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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000328-MR

JERRY W. LEONARD — APPELLANT

V.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
CIVIL ACTION NO. 02-CI-00197

CITY OF LEBANON JUNCTION;
GEORGE HALK, INDIVIDUALLY
AND AS MAYOR OF CITY OF
LEBANON JUNCTION, KENTUCKY;
JOHN R. OLLER, INDIVIDUALLY
AND AS CHIEF OF POLICE OF CITY
OF LEBANON JUNCTION, KENTUCKY;
AND BILLY MARAMAN, INDIVIDUALLY
AND AS COUNCIL MEMBER OF CITY
OF LEBANON JUNCTION, KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

MINTON, JUDGE: The involuntary dismissal of a civil action is a severe sanction for a trial court to impose. But when a party willfully fails to answer interrogatories, the trial court may do so in the exercise of its sound discretion. Jerry W. Leonard

made the conscious decision to disregard the circuit court's order compelling him to answer interrogatories. The question we are asked to review is whether the trial court abused its discretion by involuntarily dismissing Leonard's action for so doing. Since we hold that the trial court did not abuse its discretion, we affirm.

FACTUAL SUMMARY

Leonard was hired as a probationary police officer for the City of Lebanon Junction. Although Leonard disputes the "probationary" nature of his employment, the record clearly reflects and the trial court affirmatively found that on June 8, 2001, Leonard signed a document indicating his position would be probationary for a period not to exceed six months. On December 6, 2001, two days before the six-month probationary period ended, Leonard was asked to resign. He refused to resign. So the City fired him.

PROCEDURAL HISTORY

Leonard filed his complaint *pro se* on March 6, 2002, in Bullitt Circuit Court. The complaint alleged wrongful termination, defamation, slander, and damage to reputation and standing. Before either party had taken any discovery, Leonard filed a Motion for Summary Judgment. The court denied the

motion because it was premature. Leonard then filed a Motion for Reconsideration, which was also denied.

The parties proceeded with discovery. Leonard submitted lengthy interrogatories to the City and to each individual defendant. The City objected to the entire set interrogatories; specifically, it claimed that the interrogatories violated CR[1] 33.01(3). The court ordered a hearing for December 2, 2002, to consider all objections and responses. Less than a week later and over a month before the objections were to be heard, Leonard filed a motion to compel discovery. He also filed a "Motion for Order of Judgment Lien Lis Pendens Records" (sic), a motion for a protective order to prevent the taking of his deposition, and a motion to disqualify counsel for the City.

In the interim, the City responded to Leonard's requests for admissions. Thereafter, Leonard filed a Motion for Partial Summary Judgment.

On December 2, 2002, the hearing was held regarding the City's objections to interrogatories; the City was ordered to state specifically its objection to each interrogatory. A second hearing was scheduled to ensure the City's compliance with the court's order.

[1] Kentucky Rules of Civil Procedure.

On December 6, 2002, the City filed a motion to schedule a hearing on all pending, unresolved motions. And on December 30, 2002, the City filed answers and objections to Leonard's interrogatories. Leonard apparently disagreed with the City's answers. So he filed another motion to compel answers to his interrogatories, asserting the defendants "wrongly filed objections and claimed objections and, for the most part, refused to answer Plaintiff's Interrogatories . . . ."

On March 17, 2003, a hearing was held on all pending motions. The court ordered as follows: Leonard's motions to disqualify defense counsel, for partial summary judgment, for *lis pendens* liens, and for a protective order were denied; his motions to examine his records located at City Hall and to compel the defendants to answer interrogatories were granted. Leonard responded to the order with a Motion for Reconsideration and to Reverse, Vacate, or Amend and Motion to Strike, and Motion for Change of Venue.

