IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BUSINESS SERVICES OF AMERICA II, INC.,	)	No. 85654-1
Respondent,	)	En Banc
v.	)	
WAFERTECH LLC,	)	
Petitioner.	)	
_____	)	Filed April 19, 2012

CHAMBERS, J. — Business Services of America II, Inc. (BSA) sued WaferTech LLC. After the trial court dismissed BSA's claims, BSA appealed. In March 2004, the Court of Appeals affirmed dismissal of all but one claim, which it remanded for trial. After remand, the case lay mostly dormant until June 2009, when BSA noted the case for trial. WaferTech then moved for dismissal. The trial court granted the motion to dismiss, and BSA appealed. BSA argued that the trial court had no discretion to dismiss the case because CR 41(b)(1) states that if a case is noted for trial before a dismissal hearing, it "shall not" be dismissed. The Court of Appeals agreed with BSA and reversed. WaferTech sought review. We affirm the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

Facts

BSA and WaferTech were opposing parties in a lawsuit that began in 1998

following a construction contract dispute. BSA was the assignee of claims by a subcontractor who had been terminated from the contract. At trial all of BSA's claims against WaferTech were dismissed, and $856,760.48 in attorney fees were entered against it. The Court of Appeals affirmed dismissal of most claims but reversed with respect to a lien foreclosure claim, which it remanded for trial in 2004. *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC,* noted at 120 Wn. App. 1042, 2004 WL 444724.

In April 2005, WaferTech filed a satisfaction of judgment with respect to the attorney fees it had been awarded. Then, in July 2006, the trial court issued a "Stipulation and Order for Return of Exhibits." Neither party responded to the order, and the trial court destroyed the exhibits. Next, in May 2008, BSA's counsel filed a notice of intent to withdraw as BSA's counsel in the case. The notice stated, not entirely accurately, "No trial date is set. This case has been dismissed and judgment entered thereon against Plaintiffs." Clerk's Papers (CP) at 43.

After remand, BSA went through a receivership and changed ownership several times. Finally, in 2009, the current owner of BSA's claim decided to try the lien claim. BSA noted the case for trial on June 15, 2009. Two months later, WaferTech moved for dismissal. BSA opposed the motion, arguing that CR 41(b)(1) prohibited dismissal because it states that a case shall not be dismissed if it is noted for trial before the hearing on the motion to dismiss. The trial court granted dismissal, finding that it was not constrained by CR 41(b)(1). BSA appealed, and the Court of Appeals reversed the trial court, holding that CR 41(b)(1) limited the

court's discretion to dismiss the case. *Bus. Servs. of Am. II, Inc. v. Wafertech, LLC,* 159 Wn. App. 591, 245 P.3d 257 (2011).

Analysis

a. Standard of Review

Interpretation of a court rule is a question of law we review de novo. *State v. Schwab*, 163 Wn.2d 664, 671, 185 P.3d 1151 (2008) (citing *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 845, 43 P.3d 43 (2002)). Court rules are interpreted in the same manner as statutes and are construed in accord with their purpose. *State v. Wittenbarger*, 124 Wn.2d 467, 484, 880 P.2d 517 (1994). The starting point is thus the rule's plain language and ordinary meaning. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)).

b. Dismissal under CR 41(b)(1)

The dismissal of an action for want of prosecution is in the discretion of the court in the absence of a guiding statute or rule of court. *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 167, 750 P.2d 1251 (1988) (citing *State ex rel. Dawson v. Superior Court*, 16 Wn.2d 300, 304, 133 P.2d 285 (1943)). However, dismissal is mandatory if CR 41(b)(1) applies. *Id.* at 167, 168-69. The rule states in full:

> Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for

> hearing only after 10 days' notice to the adverse party. *If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.*

CR 41(b)(1) (emphasis added). There is only one exception to the mandatory application of the italicized portion of the rule: "Where dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action for want of prosecution remains." *Thorp Meats*, 110 Wn.2d at 169 (citing *Gott v. Woody*, 11 Wn. App. 504, 508, 524 P.2d 452 (1974)). Such dilatoriness "refers to unacceptable litigation practices other than mere inaction." *Wallace v. Evans*, 131 Wn.2d 572, 577, 934 P.2d 662 (1997).

