

RENDERED: NOVEMBER 26, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001504-MR

D.F. BAILEY, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 09-CI-04727

GRW ENGINEERS, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: We must decide whether the Fayette Circuit Court abused its discretion when it dismissed the complaint of Appellant D. F. Bailey, Inc. for failure to timely prosecute. We find no abuse and affirm.

## **I. Facts and Procedure**

In 2009, Bailey filed suit against Appellee GRW Engineers, Inc., claiming defamation, libel, and tortious interference with a business relationship and business expectancy. Because the issues raised in this appeal relate solely to alleged procedural error, the underlying facts are of little consequence. Suffice it to say that GRW, in a letter to the City of Liberty, allegedly misrepresented the statements of Bailey's job references, which resulted in the City awarding a construction contract to another bidder. At the time, GRW served as the City's engineer for the construction project at hand, and was tasked with vetting possible contractors.

Within a few short weeks of its filing, GRW moved the circuit court to dismiss Bailey's complaint, alleging that its statements to the City were absolutely privileged. The circuit court agreed and the matter was dismissed. Bailey appealed to this Court. In an opinion entered on June 24, 2011, we reversed the circuit court's order of dismissal and remanded for further proceedings. *D.F. Bailey, Inc. v. GRW Engineers, Inc.*, 350 S.W.3d 818 (Ky. App. 2011).

The case then sat idle for two years. Bailey made no attempt to resolve the matter or to move the case forward.

On July 10, 2013, GRW moved the circuit court to dismiss Bailey's complaint for lack of prosecution under Kentucky Rules of Civil Procedure (CR) 41.02(1). Bailey responded that the prior appeal had exhausted its financial reserves, thereby preventing it from obtaining counsel to pursue the case;

nevertheless, Bailey then stated it was ready to proceed from that point. Following a hearing, the circuit court granted GRW's motion in an order entered on August 5, 2013. The circuit court found the two-year delay significant and unreasonable, Bailey's justifications for the delay untenable, and that the delay prejudiced GRW's defense. Bailey timely appealed.

## **II. Standard of Review**

We review a circuit court's decision to involuntarily dismiss an action for lack of prosecution to see if the court abused its discretion. *Nolan v. Neeley-Thoms*, 290 S.W.3d 89, 92 (Ky. App. 2009). An abuse of discretion will be found when the circuit court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Wildcat Property Management, LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky. App. 2009) (citation omitted).

## **III. Analysis**

Bailey argues that the circuit court abused its discretion because: (1) it failed to consider and analyze certain mandatory factors; (2) it failed to appropriately consider available alternative sanctions; and (3) the circumstances were not extreme enough to warrant dismissal. We are not convinced that an abuse of discretion did, in fact, occur.

CR 41.02(1) authorizes a trial court to involuntarily dismiss an action for lack of prosecution. The rule states, in its entirety: "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." *Id.*

Bailey's most forceful argument on appeal is that the circuit court paid no heed to the factors identified in *Ward v. Houseman*, 809 S.W.2d 717 (Ky. App. 1991), before granting GRW's motion, resulting in reversible error. The court in *Ward* articulated several factors to aid courts in determining when dismissal for lack of prosecution is appropriate. Those factors include: the extent of the party's personal responsibility for noncompliance; the history of dilatoriness; whether the attorney's noncompliance was willful and in bad faith; the meritoriousness of the claim; prejudice to the other party; and alternative sanctions. *Id.* at 719.

For a time following *Ward*, this Court was of the mind that the *Ward* factors must always be fully considered and discussed before an involuntary dismissal was justified. *See Stapleton v. Shower*, 251 S.W.3d 341, 343 (Ky. App. 2008) (“[T]rial court is [required] to consider the factors set forth in *Ward* . . . when making a determination as to whether to order dismissal pursuant to CR 41.02.”); *Hill v. Fallahzadeh*, 2008 WL 3875416 (Ky. App. Aug. 22, 2008)(2007-CA-000191-MR) , at \*2 (“Kentucky law is clear, however, that any involuntary dismissal under CR 41.02 requires the trial court to consider the *Ward* factors.”). Should an order granting dismissal under CR 41.02(1) omit any reference to *Ward* or fail to give the factors adequate consideration, it could not withstand scrutiny. *See, e.g., Mullins v. Redford Tp.*, 297 S.W.3d 66, 68 (Ky. App. 2009); *Timmons v. Illinois Cent. R. Co.*, 2008 WL 1837298 (Ky. App. Apr. 25, 2008)(2006-CA-

000059-MR) , at \*3 (reversal mandated because “there is absolutely no reference to any of the *Ward* factors” in the trial court’s order).<sup>1</sup>

