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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001399-MR
&
NO. 2008-CA-001584-MR

BILL E. PRYOR AND
HELEN A. PRYOR — APPELLANTS

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 02-CI-00522

GENERAL ELECTRIC COMPANY;
GARLOCK SEALING TECHNOLOGIES, LLC;
ANCHOR PACKING COMPANY;
VIACOM, INC.;
NATIONAL SERVICE INDUSTRIES, INC.;
4520 CORPORATION, INC.;
GEORGIA-PACIFIC CORPORATION;
ROBERTSON-CECO CORPORATION;
HENRY A. PETTER SUPPLY COMPANY;
AND JOHN CRANE, INC. — APPELLEES

OPINION AND ORDER
SEPARATING CASES, DISMISSING NO. 2008-CA-001584-MR
AND ABATING NO. 2008-CA-001399-MR

** ** ** ** **

BEFORE: DIXON, KELLER, AND STUMBO, JUDGES.

KELLER, JUDGE: Bill E. Pryor (Bill) and Helen A. Pryor (Helen) appeal from the trial court's order dismissing their claims for failure to prosecute. On appeal, the Pryors argue that the trial court did not adequately address the factors in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), and that, if it had done so, it could not have dismissed their claims. The Appellees argue that the trial court made reference to and adopted the motion to dismiss filed by General Electric Company (GE), and thereby adequately addressed the *Ward v. Housman* factors. For the following reasons, we separate the appeals, dismiss appeal No. 2008-CA-001584, and hold in abeyance appeal No. 2008-CA-001399.

FACTS

On May 16, 2002, the Pryors filed a complaint against Triangle Insulation & Sheetmetal Company; North Brothers, Inc./National Service Industries, Inc.; Badham Insulation Company, Inc.; Brauer Supply Company; Henry A. Petter Supply Company; 4520 Corporation, Inc.; Robertson-Ceco Corporation; Westinghouse Electric Company/Viacom, Inc.; GE; Rapid-American Corporation; Georgia-Pacific Corporation; Certainteed Corporation; The Flintkote Company; Garlock Sealing Technologies, Inc.; Anchor Packing Company; John Crane, Inc.; Metropolitan Life Insurance Company; and ACandS, Inc. (collectively referred to hereinafter as the Defendants[1]). In their complaint, the Pryors alleged that Bill was diagnosed with an asbestos-related disease in September 2001 and

[1] We note that, during the course of litigation, National Service Industries, Inc. substituted for North Brothers, Inc. and Viacom, Inc. purchased Westinghouse Electric Company. Because these two parties are referred to by differing names in the record, for the sake of clarity, we will refer to them by their combined names.

that he contracted that disease as a result of exposure to asbestos products manufactured, sold, or otherwise placed in the stream of commerce by the Defendants. The Pryors also alleged that the Defendants either negligently or intentionally failed to warn Bill of the dangerous nature of those products. The Defendants, with the exception of Badham Insulation Company, filed answers to the Pryors' complaint at various times through January 2006. In the interim, several of the Defendants propounded interrogatories and requests for admission, to which the Pryors responded. On July 14, 2004, the Pryors' claims against Triangle Enterprises, Inc., were dismissed by agreed order. On May 18, 2004, The Flintkote Company notified the court that it had filed for bankruptcy, and Brauer Supply Company did the same on October 24, 2005.

Little else took place and, on March 4, 2008, the court issued a notice to dismiss for lack of prosecution pursuant to Kentucky Rules of Civil Procedure (CR) 77.02(2). The court only served this notice on counsel for the Pryors who responded on March 28, 2008, stating that a number of Defendants had filed for bankruptcy protection.[2] As a result, claims against those Defendants were

[2] The Pryors put in their response two separate lists of entities which had filed for bankruptcy protection. The first list contained the following names: Owens-Corning Fiberglass Corporation; Pittsburgh Corning; W.R. Grace; United States Mineral Products; The Flintkote Company; GAF Corporation; Armstrong World Industries; A.P. Green; United States Gypsum; Raymark Industries; and Flexitallic. The second list contained the following names: Brauer Supply Company; ACandS, Inc.; Flintkote Company; Owens-Corning Fiberglass Corporation; Pittsburgh Corning; W.R. Grace; United States Mineral Products; GAF Corporation; Armstrong World Industries; A.P. Green; Unites States Gypsum; and Flexitallic. We note that only Brauer Supply and Flintkote had notified the court that they had sought bankruptcy protection and that those two entities are the only two named Defendants in either list of bankrupt defendants.

The Pryors stated that the following entities had not filed for bankruptcy protection: National Service Industries (successor to North Brothers, Inc.); Badham Insulation; Henry A. Petter; 4520 Corporation; Robertson-Ceco Corporation; Westinghouse Electric; GE; Rapid

automatically stayed and, according to the Pryors, the court lacked jurisdiction to dismiss their claims against the bankrupt Defendants. The Pryors did not offer any explanation regarding their failure to take any steps to pursue their claims against those Defendants who had not filed for bankruptcy protection. On April 15, 2008, the court entered an order keeping the Pryors' claims against all Defendants on the active docket.