The sole question is whether CR 41(b)(1) applies in this case to limit the trial court's inherent discretion to dismiss. BSA's argument is straightforward. It claims that it noted the case before the hearing on the motion to dismiss, and therefore the case cannot be dismissed. *See* CR 41(b)(1). WaferTech makes two arguments in response. First, it asserts that this case falls under the "unacceptable litigation practices other than mere inaction" exception to the rule in CR 41(b)(1). *Wallace*, 131 Wn.2d at 577. Specifically, it relies on the lack of any response from BSA to the trial court's stipulation and order for return of exhibits and the notice of withdrawal from BSA's counsel, sent to both the trial court and WaferTech, stating that the case had been dismissed. WaferTech claims that these two instances amount to conduct other than mere inaction, and thus the court was within its discretion to dismiss the action. *See id.*

Second, WaferTech argues that CR 41(b)(1) does not apply on remand. It

claims that CR 41(b)(1), by its terms, applies when a case is not noted "within 1 year after any issue of law or fact has been joined" and asserts this requirement is rendered inoperative when a case has been noted, tried, appealed, and remanded in part. It also points out that no case has ever applied CR 41(b)(1) to limit, on remand from appeal, a court's inherent authority to dismiss a case.

The trial court in making its decision to dismiss the case primarily relied upon WaferTech's second argument. The following is the language at issue in this case: "If the case is noted for trial before the hearing on the motion, the action shall not be dismissed." CR 41(b)(1). This court addressed the purpose behind that language in *Thorp Meats*:

> This sentence was promulgated to encourage cases to be heard on the merits, the courts recognizing that involuntary dismissal for want of prosecution "is punitive or administrative in nature and every reasonable opportunity should be afforded to permit the parties to reach the merits of the controversy." Thus, the notice of trial setting interposed after the motion to dismiss and before the hearing on the motion is the exception to what would otherwise be a mandatory dismissal under CR 41(b)(1).

Thorp Meats, 110 Wn.2d at 168 (footnote omitted) (quoting *Yellam v. Woerner*, 77 Wn.2d 604, 608, 464 P.2d 947 (1970)). Relying on the statement that the purpose of the rule is to encourage cases to be heard on the merits, WaferTech asserts that when issues of fact and law are joined in a case, and the case is noted for trial, tried on the merits, appealed, and remanded for further trial, the concerns underlying the promulgation of CR 41(b)(1) are no longer relevant. According to WaferTech, under these circumstances the rule's purpose has been served because the merits of

the controversy have already been reached at least once. WaferTech also contends that CR 41(b)(1) by its terms applies only when a case is *not* noted within a year after joinder of any issues and so cannot apply to a case that was *already* noted and tried, appealed, and then remanded. *See* CR 41(b)(1). Thus, WaferTech argues, a trial court regains its discretion to dismiss at the point of remand.

As the Court of Appeals pointed out, there is no authority whatsoever for the claim that the rule does not apply after remand. *Bus. Servs.*, 159 Wn. App. at 598. Moreover, we have held under the predecessor rule to CR 41(b)(1) that an issue of law or fact is joined when, among other circumstances, a case is remanded from an appeal. *State ex rel. Wash. Water Power Co. v. Superior Court*, 41 Wn.2d 484, 490, 250 P.2d 536 (1952) (citing Rule 3, former Rules of Pleading, Practice and Procedure, 34A Wn.2d 69 (1938)). There is no reason to treat CR 41(b)(1) differently, and we hold CR 41(b)(1) applies to cases on remand.

WaferTech's other argument relies on the solitary exception to the ordinarily strict application of CR 41(b)(1). In *Wallace*, 131 Wn.2d at 577, as mentioned, this court found that a trial court has discretion to ignore the prohibition of dismissal under CR 41(b)(1) where delay was caused by "unacceptable litigation practices other than mere inaction." WaferTech argues BSA went beyond "mere inaction" by (1) failing to respond to the court's order resulting in destruction of exhibits and (2) stating that the case had been dismissed in its notice of withdrawal of counsel. As a result of these actions, WaferTech maintains that the trial court had discretion to dismiss the case despite CR 41(b)(1).

In both *Wallace* and *Thorp Meats*, this court expressly referred readers to the Court of Appeals case *Gott* for examples of the sort of behavior not covered by CR 41(b)(1). *Wallace*, 131 Wn.2d at 577-78 (citing *Gott*, 11 Wn. App. at 508); *Thorp Meats*, 110 Wn.2d at 169 n.14 (citing *Gott*, 11 Wn. App. at 508). Specifically, both cases cite to the following passage from *Gott*:

> We do not believe, as defendants contend, that this interpretation will seriously invade the discretionary power of the Superior Court to manage its affairs, so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court's rulings and observance of hearing and trial settings which are made. In these areas the trial court's inherent discretion is not questioned by our interpretation. *See Wagner v. McDonald*, 10 Wn. App. 213, 516 P.2d 1051 (1973) (dismissal for want of prosecution where plaintiff failed to appear at trial). *See also Link v. Wabash R.R.*, 370 U.S 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962) ([Fed. R. Civ. P.] 41) (dismissal where failure to appear at pretrial conference was combined with general dilatoriness).

