No. 34144 - Jennifer L. Caruso v. Brian N. Pearce and P & T Trucking, Inc., et al.

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OF WEST VIRGINIA

Davis J., dissenting, joined by Justice McHugh:

In this proceeding, the trial court dismissed the plaintiff's case under Rule 41(b) of the West Virginia Rules of Civil Procedure. The majority opinion has reversed the trial court's ruling because it found that the plaintiff had established good cause for not dismissing the case. For the reasons set out below, I dissent.

After the Plaintiff Filed the Complaint, She Did Nothing in the Case for Almost Three Years

The record in this case revealed that the plaintiff filed this action against the defendants on October 12, 2004. In November 2004 and October 2005, the defendants filed third-party complaints against third-party defendants.[1] Subsequent to the filing of the third-party complaints, discovery took place in the case that involved only the third-party plaintiffs and the third-party defendants. The last circuit court discovery filing between the third-party plaintiffs and the third-party defendants occurred in July of 2006.[2]

[1]The record is clear in showing that between the date of the filing of the complaint, October 12, 2004, and the dates the third-party complaints were filed, November 22, 2004, and October 13, 2005, the plaintiff did not have any activity in the case.

[2]The discovery between the third-party plaintiffs and the third-party defendants took place even though a scheduling order had not been entered by the trial court.

On July 31, 2007, the trial court issued a notice of dismissal of the plaintiff's case under Rule 41(b). The trial court did this because, from the date that the plaintiff filed her action, October 12, 2004, to the date that the trial court issued its notice of dismissal, July 31, 2007, the plaintiff failed to take any affirmative action in the case despite the fact that the third-party litigants had vigorously conducted discovery against each other.

It has been correctly observed that

> [t]here are four grounds for dismissal of a plaintiff's action under Rule 41(b): (1) failure of the plaintiff to prosecute, (2) failure of the plaintiff to comply with the rules or any order of court, (3) inactivity for more than one year, and (4) the plaintiff is delinquent in the payment of accrued court costs.

Hoover v. Moran, 222 W. Va. 112, ___ n.11, 662 S.E.2d 711, 719-20 n.11 (2008) (internal quotations and citation omitted). The trial court dismissed the action for (1) failure to prosecute and (2) inactivity for more than one year.[3] The order dismissing the action held

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[3]This Court has recognized that,

> [t]o some extent [,] "failure to prosecute" and "inactivity for more than one year" overlap. The distinction between the two grounds for dismissal lies in the fact that "failure to prosecute" is broader than "inactivity for more than one year." While the former may include the conduct of the latter, the latter does not embrace all of the types of conduct that may come under the former.

Hoover v. Moran, 222 W. Va. 112, ___ n11, 662 S.E.2d 711, 719-20 n.11 (2008) (internal quotations and citation omitted). It has been further noted by federal courts that

> [f]ailure to prosecute is not defined in Rule 41(b). It can evidence itself either in an action lying dormant with no significant activity to move it or in a pattern of dilatory tactics. The latter may consist, for example, of groundless motions, repeated requests for continuances or persistent late filings of court

"that counsel failed to establish good cause as to why the case had not been prosecuted by the Plaintiff during its pendency and, specifically, failed to establish good cause why the case had not been prosecuted during the one year immediately preceding the filing of the Notice of Dismissal."

The majority opinion erroneously focused exclusively upon the "inactivity for more than one year" basis for dismissal. To some extent, if this case merely involved the "inactivity for more than one year" ground for dismissal, I might have been inclined to agree with the resolution reached by the majority opinion. However, this case also concerned a failure to prosecute, which is a much broader ground for dismissing a case. The trial court's order specifically found that "no discovery was initiated by the Plaintiff since the Complaint was filed in October 2004[.]" In other words, this is not a case where a plaintiff had begun discovery and subsequent thereto, neglected the case for over a year. Rather, the plaintiff in this case filed her complaint then simply did nothing while her case languished in the trial court for nearly three years.

To properly evaluate the trial court's order, the majority opinion had to look at both grounds for dismissal under Rule 41(b). The "inactivity for more than one year"

> ordered papers. Such conduct may warrant dismissal after merely a matter of months, or may stretch out over a period of years.

Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 42-43 (2nd Cir. 1982) (citations omitted).

ground for dismissal was based upon the last filings by the third-party litigants. This basis for dismissal was lenient in that it allowed the plaintiff to bootstrap onto the activity that was taking place between the third-party litigants. However, under the "failure to prosecute" basis for dismissal, the trial court was in fact looking at all of the activity that had occurred in the case from the date the complaint was filed to the date the Rule 41(b) dismissal notice was issued. During this much broader time frame, the plaintiff did nothing in the case.