The Pryors filed a motion to schedule a pretrial conference on May 15, 2008, and GE filed a motion to dismiss for lack of prosecution on June 13, 2008. In its motion, GE argued that the Pryors had "taken no action to move the case forward" (emphasis omitted) since filing the complaint in 2002. GE then outlined the factors set forth in *Ward v. Housman*: (1) the extent of a party's personal responsibility; (2) the history of dilatoriness; (3) whether the attorney's conduct was willful or in bad faith; (4) whether the claim is meritorious; (5) whether and to what extent the Defendants were prejudiced by the delay; and (6) whether sanctions less draconian than dismissal are available. In analyzing these factors, GE argued that, while the Pryors might not be personally responsible for the six years of inactivity, their counsel certainly was and the Pryors have some responsibility for counsel's inactivity. Although GE did not accuse the Pryors' counsel of bad faith, it argued that six years of inactivity amounted to willful neglect. Because the Pryors had not conducted any discovery they could not point to any evidence that their claims had any merit. Furthermore, the Pryors' delay in

American; Georgia Pacific; Certainteed Corp.; Garlock; Anchor Packing; John Crane; and Metropolitan Life. These entities were all named entities in the Pryor's suit.

prosecuting their claims resulted in potential loss of witnesses and documentary evidence, prejudicing the Defendants. Finally, GE argued that no alternative sanctions would suffice to overcome the prejudice the Defendants suffered as a result of the Pryors' failure to timely prosecute their claims. Several of the other Defendants joined in GE's motion by separate pleadings.

In their response, the Pryors argued that, following the court's order keeping their case on the active docket, they moved to set the matter for a pretrial conference. They noted that none of the Defendants had responded to the court's March 4, 2008, notice and that none of the Defendants had moved to dismiss their claims until after the court issued its April 15, 2008, order and the Pryors moved for a pretrial conference. Finally, the Pryors argued that their claims have merit, they complied with all discovery requests by the Defendants, they had taken a significant step toward resolving the case by moving for a pretrial conference, the status of the parties had not changed after following the court's April 15, 2008, order, and the court should pursue less extreme sanctions than dismissal.

On June 25, 2008, the court dismissed the Pryors' claims against Garlock Sealing and Anchor Packing. The court entered a separate order dismissing GE on June 25, 2008, and, on June 27, 2008, the court entered an order dismissing Henry A. Petter Supply Company. The court dismissed North Brothers, Inc./National Service Industries, Inc. on June 27, 2008, and on July 1, 2008, the court dismissed John Crane, Inc.; 4520 Corporation, Inc.; Georgia-Pacific Corporation, and Robertson-Ceco Corporation. Finally, on July 3, 2008, the court

dismissed Westinghouse/Viacom. The court did not dismiss ACandS, Inc.; Badham Insulation Company; Brauer Supply Company; Certainteed Corporation; The Flintkote Company; Metropolitan Life Insurance Company; or Rapid-American Corporation.

Only the order dismissing John Crane, Inc., recited that there was no just reason for delay and that the order was final and appealable. The Pryors filed a notice of appeal from that order on July 17, 2008. That appeal was assigned No. 2008-CA-001399. The Pryors then filed a motion asking the court to make the other orders of dismissal final and appealable. The court issued an order on August 1, 2008, stating that the other orders of dismissal were final and appealable. However, the court did not recite that there is no just reason for delay. The Pryors then appealed from the order and that appeal was assigned No. 2008-CA-001584. This Court then consolidated the two appeals.

ANALYSIS

As an initial matter, we note that the orders dismissing Garlock, Anchor Packing, and John Crane, Inc., noted that the dismissals were with prejudice. The orders dismissing the remaining Defendants did not specify whether the dismissal was with or without prejudice. Kentucky Rules of Civil Procedure (CR) 41.02(3) provides that:

> [u]nless 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.

Therefore, we must treat all these dismissals as being with prejudice. Furthermore, because the orders adjudicate the claims of the dismissed Defendants and the Pryors, they are judgments. CR 54.01. However, as set forth below, the judgments, with one exception, are not final. To be final, a judgment must either adjudicate "all the rights of all of the parties in an action or proceeding" or be made final under CR 54.02. CR 54.02(1) provides that:

> [w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Because it did not dismiss all of the parties, the court's orders of dismissal were required to comply with CR 54.02(1). The court designated all of the orders of dismissal as final and appealable. However, the only order of dismissal reciting that there is no just reason for delay is the order dismissing John Crane, Inc. Therefore, pursuant to CR 54.02(1) the only final and appealable order is that order. No other order of dismissal is final and appealable; therefore, the Pryor's

appeal from those orders must be dismissed. Because all of the Defendants and the Pryors have common issues, we believe it would not be judicially economical to proceed with the appeal of the order dismissing John Crane, Inc., in the absence of the other Defendants. Therefore, it is hereby ordered as follows:

1. Appeal No. 2008-CA-001399, *Bill E. Pryor, et al. v. John Crane*, and appeal No. 2008-CA-001584, *Bill E. Pryor, et al. v. General Electric Company, et al.*, are hereby separated.

2. Appeal No. 2008-CA-001399, *Bill E. Pryor, et al. v. John Crane,* is hereby held in abeyance.

3. Appeal No. 2008-CA-001584, *Bill E. Pryor, et al. v. General Electric Company,* is hereby dismissed as being taken from orders that are not final or appealable.

ALL CONCUR.

ENTERED: October 2, 2009

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

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