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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001750-MR
AND
NO. 2014-CA-001787-MR

GAINES-GENTRY
THOROUGHBREDS, LLC

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 02-CI-00769

CLAY WARD AGENCY,
INCORPORATED

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, COMBS, AND JONES, JUDGES.

ACREE, JUDGE: The issue before us is whether the Fayette Circuit Court abused its discretion when it dismissed the complaint of Appellant Gaines-Gentry Thoroughbreds, LLC, for failure to timely prosecute. We find no abuse and affirm.

Appellee Clay Ward Agency, Inc., filed a protective cross-appeal to preserve its counterclaims against Gaines-Gentry in the event the circuit court's decision is reversed and the matter reinstated. Because we affirm the judgment, the issue raised in the cross-appeal is moot and we need not address it.

FACTS AND PROCEDURE

Gaines-Gentry was the manager of several thoroughbred racing limited liability companies that purchased equine insurance coverage through Clay Ward, an insurance agency specializing in the insurance of horses. On February 21, 2002, Gaines-Gentry filed suit against Clay Ward on breach of contract, fraud and negligence claims arising out of the alleged mishandling of the insurance of a foal and a stallion. Clay Ward answered and counterclaimed for unpaid equine insurance premiums. It also filed a motion to join Racing Investment Fund 2000, LLC, and others, as counterclaim defendants.

The parties exchanged written discovery and, in late 2004, Gaines-Gentry took the deposition of a bloodstock underwriter in London, England. In January 2005, the circuit court set discovery and expert witness deadlines.

In the meantime, Clay Ward moved for summary judgment on its counterclaim against Racing Investment, a motion which Racing Investment did not oppose. The circuit court entered an agreed judgment in favor of Clay Ward. A few months later, the circuit court ordered Racing Investment to show cause why it should not be held in contempt for failure to satisfy the agreed judgment. The circuit court ultimately held Racing Investment in contempt. Racing

Investment appealed the contempt order, and the Kentucky Supreme Court addressed the case in 2010. *Racing Inv. Fund 2000 v. Clay Ward Agency*, 320 S.W.3d 654 (Ky. 2010), *as corrected* (Sept. 24, 2010).

While the Clay Ward/Racing Investment matter moved its way through the courts, Gaines-Gentry's case against Clay Ward sat idle. Gaines-Gentry made no attempt to resolve the matter or to move the case forward until April 25, 2014, when it served on Clay Ward a third request for discovery. Clay Ward objected to the request and filed a motion to dismiss the matter for failure to timely prosecute under CR¹ 41.02(1). The circuit court heard the motion on August 29, 2014. After receiving arguments, the circuit court commented on several factors, discussed in detail below, relevant to its decision. The court also asked the parties to identify sanctions alternative to dismissal; the parties suggested none.

The circuit court, by order entered September 3, 2014, granted Clay Ward's motion and dismissed Gaines-Gentry's case with prejudice. Gaines-Gentry filed a CR 59 motion to reconsider and to set a trial date coupled with a motion to compel discovery. The circuit court denied the motions. This appeal followed.

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-*

¹ Kentucky Rules of Civil Procedure.

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).

ANALYSIS

Gaines-Gentry argues the circuit court abused its discretion when it granted Clay Ward’s dismissal motion. It claims the circuit court failed to adequately consider certain mandatory factors and, instead, improperly based its decision almost exclusively upon the period of inactivity in the case. Gaines-Gentry further contends the totality of the circumstances favors against dismissal.

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.*

Proper consideration of a CR 41.02(1) motion “cannot be reduced to a simple formula[.]” *Jaroszewski v. Flege*, 297 S.W.3d 24, 32 (Ky. 2009). Instead, “each case must be looked at with regard to its own peculiar procedural history and the situation at the time of dismissal.” *Id.* (footnote omitted).

In *Ward v. Houseman*, 809 S.W.2d 717 (Ky. App. 1991), this Court 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 merit of the claim; prejudice to the other party; and alternative sanctions. *Id.* at 719.

