

RENDERED: JANUARY 6, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001676-MR

EASTERN CRANE, INC.

APPELLANT

APPEAL FROM LAWRENCE CIRCUIT COURT
v. HONORABLE C. DAVID HAGERMAN, SPECIAL JUDGE
ACTION NO. 97-CI-00264

KENTUCKY POWER COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

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

JOHNSON, JUDGE: Eastern Crane, Inc. has appealed from a final order and judgment of the Lawrence Circuit Court entered on July 16, 2004, sustaining the motion of Kentucky Power Company (KPC) to dismiss, with prejudice, Eastern's breach of contract complaint pursuant to CR¹ 41.02(1) for failure to prosecute. Having concluded that the circuit court did not abuse its discretion in dismissing the complaint, we affirm.

Due to the nature of the argument on appeal, a detailed discussion of the procedural timeline of this case, as well as a related bankruptcy action, is necessary. In February

¹ Kentucky Rules of Civil Procedure.

1993 KPC contracted with Eastern to remove ash from the settlement ponds at the Big Sandy Power Plant in Lawrence County, Kentucky. Several months later, Eastern subcontracted the work to Choo-Choo City Dredging, and the work was completed in September 1993. After the completion of the job, Eastern sent KPC a statement indicating the balance due and this amount was paid in full by KPC. Although Eastern believed it had been shorted by the way KPC measured the ash ponds, Eastern never submitted another bill to KPC.

Instead, on December 30, 1997, over four years after KPC's final payment, Eastern filed the complaint in the underlying action, naming as defendants KPC and Mitch Thomas, the plant manager of the Big Sandy Power Plant. Eastern was represented by attorneys Marrs Allen May² and John Doug Hays. The complaint alleged: 1) that beginning on January 17, 1993, Eastern entered into a series of contracts with KPC, and despite fully performing under those contracts, KPC failed to pay sums due Eastern; and 2) that KPC and Thomas conspired to compel Eastern to enter into agreements with two separate labor unions, despite no requirement in the contract to do so, by threatening

² One year prior to the filing of this action, Johnny Lequire, Eastern's president and sole shareholder, filed a personal Chapter 7 bankruptcy petition. 11 U.S.C.A. § 301 (Supp. 2004); In Re: Johnny Michael Lequire and Deborah L. Stacy, No. 96-70983 (Bankr. E.D. Ky. filed October 22, 1996). Several months after filing the complaint for Eastern in the Lawrence Circuit Court, Mr. May was appointed counsel for the bankruptcy trustee in Lequire's personal bankruptcy.

to terminate present and future contracts. The complaint requested compensatory and punitive damages.

In the two years following the filing of the complaint, the record indicates that Eastern sought an order to compel discovery, deposed three KPC witnesses, filed a supplemental request for production of documents, and filed a motion for pretrial conference and to set trial. One month short of the two-year filing anniversary, a trial was scheduled for June 6, 2000.

In the months leading up to the trial date, the parties filed witness and exhibit lists, took three depositions, and Lequire gave the first of five depositions. On the eve of trial, on joint motion of the parties, the trial was continued subject to rescheduling by motion of either party.

A couple of months after the continuance, in August 2000, Eastern's request for a trial date was converted to a status conference. The case was referred to mediation. Mediation did not occur until March 2001, and was not successful. In the months before mediation occurred, Lequire gave four depositions.

In May 2001, the month following the unsuccessful mediation, Eastern again moved for a trial date. The circuit court set the matter for trial on March 11, 2002. The case lay dormant for nine months, from May 2001 until January 2002, when

both defendants filed motions for summary judgment. On the eve of trial, all parties agreed to postpone the March 11, 2002, trial date, and the circuit court granted partial summary judgment to both defendants, dismissing the conspiracy claims against KPC and Thomas as being outside the statute of limitations, leaving only Eastern's claim for breach of contract.

A flurry of activity occurred in May 2002. At Lequire's request, Eastern's attorneys were allowed to withdraw as counsel. The order entered on May 10, 2002, gave Eastern 30 days to obtain new counsel and for new counsel to enter an appearance. The order was served on Lequire, as president of Eastern. Three days later, both judges of the Lawrence Circuit Court recused from further proceedings in the case, and Lequire filed a pro se motion for continuance, citing the search for new counsel. The case remained without a judge for over two months until a special judge was appointed on July 25, 2002.

