

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000865-MR

TODD SANDERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 14-CI-002880

WAL-MART STORES EAST, LP

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON AND JONES, JUDGES.

ACREE, JUDGE: Todd Sanders appeals the Jefferson Circuit Court's April 27, 2015 order dismissing his case for failure to prosecute. We affirm.

On May 29, 2014, Sanders, through counsel, filed a personal injury action against Wal-Mart Stores East, LP. Sanders claimed he was injured when he slipped on blueberries causing him to fall.

Four months after filing suit, following a brief discovery period, the circuit court granted Sanders' counsel's motion to withdraw. It afforded Sanders forty-five days to secure new representation or notify the court of his intent to proceed *pro se*. The circuit court granted Sanders' subsequent request for additional time to find counsel.

Sanders' second attorney entered an appearance in November 2014. In March 2015, the circuit court granted that attorney's motion to withdraw, and gave Sanders thirty days to obtain new representation or announce his intention to proceed *pro se*. Over Wal-Mart's objection, the circuit court subsequently granted Sanders another continuance – until April 22, 2015 – to comply with its directive. Sanders did not inform the circuit court of new counsel or his desire to act *pro se* by the April 22, 2015 deadline.

Wal-Mart moved to dismiss the action for failure to timely prosecute under CR¹ 41.02(1).² The motion was mailed to Sanders' address of record and a courtesy copy supplied to Sanders' second attorney. The circuit court heard the motion on April 27, 2015. Sanders did not appear. The circuit court granted the dismissal motion.

¹ Kentucky Rules of Civil Procedure.

² Wal-Mart initially filed its dismissal motion in October 2014 when no attorney had appeared on Sanders' behalf within the initial forty-five-day window set by the circuit court. Upon the appearance of Sanders' second attorney in November 2014, Wal-Mart's motion was set aside. Wal-Mart renewed its motion in April 2015 when Sanders' second attorney withdrew and a third attorney failed to appear within the thirty-day time period established by the circuit court.

Sanders then filed a *pro se* CR 59.05 motion to set aside the dismissal.

The circuit court denied the motion, explaining it had given Sanders multiple continuances to obtain counsel, that even *pro se* litigants must comply with court rules and time deadlines, and that Sanders' repeated failure to prosecute justified dismissal. Sanders appealed.

Before briefing commenced, Sanders filed in this Court a motion to supplement the record with hospital and medical records, letters from Wal-Mart's insurance company, letters from Sanders' former attorneys, motions for discovery hearings, Sanders' former employment information, key definitions and various federal laws, and more. Wal-Mart objected. This Court passed the motion to the circuit court after determining that it would be in the best position to decide whether the requested materials were appropriate to include in the record. After hearing arguments, the circuit court denied Sanders' motion. It found that the proffered materials had not previously been made part of the circuit court's record. Therefore, these records were not before the circuit court when it ruled on the dismissal motion, and were not probative of the issue on appeal, *i.e.*, the circuit court's dismissal for failure to prosecute. Consistent with that decision, this Court denied Sanders' motion to supplement. The matter is now ripe for adjudication.

Sanders faults the circuit court for relieving his attorneys on multiple occasions and for failing to afford him reasonable leniency before dismissing his

complaint under CR 41.02. Sanders further complains that the circuit court erroneously denied his post-judgment request to supplement the record.

We review a circuit court's decision to involuntarily dismiss an action for lack of prosecution to see if the court abused its discretion. *Jaroszewski v. Flege*, 297 S.W.3d 24, 32 (Ky. 2009). A circuit court has abused its discretion if it acted arbitrarily, unreasonably or unfairly, or if its decision is not supported by sound legal principles. *SM Newco Paducah, LLC v. Kentucky Oaks Mall Company*, 499 S.W.3d 275, 278 (Ky. 2016).

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*, 297 S.W.3d at 32. 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. Housman*, 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 that 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.

Here, the situation at the time of dismissal was this: the matter had been pending for almost a year and, in that year period, Sanders did little to move the case toward resolution. He did not diligently pursue discovery, filed not a single dispositive motion, and did not request a trial date. Indeed, the circuit court’s record contains a mere 35 pages and is made up almost entirely of motions and orders related to the withdrawal of Sanders’ various attorneys. And Wal-Mart appears to have initiated the little discovery that occurred. We, like the circuit court, are convinced Sanders was not diligently pursuing his case.

Sanders attributes the little activity in this case to his lack of stable legal counsel. He faults the circuit court for allowing the departure of all legal representation, arguing an “attorney cannot just simply abandon their client in the

middle of a civil lawsuit.” However, an attorney may withdraw from representing a client for a myriad of reasons. Kentucky’s Supreme Court Rules permit an attorney to do so, even when litigation is pending, provided counsel receives leave of court. *See* SCR 3.130(1.16). We do not question the circuit court’s discretion in allowing Sanders’ attorneys to withdraw in this case. The circuit court was in the superior position to make that decision, and we decline to second guess it now. We are also mindful that the circuit court afforded Sanders ample time, including multiple extensions, to obtain new counsel.

There is no ultimate right to counsel in a civil proceeding. *See May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997). Even *pro se* litigants must diligently pursue their case. “The law demands the exercise of due diligence by a litigant, and the plaintiff (whether represented by counsel or proceeding *pro se*) must take steps to bring the action to a final judgment.” *Nolan v. Neeley-Thoms*, 290 S.W.3d 89, 92 (Ky. App. 2009). Sanders failed to comply with court-imposed deadlines, propounded little, if any, discovery, and failed to advance the matter toward resolution. There is simply nothing indicating Sanders was actually making a good faith effort to prosecute this action.

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 Sanders failed to take even a single step, official or otherwise, toward resolving its dispute with Wal-Mart for the entire year period during which the matter was pending.

Sanders also advances a rather muddy argument challenging the circuit court’s denial of his motion to supplement the record. He argues the items subject of his motion – medical records, letters, employment information, etc. – were “always part of the original case.” We are puzzled by Sanders’ argument, for if the materials were already contained in the circuit court record there would have been no need for him to supplement the record. In any event, we find his argument meritless.

“It is a fundamental rule of appellate practice that after a final judgment has been rendered in the circuit court no additions to the record can be made of matters which were not before the trial court when the judgment was rendered.” *Fortney v. Elliott’s Adm’r*, 273 S.W.2d 51, 52 (Ky. 1954) (citation omitted). “The case must be tried in this court on the record as it was presented to

the trial court.” *Id.* We have scoured the record and found that the items Sanders sought to include by way of his motion to supplement were not presented to the circuit court prior to its final order disposing of the case. We further agree with the circuit court that the proffered items, while perhaps material to Sanders’ substantive claim against Wal-Mart, are entirely irrelevant to whether the circuit court properly dismissed Sanders’ complaint for failure to timely prosecute.

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 Sanders’ complaint warranted. We cannot say the circuit court abused its discretion.

Accordingly, we affirm the Jefferson Circuit Court’s April 27, 2015 order dismissing Sanders’ complaint for failure to prosecute under CR 41.02.

ALL CONCUR.

BRIEF FOR APPELLANT:

Todd Sanders, *Pro Se*
Peewee Valley, Kentucky

BRIEF FOR APPELLEE:

Jennifer Kincaid Adams
Thomas E. Stevens
Louisville, Kentucky