

RENDERED: JANUARY 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000051-MR

WORLDWIDE ASSET PURCHASING, L.L.C.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 06-CI-01067

GLENN SIMPSON

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND VANMETER, JUDGES.

CAPERTON, JUDGE: Worldwide Asset Purchasing, Inc. (“Worldwide”) appeals the McCracken Circuit Court’s dismissal with prejudice of its action for lack of prosecution. Worldwide argues that the trial court erred by dismissing with prejudice the action *sua sponte*, without considering lesser sanctions, and therefore

exceeded its discretion. After a careful review of the record and the applicable law, we vacate and remand back to the trial court.

Worldwide filed a complaint to recover a defaulted car loan against Glenn C. Simpson¹ on October 10, 2006. Worldwide's attorneys moved offices in May 2007. The trial court issued a show cause order on November 8, 2007, which stated that "[p]ursuant to CR 77.02(2), notice is hereby given that no pretrial step has been taken in this action within the last year and the case will be dismissed on December 10, 2007, for want of prosecution unless [a] showing of good cause." This notice² and the subsequent order of dismissal were sent to the old office location.³ Worldwide timely appealed the dismissal.

In support of its claim of error that the trial court abused its discretion by dismissing with prejudice their action *sua sponte*, Worldwide presents three arguments⁴. One, that the trial court could not have properly dismissed the action

¹ Simpson failed to file an appellee brief. CR 76.12(8)(c) permits this Court the following options in this situation: "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." We have elected option two, as Worldwide's brief reasonably appears to sustain such action.

² We note that no argument was presented to this Court concerning whether notice sent to an incorrect address, through no fault of the circuit clerk, was effective when used for mailing of a show cause order pursuant to CR 77.02(2).

³ Worldwide avers that between May and December of 2007, counsel continued to file pleadings and motions in other cases in the same circuit with their new address and was unaware that the trial court's records reflected the old address in this case.

⁴ The language of the trial court's order of dismissal is germane to the errors argued by Worldwide. The order states:

The above action coming before the Court on the Court's own Motion to Dismiss for lack of prosecution pursuant to notice to show cause entered herein on the 8th day of November, 2007, and no action having been taken within the time specified in the above show cause notice; IT IS ORDERED that this action be DISMISSED with prejudice and that the same is hereby stricken

under CR 41.02, which requires a motion by the defendant. Two, the trial court did not properly dismiss the action under CR 77.02(2), as the civil rule requires dismissal *without* prejudice. Lastly, that by dismissing with prejudice, the trial court was required to undertake an analysis of the *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991) factors⁵ prior to dismissal.

At the outset we note that dismissal pursuant to either CR 41.02 or CR 77.02 is discretionary and reviewed under an abuse of discretion standard. *Wright v. Transportation Cabinet*, 891 S.W.2d 412, 413 (Ky.App. 1995). Abuse of discretion is that decision which is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

CR 77.02(2) states:

At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order *dismissing without prejudice* each case in which no answer or an insufficient answer to the notice is made.

Id. (emphasis added). CR 77.02 is often referred to as the “housekeeping” rule as it allows our trial courts to purge their dockets of stale cases. *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753, 755 (Ky.App. 1982). Under the plain

from the docket.

⁵ The factors that a trial court is required to assess prior to a dismissal with prejudice are commonly referred to as the Ward factors: (1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the attorney's conduct was willful and in bad faith; (4) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions. Ward at 719.

language of the rule, the trial court is required once a year to review its cases and dismiss those in which no pretrial steps have been taken in the preceding year unless good cause is shown. *See Bohannon v. Rutland*, 616 S.W.2d 46, 46 (Ky. 1981).

Notably, however, the rule provides that cases shall be dismissed “without prejudice.” CR 77.02(2). This is unlike an involuntary dismissal under CR 41.02,⁶ where a dismissal under the rule is with prejudice and “operates as an adjudication upon the merits.” CR 41.02(3).

We agree with Worldwide’s first two arguments, namely, that the trial court exceeded its discretion as the dismissal does not comport with either CR 41.02 or CR 77.02(2). The language of the notice sent by the trial court indicates that the motion to dismiss for lack of prosecution would be pursuant to CR

⁶ CR 41.02 states:

(1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

(2) In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52.01.

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

77.02(2). The actual order entered by the trial court does not comport with the requirements of CR 77.02(2) because the dismissal was *with prejudice*. The *sua sponte* order also does not comport with CR 41.02 because the defendant did not move for the dismissal. *See also Manning v. Wilkinson*, 264 S.W.3d 620, 623 (Ky.App. 2007).

We also agree with Worldwide's remaining argument that if it was the intent of the trial court to proceed under CR 41.02, then the trial court exceeded its discretion by failing to consider the *Ward* factors prior to entering an order to dismiss *with prejudice*. This Court in *Ward*, and more recently in *Toler v. Rapid American*, 190 S.W.3d 348 (Ky.App. 2006), undertook an analysis of dismissals for lack of prosecution. Both *Ward* and *Toler* highlight the severity of dismissal *with prejudice* and necessarily conclude that the trial court must undertake a thorough analysis complete with findings that consider all relevant factors and lesser sanctions prior to dismissing an action with prejudice. *Manning* at 624.

In that the trial court stated that it was proceeding under CR 77.02(2), we view the dismissal with prejudice as error and, thus, reverse the order of the McCracken Circuit Court dismissing the case with prejudice.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Cliff G. Linn
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