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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000917-MR
AND
NO. 2005-CA-001050-MR

JOHN L. SABA, M.D.;
KIMBERLY SABA

APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NOS. 02-CI-01413 & 03-CI-01156

ST. JOSEPH HEALTHCARE, INC.;
LYLE MYERS, M.D.

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: John L. Saba, M.D., and his wife, Kimberly Saba, appeal from an order of the Fayette Circuit Court dismissing their two lawsuits against Saint Joseph Healthcare, Inc. (Saint Joseph) and Lyle Myers, M.D., for failing to diligently prosecute their lawsuits and for failing to comply with an order of the circuit court to timely obtain a substitute

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

attorney to represent them in the actions. The lawsuits concern an employment dispute involving the suspension of Dr. Sabo following untrue allegations of sexual abuse made by a patient. For the reasons stated below, we affirm.

On February 1, 2001, Dr. Saba was granted unqualified, provisional medical staff privileges at St. Joseph Hospital in Lexington. Dr. Saba's medical staff privileges were in urology, a field in which he has been board certified since 1978.

On March 19, 2002, a female patient appeared at Dr. Saba's office for a scheduled surgical evaluation. The patient had been referred to Dr. Saba because she had not responded to prior treatment for an incontinence problem. In the course of the appointment, Dr. Saba performed a physical examination and a bladder ultrasound on the patient. For some reason, the patient believed that in the course of the examination and ultrasound procedure Dr. Saba improperly fondled her breasts.²

As was his practice, Dr. Saba had a female chaperone with him, Ashley Elam, a Certified Medical Assistant, when he treated the patient. The patient reported her accusation to hospital management. For some reason, Elam corroborated the patient's allegation,³ and on March 20, 2002, Saba's hospital

² The record discloses that the patient had been diagnosed with various psychological problems.

³ The record discloses that Dr. Saba and Elam had experienced difficulties in their working relationship.

privileges were suspended by Dr. Myers, Chairman of the Medical Staff Governing Council of Saint Joseph.

On April 3, 2002, Saba, by counsel Kent Masterson Brown, filed a "Verified Complaint for Declaratory Judgment, Temporary Restraining Order, Temporary Injunction, Permanent Injunction and Damages" in Fayette Circuit Court (Case No. 02-CI-1413). The Complaint alleged causes of action on theories of breach of contract, violation of medical staff bylaws and his rights to fair process, and breach of occupancy agreement. Named as defendants were Saint Joseph Healthcare, Inc. and Lyle Myers, M.D. On April 9, 2002, the circuit court held a hearing on Saba's Motion for Temporary Injunction, following which the motion was denied.

On April 26, 2002, the defendants filed their answer in Case No. 02-CI-1413, and on July 9, 2002, filed a motion to dismiss the action. The motion to dismiss argued that the circuit court did not have jurisdiction over the matter pending the completion of administrative proceedings under the hospital bylaws. In the alternative, the defendants requested that the action be stayed pending the exhaustion of the administrative process. The defendants' motion to dismiss was not granted at this time, and litigation proceeded, including the filing of discovery requests by Dr. Saba and the taking of the deposition of the accusing patient in October 2002.

On April 11, 2002, administrative proceedings before the St. Joseph Medical Governing Council began pursuant to the hospital's bylaws. At this time the Council voted that Dr. Saba's suspension should remain in effect; the decision was subsequently upheld by the St. Joseph Board of Directors.

On March 18, 2003, Dr. Saba and his wife, Kimberly Saba, now represented by Larry B. Franklin, filed Case No. 03-CI-1156 in Fayette Circuit Court. The Sabas pleaded causes of action for defamation, including false, unprivileged statements to the Kentucky Board of Medical Licensure (KBML) and the National Practitioner Data Bank; fraudulent inducement; the tort of outrage; interference with contractual relations; interference with existing and prospective business relations; and breach of duty as established by the hospital bylaws applicable to doctors practicing at the defendant corporation's hospitals.

On April 18, 2003, an agreed order was entered by the circuit court consolidating Case Nos. 02-CI-01413 and 03-CI-01156 and staying the cases until Dr. Saba had exhausted his administrative remedies.

Hearings pursuant to the hospital bylaws began on February 12, 2003. On April 18, 2003, the Hearing Committee issued a memorandum terminating the suspension of Dr. Saba's clinical privileges. Hearings before the KBML commenced in

January 2002 and concluded in May 2003. On August 19, 2003, the Hearing Officer entered findings of fact and a recommended order exonerating Dr. Saba. On October 21, 2003, the KBML entered an order accepting in whole the Hearing Officer's recommended order, thus concluding the administrative proceedings.

Following the conclusion of the administrative proceedings, on December 11, 2003, Thomas E. Clay was substituted as the Sabas' counsel. On January 13, 2004, the Sabas filed a motion to compel the defendants to answer discovery requests previously served upon the defendants. The parties appeared for a hearing on the Sabas' motion to compel on January 23, 2004. The defendant's filed notice of service of their discovery answers on February 13, 2004.

On February 25, 2004, citing irreconcilable differences with his clients, Thomas Clay moved to withdraw as counsel for the plaintiffs, which was thereafter granted. On April 23, 2004, David J. Guarnieri entered an appearance on behalf of the Sabas. The plaintiffs deposed defendant Lyle Myers on September 9, 2004. This was the last substantive step taken prior to the dismissal of the present actions.

By motion filed October 6, 2004, Guarnieri moved to withdraw as counsel for the Sabas, citing irreconcilable differences. On October 29, 2004, the circuit court entered an order granting Guarnieri's motion to withdraw. The order

further provided that "[t]he plaintiffs shall have 45 days in which to have new counsel enter an appearance during which period of time the defendants shall take no substantive action in this matter." Hence, pursuant to this order, the Sabas had until December 13, 2004, to obtain substitute counsel.

