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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170818

Ace American Insurance Company

v.

Rouse's Enterprises, LLC, d/b/a Rouses Markets

**Appeal from Baldwin Circuit Court
(CV-16-900890)**

BOLIN, Justice.

Ace American Insurance Company ("Ace"), an intervenor in the action below, appeals from the Baldwin Circuit Court's dismissal of the action filed by Ace's insured, Willie James Westbrook, against Rouse's Enterprises, LLC, d/b/a Rouses Markets ("Rouses Markets").

1170818

Facts and Procedural History

On August 11, 2016, Westbrook sued Rouses Markets seeking to recover damages for injuries he sustained as the result of the allegedly negligent operation of a pallet jack by a Rouses Markets' employee while Westbrook was delivering goods to the Rouses Markets' location in Spanish Fort during the course of his employment with Cardinal Logistics Management Corporation ("Cardinal"). On that same date, Westbrook noticed the taking of the depositions of a Rouses Markets' representative and the employee who was operating the pallet jack.

On November 12, 2016, Ace filed a motion and complaint in intervention in the action, alleging that it had paid Westbrook \$55,679.19 in workers' compensation benefits as Cardinal's workers' compensation insurer pursuant to a workers' compensation insurance policy executed in Louisiana. Ace asserted that, pursuant to La. R.S. § 23:1102, it was entitled to a reimbursement from the proceeds of any recovery by Westbrook from Rouses Markets for those amounts expended on behalf of Westbrook under the workers' compensation insurance policy. On November 15, 2016, the trial court entered an order granting Ace's motion to intervene.

1170818

On March 27, 2018, Rouses Markets moved the trial court to dismiss the complaint against it pursuant to Rule 41(b), Ala. R. Civ. P., arguing that Westbrook has failed to prosecute the case. Rouses Markets alleged:

"1. This case involves an alleged incident on January 14, 2016, wherein [Westbrook] claims he was injured while delivering and helping to unload merchandise at [Rouses Markets'] store.

"2. This lawsuit was initiated on August 11, 2016.

"3. During the course of the party and factual discovery, no evidence was presented to indicate that [Westbrook] was in fact ever injured at [Rouses Markets'] store.

"4. Thereafter, on September 28, 2017, [Westbrook's] counsel of record Lucy Elizabeth Tufts, Esq. filed her Motion to Withdraw as counsel for [Westbrook], ... which this Court granted on October 3, 2017.

"5. Since then, no new counsel of record has appeared for [Westbrook] and [Westbrook] has otherwise made no further attempt to prosecute this case since the withdrawal of his counsel of record over five (5) months ago."

It appears that on April 2, 2018, the trial court ordered Westbrook to respond to the motion to dismiss by April 12, 2018. Westbrook did not respond. However, on April 12, 2018, Ace filed a motion in response to Rouses Markets' motion to dismiss, requesting that the trial court deny the motion to

1170818

dismiss and stating that it was filing the motion in response to the motion to dismiss because Westbrook had failed to respond; that it had paid to that date approximately \$150,736.09 in workers' compensation benefits on behalf of Westbrook; that it was entitled to reimbursement of those funds expended from the proceeds of any recovery by Westbrook from Rouses Markets; and that, because Westbrook "apparently has chosen not to pursue this matter, Ace request[ed] this Honorable Court to allow it to proceed to obtain recovery of the of the [workers'] compensation it has paid and will pay" to Westbrook.

On April 24, 2018, the trial court entered an order granting Rouses Markets' motion to dismiss the action for want of prosecution.

Discussion

This Court has stated:

"Dismissal of an action is governed by Rule 41(b), Ala. R. Civ. P., which states, in pertinent part:

"'For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise

specifies, a dismissal under this subdivision and any dismissal not provided for in this rule ... operates as an adjudication upon the merits.'

