

RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002548-MR

ALISA D. SAIN AND MARTINIQUE SAIN

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 01-CI-000823

DEBRA L. SMALLWOOD AND
ALLSTATE INSURANCE COMPANY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Alisa D. Sain and Martinique Sain (collectively referred to as the Sains) appeal from an October 27, 2003, Order of the Jefferson Circuit Court dismissing their complaint for lack of prosecution. We reverse and remand.

On December 24, 1998, the Sains were involved in a motor vehicle accident with Debra Smallwood. At the time of the accident, Smallwood's auto insurance carrier was Allstate Insurance Company (Allstate).

On February 1, 2001, the Sains filed a complaint in the Jefferson Circuit Court. The Sains unsuccessfully attempted to have Smallwood personally served on numerous occasions. On April 11, 2002, a *sua sponte* order was entered directing counsel to schedule a pretrial conference within thirty days. Pursuant to the order, the Sains filed a motion to set the case for pretrial conference. The conference was subsequently scheduled for July 1, 2002.

Prior to the July pretrial conference, the Sains filed a motion to compel Allstate to provide the address and social security number of Smallwood, its insured. The court ordered Allstate to provide this information. On October 10, 2002, the Sains filed a motion for contempt, alleging Allstate had failed to comply with the court's order to provide the information. Following a hearing on the matter, the circuit court determined Allstate had complied with its order and thus, denied the Sains' motion for contempt.

On July 23, 2003, the court entered another *sua sponte* order that scheduled a pretrial conference for September 11, 2003. Following this conference, the circuit court dismissed the complaint, without prejudice. In the order of dismissal, the circuit court stated that the Sains had "been unable, despite reasonable efforts, to locate [Smallwood] and obtain personal service upon her as required by CR 4.04." Thereafter,

the Sains filed a motion to vacate pursuant to Ky. R. Civ. P. (CR) 59.05, which the circuit court denied. This appeal follows.¹

The Sains contend the circuit court abused its discretion by dismissing their complaint. Specifically, the Sains argue the dismissal was erroneous as it did not comply with CR 77.02. The Sains assert they were operating in good faith to advance the case and were prevented from proceeding because Smallwood was actively eluding service.

The circuit court's order did not state the specific civil rule of procedure relied upon for dismissal. CR 41.02 and CR 77.02 provide procedural mechanisms for such dismissal. CR 41.02 is clearly inapplicable because dismissal may only be granted upon a motion by the defendant. Here, no such motion was made, and the order of dismissal was *sua sponte*. Accordingly, we view the circuit court's dismissal as being pursuant to CR 77.02(2), which states as follows:

(2) 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

¹ We note that an attorney for Smallwood appeared at the hearing on September 11, 2003, and received a copy of the circuit court's order as well as copies of brief filed by the Sains and Allstate. The parties do not address the attorney's appearance, and we are puzzled why the court would dismiss the case under Ky. R. Civ. P. (CR) 77.02, with Smallwood's counsel being present.

an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

CR 77.02(2) provides a mechanism whereby the circuit court may remove stale cases from its docket and is often referred to as a "housekeeping" rule. Hertz Commercial Leasing Corp. v. Joseph, 641 S.W.2d 753 (Ky.App. 1982)(citation omitted). CR 77.02(2) specifically provides that each attorney of record be given notice and that counsel be given thirty days to respond to the proposed dismissal. Id. Furthermore, if the complaint is dismissed, an order shall be entered to that effect. Id. The foregoing requirements are mandatory because dismissal of a party's complaint "is not to be treated lightly." Id. at 755.

In the case sub judice, the *sua sponte* order merely stated that a fifteen minute pretrial conference would be held on September 11, 2003. The order does not give notice to the Sains that the case could be dismissed for lack of prosecution. As the notice requirement of CR 77.02 is mandatory, we are of the opinion that dismissal was improper.

For the foregoing reasons, the October 27, 2003, Order of the Jefferson Circuit Court is reversed and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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