Two months later, the City filed a motion for summary judgment. In support of its motion, the City claimed that because Leonard was a probationary employee who was fired before the expiration of his probationary period, he could not bring a wrongful discharge action. Since this was the crux of Leonard's complaint, the City claimed that summary judgment was the only

appropriate remedy. On June 3, 2003, an order partially granting the City's motion for summary judgment was entered. The order granted the motion to the extent of Leonard's claim of wrongful discharge. Leonard's claims for defamation, slander, and violation of due process remained in the litigation.

Leonard filed a motion for reconsideration and to reverse, vacate, or amend the court's order granting summary judgment. His motion was denied. So Leonard filed a Notice of Appeal.

Thereafter, the court ordered that the trial date in this action be remanded. Since Leonard had filed an appeal, the court found that "judicial economy would be best served" if the trial was stayed until all issues, including those on appeal, could be addressed.

Before Leonard's appeal, but after the order granting summary judgment, the City submitted interrogatories to Leonard. Leonard refused to answer. On November 14, 2003, the City filed a Motion to Compel. Three days later, the Court of Appeals entered an order dismissing Leonard's appeal because it was interlocutory and, therefore, not appealable.

In response to the City's Motion to Compel, Leonard responded with his own cross-motion to compel, and a motion for fees and costs. The court responded by ordering Leonard to respond to the City's interrogatories within thirty days.

Leonard replied with a motion to reverse, vacate, or amend the court's order. However, on January 17, 2004, Leonard tendered his answers to the interrogatories. In response to the City's questions, Leonard initially objected but then stated that "all allegations have been duly set forth in the complaint duly filed in this cause of action in this instant case and defendants are referred to the complaint."

The City responded with a Motion to Dismiss and a Supplemental Motion to Dismiss. The original motion was based on Leonard's continued failure to comply with the court's order; however, after receiving Leonard's answers, the City filed a supplemental motion to dismiss based also on the insufficiency of his response.

On February 2, 2004, the court entered an order granting the City's motion to dismiss. The court stated that after viewing the record and considering Leonard's failure to comply with CR 37.04, the action should be dismissed with prejudice. In its subsequent findings of fact, conclusions of law, and judgment, the court held that Leonard had failed to object to the City's interrogatories; that his answers to the interrogatories did not comply with CR 33.01; that his refusal to answer was conscious and intentional; and that he failed to provide the court with any reason for the delay. This appeal follows.

Leonard argues that the Bullitt Circuit Court abused its discretion when it dismissed his action with prejudice. We disagree.

CR 37.04 states that if a party fails to answer or properly object to interrogatories, the court may take any action authorized under CR 37.02(2)(a), (b), or (c). Under CR 37.02(2)(c), it is within the court's discretion to dismiss an action or proceeding or to render a judgment by default against the "disobedient" party.

The involuntary dismissal of an action is undoubtedly a severe sanction to impose upon a party; in Polk v. Wimsatt,[2] the Court held that "[b]ecause of the grave consequences of a dismissal with prejudice . . . [it] should be resorted to only in the most extreme cases."[3] The rule permitting a court to involuntarily dismiss an action "envisions a consciousness and intentional failure to comply with the provisions thereof."[4] Since the result is harsh, "the propriety of the invocation of the Rule must be examined in regard to the conduct of the party against whom it is invoked."[5]

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[2] 689 S.W.2d 363 (Ky. 1985).

[3] *Id.* at 364, 365.

[4] Baltimore & Ohio Railroad Company v. Carrier, 426 S.W.2d 938, 940 (Ky. 1968).

[5] *Id.* at 941.

Nonetheless, there are cases where dismissal of an action may be the most appropriate remedy. The standard of review in such circumstances is whether the trial court's decision was an abuse of discretion.[6] The court's discretion is not "unbridled" but, rather, rests "upon a finding of willfulness or bad faith on behalf of the party to be sanctioned."[7] Because "reasonable compliance" with the Civil Rules is necessary for the "effective administration of justice . . . [t]he proper application and utilization of those Rules should be left largely to the supervision of the trial judge."[8] So we must respect the trial court's "exercise of sound judicial discretion in [its] enforcement"[9] of the rules.

