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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002330-MR

JOHNNY T. BROWN — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETT, JUDGE
ACTION NO. 03-CI-01281

THE LAKE CUMBERLAND AREA DRUG TASK FORCE; JOEL CUNIGAN — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Johnny T. Brown appeals from an order of the Pulaski Circuit Court dismissing his civil complaint against the Lake Cumberland Area Drug Task Force (Task Force) and Task Force law enforcement officer Joel Cunigan. The court dismissed Brown's complaint pursuant to Kentucky Rules of Civil Procedure (CR) 77.02(2) (court-initiated dismissal for want of prosecution) and CR 37.02(2)(c)

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(dismissal for failure to comply with discovery order). For the reasons stated below, we vacate and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 2003, Brown, represented by attorney Marc J. Stanziano, filed a civil complaint in the Pulaski Circuit Court naming the Task Force and Cunigan as defendants. The Task Force appears to be a quasi-governmental agency which is funded by various local governments and the state and federal governments to investigate illegal drug activity in the Lake Cumberland area. Cunigan is a law enforcement officer employed by the Task Force.

In his complaint, Brown claimed that the Task Force and Cunigan committed slander, defamation, false imprisonment, the tort of outrage, and negligence in connection with his arrest and indictment on drug trafficking charges in 2002 and in connection with the ensuing newspaper publicity generated by a Task Force press release. For his part, Cunigan provided the grand jury testimony that resulted in Brown's indictment. Ultimately, the indictment against Brown was dismissed when the prosecuting Commonwealth's Attorney reviewed a videotape which showed Brown was not the person who was responsible for the drug trafficking activity alleged by Cunigan and the Task Force.

On March 10, 2004, Brown was deposed by the defendants. On June 18, 2004, Cunigan served Brown with "Interrogatories and Request for Production of Documents." The discovery request was served on Stanziano, but not on Brown personally.

The next filing in the record - filed on July 13, 2005 - was a motion filed by Stanziano to withdraw from the case. On July 14, 2005, the court entered an order permitting Stanziano to withdraw. The order further stated, "Mr. Stanziano is relieved of any further responsibility as counsel for Mr. Johnnie T. Brown. The Petitioner shall have 60 days to secure new counsel." The order reflects distribution to Stanziano, but not to Brown personally.

On July 20, 2005, Cunigan filed a motion to dismiss pursuant to CR 77 for lack of prosecution. The motion further states that "in the alternative, that should the Court allow the Plaintiff additional time to retain new counsel, that should the Plaintiff not retain new counsel during that period of time allowed by the Court, that the matter would automatically be dismissed, without further motion." Though it is clear from his motion that Cunigan is aware that Stanziano has withdrawn from the case, the certificate of service reflects that the order was served on Stanziano, but not on Brown personally. Further, service to Stanziano was to the wrong address. The motion was noticed to be heard on August 5, 2005.

Stanziano received a copy of Cunigan's motion and, even though he had by then withdrawn as Brown's counsel of record, filed a response captioned "Plaintiff's Response to Defendant's (LCADTF) Motion to Dismiss." The response argued against dismissal and further stated:

> As regards the discovery that is outstanding, counsel has the information the defense counsel mentioned in his Motion in counsel's file. It has not been turned over yet because , defense counsel has not yet obtained and turned over the audio tape of the Defendant (Cunigan's) testimony before the

> Pulaski grand jury. When seeking equity, the defendant should come to court with clean hands. When the Plaintiff gets the grand jury tape, he'll turn over the Answers to the Interrogatories - - - after he gets new counsel.

On July 25, 2005, Cunigan filed an amended motion to dismiss that reflected service to Stanziano at his proper address and to Brown personally. The motion was renoticed to be heard on September 16, 2005, renoticed again for October 5, 2005, and renoticed yet again for October 7, 2005. In the meantime, the Task Force joined in the motion. The court finally heard the motion on October 7, 2005. On October 13, 2005, the trial court entered an order dismissing the complaint. The order stated, in relevant part, as follows:

> . . . . Between December 19, 2003 and the date of this Order, the Plaintiff has taken no pretrial steps to move this case towards resolution.
>
> On July 13, 2005, former Plaintiff counsel, Marc J. Stanziano, filed a motion to withdraw as counsel in this matter and on July 14, 2005, this Court sustained Mr. Stanziano's motion to withdraw and gave the Plaintiff, Johnny T. Brown, sixty days to secure new counsel. On July 19, 2005, counsel for Mr. Cunigan served his motion to dismiss to which Mr. Stanziano responded after withdrawing from the case and without any notice to the Court that he was re-entering an appearance in the matter. His response is therefore a nullity.
>
> Defense counsel re-noticed their motion to dismiss for hearing on October 7, 2005 and this matter was heard at that time. Plaintiff's time to have new counsel enter an appearance expired on or about September 15, 2005.
>
> Although associated with former Plaintiff counsel, Marc J. Stanziano, Ms. Katie Wood entered an appearance with the Court at the hearing of this matter on October 7, 2005. No explanation was offered by Ms. Wood as to why the matter simply wasn't placed in her hands upon Mr. Stanziano's

> withdrawal. Nor was any explanation given as to why her appearance in the case was not effected within the period of sixty days allowed by this Court's previous Order of July 14, 2005.
>
> Accordingly, pursuant to the Court's powers to control its docket and discovery, and noting that by the date of the hearing on this matter on October 7, 2005, that Plaintiff still had not answered the Defendant's interrogatories and requests for production of documents, dismisses this action pursuant to Kentucky Rule of Civil Procedure 37.02(2)(c) and 77.02(2).

This appeal followed.

Brown contends that the circuit court erred by dismissing his complaint under both CR 37.02(2)(c) and CR 77.02(2).

DISMISSAL UNDER CR 37.02(2)(c)

CR 37.02, which is captioned "Failure to Comply with Order," states, in relevant part, as follows:

> (2) Sanctions by court in which action is pending.
>
> If a party . . . **fails to obey an order to provide or permit discovery**, including an order made under Rule 37.01 or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (emphasis added).
>
> Our standard of review of a dismissal under CR 37

is whether the trial court's decision was an abuse of discretion. *Greathouse v. American National Bank and Trust Co.*, 796 S.W.2d 868, 870 (Ky.App. 1990).

Dismissal of the action as a sanction against the offending party "is a drastic measure, and should be utilized cautiously and judiciously." *Natural Resources and Environmental Protection Cabinet v. Williams*, 768 S.W.2d 47, 50 (Ky. 1989). Nevertheless, as noted by this court in the *Greathouse* case, "[i]t has also been stated that 'if a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion.'" *Id.* at 870, quoting *Regional Refuse Systems, Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988), *overruled on other grounds as superseded by rule change*, *Vance, by and through Hammons v. U.S.*, 182 F.3d 920 (6th Cir. 1999).

The circuit court's dismissal under 37.02(2)(c) was an abuse of discretion because the rule is, by its plain language, specifically limited to when a party "**fails to obey an order** to provide or permit discovery." (Emphasis added). While Cunigan had served a discovery motion upon Brown and Brown had failed to respond thereto, the circuit court had not ordered that Brown comply with the discovery motion. Hence, an essential element of the rule – that the failure to provide discovery be in violation of a court order – is not present.

"The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Because there was no violation of "an order to provide or permit discovery" as required under the rule to permit the sanction imposed, the circuit court abused its discretion by dismissing Brown's complaint under this rule.

DISMISSAL UNDER CIVIL RULE 77.02(2)

The circuit court's October 13, 2005, order also states that the dismissal is pursuant to CR 77.02(2). CR 77.02(2) provides as follows:

> At least once each year trial courts shall review all pending actions on their dockets. **Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown.** The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made. (Emphasis added).

CR 77.02(2) provides a mechanism whereby a circuit court may remove stale cases from its docket and is often referred to as a "housekeeping" rule. *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753, 755 (Ky.App. 1982). The rule's phrase "no pretrial steps" has been construed "to encompass situations in which no action of record has been taken by either party during the year next preceding the judges' review of the docket." *Bohannon v. Rutland*, 616 S.W.2d 46, 47 (Ky. 1981). Dismissals for lack of prosecution pursuant to CR 77.02 are reviewed under an abuse of discretion standard. *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky.App. 2006).

