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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001896-MR

TAYLOR COUNTY BROADCASTING COMPANY, INC.

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 86-CI-00241

TAYLOR COUNTY BANK

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: Taylor County Broadcasting Company, Inc. (the Broadcasting Company) filed this action in which it alleged breach of fiduciary duties and improper foreclosure on collateral against Taylor County Bank (the Bank) on October 1, 1986. Almost 18 years later, on motion of the Bank, the Taylor Circuit Court found that the Broadcasting Company had not made a reasonable effort to prosecute the action and dismissed the action with prejudice. The Broadcasting Company filed a motion to vacate the dismissal, which the circuit court denied,

precipitating this appeal. The issue here is: did the trial court abuse its discretion in dismissing the case with prejudice? After reviewing the extreme circumstances of this case, we do not conclude that it did. Thus, we affirm.

This is not the first time this case has been before this Court on appeal. The first time was in 1988 when the Broadcasting Company appealed the trial court's issuance of summary judgment in favor of the Bank. In that appeal, a panel of this Court held in an unpublished opinion that the summary disposition of the case was improper because factual issues remained on the circumstances of the guaranty transaction at the heart of the dispute and remanded it to the trial court for further proceedings (88-CA-903-MR, rendered September 22, 1989).

In that opinion, this Court did, however, affirm the trial court's dismissal of two other claims asserted by the Broadcasting Company: (1) the claim that the Broadcasting Company's corporate guarantee of indebtedness of its former officer was void as against public policy and (2) a tort claim that the Bank induced the former officer to violate a fiduciary duty. The Broadcasting Company sought discretionary review in the Kentucky Supreme Court, which the court denied in January of 1990 (89-SC-774-D).

On May 21, 1991, after the remaining claim returned to the trial court's docket, the trial court issued a notice and

order to dismiss under CR 77.02(2) for lack of prosecution. The Broadcasting Company responded by filing an objection to dismissal in which it stated that it was in the process of securing expert testimony, and that it intended to move for a trial date within 90 days. The trial court did not dismiss the case at that time.

Over two years after it issued the previous notice of dismissal, the trial court issued a second notice of dismissal for lack of prosecution. Two months later, the Broadcasting Company responded that it intended to complete its discovery within the next four months and moved to set this case for trial.

Ten months after the Broadcasting Company filed that response to the second notice of dismissal, the trial court issued its third notice to dismiss for lack of prosecution. The Broadcasting Company failed to respond. So, on February 8, 1995, the trial court issued an order dismissing the case without prejudice for want of prosecution. Almost two weeks later, the Broadcasting Company filed a motion to set aside the order of dismissal. The trial court granted the motion, and almost five months later, the Broadcast Company filed a motion to set the case for trial. In response, the trial court set a trial date of May 2, 1996. By agreement of the parties, that date was rescheduled to October 24, 1996.

A little over one month before the rescheduled date, however, the Bank filed a motion to permit its filing of a counterclaim based on what it alleged to be "outrageous, abusive, and vexatious litigation practices" by the Broadcasting Company's attorney. According to the Bank, the Broadcasting Company served a subpoena on a nonparty bank directing that bank to produce certain records maintained by the bank with respect to its business dealings with the former officer of the Broadcasting Company. The subpoena was not issued in connection with a deposition, hearing or trial. The trial court allowed the Bank to file its counterclaim and later allowed the Bank to file an amended counterclaim. After the Bank filed its amended counterclaim, the Broadcasting Company made a motion for separate trials on its surviving claim and the Bank's counterclaim. The trial court denied the motion for separate trials.

Ten days before the trial date of October 24, 1996, the parties agreed to continue that trial date until either party filed a motion to reset it. In less than a couple of months, the trial court rescheduled the case for trial on August 20, 1997. As to the Bank's counterclaim based on abuse of process, the Broadcasting Company made a motion for summary judgment. The trial court granted the motion and dismissed the

Bank's counterclaim, however it later vacated that decision and denied the Broadcasting Company's motion for summary judgment.

In the meantime, the August 20, 1997 trial date came and went, having been continued again by agreement of the parties. Eventually, in an order entered June 5, 2001, on the trial court's own motion, it set a trial date of January 28, 2002. But by agreement of the parties, that date was continued yet again and rescheduled for May 28, 2002.

A couple of months before the May 28, 2002 trial date, the Broadcasting Company made a second motion for separate trials, but the trial court denied the motion. Presumably because the Broadcasting Company determined that its counsel's dual role as both advocate and witness (on the amended counterclaim) was unacceptable, the Broadcasting Company's counsel filed a motion for permission to withdraw. In an order entered May 13, 2002, the trial court granted the motion and gave the Broadcasting Company 60 days in which to employ substitute counsel.

No further activity took place on the court's docket until over one year later when the Bank filed a motion to dismiss the action under CR 41.02 for the Broadcasting Company's failure to prosecute. The Broadcasting Company did not file a response, but the trial court did not take any action on that motion.

Almost another year passed and the Bank renewed its motion to dismiss for failure to prosecute. Five days later, current counsel for the Broadcasting Company filed its entry of appearance. In addition, it filed a notice/motion for a jury trial date. The trial court heard the motions on May 18, 2004, as a result of which it concluded that the Broadcasting Company had not made a reasonable effort to prosecute the action following the May 13, 2002 Order allowing it 60 days to employ new counsel. The trial court dismissed the action with prejudice.