"Concerning the application of Rule 41(b), this Court in Riddlesprigger v. Ervin, 519 So. 2d 486 (Ala. 1987), held as follows:

"Rule 41(b) has been construed to mean that a trial court has the inherent power to dismiss a cause for want of prosecution or for failure to comply with court rules or orders. Ryder Int'l Corp. v. State, 439 So. 2d 162 (Ala. Civ. App. 1983). Accord, Link v. Wabash R.R., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Such a dismissal is generally considered to be within the sound discretion of the trial court and will be reversed on appeal only for an abuse of that discretion. Whitehead v. Baranco Color Labs, Inc., 355 So. 2d 376 (Ala. Civ. App. 1978). It need only be determined, upon appellate review of a trial court's action under Rule 41(b), whether the ruling is supported by the evidence. Strickland v. National Gypsum Co., 348 So. 2d 497 (Ala. Civ. App. 1977); Nettles v. First Nat'l Bank, 388 So. 2d 916 (Ala. 1980).

"....

"As this Court has heretofore observed:

"In Alabama, and many federal courts, the interest in disposing of the litigation on the merits is overcome and a dismissal may be granted when there is a clear record of delay,

willful default or contumacious conduct by the plaintiff. Smith v. Wilcox County Board of Education, 365 So. 2d [659] at 661 [Ala. 1978]. See, e.g., Boazman v. Economics Laboratory, Inc., 537 F.2d 210 (5th Cir. 1976); Pond v. Braniff Airways, 453 F.2d 347 (5th Cir. 1972). Willful default or conduct is a conscious or intentional failure to act. Welsh v. Automatic Poultry Feeder Co., 439 F.2d 95 (8th Cir. 1971). 'Willful' is used in contradistinction to accidental or involuntary noncompliance. No wrongful motive or intent is necessary to show willful conduct."

"'Selby v. Money, 403 So. 2d 218, 220 (Ala. 1981).'

"519 So. 2d at 487-88. Further, this Court has held that '[b]ecause the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to grant a motion to dismiss for failure to prosecute will be accorded considerable weight by a reviewing court.' Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 604 So. 2d 332, 341 (Ala. 1991)."

Gill v. Cobern, 36 So. 3d 31, 32-33 (Ala. 2009).

Ace argues that there is no evidence in the record indicating that it or Westbrook had engaged in any undue delay, willful default, or contumacious conduct. Rouses Markets responds by arguing that this Court should not hold

1170818

Ace, a third-party intervenor seeking reimbursement for its contractual obligation to pay Westbrook workers' compensation benefits, in the same regard as an aggrieved plaintiff when evaluating the harshness of a dismissal for want of prosecution pursuant to Rule 41(b), Ala. R. Civ. P. Rouses Markets has cited no authority in support of its contention that this Court should not hold Ace in the same regard as an aggrieved plaintiff when evaluating the merits of a dismissal under Rule 41(b).

Rule 24(a), Ala. R. Civ. P., provides:

"Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

"Intervention is a method by which an outsider with an interest in an action may come into the action as a party on his own application." Root v. City of Mobile, 592 So. 2d 1051, 1053 (Ala. 1992) (citing Ex parte Howell, 447 So. 2d 661 (Ala. 1984) (emphasis added)). Rouses Markets has not challenged Ace's standing, as an intervenor, to pursue its statutory-

1170818

reimbursement interest in the workers' compensation benefits it has paid Westbrook, following the dismissal of Westbrook from the action. In Taylor Coal Co. v. Pearson, 380 So. 2d 779 (Ala. 1980), Crocker sued Pearson in the Fayette Circuit Court seeking to quiet title to mineral rights in certain lands. Taylor Coal Company moved to intervene, and its motion to intervene was granted. Following Taylor Coal's intervention, the trial court ordered that a number of certain other parties be added to the action by amendment. Neither Crocker nor Taylor Coal complied with the trial court's order. Thereafter, the trial court dismissed the action for failure to prosecute. Subsequently, Pearson sued Taylor Coal and others alleging trespass and conversion of coal and mineral rights in land that had been involved in the prior action. Taylor Coal sought to revive the prior action by filing an amendment adding the necessary parties whose absence had led to the dismissal. Taylor Coal then moved the trial court to dismiss Pearson's trespass and conversion action, arguing that the prior action was a prior pending suit. Pearson moved the trial court to dismiss Taylor Coal's amendment, arguing that Taylor Coal had been previously dismissed with prejudice when the trial court

1170818

dismissed the action for want of prosecution. The trial court entered an order granting the motion to dismiss Taylor Coal's amendment. In determining that the trial court's dismissal for want of prosecution did not apply to Taylor Coal, this Court stated, among other things:

"It is well established that under Rule 24, [Ala. R. Civ. P.], the complaint upon intervention is no longer subordinate to the main proceedings, and that dismissal of the original plaintiff does not necessarily and automatically compel dismissal of the intervenor. See 3B Moore's Federal Practice, ¶ 24.16(6)."