In August 2002 there was another flurry of activity. KPC filed a motion to dismiss the remaining claim for breach of contract pursuant to CR 41.02(1) for Eastern's failure to secure new counsel by the circuit court's ordered deadline. The motion was served on Lequire, and the order granting partial summary judgment was attached as an exhibit. Lequire sent a letter to the circuit court on behalf of Eastern, asking for additional

time to obtain counsel, stating that he had been unaware of the summary judgment until June 2002, when he personally reviewed the case record. Several days later, Lequire, pro se, responded to KPC's motion to dismiss, asking for his day in court.

On November 21, 2002, six months after Eastern's counsel was allowed to withdraw, and five months after the circuit court ordered deadline for Eastern to obtain counsel, Jennifer S. Whitlock entered an appearance as counsel for Eastern. With the exception of this entry of appearance, no activity occurred in the circuit court case from August 2002 until August 2003.

While the circuit court case lay dormant, the bankruptcy case was active from August to October 2003. During this time frame, May was replaced as counsel for the bankruptcy trustee, and on August 29, 2003, the new counsel for the bankruptcy trustee filed in the circuit court case, on behalf of Eastern, an appearance motion and a motion to intervene as the true party in interest, stating as a basis the protection of the interest of Lequire's bankruptcy estate. This new counsel also filed a response to KPC's motion to dismiss, arguing that it was moot as counsel had now been retained.

In September 2003 KPC filed in the circuit court action another motion to dismiss the original complaint, citing lack of prosecution and Eastern's failure to comply with the

June 10, 2002, deadline for obtaining counsel. Bankruptcy counsel objected to KPC's motion, and filed an affidavit from the bankruptcy trustee. The affidavit indicated the trustee had retained May as counsel for Eastern in the circuit court action, that it did not know he had withdrawn from the case the previous year, and that it employed new counsel for Eastern as soon as it secured approval from the bankruptcy court.

Less than one month later the bankruptcy trustee served notice of abandonment of the bankruptcy estate's interest in the circuit court case, upon determining that pursuit of the case would not be cost-effective "due to the complexity of this matter and Mr. Lequire's deposition testimony in the record" The trustee stated that it also had "grave concerns about the likelihood of success on the merits and believe[d] that Mr. Lequire [was] in the best position to proceed on behalf of Eastern Crane, Inc." The case was thereafter abandoned by an order in the bankruptcy action entered on October 21, 2003, and an order was entered in the circuit court allowing counsel for the bankruptcy trustee to withdraw from the circuit court case.

Following the bankruptcy court's abandonment, the circuit court directed the parties to prepare a memorandum outlining the time it would take to have the action ready for trial. KPC indicated that it would take six to nine months to get ready for trial, with ten to 12 witnesses still needing to

be deposed. Also, KPC reported that the location of one undeposed witness was unknown, that nine of 21 witnesses designated by KPC in 2000 were either retired or no longer with KPC, and, that the president of Choo-Choo City Dredging had reported that he did not know if he any longer had any of the records pertaining to the 1993 Big Sandy Power Plant ash removal. Eastern likewise indicated that it would need six months to prepare for trial, and during that time it would need to take a minimum of six depositions. Eastern also filed a response to KPC's motion to dismiss.

On July 14, 2004, the circuit court sustained KPC's motion to dismiss for failure to prosecute and stated as follows:

[T]he record in the case at bar demonstrates that: (1) Eastern Crane's work at KPC's Big Sandy Plant occurred eleven (11) years ago in 1993; (2) Eastern Crane filed its complaint commencing this action six and half (sic) (6 1/2) years ago in 1997; (3) Eastern Crane requested its prior counsel to withdraw in April, 2002; (4) Eastern Crane knew sometime prior to April 11, 2002, that it needed to obtain new counsel to prosecute the subject action because it asked its former counsel to withdraw; (5) Eastern Crane did not comply with the order of May 10, 2002, as it failed to secure new counsel by June 10, 2002; (6) Eastern Crane neither sought relief from the order of May 10, 2002, nor requested an extension of time to secure new counsel; (7) More than fifteen (15) months passed from May 10, 2002, to August 28, 2003, before Eastern Crane secured new counsel (which, in fact, was

actually counsel for the bankruptcy trustee of Johnny Lequire, the sole shareholder and officer of Eastern Crane); (8) the case is still not ready for trial and will require at a minimum six (6) months to be readied for trial with significant discovery still needing to be accomplished; (9) many of KPC's witnesses are no longer employed by KPC or its affiliates and the whereabouts of at least one (1) undeposed witness is now unknown; and, (10) six (6) to twelve (12) depositions remain to be taken of witnesses who will be questioned about their recollections of events and conversations which occurred more than eleven (11) years ago.

It is a well recognized principal [sic] in Kentucky law that a trial court is vested with a broad discretion in determining the question of whether an action should be dismissed for want of diligent prosecution. Modern Heat & Sup. Co. v. Ohio Bank Bldg. & Equip. Co., Ky., 451 S.W.2d 401 (1970). See also Jenkins v. City of Lexington, Ky., 528 S.W.2d 729 (1975). Kentucky Rule of Civil Procedure 41.02(1) specifically authorizes and empowers a trial court to dismiss an action as the result of the failure of a[] plaintiff to prosecute his action. What constitutes a failure to prosecute so as to warrant a dismissal must be determined by the circumstances of each particular case. A lengthy delay may result in dismissal with prejudice by the trial court. Kurt A. Phillips, Kentucky Practice, Vol. VII, Rules of Civil Procedure Annotated, (5th ed., 1995), at 53. Accordingly, taking into consideration the foregoing matters as shown by the record, and recognizing the broad discretion vested in Kentucky trial courts to dismiss for want of prosecution,

IT IS HEREBY ORDERED that defendant Kentucky Power Company's motion to dismiss the complaint is SUSTAINED and the complaint filed herein against the aforesaid defendant

shall be, and hereby is DISMISSED for failure to prosecute pursuant to C.R. 41.02(1) with prejudice

This appeal followed.

Eastern argues that the circuit court abused its discretion in dismissing the complaint for failure to obtain counsel and for failure to prosecute. A close reading of these two arguments reveals, however, that while conceding that there was a delay in prosecution of the case, Eastern essentially presents one argument, that the delay was due to attorney May's failure to keep the bankruptcy trustee aware of the circuit court case status, specifically that he had withdrawn as counsel. Also, a close reading of the final order and judgment indicates that while KPC argued in their motion to dismiss the failure of Eastern to follow the circuit court's order in obtaining counsel in a timely fashion, and the circuit court considered this argument, it amounted to only one factor in the circuit court's final decision to dismiss for failure to prosecute. We, therefore, will address Eastern's arguments together.

The circuit court granted dismissal of Eastern's complaint pursuant to CR 41.02(1) which provides as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

Dismissal pursuant to CR 41.02(1) is an extreme remedy as it operates as an adjudication on the merits.³ It is incumbent on the trial court to consider each case in light of the particular circumstances involved; length of time alone is not the test of diligence.⁴

Our standard for review of a trial court's dismissal for lack of prosecution is whether the trial court abused its discretion.⁵ Our responsibility is to review the trial court's exercise of discretion for arbitrariness, unreasonableness, unfairness, or if it was unsupported by sound legal principles.⁶ In Ward v. Housman,⁷ a divided panel of this Court recommended guidelines for reviewing the dismissal of a case as a sanction for dilatory conduct of counsel. While that specific factor is not the main issue herein, it is helpful to consider the Ward guidelines: "1) the extent of the party's personal responsibility; 2) the history of dilatoriness; 3) whether the

³ See CR 41.02(3).

⁴ Polk v. Wimsatt, 689 S.W.2d 363, 364-65 (Ky.App. 1985); Gill v. Gill, 455 S.W.2d 545, 546 (Ky. 1970).

