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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000645-MR

PATRICK MURPHY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 09-CI-011294

BRYAN WEBER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: In this dispute between a tenant and landlord, Patrick Murphy, proceeding *pro se*, has appealed from the Jefferson Circuit Court's August 3, 2017, order dismissing his action against Bryan Weber without prejudice due to his failure to appear for the jury trial. Finding no abuse of discretion, we affirm.

Murphy, while represented by counsel, filed a verified complaint against Weber in November 2009. Murphy had been renting real property from Weber on New Hopewell Road in Louisville, Kentucky, since 2004. In July 2007, Murphy moved to another property Weber owned on the same street at Weber's request. Murphy claimed that in November of that year, Weber unlawfully removed his belongings from the rental property and refused to give them back to him. He also claimed Weber refused to give him access to the rental property. Based upon those allegations, Murphy raised claims for breach of contract, unlawful ouster/abuse of access, outrageous conduct, conversion, and violations of Kentucky's Consumer Protection Act, Kentucky Revised Statutes (KRS) 367.110, *et seq.* As a result, Murphy sought compensatory and punitive damages. Weber filed an answer disputing Murphy's claim as well as a counterclaim against him, seeking \$6,000.00 for damages to his property, rental storage at a rate of \$125.00 per month from November 2007 to the present, and \$500.00 for a mobile phone bill. Murphy, in turn, disputed Weber's counterclaim, stating that it was barred by the doctrines of laches, estoppel, unclean hands, and illegality.

In December 2011, Murphy filed a motion seeking to retrieve his personal property under Weber's control or in his possession. Weber objected to the motion, likening it to a motion for summary judgment and arguing that genuine issues of material fact existed. The court conducted a hearing in August 2012 and

denied the motion by order entered October 9, 2012, refusing to issue a writ of possession to Murphy.

By order entered August 23, 2012, the circuit court set the matter for a three-day jury trial beginning May 14, 2013. The order also set forth the times for filing expert disclosures, dispositive motions, witness lists, and damages itemization. Murphy's counsel was permitted to withdraw on November 27, 2012, and Murphy was given 45 days to retain new counsel. The envelope addressed to Murphy at an address on Bardstown Road containing the order was marked "refused," and it was returned to the sender as not deliverable as addressed and unable to forward. The court held a final pretrial conference on April 18, 2013, which Murphy attended. The order reflects that Murphy had been unable to hire a new attorney and was representing himself. The jury trial was rescheduled for July 8, 2013. The order was served on Murphy at an address on Java Court. The record does not reflect why the trial was not held on that date.

On August 9, 2013, Murphy filed a motion to enforce a settlement agreement for the return of his personal property. Weber filed a settlement agreement and release of claims dated August 14, 2013, which detailed the agreement reached between him and Murphy to dismiss the action with prejudice. The terms of the agreement provided that Murphy was to pick up his personal possessions from Weber on or before July 31, 2013, in exchange for a release of

Murphy's claims against him. A hearing was held later that year, and the court entered an order denying the motion in June 2014. We therefore presume the settlement was ultimately unsuccessful.

In November 2013, the court entered a second jury trial order, scheduling the trial for April 9, 2014. The service copy of Murphy's order sent to the Bardstown Road address was returned to the court. Murphy filed a motion on April 2, 2014, to continue the trial scheduled to begin a few days later. He stated a key witness was having knee surgery on the date of the trial and would not be available to testify. Murphy listed his address as being on Java Court. The court then rescheduled the trial until June 4, 2014. A month later, the court rescheduled the trial on Weber's motion until September 30, 2014. And the trial was once again reassigned to December 16, 2014, because the court was in trial. On Murphy's motion, the trial was reassigned in January 2015 to April 14, 2015.

On April 9, 2015, Murphy moved the court to set a new trial date based on the unavailability of "vital witnesses" to his case on the set trial date. Weber did not object to the motion, and the court rescheduled the trial for November 17, 2015, and then to February 16, 2016, by order entered in August 2015. On February 11, 2016, Murphy again moved to continue the trial date, stating that one of his witnesses was experiencing complications from open heart

surgery and would be unable to testify. The trial was rescheduled for May 10, 2016, and then to November 15, 2016, because the court was in trial.

On November 3, 2016, Murphy filed yet another motion to continue the trial because he could not locate one of his witnesses, who had recently moved, to serve his subpoena. By order entered November 10, 2016, the court scheduled the trial for August 1, 2017. The order was served on Murphy at his Java Court address.

Murphy failed to appear for the jury trial scheduled for August 1, 2017. Counsel for Weber informed the court that he had not heard from Murphy in the last 30 days, but that Murphy knew this was the trial date because they went in the back at the last court date to set a date with the secretary. The court called Murphy on his cell phone to determine why he had not appeared. Murphy told the court he thought the jury trial date was August 14, 2017, and that he had intended to file a motion to reassign that trial date. Murphy also told the court that he had moved four times in the last month and his belongings were scattered. However, the court opted to dismiss the action without prejudice by order entered August 2, 2017, noting that Weber agreed to dismiss his counterclaim. This appeal now follows.¹

¹ The circuit court denied Murphy's motion to proceed *in forma pauperis* on appeal, and Murphy timely appealed that ruling to this Court pursuant to *Gabbard v. Lair*, 528 S.W.2d 675 (Ky. 1975). By order entered January 22, 2018, this Court affirmed the circuit court's ruling. The

On appeal, Murphy relies upon Kentucky Rules of Civil Procedure (CR) 59.01(a) and (c) to support his arguments that the circuit court should not have dismissed his appeal but rather should have imposed a lesser sanction. Weber disputes Murphy's arguments and argues that the circuit court did not abuse its discretion in dismissing the action when Murphy failed to appear for trial.