380 So. 2d at 781 n.1.

Accordingly, Ace, as an intervenor, is afforded no less protection when evaluating the merits of a dismissal for want of prosecution under Rule 41(b) than is a first-party plaintiff.

Westbrook filed the initial complaint in this case in August 2016. Ace moved to intervene in the action and filed its complaint in intervention on November 12, 2016. The trial court granted Ace's motion to intervene on November 15, 2016. It appears that Westbrook and Rouses Markets engaged in discovery. Thereafter, on September 28, 2017, Westbrook's counsel moved to withdraw from the case. On October 3, 2017,

1170818

the trial court entered an order granting counsel's motion to withdraw. On March 27, 2018, approximately six months after Westbrook's counsel had withdrawn, Rouses Markets moved the trial court to dismiss the action for want of prosecution. Rouses Markets asserted that, since Westbrook's counsel had withdrawn, no new counsel of record had appeared to represent him and he had otherwise made no further attempt to prosecute this case. When Westbrook did not respond to Rouses Markets' motion to dismiss even after the trial court had ordered him to respond by April 12, 2018, Ace, on April 12, 2018, filed a motion in response to the motion to dismiss asserting its interest in the action and requesting that it be allowed to proceed to obtain a recovery of the workers' compensation benefits it had paid on behalf of Westbrook.

Even assuming that the trial court found Westbrook's approximate six-month period of inaction following the withdrawal of his counsel and his failure to respond to the motion to dismiss to be a "clear record of delay, willful default or contumacious conduct" warranting a dismissal of the action, nothing in the record indicates that Ace, as intervenor, had engaged in any similar conduct. Rather, Ace

1170818

filed its intervenor action within a reasonable time after the complaint in this case was filed to protect its interests. When it became apparent that Westbrook was not going to respond to the motion to dismiss within the time allotted by the trial court, Ace promptly and timely filed a response to Rouses Markets' motion to dismiss, again setting forth its interests in the case and requesting that the trial court allow it to proceed to recover the workers' compensation benefits it had paid on behalf of Westbrook. Nothing in the record indicates that Ace acted with "willful default or contumacious conduct." Gill, 36 So. 3d at 33.

Rouses Markets argues that Ace remained inactive in the action after intervening until it filed its response to the motion to dismiss. There was, however, no reason for Ace to become active in the case after intervening, because Westbrook and Rouses Markets had engaged in discovery and, by all appearances, the case was proceeding. However, as mentioned above, once it became clear that Westbrook was no longer prosecuting the case after his counsel had withdrawn, and after he had failed to respond to the motion to dismiss within the time ordered by the trial court, Ace filed its motion in

1170818

response to the motion to dismiss, requesting that the trial court allow it to proceed on its claim. Based on these circumstances, we cannot say that the record evidences a "clear record of delay" on Ace's part. Gill, 36 So. 2d at 32-33.

Conclusion

This Court has stated that, "'since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations' and that, as a result, 'appellate courts will carefully scrutinize such orders and occasionally will find it necessary to set them aside.'" Smith v. Cowart, 68 So. 3d 802, 811 (Ala. 2011) (quoting Smith v. Wilcox Cty. Bd. of Educ., 365 So. 2d 659, 661 (Ala. 1978)). We cannot say that the circumstances presented by this case present an extreme situation in which dismissal of Ace's claim for want of prosecution is warranted. Accordingly, we reverse the judgment of the trial court dismissing Ace's claim and remand the case for further proceedings.

REVERSED AND REMANDED.

Stuart, C.J., and Parker, Main, Wise, Sellers, and Mendheim, JJ., concur.

Shaw and Bryan, JJ., concur in the result.