The Broadcasting Company filed a motion to vacate the order of dismissal and set the motion for a hearing. In its memorandum in support of the motion, new counsel for the Broadcasting Company acknowledged that the case had been lying dormant for some time, but argued that the length of time an action has been before a court is not grounds for dismissing it on technical grounds. Moreover, the Broadcasting Company asserted that dismissal under CR 41.02 for failure to prosecute is only appropriate in the most extreme cases because it deprives the plaintiff of its right to trial on the merits. In support of its arguments, the Broadcasting Company urged the trial court to consider the six factors articulated in Ward v. Housman, 809 S.W.2d 717, 719 (Ky. App. 1991) before dismissing the case.

The trial court denied the Broadcasting Company's motion to vacate the order of dismissal. In its order denying the motion, the trial court found and concluded as follows:

This cause is before the Court on Plaintiff's motion to vacate the Order of Dismissal entered herein on May 20, 2004. Each party has fully briefed the issue before the Court, and the Court has considered those memoranda, as well as the oral arguments presented by counsel at the hearing conducted upon Plaintiff's motion.

The Court has considered at length the arguments advanced by Plaintiff as a part of its motion. Plaintiff concedes that the delay in bringing this matter to some final adjudication is extraordinary, but attempts to impose some blame for that delay upon Defendant. That effort does not appear to be well-founded in that Defendant's Counterclaim, which Plaintiff claims created a part of its procedural difficulties, was filed in 1996, about a year after this case was first dismissed for lack of prosecution, and then reinstated on the Court's docket pursuant to Plaintiff's motion.

As this record reflects, this case was to have been tried in May of 2002. A few weeks before that trial, Plaintiff's counsel sought a continuance, and further sought to withdraw as counsel in the case, apparently to serve thereafter as a witness. Withdrawing counsel then submitted to this Court an Order granting the requested relief, and providing further that the Plaintiff should be given sixty (60) days within which to employ, and presumably identify, other counsel. That Order was entered without objection, and no extension or enlargement of the time period set forth therein was sought even though Defendant, in May of 2003, presented its initial motion, made pursuant to CR 41.02, seeking to dismiss this proceeding. No hearing was conducted on that motion, and another year

passed with no action from the Plaintiff, either in the form of compliance with the Court's May 13, 2002 Order, or otherwise. Only after Defendant noticed for hearing on May 18, 2004, still another motion to dismiss pursuant to CR 41.02 did Plaintiff come forward and pronounce its willingness to proceed.

Plaintiff suggests, without elaboration, that some remedy less harsh than dismissal would appropriately deal with the Plaintiff's continual failure to prosecute this action. However, there comes a point at which delay in litigation exceeds the bounds of reason, and that point was, in the Court's opinion, reached in this matter. The Court cannot abdicate in favor of either party the Court's responsibility for controlling its docket, nor can it overlook the intentional disregard of its Orders. Jenkins v. City of Lexington, Ky., 528 S.W.2d 729 (1975).

ACCORDINGLY, Plaintiff's motion to vacate is **OVERRULED**.

On appeal, the Broadcasting Company argues that the trial court's dismissal of the case for failure to prosecute constituted an abuse of discretion. Moreover, the Broadcasting Company contends that the trial court abused its discretion by dismissing the case without applying the law governing dismissals for failure to prosecute as announced in Ward, 809 S.W.2d at 719.

As accurately stated by the Broadcasting Company, we review dismissals under CR 41.02 for failure to prosecute under an abuse of discretion standard. See Jenkins v. City of Lexington, 528 S.W.2d 729, 730 (Ky. 1975); Ward, 809 S.W.2d at

720. In determining whether the dismissal constituted an abuse of discretion, "[e]ach case must be considered in the light of the particular circumstances involved and length of time is not alone the test of diligence." Gill v. Gill, 455 S.W.2d 545, 546 (Ky. 1970). Moreover, this Court has held that a trial court should consider the following six factors in deciding whether dismissal is appropriate:

- 1) the extent of the party's personal responsibility;
- 2) the history of dilatoriness;
- 3) whether the attorney's conduct was willful and in bad faith;
- 4) meritoriousness of the claim;
- 5) prejudice to the other party, and
- 6) alternative sanctions.

Ward, 809 S.W.2d at 719.

In this case, the trial court issued its judgment dismissing the case for want of prosecution after three notices of dismissal and two motions to dismiss over 13 years. The procedural history outlined above shows a pattern of the Broadcasting Company being compelled to act by the notices of or motions for dismissal. And on more than one occasion, the Broadcasting Company failed to even respond to the court-issued notices of dismissal or motions to dismiss filed by the Bank. We agree with the trial court that the delay in this case with little to no explanation for the delay by the Broadcasting Company exceeds the bounds of reason.

None of the various directions that this case took, including original counsel's withdrawal, can excuse the Broadcasting Company from its duty to prosecute. As stated in Gorin v. Gorin, 292 Ky. 562, 167 S.W.2d 52, 55 (Ky. App. 1942):

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.

The Broadcasting Company argues that the trial court abused its discretion in dismissing this case because its order of dismissal does not include a finding on each of the six factors enumerated in Ward. Despite the lack of findings on each of the factors, it is clear to this Court that two factors -- on which the court did make findings -- far outweighed the others: (1) the history of dilatoriness and (2) no appropriate alternative sanction.

While findings on the other suggested factors are certainly preferred, we believe a remand to the trial court for additional findings is not warranted in this case. Ward does not hold that any one factor is to be given more weight than the others. In the end, the test is abuse of discretion in light of the particular circumstances involved. And we believe the circumstances of this case justified the harsh penalty imposed.

We affirm the order of dismissal of the Taylor Circuit Court.

ALL CONCUR.

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