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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002125-MR

JOYCE LANE

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 05-CI-01171

HUGH MONTGOMERY RICHARDS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Joyce Lane, *pro se*, appeals from an order granting Hugh Montgomery Richards's motion to dismiss for failure to prosecute. Lane alleges the trial court abused its discretion when it granted the motion to dismiss because it did not consider the totality of the circumstances. We affirm.

This case is on appeal to this Court for the third time since January 2007.

The facts are undisputed but somewhat convoluted. For ease of reference and

clarification, a previous recitation of the underlying facts by this Court in a published opinion is provided:

Lane retained Richards in April of 1998 to represent her in an action in federal district court against the Bell County School Board for various violations of federal law. The district court dismissed her claim on February 11, 2002. Lane then retained H. Wayne Roberts to represent her in her appeal to the Court of Appeals for the Sixth Circuit. The court dismissed that appeal on August 12, 2003.

On September 12, 2003, Roberts wrote a letter to Lane informing her of the dismissal. Roberts further stated in his letter that he would not continue to represent her in the prosecution of any further proceedings because he believed an appeal to the United States Supreme Court would be futile. Furthermore, he correctly informed her that she had ninety days from August 12, 2003, to file the writ of certiorari with that court. Also, Roberts expressed his view that Lane had a malpractice claim against Richards. Finally, he expressed what proved to be a conservative and cautious view that Lane had one year from August 12, 2003, to file such a claim.

Without Roberts to represent her in her pursuit of relief before the United States Supreme Court, Lane retained Thomas Grady in October 2003 to do so. Shortly after she paid him a \$7,000 retainer, Grady told Lane verbally that he had timely filed the writ and that she should expect a ruling from the Supreme Court between April and December 2004. On March 23, 2004, Grady wrote to Lane stating, “[a]s soon as I hear from the Supreme Court I will let you know.”

The record shows that on July 28, 2004, Lane wrote either to Grady or his firm. Five months later, on December 28, 2004, one of the firm’s partners responded.

Mr. Grady’s service with this firm has been terminated.... Mr. Grady prepared a Writ of Certiorari in the Supreme Court but never filed it.

This means that her claim against the school board terminated on or about November 11, 2003, when the time for petitioning the Supreme Court expired. Lane received this letter on December 31, 2004. Though she learned of Richards' alleged negligence in September 2003, December 31, 2004, is the date on which she discovered her alleged injury.

Lane v. Richards, 256 S.W.3d 581, 583 (Ky.App. 2008).

Represented by Bobby G. Wombles, Lane filed the underlying suit against Richards on November 3, 2005. The original action filed against Richards was dismissed by the circuit court for failure to file within the statute of limitations. In the published opinion quoted above, this Court reversed the dismissal on June 13, 2008, and remanded for further proceedings.

Upon remand, Richards's counsel made several attempts to contact Wombles. After eight months elapsed with no activity in the case, on March 2, 2009, Richards's counsel filed a motion for summary judgment and a motion to dismiss for failure to prosecute.

Richards's motion was scheduled to be heard on March 13, 2009, but was rescheduled by agreed order to be heard on April 10, 2009. On April 8, 2009, Wombles filed a motion for summary judgment. Because of Wombles medical condition, at the scheduled motion hour the motions were passed indefinitely until Wombles could withdraw or appear to argue the motions. Richards's attorney sent Wombles a letter explaining the events at the motion hour.

On July 20, 2009, Richards's counsel received a letter from Wombles indicating he was going to file a motion to withdraw. After over a month elapsed and no motion to withdraw was filed, on September 2, 2009, Richards's counsel renewed its motion to dismiss for failure to prosecute. Wombles contacted Richards's counsel and stated Lane would agree to an agreed order of dismissal and mutual release. Consequently, Richards's counsel passed the pending motion and sent a letter confirming their conversation and provided drafts of an agreed order and mutual release.

On September 17, 2009, Wombles contacted Richards's attorney and stated he sent the documents to Lane. After Richards's counsel received no response from Wombles, on October 6, 2009, Richards's attorney sent a letter inquiring about the status of the proposed agreed order and mutual release. On October 7, 2009, Wombles informed Richards's attorney Lane would not settle. Richards's attorney renoticed the motion to dismiss for a hearing on November 13, 2009.