In Ward v. Housman,[10] this Court suggested six factors that trial courts should consider before involuntarily dismissing an action. Those factors, which were originally proposed by the United States Court of Appeals for the Third Circuit, are: the extent of the party's personal responsibility; the history of dilatoriness; whether the attorney's conduct was willful and in bad faith; meritoriousness

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[6] Greathouse v. American National Bank and Trust Co., 796 S.W.2d 868, 870 (Ky.App. 1990).

[7] *Id.*

[8] Naïve v. Jones, 353 S.W.2d 365, 367 (Ky. 1961).

[9] *Id.*

[10] 809 S.W.2d 717 (Ky.App. 1991).

of the claim; prejudice to the other party; and alternative sanctions.[11]

To determine the propriety of the dismissal of Leonard's action, we will discuss the matter pursuant to the factors enumerated in Ward.

1. The extent of the party's personal responsibility.

Because Leonard represented himself, his personal responsibility with regard to this case was extensive. It would, in fact, be impossible for us to hold that Leonard was not totally responsible for his failure to answer the City's interrogatories. Leonard filed his own complaint, all of his own motions, and represented himself at hearings before the court. He affirmatively chose not to answer the interrogatories; therefore, we feel that the extent of his personal responsibility has been fully established and do not believe that further discussion of this factor is warranted.

2. The history of dilatoriness.

The record does not reflect a broad history of dilatoriness in this action. Although this case has been pending for over two and a half years, it does not appear that blame for the delay can necessarily be placed with either party.

[11] Scarborough v. Eubanks, 747 F.2d 871, 874-878 (3rd Cir. 1984); *see also*, Ward, *supra* at 719.

For the most part, the delays were the result of scheduling conflicts—both with the parties and the court. Therefore, we do not believe this factor is significant to the disposition of this case.

3. Whether the attorney's conduct was willful and in bad faith.

Because Leonard was acting as his own attorney, the question is whether Leonard's own conduct was willful and in bad faith. We believe it was.

The City's interrogatories were originally filed on August 5, 2003. After three months without a response from Leonard, the City filed its motion to compel. Leonard claimed the interrogatories were improperly submitted because the case was originally set for trial on June 21, 2003; so he argued discovery had ended, and the City's interrogatories were untimely. Specifically, Leonard stated, "defendants seek to reopen discovery and this is not appropriate. This would be the equivalent to one party wanting to reopen discovery in the middle of a trial."

We note that Leonard never filed objections to the City's interrogatories under CR 33.01, and he failed to take into account the fact that the case was not tried in June 2003 because of his pending interlocutory appeal. The purpose of setting a date for the conclusion of discovery is to prevent

delays in the trial date. Since a new trial date had not been set, there was no reason that discovery could not continue. Therefore, the City's submission of interrogatories was proper; and the reasons stated for Leonard's refusal to answer were without merit.

After the court entered its order compelling Leonard to answer the City's interrogatories, Leonard responded with a motion to reverse, vacate, or amend the court's order. Apparently still miffed by what he considered to be the City's insufficient responses to his own interrogatories, Leonard stated:

> Defendants have wrongfully filed objections and claimed objections and, for the most part, refused to answer Plaintiff's Interrogatories in violation of the Kentucky Rules of Civil Procedure. Plaintiff is rightfully entitled under the rules to require defendants to make proper answer to the interrogatories propounded to them. Plaintiff has rightly, properly and legal [sic] refused to answer further interrogatories improperly propounded to him by Defendants, et al, in violation of the rules of discovery and in as much as discovery has long since ended since the above styled case was originally set for trial in July [sic] 2003 and this case was continued upon the motion of the court due to its schedule.