The Kentucky Supreme Court addressed the issue in *Jaroszewski v. Flege*, 297 S.W.3d 24 (Ky. 2009). There, the Supreme Court declined “to embrace a formulaic approach where certain listed factors must always be discussed, and other relevant factors may not be discussed.” *Id.* at 32. Explaining further, the Court stated:

[P]erhaps *Ward* is sometimes misunderstood as clearly holding that trial courts must always explicitly analyze the six particular factors listed in it in ruling on a motion to dismiss for want of prosecution. Conversely, this precedent is also misunderstood to suggest that the trial court’s dismissal order is unassailable on appeal if it recites and attempts to analyze each of the six listed factors. In contrast to this misunderstanding, we hold that the propriety of the trial court’s ruling does not necessarily hinge on its discussing the six particular factors listed in *Ward*.

*Id.* at 33 (footnote omitted); *see also Reuss*, 302 S.W.3d at 93 (“[N]ot every *Ward* factor need be considered in every case, nor is a non-enumerated factor unavailable for the court’s consideration.”).

Instead, the appropriate inquiry is whether the circuit court based its “decision to dismiss under CR 41.02 upon the totality of the circumstances,” taking into consideration all *relevant* factors, which may or may not include some or all of the *Ward* factors. *Jaroszewski*, 297 S.W.3d at 36. This standard requires the circuit court to “make explicit findings on the record so that the parties and

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<sup>1</sup> We cite *Hill* and *Timmons* not for their precedential value, but by way of illustration.

appellate courts will be properly apprised of the basis for” its ruling; “and the appellate courts can assess whether the trial court properly considered the totality of the circumstances in dismissing the case.” *Id.*

Circling back to the case before us, in light of *Jaroszewski*, we reject Bailey’s argument that the circuit court’s order must be reversed because it makes no mention of the *Ward* factors. But this conclusion does not terminate our discussion. Bailey also argues that the circuit court did not carefully and fully analyze the particular circumstances of this case, did not consider alternative sanctions, and that the totality of the circumstances was not extreme enough to warrant dismissal.

While the circuit court’s order certainly lacks the length of some opinions of this Court, we cannot say it is so devoid of substance to warrant reversal. The order indicates that the circuit court considered several factors before rendering its decision, including the length of delay, the reason for the delay, the degree of personal responsibility, and the prejudice to defendant GRW. Specifically, after expressing familiarity with the matter, the circuit court found the two-year delay entirely unreasonable. Considering that this is a fairly simple case involving an isolated incident, few parties, and relatively well-established principles of law, we are inclined to agree with the circuit court.

The circuit court also found Bailey’s explanation for the delay – its inability to pay its attorney – insufficient to justify such a substantial delay. It is as clear to this Court as it was the circuit court that Bailey, rather than its attorney,

was responsible for the holdup. Further, it goes without saying that prejudice visits any defendant who must linger in litigation of indeterminate duration while the plaintiff decides when and whether to pursue his claim. *See Jaroszewski*, 297 S.W.3d at 32 (one of the “basic purposes” behind CR 41.02 is “to protect the defendant from the prejudice of being a defendant in a lawsuit for a protracted period”).

The totality of the circumstances standard is a flexible one that turns on the specific facts of the specific case. It is entirely plausible for the official court record to experience no activity while behind-the-scenes negotiations, mediations, settlement discussions, or other events take place. But that is not this case. Prosecution within the context of CR 41.02 “entails ‘pursu[ing] the case diligently toward completion’ or, in other words, actually working to get the case resolved – not just keeping it on a court’s docket or occasionally working on the file without actively attempting to resolve the matters in dispute.” *Jaroszewski*, 297 S.W.3d at 32 (footnote omitted). The record indicates that Bailey failed to take even a single step, official or otherwise, toward resolving its dispute with GRW for at least two years.<sup>2</sup> And, while it was within the circuit court’s discretion to consider alternative sanctions, nothing demands that it do so, particularly when, as in this case, the record does not indicate that the plaintiff requested an alternative sanction in lieu of dismissal.

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<sup>2</sup> We acknowledge that precedent holds that “length of time is not alone the test of diligence.” *Jaroszewski*, 297 S.W.3d at 35 (quoting *Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970)). But, as previously indicated, length of delay was not the only factor considered by the circuit court in this case.

Dismissal under CR 41.02 is a severe sanction. It terminates the entire action leaving no true and sure avenue for recourse. These considerations must be balanced, however, against the plaintiff's obligation to diligently pursue his or her case. There are sound justifications for this. Here, after assessing all the relevant factors and considerations, the circuit court found dismissal of Bailey's complaint warranted. We cannot say the circuit court abused its discretion.

#### **IV. Conclusion**

For the foregoing reasons, we affirm the August 5, 2013 order of the Fayette Circuit Court.

ALL CONCUR.

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