

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002532-MR

DAVID J. LAZAR

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 97-CI-00138

RAYMOND E. BATES, JR.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, PAISLEY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. David J. Lazar appeals the dismissal (without prejudice) of his suit against Raymond E. Bates, Jr. by the trial court pursuant to CR 77.02(2), for want of prosecution. This was Lazar's third show cause notice and we do not believe the trial court abused its discretion. Therefore, we affirm.

David J. Lazar (Lazar) owns and lives on a parcel of real estate in Carroll County, Kentucky. Lazar developed an aquaculture business on his property in 1988. Raymond E. Bates,

Jr., and his wife, Lynda E. Bates, own an adjacent parcel of real estate upstream from Lazar. The Bateses operate a cattle farming operation on their land and in November of 1994, allowed a mobile home to be placed on their property without a septic tank. In May of 1995, the Bateses constructed a cattle manure treatment lagoon. Lazar contends the treatment lagoon was never completed, or was negligently constructed so that both the animal waste and the human waste drain into Lazar's aquaculture lake. Lazar contends the pollution caused his business to shut down in 1995, and has not reopened since due to the pollution. Lazar filed suit on September 5, 1997, against Raymond E. Bates, Jr. (Bates) for trespass, negligence, strict liability, nuisance, gross or willful negligence, and inferred a boundary line dispute. An answer was filed on September 30, 1997. In May of 1998, Lazar changed counsel. On January 27, 1999, the court sent a notice to dismiss pursuant to CR 77.02(2), to show cause why the action should not be dismissed for not taking any pretrial steps within a year. On February 17, 1999, a substitution of counsel for Lazar was filed and new counsel moved for a pretrial conference. On February 19, 1999, Bates propounded a set of interrogatories and a request for production of documents. On March 2, 1999, Lazar moved to disqualify Bates's counsel, which was denied. Lazar did not answer the interrogatories and on May 26, 1999, Bates filed a motion to

compel. On June 19, 1999, Lazar provided answers. On December 8, 1999, Lazar sent Bates a set of interrogatories which were answered by January 31, 2000. The court sent another CR 77.02(2) notice to show cause on September 27, 2000. On January 17, 2001, Lazar requested that Bates supplement his answers to Lazar's interrogatories, which was denied by the court on January 23, 2001. On February 12, 2001, the court conducted its hearing on the CR 77.02(2) notice and found cause shown and again did not dismiss. On July 3, 2001, both parties' depositions were taken. On August 20, 2002, the court sent a third CR 77.02(2) notice with a show cause hearing scheduled for October 7, 2002. Lazar filed motions to refer the case to mediation and to set for a jury trial. On October 7, 2002, the trial court denied the motions and dismissed. A timely motion to alter or amend (CR 59.05) was heard on November 4, 2002, and was denied on November 7, 2002. This appeal followed.

Lazar has one argument on appeal, that the trial court's dismissal was an abuse of discretion. CR 77.02(2) is a "housekeeping" rule which requires that, at least once a year, trial courts must review their cases and dismiss those in which no pretrial steps have been taken in the preceding year unless good cause is shown. Bohannon v. Rutland, Ky., 616 S.W.2d 46, 47 (1981). Twice before, Lazar was served with a notice to show cause why the action should not be dismissed, and both times

Lazar did just enough to get by. The July 3, 2001, depositions were the last pretrial action taken, when over a year later, on August 20, 2002, the court issued its third show cause notice. Whether Lazar has shown cause, or a sufficient reason not to dismiss, is a discretionary call of the trial court. See Wright v. Transportation Cabinet, Ky. App., 891 S.W.2d 412, 413 (1995). At the October 7, 2002, show cause hearing, counsel for Lazar sought to have the case sent to mediation or set for jury trial, but no reasons were given for the lack of preparation for trial. If there ever was a ship stalled in the water, this was it. The trial court exercised an abundance of patience, and this is the type of case CR 77.02(2) was designed to address.

We opine that the Carroll Circuit Court did not abuse its discretion in dismissing the case without prejudice. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Maureen Sullivan
Louisville, Kentucky

BRIEF FOR APPELLEE:

James M. Crawford
Carrollton, Kentucky