Justice Cleckley made clear in *Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996), that, to prevent a Rule 41(b) dismissal, "the plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the case to proceed[.]" *Dimon*, 198 W. Va. at 50, 479 S.E.2d at 349. In the instant case, the trial court found that the plaintiff had failed to establish "good cause" for failing to prosecute the case and for inactivity for more than one year. The majority opinion concluded that the absence of a scheduling order, which did not preclude the third-party litigants from vigorously engaging in discovery,[4] constituted good cause for the inactivity for more than one year. However, this tortured result because the plaintiff also failed to prosecute her case after the complaint was filed, *i.e.*, the plaintiff did nothing but file a complaint and thereafter sleep on her rights for almost three years. *See Safouane v. Fleck*,

[4]*See* note 5, *infra.*

226 Fed. Appx. 753 (9th Cir. 2007) (Rule 41(b) dismissal, even though scheduling order was not entered, in case pending in district court for almost five years without being prosecuted); *Bielinski v. Casual Corner Group, Inc.*, No. 99 Civ. 693 (TPG), 2002 WL 2012622 (S.D.N.Y. Aug. 30, 2002) (same; case pending over three years). A longstanding legal maxim adhered to by this Court is that "[t]he law aids those who are diligent, not those who sleep upon their rights." *Dimon*, 198 W. Va. at 48, 479 S.E.2d at 347 (internal quotations and citation omitted). "We have explained this principle of law to mean that when attorneys are careless, and [do] not attend to their interests in court . . . , they must suffer the consequences of their folly." *Law v. Monongahela Power Co.*, 210 W. Va. 549, 561, 558 S.E.2d 349, 361 (2001) (Davis, J., dissenting) (internal quotations and citation omitted).

The majority opinion's reliance on the lack of a scheduling order as an impediment to the plaintiff's ability to engage in discovery is misplaced.[5] Parties are not

[5]I wholeheartedly agree with the majority opinion's recognition that a trial court has a mandatory duty to enter a scheduling order. Indeed, I have previously commented that:

> [u]nder Rule 16(b), it is mandatory that trial courts enter a scheduling order that limits the time to join parties, amend pleadings, file and hear motions, and complete discovery. *See Elliott v. Schoolcraft*, 213 W. Va. 69, 73 n. 5, 576 S.E.2d 796, 800 n. 5 (2002) (per curiam) (reversing summary judgment in part because the trial court did not enter a scheduling order in the case).

State ex rel. Pritt v. Vickers, 214 W. Va. 221, 226, 588 S.E.2d 210, 215 (2003) (footnote omitted). However, insofar as trial judges have heavy caseloads, it is understandable that a trial judge might, on a rare occasion, fail to timely enter a scheduling order in a case. When such an oversight occurs, a plaintiff should not allow almost three years to pass without

prohibited from initiating discovery without a scheduling order.[6] The West Virginia Rules of Civil Procedure expressly authorize specific discovery, after the commencement of an action, without the intervention of a trial court. It is provided under Rule 30(a) that, "[a]fter the commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." Under Rule 31(a), "[a] party may take the testimony of any person, including a party, by deposition upon written questions without leave of court[.]" Rule 33(a) states that, "[w]ithout leave of court . . . , any party may serve upon any other party written interrogatories[.]" Finally, "[a] plaintiff may, without leave of court, serve a Rule 34(a) discovery request (production of documents) upon any defendant together with service of the summons and complaint or after service of process." Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 34(b), at 833 (3d ed. 2008). *See also Orduna v. Texas Comm'n on Alcohol & Drug Abuse*, 220 Fed. Appx. 249, 250 (5th Cir. 2007) (affirming Rule 41(b) dismissal where, after filing complaint, plaintiff took no action in case for four and a half years).

In view of the freely available discovery tools under our rules, it is simply wrong for the majority opinion to disturb the trial court's Rule 41(b) dismissal order. The

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alerting the trial judge that a scheduling order has not been entered.

[6]This fact is obvious because, as earlier noted, the third-party litigants in this case actively engaged in discovery in the absence of a scheduling order.

plaintiff in this case had almost three years to invoke our discovery rules, and she failed to do so. This conduct justified the trial court's dismissal for failure to prosecute. "There could hardly be a clearer case of failure to prosecute." *M & H Cosmetics, Inc. v. Alfin Fragrances, Inc*., 102 F.R.D. 265, 267 (E.D.N.Y. 1984). *See also Salmon v. City of Stuart*, 194 F.2d 1004 (5th Cir. 1952) (upholding Rule 41(b) dismissal upon finding that "following the filing of this . . . suit, no action was taken in it by the plaintiffs for one year and three months").

In the final analysis, "Rule 41(b) protects the integrity of a court's docket by giving courts discretion to dismiss actions that are not being actively pursued." Cleckley, et al., *Litigation Handbook* § 41(b), at 934. The trial court adhered to the standards of Rule 41(b) and did not abuse its discretion in dismissing this case. The majority opinion's "new and intolerable standard will make it impossible for . . . judges to control their dockets . . . ,because litigants will be able to indefinitely . . . extend litigation by simply saying 'I was busy doing something else.'" *Plummer v. Workers Compensation Div*., 209 W. Va. 710, 718, 551 S.E.2d 46, 54 (2001) (Davis, J., dissenting). "The standard [the majority opinion] adopts here encourages dilatory behavior rather than diligence[.]" *Gaither v. City Hosp., Inc*., 199 W. Va. 706, 717, 487 S.E.2d 901, 912 (1997) (Maynard, J., dissenting). Consequently, my respect for the rule of law precludes me from joining the majority opinion.

In view of the foregoing, Justice McHugh and I respectfully dissent.