RENDERED: MAY 18, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002611-MR

CADLE COMPANY, SERVICER FOR C&W ASSET ACQUISITION, LLC — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 03-CI-003986

MMAPCO, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Cadle Company appeals from a dismissal with prejudice of their foreclosure case against MMAPCO, LLC. For the reasons set forth herein, we affirm the judgment of the Jefferson Circuit Court.

In 1996, Fifth Third Bank loaned $60,000.00 to Marie D. Mason. In return, Mason executed a note in favor of Fifth Third and granted it a mortgage on her home. Fifth Third assigned the mortgage to C&W Asset Acquisition, and Cadle is the servicer

for C&W. Shortly before her death, Mason deeded her home to MMAPCO, which is incorporated and controlled by her son Phillip J. Mason. This case involves an attempt to foreclose on this property due to non-payment.

This case was filed May 2, 2003. On June 16, 2003, the trial court granted a Motion for More Definite Statement filed by MMAPCO and entered an order allowing Cadle ten days to respond. Cadle failed to respond, and MMAPCO filed their first Motion to Dismiss July 14, 2003. Cadle finally filed its response July 25, and the trial court denied the Motion to Dismiss.

On February 3, 2004, the trial court granted a Motion to Compel and ordered Cadle to respond to discovery requests first served by MMAPCO on June 19, 2003. Fifteen days later, MMAPCO filed another Motion to Dismiss and requested a monetary award for Cadle's failure to comply. The trial court again denied the Motion to Dismiss but granted reasonable expenses incurred to obtain the Court's Orders Compelling Discovery in the sum of $615.00. The amount was paid one year later after MMAPCO filed a Motion for Sanctions. MMAPCO filed another Motion to Dismiss in the interim but was again denied.

The court entered its Trial Order July 13, 2005. Among other requirements, the Trial Order mandated that the parties exchange witness lists by October 20, 2005, ninety days prior to the scheduled trial date. MMAPCO served its witness list on October 20, 2005. At the pretrial hearing on October 28, 2005, MMAPCO informed the trial court that Cadle had not yet identified its witnesses, and the court admonished Cadle to

comply with the Trial Order. Despite the admonishment, Cadle had yet to submit its witness list prior to the court's dismissal of the case November 21, 2005. Cadle hereby appeals the dismissal with prejudice of its case.

Cadle argues that the trial court abused its discretion when it dismissed Cadle's case against MMAPCO. We disagree.

Kentucky CR 41.02(1) governs the involuntary dismissal of cases for failure to comply with a court order, and we review the trial court's decision under the abuse of discretion standard. *See Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991).

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. Considering whether a case should be dismissed for dilatory conduct of counsel, trial courts must consider 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*. at 719.

In the case at hand, it is clear that it was no one other than Cadle's fault that the repeated delays took place. Moreover, the record clearly reflects a history of dilatoriness by Cadle to virtually every order issued by the trial court. It is unclear whether the attorney's conduct was necessarily in bad faith, but it is difficult to interpret it as anything but willful. Additionally, the meritoriousness of the claim is in serious question given that in Cadle's long overdue response to MMAPCO's Motion for

Sanctions, it admitted that there had been a release issued on this property but that it had no knowledge of the decision to issue the release and could offer no witnesses with adequate knowledge of the transaction. Finally, Cadle's counsel claims to have been unaware of the dismissal of this case until December 13, 2005. This admission only serves to weigh further in favor of this dismissal since Cadle had still not produced the witness list as of that date, which was a mere month before the scheduled trial date. It is clear that Cadle's blatant disregard for the orders of the trial court would have severely prejudiced MMAPCO given that the witness list would have only been available to MMAPCO less than one month before trial. This is a seriously inadequate amount of time to allow MMAPCO to prepare for trial and is clearly prejudicial. No other sanctions seem appropriate given the clear prejudice and history of dilatoriness. Therefore, we find it within the discretion of the trial court to have dismissed this case with prejudice.

Cadle also contends that it was denied due process of law because it did not receive notice of either the motion to dismiss or the subsequent order. We disagree. The notice of the motion to dismiss was sent from MMAPCO's attorney, whereas the trial court's Order dismissing the case was sent from the court. It would appear that not only is Cadle's attorney incapable of following the court's orders, but he/she is also unable to receive incoming mail. Regardless of this issue, however, the record indicates that Cadle repeatedly failed to follow the court's orders. It is on this basis that the dismissal was granted. We will not now overturn the trial court based on Cadle's own mail delivery issue.

Accordingly, we affirm the judgment of the Jefferson Circuit Court.

KELLER, JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: I respectfully dissent. While the dilatory habits of Appellant's counsel are obvious to us, only the trial court is in a position to assess all the relevant factors set forth in *Ward v. Housman,* 809 S.W.2d 717 (Ky.App. 1991). We said in *Toler v. Rapid American*, 190 S.W.3d 348 (Ky.App. 2006):

> *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.*

Id. at 351-52 (emphasis added).

The order from which the appeal is taken makes no reference whatsoever to the factors specifically enumerated in *Ward,* and enumerated again in *Toler*, and once again in the very recent case of *Jaroszewski v. Flege*, 204 S.W.3d 148, 150 (Ky.App. 2006). Because the responsibility for making findings as to these factors "falls solely upon the trial court," I believe this case should be remanded with instructions that the trial court do so.

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