Gott, 11 Wn. App. at 508. Other cases, although not expressly addressing want of prosecution, have allowed discretionary dismissal for failures to appear, filing late briefs, and similarly egregious sorts of dilatory behavior. *E.g., Apostolis v. City of Seattle*, 101 Wn. App. 300, 305, 3 P.3d 198 (2000).[1]

The behavior engaged in by BSA here does not rise to the level of "unacceptable litigation practices other than mere inaction." *Wallace*, 131 Wn.2d at 577. A lack of response to the court's recall of exhibits is not equivalent to a

[1] BSA also argues that WaferTech's claim is more appropriately viewed as an estoppel claim than a failure to prosecute claim and spends some time arguing why an estoppel claim would fail here. It is not clear why BSA is raising an argument for WaferTech, but since WaferTech does not raise it, the court will not address it.

failure to appear at a court proceeding or noncompliance with a court order or ruling. No response was required to the court's stipulation and order.[2] The withdrawal of counsel accompanied by a statement that the case had been dismissed, while certainly not commendable, is likewise not an unacceptable litigation practice that is a basis for an exception to CR 41(b)(1). The withdrawal notice came about four years after the case was remanded for trial, and there is no evidence that any party took any action or relied in any way on the statement in the notice that the case was "dismissed." CP at 43.

While we do not commend BSA's failure to promptly move its case forward, neither should WaferTech be commended. At all times, WaferTech knew that the Court of Appeals had remanded the lien claim for trial. *See* Report of Proceedings (Aug. 26, 2009) at 3-5. CR 41(b)(1) is designed to provide an option for parties like WaferTech if they wish for early resolution. Certainly no one would expect BSA to move to dismiss its own claim. One year after remand, WaferTech could have moved at any time to dismiss BSA's claim for want of prosecution. *See* CR 41(b)(1). If WaferTech was concerned that delay would prejudice its ability to present its case, a motion under CR41(b)(1) was available to WaferTech to bring the case to a conclusion.[3] WaferTech failed to move under CR 41(b)(1) for four

[2] It is not clear from the record whether either party retains copies of the exhibits. The record does establish that the trial court possesses copies of all files on microfiche.

[3] Surprisingly, the dissent claims the majority says something it does not. To wit: that WaferTech had an obligation to "forward the prosecution of the case." Dissent at 7. We do not assert or even suggest that a defendant has any such obligation. We do suggest that if a defendant wants a case dismissed for want of prosecution, moving for dismissal before the opponent notes its case for trial is the best way for the defendant to accomplish its goal.

years and finally made its motion only after BSA noted the case for trial. Further, while WaferTech complains that BSA did not respond to the trial court's "Stipulation and Order for Return of Exhibits," which it claims resulted in the destruction of trial court exhibits, WaferTech also failed to respond to the notice regarding exhibits.[4] If WaferTech wanted to save the trial court exhibits, it could easily have done so. WaferTech seems to make much of BSA's counsel's notice of intent to withdraw, in which the withdrawing lawyer erroneously states, "[T]his case has been dismissed and judgment entered thereon against Plaintiffs." CP at 43. But the notice of intent was not an order dismissing a claim. The "Notice of Intent to Withdraw" in fact presented WaferTech with a perfect opportunity to seek an order of dismissal of all claims, but it failed to do so.

Trial courts, of course, have inherent authority to maintain their calendars and to control their courtrooms. The facts of this case do not implicate that authority.

Conclusion

We hold that because this case was noted for trial before the hearing on the motion to dismiss, under the plain terms of CR 41(b)(1), the trial judge lacked discretion to dismiss the case. Under the facts before us, BSA did not engage in the sort of unacceptable litigation practices that would allow an exception to CR 41(b)(1). The Court of Appeals is affirmed.

[4] No party claims that copies of the exhibits do not exist in some form or that any exhibit was permanently lost.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

	Justice James M. Johnson
	Justice Debra L. Stephens
	Gerry L. Alexander, Justice Pro Tem.
Justice Susan Owens	Dennis J. Sweeney, Justice Pro Tem.
Justice Mary E. Fairhurst	