⁵ See Jenkins v. City of Lexington, 528 S.W.2d 729, 730 (Ky. 1975) (standard of review is abuse of discretion); Nall v. Woolfolk, 451 S.W.2d 389, 390 (Ky. 1970) (power of court to dismiss for want of prosecution is inherent power of the court); Modern Heating & Supply Co. v. Ohio Bank Building & Equipment Co., 451 S.W.2d 401, 403-04 (Ky. 1970) (unless trial court abuses its discretion by dismissing, appellate court will not interfere).

⁶ Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

⁷ 809 S.W.2d 717, 719 (Ky.App. 1991).

attorney's conduct was willful and in bad faith; 4) meritoriousness of the claim; 5) prejudice to the other party; and 6) alternative sanctions."⁸

Having reviewed the record and arguments of counsel, we find no abuse of discretion by the circuit court in dismissing Eastern's complaint. Eastern blames the delay on the bankruptcy trustee's failure to secure counsel for the action, but this argument fails to pass muster under the Ward guidelines. First, despite Eastern's argument shifting blame for the delay in obtaining counsel to the bankruptcy trustee, the record establishes that the bankruptcy trustee was not responsible for obtaining counsel for Eastern because 1) although Eastern had filed its complaint after Lequire filed for bankruptcy, the breach of contract action was filed by Eastern before the bankruptcy trustee appointed counsel for purposes of the bankruptcy; and 2) the bankruptcy trustee ultimately moved to intervene in the breach of contract action, after counsel had withdrawn, demonstrating that it was not the "real party in interest" representing Eastern and Lequire up to that time. Additionally, the record establishes that Lequire, as president and sole shareholder of Eastern, was personally responsible for withdrawal of Eastern's counsel and, although knowing he was

⁸ Ward, 809 S.W.2d at 719 (citing Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3d Cir. 1984)).

responsible for retaining new counsel by the deadline, he failed to do so.

Second, there is a history of dilatoriness. Eastern sought or agreed to several continuances since May 2000, and although Lequire filed several pro se documents in the summer of 2002, these ended in August 2002. Although Whitlock entered an appearance for Eastern on November 21, 2002, the case stayed dormant for nine more months until the bankruptcy trustee attempted to resurrect it in August 2003, with a motion to intervene. Furthermore, as late as fall of 2003, Eastern indicated that it still needed six months to get ready for trial.

Third, the merits of Eastern's claim are suspect, if for no other reason than the bankruptcy trustee abandoned its claim because of Lequire's deposition testimony and grave concerns about the likelihood of success on the merits.

Fourth, prejudice to KPC from the delay in prosecuting a 1993 contract on a case filed in 1997 was evident from the loss of potentially important documents and unknown whereabouts of one undeposed witness as well as almost one-half of KPC's witnesses who had either retired or left KPC.

Next, while attorney conduct in the delay is not totally applicable, we do note that there were no pleadings filed by Eastern's counsel following her entry of appearance in

November 2002, until after the bankruptcy trustee abandoned the case in October 2003. And insofar as the sixth factor of consideration of alternative sanctions, the desirability of an alternative sanction is lessened by the prejudice shown by KPC.⁹

In summary, this is a 1997 action arising from a 1993 contract which moved along slowly for four and one-half years. At one point during that time frame, the case lay dormant for ten months, awaiting trial. Following entry of summary judgment, Eastern's counsel was allowed to withdraw per Lequire's request. Despite being under a court order to obtain counsel, the case remained without counsel for seven months. After counsel entered an appearance, the case remained dormant for eight more months until the three-month period of attempted bankruptcy court intervention. Although length of time is only a factor, dismissal for failure to prosecute has been held proper due to dormancies of two and one-half years,¹⁰ two years,¹¹ and three and one-half years,¹² which equal or exceed the dormancies in this case. We cannot conclude that the circuit court acted arbitrarily, unfairly, or unreasonably, nor was its

⁹ Polk, 689 S.W.2d at 364-65.

¹⁰ Nall, 451 S.W.2d at 390.

¹¹ Jenkins, 528 S.W.2d at 730.

¹² Modern Heating, 451 S.W.2d at 403-04.

decision unsupported by sound legal principles. Thus, its dismissal was not an abuse of discretion.

For the foregoing reasons, the order and judgment of the Lawrence Circuit Court is affirmed.

ALL CONCUR.

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