

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000094-MR

MICHAEL WITT

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 01-CI-00111

RANDELL MAYNE,
and CORBIN ICE COMPANY, INC.

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BARBER, JUDGE: Appellant, Michael Witt (Witt), has appealed from a circuit court order dismissing his case against Randell Mayne and Corbin Ice Company, Inc. with prejudice and a subsequent order denying Witt's motion to set-aside the dismissal. The order dismissing the case was with prejudice and entered because of Witt's failure to prosecute the case. We vacate and remand because the record does not reflect that the

circuit court considered certain relevant factors prior to ordering the case dismissed.

Dismissals for lack of prosecution are entered pursuant to CR 41.02(1). That rule provides, simply, that a case may be dismissed for the failure of the plaintiff to prosecute his case or comply with the rules or orders of the court. The standard for review of a circuit court's order dismissing a case is whether the court abused its discretion. Jenkins v. City of Lexington, 528 S.W.2d 729, 730 (Ky. 1975).

However, Kentucky's appellate courts have consistently held that relevant factors should be considered before an order dismissing a case with prejudice is entered. Those factors include the particular facts and circumstances of the case, including whether the case has been placed on the court's trial docket, and the reasons for the delay since delay alone is not the test of due diligence. Gill v. Gill, 455 S.W.2d 545, 546 (Ky. 1970). In addition, the court should determine whether less drastic measures would remedy the situation especially where there is no prejudice to the party requesting dismissal. Polk v. Wimsatt, 689 S.W.2d 363, 364-365 (Ky.App. 1985).

Further factors relevant to whether the court should dismiss the action with prejudice can be found in Ward v. Housman, 809 S.W.2d 717, 719 (Ky.App. 1991).

In this case the parties agree that nothing in the case occurred from April 25, 2002, when court ordered mediation was conducted but failed, and when the court ultimately dismissed the case in December 2003. However, Witt claims that no further pretrial steps were needed, and that the case was ready to be placed on the court's trial docket. The record further shows that the case had never been placed on the court's trial docket nor had the court issued a show cause order pursuant to CR 77.02.

The written and audio record does not reflect that the trial court considered any of the factors outlined above prior to entering its order dismissing Witt's case with prejudice. Since it is not this Court's role to make findings, we vacate and remand the case for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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