "It would be ineffective and highly prejudicial to require Defendant to conduct El Khalidi's deposition by remote, electronic means in a foreign country." El-Khalidi also argues that the trial court's conclusion that "No lesser sanction [except dismissal] would promote El Khalidi's compliance with

the Court's discovery order" reveals that the court imposed a death penalty sanction by dismissing his case.

We note that the order of dismissal the trial court signed states that the court found AADC's motion to have merit and that it was granted. The order then recites that "Plaintiff's claims and causes of action are dismissed in their entirety with prejudice." The trial court's conclusions also note that the court had the inherent authority to dismiss because "El Khalidi has failed to prosecute his case with diligence by delaying discovery for years without reasonable cause." Since AADC's motion included several grounds for dismissal, including a dismissal based on the trial court's inherent right under the common law to control its docket, we disagree with El-Khalidi's claim that sanctions were the only reason the trial court dismissed his case.

Having concluded that the trial court's order should be affirmed because the trial court exercised reasonable control over its docket, we need not reach El-Khalidi's arguments challenging findings one through seven and conclusion number three. *See* Tex. R. App. P. 47.1.

El-Khalidi also argues that findings fourteen and fifteen, which reflect the trial court did not accept El-Khalidi's claim that he could not travel, are not supported by the record. In resolving issue three, we explained why these findings are supported

by the evidence presented to the trial court in the parties' motions. The exhibits and pleading El-Khalidi submitted to the trial court showed that El-Khalidi had traveled between Amman and Jeddah during time periods when he was aware that he had been diagnosed with congestive heart failure, and this evidence allowed the trial court to conclude that El-Khalidi's health was not so poor that he could not travel to attend to matters that he considered to be important.

El-Khalidi also argues the trial court should not have considered any of the evidence in the record that relates to cause number 52483 because it was not properly authenticated. In cause number 55018, AADC's counsel supported his pleadings with various exhibits that had been filed in the earlier case, cause number 52483. These exhibits were accompanied by an affidavit from AADC's attorney that states the documents were true and correct copies of documents filed in cause number 52483. The documents referenced in the attorney's affidavit consist of a Rule 11 agreement, notices of deposition, orders, pleadings, and transcripts from hearings in cause number 52483. Because the evidence from cause number 52483 was properly before the trial court in cause number 55018, El-Khalid's complaint the trial court abused its discretion by considering the documents has no merit.

We conclude that the arguments El-Khalidi presents in his fourth issue do not justify reversing the trial court's order of dismissal. We overrule issue four.

Ruling Prior to Submission Date

In issue five, El-Khalidi contends the trial court abused its discretion by ruling on AADC's motion to dismiss before the date AADC notified him that the trial court would consider AADC's motion. El-Khalidi also argues that by ruling on AADC's motion four days before the date the case was set for submission, the trial court deprived him of his opportunity to fully and finally respond to AADC's motion. In response, AADC concedes that the trial court ruled prematurely on its motion, but it argues the error was harmless since El-Khalidi filed a motion to reconsider and re-urged his claim that he could not travel because he was in poor health. AADC notes that these same arguments were all considered and rejected by the trial court when it ruled on the merits of its motion to dismiss.

In this case, El-Khalidi filed a motion to reconsider, and he pointed out that by ruling on AADC's motion on September 1, 2016, the trial court decided the motion to dismiss four days before the date the motion had been scheduled to be decided. El-Khalidi's motion to reconsider asserts that he was harmed by the trial court's decision to decide the case before September 5 because "[t]he only evidence presented in the record are unauthenticated hearsay documents, to which Plaintiff objects (and which such objections he was precluded from asserting by the Court's premature consideration of the Motion) which were never offered into evidence."

However, we have already explained why the exhibits the trial court considered in deciding the motion were properly before the court. The record on appeal shows that AADC filed various exhibits along with the motion to dismiss on February 4, 2016. AADC's exhibits included an affidavit from its counsel which states that the exhibits attached to AADC's motion are true and correct copies of the originals. Over a period of six months after AADC moved to dismiss El-Khalidi's suit, El-Khalidi filed five responses. He never objected to the exhibits on the basis that he now claims the exhibits were objectionable. Instead, El-Khalidi's responses asserted that his failure to comply with the trial court's orders occurred because he lives in Saudi Arabia and could not travel.

On August 1, 2016, AADC attached additional exhibits to a supplemental brief. These exhibits were not accompanied by an affidavit from counsel, but the exhibits consist of orders signed in this lawsuit and communications between the parties' attorneys or between El-Khalidi's attorney and the trial court. *See* Tex. R. Evid. 801(e)(2)(D) (a statement offered against an opposing party that was made by the party's agent on a matter within the scope of that relationship while it existed is not hearsay). Additionally, El-Khalidi did not object to these exhibits in the response he filed on August 22, 2016.

The various exhibits AADC relied on in its motion to dismiss were used to show that El-Khalidi had failed to fully respond to AADC's written discovery, that El-Khalidi's previous lawyers had withdrawn from the case, and that El-Khalidi had entered into an arguably enforceable Rule 11 agreement to dismiss his claims even before the trial court ruled on AADC's motion to dismiss. Significantly, the trial court's written findings do not reflect that the court dismissed El-Khalidi's case based on any of the matters that relate to any dispute between the parties regarding AADC's written discovery. The court's findings also do not indicate that it dismissed El-Khalidi's case due to problems that occurred when various attorneys representing El-Khalidi sought to withdraw. The trial court's findings also do not reflect that the dismissal relied on any alleged agreement to dismiss that AADC's attorneys reached with the attorneys representing El-Khalidi.

Our decision upholding the trial court's order is based on the findings and conclusions supporting the dismissal under the trial court's inherent power to control its docket. The exhibits that were properly before the court and properly authenticated support the trial court's decision dismissing the case for want of prosecution. Assuming the trial court considered the exhibits that are the subject of the complaints El-Khalidi raises in issue five, he has not shown that the trial court would not have reached the same conclusion had it not considered these exhibits.

See Tex. R. App. P. 44.1(a)(1). Because we cannot conclude that the court's error in ruling prematurely on AADC's motion probably caused the trial court to render an improper judgment, we overrule issue five.

Having overruled El-Khalidi's issues, we affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on September 11, 2017
Opinion Delivered November 9, 2017

Before McKeithen, C.J., Kreger and Horton, JJ.