



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-16-00231-CV

TDINDUSTRIES, INC., APPELLANT

V.

**UNITED NATIONAL INSURANCE COMPANY, A/S/O
1500 BROADWAY PARTNERS, LTD., APPELLEE**

On Appeal from the 99th District Court
Lubbock County, Texas
Trial Court No. 2016-519,559, Honorable William C. Sowder, Presiding

May 23, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

United National Insurance Company, as subrogee of its insured, sued TDIndustries, Inc. (TDI), a licensed engineering firm, for alleged negligence in the design and installation of a storm-water drainage system in United's insured's building. United did not file a certificate of merit with its original petition and TDI moved to dismiss the suit with prejudice under Civil Practice and Remedies Code section 150.002(e) for

that reason.¹ At the hearing on United’s motion, United did not deny its failure to file a certificate of merit or that the suit should be dismissed. It argued instead for dismissal without prejudice. Counsel for United told the trial court that he “looked at it as a roofing case, but upon further reflection looking at TD Industries, they’re clearly an engineering firm as well.” United’s counsel also told the court at the conclusion of the hearing that he had given counsel for TDI a certificate of merit “that [United] just obtained.” The trial court dismissed the case without prejudice and TDI appeals that determination. We will affirm the trial court’s order of dismissal without prejudice.

Analysis

Through three issues, TDI argues the trial court abused its discretion by not dismissing United’s case with prejudice. “A court abuses its discretion if its decision is arbitrary, unreasonable, or without reference to guiding principles.” *In re GE Co.*, 271 S.W.3d 681, 685 (Tex. 2008) (orig. proceeding).

In every suit or arbitration for damages arising out of the provision of professional services by licensed or registered professionals, including architects and engineers, the plaintiff must file the affidavit of a third-party professional, called a “certificate of merit,” with its complaint. TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a),(b).² By subsection 150.002(e), failure to file the affidavit “in accordance with this section shall result in

¹ TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e) (West 2011).

² Section 150.002 is entitled “Certificate of Merit” but thereafter refers to the certificate as an “affidavit.”

dismissal of the complaint against the defendant. This dismissal may be with prejudice.” TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e).

The contentions TDI raises by its three issues largely parallel the issues just recently addressed by the Supreme Court of Texas. See *Pedernal Energy, LLC. v. Bruington Eng’g., Ltd.*, No. 15-0123, 2017 Tex. LEXIS 408, at *13 (Tex. Apr. 28, 2017). We find the court’s holdings in *Pedernal Energy* resolve all TDI’s contentions, and we will address TDI’s three issues together.

TDI’s primary argument is that a trial court “lacks any real discretion” when a plaintiff fails to file a certificate of merit with its original petition, and must dismiss the suit with prejudice.³ *Pedernal Energy* holds the trial court’s decision whether to dismiss with or without prejudice in that circumstance is discretionary, subject to the prohibition on arbitrary or unreasonable decisions without reference to guiding rules or principles. 2017 Tex. LEXIS 408, at *16 (citing *CTL/Thompson Texas, LLC v. Starwood Homeowner’s Ass’n*, 390 S.W.3d 299, 301 (Tex. 2013) (per curiam)).

TDI also argues against the application of a “good cause” standard, by which a court might dismiss the plaintiff’s claim without prejudice if its failure to file the certificate

³ TDI relies on the court of appeals opinion in *Pedernal Energy*, which had so held. See *Bruington Eng’g, Ltd. v. Pedernal Energy, Ltd.*, 456 S.W.3d 181, 189 (Tex. App.—San Antonio 2014) (“A failure to file a section 150.002(a) affidavit contemporaneously with the first-filed petition mandates dismissal with prejudice pursuant to section 150.002(e)”), *rev’d*, *Pedernal Energy, LLC. v. Bruington Eng’g, Ltd.*, No. 15-0123, 2017 Tex. LEXIS 408 (Tex. Apr. 28, 2017).

of merit was not intentional or the result of conscious indifference.⁴ The court in *Pedernal Energy* rejected such a standard. 2017 Tex. LEXIS 408, at *13. Noting the absence of an expressly-stated legislative rule or principle to guide a court's decision, the court held that the decision requires consideration of various factors, giving attention to the facts and circumstances of the particular case. *Id.* at *16.⁵ It reiterated its explanation in *CTL/Thompson* that dismissal under section 150.002(e) "is a sanction . . . to deter meritless claims and bring them quickly to an end." *Id.* at *17 (quoting *CTL/Thompson*, 390 S.W.3d at 301).

Applying the abuse-of-discretion to the record before us, we consider whether the circumstances presented to the trial court at the time of its dismissal demonstrated that United's claims are meritless, or otherwise required dismissal with prejudice. See *Pedernal Energy*, 2017 Tex. LEXIS 408, at *18 (court considered "record as of the time of the dismissal"). United's petition alleged TDI negligently installed, designed, or serviced a storm-water drainage system and as a proximate result of the negligence its insured sustained damage to its business property in the amount of \$317,729.61. On its face, the pleading alleged a cause of action for negligence brought by an insurance company as its insured's subrogee. Standing alone, United's failure to file a certificate of merit with its original petition does not show its allegations have no merit and require

⁴ TDI also proposes another standard requiring dismissal with prejudice. Because the Supreme Court of Texas now has prescribed the standard, we need not discuss TDI's proposal.

⁵ Among other cases, the court cited, 2017 Tex. LEXIS 408, at *16, its opinion in *Iloff v. Iloff* and its reference to an exercise of discretion that is not unlimited but is "a sound and legal discretion within the limits created by the circumstances of a particular case." 339 S.W.3d 74, 81 (Tex. 2011) (citation omitted).

the sanction of dismissal with prejudice. See *Pederal Energy*, 2017 Tex. LEXIS 408, at *18 (plaintiff's "failure to file an expert affidavit with its original petition was not, by itself, evidence that the allegations in its petition lacked merit or mandated the sanction of dismissal with prejudice"). Nor has TDI demonstrated the trial court's dismissal without prejudice otherwise constituted an abuse of discretion. See *id.* (finding record as of time of dismissal did not otherwise lead to conclusion court violated guiding rules or principles such that dismissal without prejudice was abuse of discretion). The expert's affidavit that United produced at the hearing is not in the appellate record and it is unclear the trial court reviewed it. Nonetheless, United's ability to produce an expert's affidavit at the hearing is a factor the trial court could have considered in its decision whether to dismiss the case with prejudice. In sum, the record before us does not demonstrate the trial court abused its discretion by dismissing United's case without prejudice. We overrule TDI's issues.

Conclusion

Having overruled TDI's issues, we affirm the judgment of the trial court.

James T. Campbell
Justice