The record discloses that the impetus for the circuit court's dismissal of the case was Cunigan's motion to dismiss, and, consequently, was not a product of its annual housekeeping duties under CR 77.02(2). More importantly, however, the rule requires notice to the parties and a warning of dismissal except for good cause shown. The record

discloses that the notice requirement of the rule was not complied with, and, accordingly, dismissal under this rule was not proper.[2]

HARMLESS ERROR

The appellees recognize the procedural flaws that made dismissal under CR 37.02(2) and CR 77.02(2) improper, but they contend we should consider those flaws harmless error and nevertheless affirm the circuit court's order of dismissal. However, the most serious procedural flaw in the case is not related to those identified above; rather, it is the circuit court's failure to have properly justified its dismissal as required under *Ward v. Housman*, 809 S.W.2d 717 (Ky.App.1991), and *Toler, supra*. As noted in *Toler*:

> [D]ismissal of a case pursuant to CR 41.02 or CR 77.02[3] "should be resorted to only in the most extreme cases" and we must "carefully scrutinize the trial court's exercise of discretion in doing so." *Polk v. Wimsatt*, 689 S.W.2d 363, 364-65 (Ky.App. 1985). The rule permitting a court to involuntarily dismiss an action "envisions a consciousness and intentional failure to comply with the provisions thereof." *Baltimore & Ohio Railroad Co. v. Carrier*, 426 S.W.2d 938, 940 (Ky. 1968). 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." *Id.* at 941. Moreover, 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." *Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970). In addition, the court should determine whether less drastic measures would remedy the

[2] We are cognizant that Brown had actual notice of Cunigan's motion to dismiss under the rule, and, in the normal course of events, and in other contexts, the error may have qualified as a harmless one. However, as further discussed, the harmless error rule is not applicable under the circumstances of this case.

[3] And, we note, CR 37.02(2)(c).

> situation, especially where there is no prejudice to the party requesting dismissal. *See Polk*, 689 S.W.2d at 364-65.
>
> Further factors relevant to whether the court should dismiss an action with prejudice can be found in *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991). In *Ward*, this Court adopted the guidelines set forth in *Scarborough v. Eubanks*, 747 F.2d 871 (3d Cir.1984) for determining whether a case should be dismissed for dilatory conduct under Rule 41(b) of the Federal Rules of Civil Procedure-the counterpart to our CR 41.02(1). We specifically held that the following factors should be considered: (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) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions. *Ward*, 809 S.W.2d at 719.
>
> As the trial court's decision to dismiss here appears to have been based almost exclusively on the Tolers' inaction from January 2002 to May 2004, we believe that the *Ward* factors are particularly relevant. Accordingly, we find ourselves hesitant to affirm or reverse the trial court because the record is unclear as to whether the *Ward* factors were properly considered or even considered at all. It instead reflects that the court's decision was based almost exclusively upon the fact that there was a two-and-a-half-year lack of activity. While such a fact must certainly be considered in determining whether to dismiss a case for lack of prosecution, it is not the only fact to be examined. *See Gill*, 455 S.W.2d at 546.
>
> The responsibility to make such findings as are set forth in *Ward* before dismissing a case with prejudice falls solely upon the trial court. Accordingly, even though we understand and sympathize with the court's desire to move the cases on its docket along in a timely and expeditious manner, we find ourselves compelled to vacate its orders as to dismissal here and to remand this action for further consideration in light of *Ward*. In doing so, we express no view as to whether dismissal with prejudice will ultimately be merited.

Toler, 190 S.W.3d at 351-52.

As in *Toler*, the circuit court in this case appears to have relied exclusively upon the length of time that the case had been on the docket without any steps having been taken.[4]

As such, the circuit court failed to adequately consider the remaining *Ward* factors in its decision to dismiss. As the responsibility to make such findings before dismissing a case falls solely upon the trial court, we vacate and remand for additional findings addressing the full range of *Ward* factors. The circuit court should thereafter reconsider its dismissal decision based upon its findings under *Ward*.[5]

For the foregoing reasons, the order of the Pulaski Circuit Court is vacated, and the case is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

[4] The court also relied upon the failure of Brown to timely respond to Cunigan's discovery request; however, as noted, he was not under court order to so respond, thereby rendering CR 37.02(2)(c) inapplicable.

[5] The appellees also contend that we should view any procedural errors as harmless by reviewing this case as a summary judgment pursuant to CR 56. However, a dismissal based upon summary judgment is not before us, nor has Brown been afforded a fair opportunity to argue in opposition to dismissal upon summary judgment grounds. Accordingly, we decline to review the circuit court's dismissal as harmless under CR 56. We note, however, that nothing in this opinion should be construed as preventing motions for summary judgment upon remand.

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BRIEF FOR APPELLEE JOEL CUNIGAN:

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