

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000615-MR

OSSIE A. MARSHALL

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 13-CI-00647

LEDINGTON FOODS OF ELIZABETHTOWN, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Ossie Marshall appeals the dismissal, with prejudice, of his case against Ledington Foods of Elizabethtown, Inc. Marshall argues that the trial court erred in dismissing his case after his request for a continuance was denied.

We find no error and affirm.

On April 12, 2013, Marshall filed the underlying complaint against Ledington Foods. The complaint alleged that he became ill after eating food from

a KFC restaurant owned by Ledington Foods. He claimed negligence and gross negligence on the part of Ledington Foods for improper preparation and sale of contaminated food.

On May 26, 2015, the case was set for a trial to be held on March 28-29, 2016. No further filings were made by Marshall until February 11, 2016, when he filed a motion for continuance. No reasons for the continuance were set forth in the motion. Ledington Foods then filed its response to the motion which supported the granting of a continuance.

The motion was heard by the trial court on February 23. At the hearing, Marshall's counsel stated that his motion was based on the need to seek additional documents from government agencies which investigated the alleged food poisoning and to allow for the deposition of a potential witness who lived in Florida. Counsel for Ledington Foods joined the motion and requested that if a continuance were granted, that the case be continued until at least September of 2016. The court declined to rule on the motion at that time. The court stated that the parties should first mediate the case and then it would rule on the motion to continue.

The parties participated in mediation, but it was unsuccessful. On March 24, 2016, the trial court issued an order denying the motion to continue. On March 28, the first day of trial, counsel for Marshall appeared and orally renewed his motion for a continuance. Ledington Foods opposed the motion because it was prepared for trial. The trial court denied the renewed motion and asked if

Marshall's counsel was ready for trial. Counsel stated he was not and could not present any evidence at that time. Ledington Foods stated that it was ready for trial and then moved for a directed verdict based on Marshall presenting no evidence. The trial court granted the motion for directed verdict and this appeal followed.

On appeal, Marshall argues that the trial court erred in refusing to grant a continuance. The proper standard of review for a trial court's failure to grant a motion for continuance is abuse of discretion. *Abbott v. Commonwealth*, 822 S.W.2d 417, 418 (Ky. 1992).

Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991) (citations omitted), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). Even though *Snodgrass* is a criminal case, these same factors can be used in civil cases. *Guffey v. Guffey*, 323 S.W.3d 369, 372 (Ky. App. 2010).

After examining the above factors, we believe the trial court did not abuse its discretion when it denied Marshall's motions for continuance.

LENGTH OF DELAY

Marshall's counsel did not request a specific amount of time to continue the trial; however, counsel for Ledington Foods stated that it be continued until

September. This would have delayed the trial at least six more months. It is worth noting that at the point the motion for a continuance was made, the case had been pending for almost three years and the trial date had been set around ten months prior.

PREVIOUS CONTINUANCES

There had been no previous continuances.

INCONVENIENCE TO LITIGANTS, WITNESSES, COUNSEL, AND THE COURT

Here, a continuance would have inconvenienced Ledington Foods because it had expended time diligently preparing for trial once the continuance was denied.

WAS THE DELAY PURPOSEFUL OR CAUSED BY THE MOVANT

This delay was not purposeful.

AVAILABILITY OF OTHER COUNSEL

This issue is not relevant to the case at hand as counsel's schedule or a prior engagement was not the cause of the motion for continuance.

COMPLEXITY OF THE CASE

This case does not seem to be too complex. It is a case of alleged food poisoning from a single restaurant.

WHETHER DENYING THE CONTINUANCE WOULD LEAD TO

IDENTIFIABLE PREJUDICE

Marshall does not indicate what prejudice occurred by the denial of the continuance. The motion to continue was requested in order to obtain more government documents and to try and procure or depose a witness living in Florida. Marshall does not indicate what he anticipated the additional government documents might have evinced. Also, he does not indicate why he was unable to depose the Florida witness in the three years the case had been pending.¹

We acknowledge that, based on the above factors, this case is a close call. We cannot, however, say that the trial court abused its discretion in denying the motion. This case had been pending for a considerable amount of time. In addition, Marshall does not indicate what help the government agency documents would have been to his case, nor how vital the Florida witness's testimony was to his case. Finally, Ledington Foods was prepared for trial even though it initially supported the motion for continuance. For these reasons, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William T. Hutchins
Bardstown, Kentucky

BRIEF FOR APPELLEE:

James R. Coltharp, Jr.
Jessica Shay Morgan
Paducah, Kentucky

¹ We will note that the record indicates this witness began living in Hawaii soon after Marshall became ill and it is unclear when the witness moved to Florida.