On December 9, 2004, attorney Ed Dove contacted the defendants and advised them that a representative of Dr. Saba had contacted him about potentially representing the Sabas, but that he had not yet reached a decision on the matter. The defendants advised Dove that they would be willing to grant the Sabas an additional 30 days to secure counsel without the need for court intervention. Dove, however, never entered an appearance on behalf of the Sabas.

On March 15, 2005, the defendants filed a motion to dismiss upon the grounds that the Sabas had failed to comply with the circuit court's October 29, 2004, order by failing to obtain substitute counsel within 45 days, and because the plaintiffs had otherwise failed to prosecute the actions in a diligent manner. A hearing was held on the motion on March 25, 2005, prior to which no response was filed by the plaintiffs. At the hearing Robert L. Abell appeared before the court and stated that (1) the Sabas had contacted him sometime prior to March 11, 2005, regarding the cases and had provided him with materials relevant to the case, and that (2) he intended to

enter an appearance on the plaintiffs' behalf upon reaching terms of representation, and that he anticipated doing so that day or soon thereafter.

Nevertheless, at the conclusion of the hearing the circuit court ordered that the case be dismissed; an order dismissing the case was thereafter entered on April 4, 2005. On May 3, 2005, the Sabas filed their notice of appeal from that order (Case No. 2005-CA-000917-MR).

In the meantime, Robert L. Abell filed a notice of appearance for the Sabas, and on April 25, 2005, the plaintiffs filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 requesting that the circuit court set aside its April 5, 2005, order dismissing the cases. On May 4, 2005, the circuit court entered an order denying the Sabas' motion. On May 20, 2005, the Sabas filed their notice of appeal in Case No. 2005-CA-001050-MR.

Before us, the appellants contend that the circuit court erred by dismissing their claims. Specifically, the appellants claim that the trial court erred because only four and one-half months elapsed between the discharge, over their protest, of counsel Guarnieri; the appellants demonstrated efforts to secure counsel during this period; present counsel appeared at the hearing to dismiss and indicated that he was near finalizing an agreement to represent the appellants in the

matter; and because substantial factual developments had occurred in the administrative proceedings.

The circuit court dismissed the actions on the basis that the plaintiffs had failed to comply with the circuit court's order dated October 29, 2004, and had otherwise failed to prosecute the actions in a diligent manner. Based upon these reasons for the dismissal, we construe the dismissal as pursuant to CR 41.02.

CR 41.02(1) provides that "[f]or 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."

Because of the grave consequences of a dismissal with prejudice, we have no doubt that such a dismissal pursuant to either CR 41.02 for failure to prosecute or CR 77.02 should be resorted to only in the most extreme cases, see 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2369 (1971), and that this Court should carefully scrutinize the trial court's exercise of discretion in doing so. This kind of dismissal may even raise questions of constitutional import. Cf. Societe Industrielle pour Participations v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). Less drastic remedies, including dismissal without prejudice, would normally suffice to punish a dilatory, but not recalcitrant, party where the rights of other parties have not been prejudiced by the delay.

Polk v. Wimsatt, 689 S.W.2d 363, 364-365 (Ky.App. 1985).

In ruling on a motion for involuntary dismissal, the trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial. Scarborough v. Eubanks, 747 F.2d 871 (3rd Cir. 1984), gives a worthwhile guideline for analysis of these situations under Fed.R.Civ.P. 41(b), which is our counterpart rule on the federal side. Considering whether a case should be dismissed for dilatory conduct of counsel, trial courts should consider the Scarborough case and these relevant factors: 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. Id., pp. 875-878. Although CR 41.02(1) refers to dismissal of an action or a claim therein as the sole remedy for a violation of the rule, a sanction less than dismissal is also appropriate. Ward v. Housman, 809 S.W.2d 717, 719-720 (Ky.App. 1991).

Application of CR 41.02 is a matter that is within discretion of the trial court. Thompson v. Kentucky Power Co., 551 S.W.2d 815, 816 (Ky.App. 1977). Accordingly, we will reverse the circuit court's decision only if it abused its discretion by dismissing the Sabo's claims under CR 42.01. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by

sound legal principles." The Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

We are mindful of the admonition contained in Polk v. Wimsatt, supra, that dismissal pursuant to [] CR 41.02 for failure to prosecute . . . should be resorted to only in the most extreme cases." Nevertheless, viewing this record in its entirety we are of the opinion that there is simply no basis for the contention that the circuit court abused its discretion in invoking CR 41.02 and dismissing these cases. Case No. 02-CI-00413 was filed on April 3, 2002, and Case No. 03-CI-01156 was filed on April 18, 2003. During the course of this litigation plaintiffs went through an extended series of attorneys, and upon the dismissal of Guarnieri in October 2004, the appellants were given a reasonable amount of time, 45 days, to procure substitute counsel. At the conclusion of this period, the defendants themselves obliged plaintiffs with an additional 30 days to retain counsel. Yet still, it was not until two months following this period of generosity that the defendants moved for dismissal. At the hearing, present counsel, at best, gave a lukewarm assurance that he would enter an appearance. Given the history of the cases, the circuit court, understandably, did not assign credence to Abell's equivocations. Moreover, for the reasons previously discussed, the Circuit Court did not abuse

its discretion in denying the appellants' post-dismissal motion to set aside its April 5, 2005, order.

In summary, we find no error in the circuit court's dismissal pursuant to CR 41.02.

For the foregoing reason the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Abell
Lexington, Kentucky

BRIEF FOR APPELLEE:

William A. Hoskins
Jay E. Ingle
Kenneth B. Oakley
Lexington, Kentucky