The gist of Leonard's argument is that because the City did not respond to his interrogatories the way he wanted them to respond, he should not be required to answer the City's

interrogatories. By consciously refusing to answer the City's interrogatories and failing to comply with the court's order, we conclude that Leonard's conduct was willful and in bad faith.

4. Meritoriousness of the claim.

Summary judgment was granted in this case on Leonard's claim of wrongful discharge; however, the matters of defamation, slander, and violation of due process were reserved. The circuit court did not make any findings with regard to these issues.

In Scarborough, the Court stated:

> For purposes of dismissal, a claim will be considered meritorious when the allegations of the pleading, if established at trial, would support recovery by plaintiff. The meritoriousness of the claim for this purpose must be evaluated on the basis of the facial validity of the pleadings, and not on summary judgment standards.[12]

Looking solely at the facial validity of the pleadings, we do not believe that the reserved issues in this case have any merit. Leonard repeatedly argues that his termination was unlawful because the City failed to follow the requirements of KRS 15.520. But KRS 15.520 does not apply to Leonard's termination. That statute specifically applies to the manner of investigation and hearing required when a complaint is filed against an officer.

[12] Scarborough, *supra* at 875.

Although a complaint was filed against Leonard, he again fails to take into consideration the fact that he was a probationary employee. As such, he could be fired at will, without reason, during the first six months of his employment. Leonard's employment was terminated before the expiration of that six-month period. So the City was not required to adhere to the procedures set forth in KRS 15.520. Therefore, we do not believe that the failure to proceed under KRS 15.520 violated Leonard's right to due process. Nor do we believe that the City's failure to adhere to KRS 15.520 prompted claims of defamation and slander. KRS 15.520 states that no public statements may be made regarding alleged violations while a complaint is pending. Leonard claims that the City made public statements about his termination in violation of this statute. But because KRS 15.520 does not apply to Leonard's termination, any alleged public statements made about the conditions of his termination would not violate the statute. In his complaint, Leonard specifically states:

> 38. Notwithstanding KRS 15.520, that prior to Officer Leonard's termination of employment by Chief Oller, that Council Member Billy Maraman did make public statements on the charges and further stated that Mayor Halk was going to terminate Officer Leonard's employment, thereby defaming Officer Leonard and causing damages to the Plaintiff in his person and his good name and reputation and standing in the community.

We do not believe that this, or any other allegation regarding alleged defamatory or slanderous remarks made by the City, is meritorious. Therefore, based on this factor, the court's dismissal of the action was proper.

5. Prejudice to the other party.

The examples of prejudice cited by the Court in Scarborough include "irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed on the opposing party."[13] The City does not claim that Leonard's failure to answer interrogatories caused it any quantifiable prejudice. Likewise, we do not see that any prejudice resulted. So this factor weighs in favor of Leonard.

6. Alternative sanctions.

Admittedly, there were other, less severe sanctions the court could have imposed on Leonard. Under CR 37.02(2), other available sanctions include "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence";[14] **"**[a]n order striking out pleadings or parts

[13] *Id.* at 876.

[14] CR 37.02(2)(b).

thereof";[15] or "an order treating as a contempt of court the failure to obey any orders . . . ."[16]

However, as previously discussed, the decision to impose a sanction on a party is within the discretion of the trial court. In this case, the court opted for the harsher alternative of involuntarily dismissing Leonard's action. We find no abuse of discretion in this decision.

CONCLUSION

Taking into consideration the totality of the factors, we believe Leonard's claims were properly dismissed with prejudice. Leonard was personally responsible for his failure to answer the interrogatories; his delay in responding was willful and in bad faith; his remaining claims appear to be without merit; and the court, in its discretion, chose to impose the harshest sanction. Based on these factors, we hold that the order of the Bullitt Circuit Court involuntarily dismissing Leonard's complaint with prejudice was not an abuse of discretion. So we affirm.

ALL CONCUR.

[15] CR 37.02(2)(c).

[16] CR 37.02(2)(d).

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