RENDERED: April 1, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000356-MR

CARLOS HOWELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS PAISLEY, JUDGE[1]
ACTION NO. 00-CI-03828

VERIZON SOUTH, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

HENRY, JUDGE: The Appellant, Carlos Howell, filed a complaint alleging premises liability and personal injury in October of 2000. Howell also prosecuted a worker's compensation claim

[1] Judge Paisley denied the Motion for Reconsideration and was the judge of record at the time of filing of the appeal. Judge Laurance B. VanMeter presided in the case until his election to the Kentucky Court of Appeals.

arising from the same injury against a company that is not a party to this case.

Howell's activity in the case consisted of filing written discovery requests in May of 2001 and responding to some discovery requests in February of 2002 following a Motion to Compel by Verizon.

Pursuant to CR[2] 77.02(2), the trial court issued a Notice to Dismiss in August of 2003 due to Howell's failure to prosecute the case. On August 29, 2003, the trial court held a hearing on the proposed dismissal, and entered an order allowing Howell sixty days in which to take affirmative action in the case or face dismissal with prejudice. Upon the expiration of the sixty-day period Howell filed a request for an additional sixty days. The trial court denied the request and entered an order granting the dismissal of the action with prejudice. Howell appealed, citing abuse of discretion by the trial court judge.

Howell correctly notes that dismissal of an action with prejudice is a severe sanction, and that it "should be resorted to only in the most extreme cases." Polk v. Wimsatt, 689 S.W.2d 363, 364-365 (Ky. 1985). However, there are circumstances where the "effective administration of justice" demands at least reasonable compliance with the Civil Rules.

[2] Kentucky Rules of Civil Procedure.

Naïve v. Jones, 353 S.W.2d 365, 367 (Ky. 1961). Therefore dismissal of an action in some situations may be the best remedy. Greathouse v. American National Bank and Trust Co., 796 S.W. 2d 868, 870 (Ky.App. 1990). The standard for reviewing these dismissals is whether the trial court abused its discretion. Greathouse, supra, at 870.

In the case of Ward v. Housman, 809 S.W.2d 717 (Ky. App. 1991), this court adopted a six factor test derived from the United States Court of Appeals for the Third Circuit's decision in Scarborough v. Eubanks, 747 F.2d 871, 875-878 (3rd Cir. 1984). The six factors are: the history of dilatoriness, the extent of the party's personal responsibility, the extent to which the attorney's conduct was willful and in bad faith, the meritoriousness of the underlying claim, the amount of resulting prejudice to the other party, and the availability of alternative sanctions.

As for dilatoriness, there is a well documented history of unnecessary delays in this case. After receiving a notice of dismissal from the trial court, Howell asked for sixty days to take action. Upon the expiration of this reprieve, Howell's only action was to ask for an additional sixty days.

We will take the factors of personal responsibility and whether the attorney's behavior was willful and in bad faith as a single subject. The litigants disagree on who exactly is

responsible for the dilatoriness present in this case. Howell's attorneys accept the blame for the delay, arguing that their client should not suffer for their actions. Verizon argues that Howell is largely to blame, citing its own difficulty in contacting Mr. Howell as the reason for some of the delay. It also notes that the client has two attorneys whose combined efforts should have been sufficient to prosecute this litigation in a timely manner.

In any event the record supports the conclusion that the conduct of the attorneys was willful and that Howell himself was partly responsible for the delay. As noted in Gorin v. Gorin, 292 Ky. 562, 167 S.W.2d 52, 55 (1943):

> A litigant may not employ an attorney and then wash his hands of all responsibility. The law demands the exercise of due diligence by the client as well as by his attorney in the prosecution or defense of litigation.

As for the meritoriousness of the case, Howell has given us little to go on. Verizon argues that the claim must be of comparatively little merit since Howell failed to put much effort into the prosecution of this case while simultaneously litigating the worker's compensation claim to its conclusion.

The prejudice to Verizon results from the difficulty of preparing a defense years after the incident. Witnesses

would be difficult to locate and evidence may have been misplaced or destroyed.

The final factor for review is the availability of alternative sanctions for the offending party. The Civil Rules provide several alternative and less drastic sanctions. However, which of these sanctions to employ is primarily within the trial court's discretion. We are not to substitute our judgment for that of the trial court unless that discretion is abused. The fact that Howell failed to prosecute this case even after being given a sixty day extension of time to do so, supports the trial court's decision.

Reviewing all the factors, we find no abuse of discretion. We affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
James W. Owens Paducah, Kentucky	Nolan Carter, Jr. Lexington, Kentucky