Our standard of review is set forth in *Wildcat Property Management, LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky. App. 2009):

“Dismissals for lack of prosecution pursuant to CR 41.02 and CR 77.02 are reviewed under an abuse of discretion standard.” *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky. App. 2006). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

In the case of a dismissal with prejudice, a higher level of scrutiny is required before a trial court may dismiss an action: “This Court has held that the involuntary dismissal of a case with prejudice ‘should be resorted to only in the most extreme cases,’ and a reviewing court must ‘carefully scrutinize the trial court’s exercise of discretion in doing so.’” *Polk v. Wimsatt*, 689 S.W.2d 363, 364-

court denied Murphy’s motion to reconsider on March 29, 2018, and he paid the \$160.00 filing fee on April 27, 2018. His tendered notice of appeal was filed that day.

65 (Ky. App. 1985).” *Wildcat Property Management*, 302 S.W.3d at 93. Here, however, the circuit court dismissed Murphy’s complaint without prejudice.²

CR 59.01, cited by Murphy, provides, in relevant part, as follows:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

.....

(c) Accident or surprise which ordinary prudence could not have guarded against.

Murphy argues that he is entitled to relief pursuant to subsection (a) because he did not receive the order reassigning the trial date to August 1, 2017. However, in his reply brief, he admitted he had received the new trial date when he and counsel for Weber went to the circuit court’s office to set the date. He blamed a problem with his cellular phone failing to roll over his calendar entries to the following year and

² Because the complaint was dismissed without prejudice, we presume the court based the dismissal on CR 77.02(2), which provides as follows:

At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

thought the trial had been scheduled for two weeks later. He also cited to irregularity in the court proceedings, but we are unable to determine what this means in terms of Murphy's argument because he does not elaborate on it. Finally, he cites to subsection (c) to argue that his need to move on August 1, 2017, at short notice as well as his cellular phone problems constituted surprise. These reasons – either individually or collectively – are not sufficient to establish that the circuit court abused its discretion in dismissing the complaint.

Our review of the record establishes that the trial in this matter was rescheduled eleven times from August 23, 2012, when the trial was originally scheduled to take place in May of 2013, to November 3, 2016, when the trial was rescheduled for August 1, 2017. Some of the trial dates were moved due to the court's trial schedule or at Weber's request. However, Murphy moved to continue six of the trial dates for various reasons as set forth above. And the court reported that Murphy told him during the telephone conversation in open court on August 1, 2017, that he intended to file another motion to continue the trial that he thought was set for later in August. Based upon the circumstances of this case, including the multiple continuances at Murphy's request over the course of several years, his failure to appear at trial, and his lack of good reason for missing the trial, we must hold that the circuit court did not abuse its discretion in dismissing the action without prejudice.

Had the circuit court dismissed Murphy’s complaint with prejudice under CR 41.02(1), which permits a defendant to move for dismissal “[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court,” our inquiry would have been more stringent. For many years, courts followed the rule of law as set forth in *Ward v. Housman*, 809 S.W.2d 717, 719-20 (Ky. App. 1991), to determine whether an action should be involuntarily dismissed with prejudice under CR 41.02. We held:

In ruling on a motion for involuntary dismissal, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial. *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir. 1984), gives a worthwhile guideline for analysis of these situations under Fed.R.Civ.P. 41(b), which is our counterpart rule on the federal side. Considering whether a case should be dismissed for dilatory conduct of counsel, it would be well for our trial courts to consider the *Scarborough* case and these relevant factors:

- 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.

Id., pp. 875-878.

Although CR 41.02(1) refers to dismissal of an action or a claim therein as the sole remedy for a violation of the rule, it is our conclusion that a sanction less than dismissal is also appropriate. Needless to say, the rule is subject to the sound discretion of the trial judge.

Ward, 809 S.W.2d at 719-20.

In *Jaroszewski v. Flege*, 297 S.W.3d 24, 36 (Ky. 2009), the Supreme Court examined *Ward* and reworked the analysis as follows:

In the future, the trial court must base its decision to dismiss under CR 41.02 upon the totality of the circumstances; and it should take into account all relevant factors, whether or not those factors are listed in *Ward*. Explicit consideration of each individual factor listed in *Ward* is not required, although we encourage trial courts to address any factors listed in *Ward* that are relevant for consideration in that particular case.

While such cases as *Ward* may have been helpful in identifying some of the relevant factors in determining whether dismissal for lack of prosecution is appropriate in a particular case under the totality of the circumstances, perhaps it is also helpful to consider the policies and purposes behind such dismissals in holistically deciding such cases, rather than simply reciting formulaic lists.

The basic purposes of dismissals for want of prosecution under CR 41.02 and its federal counterpart, Fed.R.Civ.P. 41(b), are (1) to protect the defendant from the prejudice of being a defendant in a lawsuit for a protracted period (including monetary and psychological costs, as well as problems developing one's defense where delay creates loss of or difficulty obtaining evidence); and (2) "to preserve the integrity of the

judicial system” by encouraging quick resolution of cases, “disposing of inactive cases [that] clog the calendar” and sanctioning “misuse or abuse of the legal system.”

Trial courts must make explicit findings on the record so that the parties and appellate courts will be properly apprised of the basis for the trial court’s rulings; and the appellate courts can assess whether the trial court properly considered the totality of the circumstances in dismissing the case.

(Footnotes omitted.) Because the circuit court dismissed Murphy’s complaint without prejudice, we need not scrutinize the circuit court’s decision based upon the holding in *Jaroszewski*.

For the foregoing reasons, the order of the Jefferson Circuit Court dismissing Murphy’s complaint is affirmed.

ALL CONCUR.

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