On November 12, 2009, Wombles filed a motion to withdraw due to his health and requested his pleading in response to Richards's motion for summary judgment be stricken. The trial court passed Richards's motion to dismiss to December 11, 2009. Following a hearing at which neither Lane nor Wombles appeared, the trial court entered an order on December 15, 2009, granting Wombles's motion to withdraw and allowing Lane thirty days to obtain new counsel. On February 2, 2010, the trial court granted Richards's motion to dismiss for failure to prosecute.

Lane again appealed to this Court arguing she was unaware of the events leading to the dismissal. We reversed the trial court by an opinion rendered August 24, 2012, holding the court failed to address the factors set forth in *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991), with sufficient explicitness of the basis for its ruling and remanded the case for further findings of fact. *Lane v. Richards*, 2010-CA-000414-MR, 2012 WL 3628888 (Ky.App. 2012).

On remand, Richards's counsel filed a motion to enter findings of fact consistent with this Court's opinion. At a hearing, Lane appeared *pro se*. On November 16, 2012, the trial court issued a sixteen-page order applying the facts to each of the *Ward* factors as well as the totality of the circumstances. Lane appealed.

Kentucky Rules of Civil Procedure (CR) 41.02(1) provides a defendant may move for dismissal of any action or claim on the basis of the plaintiff's failure to prosecute. It is well-established that a dismissal for failure to prosecute is within the sound discretion of the circuit court. *Jaroszewski v. Flege*, 297 S.W.3d 24, 32 (Ky. 2009). A trial court has abused its discretion if it acted in a way which was "arbitrary, unreasonable, unfair or, unsupported by sound legal principles." *Wildcat Property Management, LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky.App. 2009)(quoting *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004)).

In *Ward*, the Court enumerated factors to be considered by a trial court when presented with a motion to dismiss under CR 41.02, including: "(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) meritoriousness of the claim; (5) prejudice to the other party; and (6) alternative sanctions.” *Ward*, 809 S.W.2d at 719. In *Jaroszewski*, our Supreme Court clarified that a trial court may rely on the *Ward* factors, but may also consider other relevant factors. Ultimately the court's decision must be based on the totality of the circumstances. *Jaroszewski*, 297 S.W.3d at 36.

In this case, the circuit court considered the *Ward* factors and made specific findings regarding each. Additionally, it considered the totality of the circumstances. Although Lane participated in the appeals, a review of the record reveals that during the time the case was not on appeal, Lane took no affirmative steps to pursue her case. Each time her case was remanded, Lane did not conduct discovery or schedule the deposition of any witness, including Richards. The first action, taken after remand in 2008, was by Richards when he filed his motion to dismiss eight months later. In total, except for Richards's motion, this case sat idle in the trial court for the entire twenty-one month period the case was not on appeal. As noted by the trial court, the case's dilatory history must fall on Lane who “may not employ an attorney and then wash [her] hands of all responsibility.” *Gorin v. Gorin*, 292 Ky. 562, 167 S.W.2d 52, 55 (1942). The law demands the exercise of due diligence by the client as well as her attorney.

In considering whether Wombles's conduct was willful or in bad faith, the trial court noted that Richards did not suggest the delays were the result of willfulness or bad faith. Consequently, it found that factor favored neither party.

Considering the merits of Lane's claim, the trial court noted to prevail, Lane would be required to prove Richards was negligent and she could have prevailed on her underlying federal claims. In view of the Federal Sixth Circuit Court's opinion affirming the dismissal of her action, the trial court found that factor weighed against Lane's claims.

The trial court found the prejudice factor weighed on Richards's side. Although it rejected the notion that passage of time is inherently prejudicial, in this case, the underlying facts occurred more than fourteen years ago. Given its finding of prejudice to Richards caused by the dilatory nature of the prosecution of the case, the court concluded dismissal was the appropriate sanction.

Finally, in accordance with *Jaroszewski*, the trial court considered the totality of the circumstances, including Lane's claims she did not have notice of various proceedings. The trial court noted that until December 2009, Lane was represented by counsel and, after that date, three months elapsed before it granted the motion to dismiss.

The trial court rendered a detailed order. Under the totality of the circumstances, we conclude the circuit court did not abuse its discretion in dismissing the action.

Based on the foregoing, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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