When contemplating a CR 41.02(1) motion, all or some of the *Ward* factors may be instructive, but they are not mandatory where they are irrelevant to the particular case before the trial court. *Jaroszewski*, 297 S.W.3d at 33 (“[W]e hold the propriety of the trial court’s ruling does not necessarily hinge on its discussing the six particular factors listed in *Ward*.”). The circuit court, instead, need only “consider[] all relevant facts and circumstances[]” to determine whether the totality of the circumstances warrants dismissal with prejudice. *Id.* at 32-33. This standard requires the circuit court to “make explicit findings on the record so that the parties and appellate courts will be properly apprised of the basis for” its ruling, and so that “the appellate courts can assess whether the trial court properly considered the totality of the circumstances in dismissing the case.” *Id.*

In the matter before us, Gaines-Gentry argues the circuit court’s order dismissing is void of any meaningful discussion of the *Ward* factors and the trial judge’s statements from the bench during the August, 2014, hearing lack substantive value. We have carefully reviewed the record and find the circuit court’s oral analysis and ruling during the aforementioned hearing sufficient to apprise this Court of the basis for its decision. The circuit court touched upon each *Ward* factor and considered the length of delay (substantial), the reason for the delay (insufficient to justify such a substantial delay), the degree of Gaines-

Gentry's personal responsibility (significant), and the prejudice to defendant Clay Ward (considerable).

In considering each of the *Ward* factors, the circuit court appropriately assessed the propriety of dismissal with prejudice, including the impact on the parties and the interests of justice. It noted Gaines-Gentry took no action in its case, at all, for years; that Clay Ward would be severely prejudiced to defend a case originating from 2002 (or earlier); and no alternative sanctions were self evident or offered by the parties. The circuit court further found no bad faith on behalf of Gaines-Gentry and the merit of its claims uncertain. The circuit court concluded, based on Gaines-Gentry's lengthy period of inactivity and the failure to meaningfully pursue its claims following finality of the Clay Ward/Racing Investment appeal in 2010, that dismissal on the merits was an appropriate solution.

We agree with the circuit court. Gaines-Gentry failed to diligently pursue its case toward completion in the twelve years it remained on the docket. *Jaroszewski*, 297 S.W.3d at 32. Gaines-Gentry propounded only a handful of discovery requests and took one deposition. It does not appear it ever requested a pretrial conference or a trial date until 2014. There is no evidence Gaines-Gentry took any steps outside the official court record – such as mediation or informal settlement negotiations – since late 2004 or early 2005. In fact, it appears all activity ceased in early 2005. 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”). 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 Gaines-Gentry requested an alternative sanction in lieu of dismissal.

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 Gaines-Gentry failed to take even a single step, official or otherwise, toward resolving its dispute from January 2005 until April 2014, a period of over nine years. We are well aware of the Clay Ward/Racing Investment appeal. But that matter, while related, is separate and distinct from Gaines-Gentry’s allegations against Clay Ward. Nothing prevented Gaines-Gentry from simultaneously pursuing its case.

Gaines-Gentry states, repeatedly, and with emphasis, that length of time alone is not the test of diligence. *See Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970); *Stapleton v. Shower*, 251 S.W.3d 341, 343 (Ky. App. 2008). We are fully aware of this principle and its precedential support. But, as previously indicated, length of delay was not the only factor considered by the circuit court in this case.

Gaines-Gentry also seeks to shift the blame elsewhere: to the defendant for not moving the case forward and to the circuit court for not setting the matter for trial. Gaines-Gentry offers no explanation, except for the ancillary Clay Ward/Racing Investment appeal, for its lack of meaningful progress on its case. It argues simply that it has a legitimate claim that could be tried in a short time and that the circuit court should not deprive Gaines-Gentry of its day in court. That day has passed. Gaines-Gentry was the master of its case. It was fully capable of moving the case forward. Gaines-Gentry chose not to do so. Seeking to blame others for its own dilatory conduct will not persuade this Court.

Dismissal under CR 41.02(1) 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 the right of the defendant to have the case against him timely prosecuted. Here, after assessing all the relevant factors and considerations, the circuit court found dismissal of Gaines-Gentry's complaint warranted. We cannot say the circuit court abused its discretion.

CONCLUSION

We affirm the Fayette Circuit Court's September 3, 2014 dismissing
Gaines-Gentry's complaint under CR 41.02(1) for failure to prosecute.

JONES, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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