Rel: January 10, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180737

Betty Wilson et al.

v.

Marion Martin Merriweather et al.

Appeal from Talladega Circuit Court
(CV-16-900287)

THOMPSON, Presiding Judge.

Betty Wilson, Mary Ann Swain, the heirs and/or undetermined heirs of Jerry Swain, Jr., Rosie Lee Garrett, Minnie Ree Garrett, Kindness Swain, Dorothy Sue Keith, and Janie Mae Powell ("the plaintiffs") brought an action in the

Talladega Circuit Court ("the trial court") seeking to quiet title to certain real property in Alpine ("the property"). The complaint, filed on September 6, 2016, named as defendants the property itself, Marion Martin Merriweather, who, according to the complaint, held an undivided one-fifth interest in the property, "and all persons claiming any present, future, contingent, remainder, reversion, or other interest" in the property. It appears that, on the same day, the plaintiffs moved the trial court for an order to allow the "unknown defendants" to be served by publication.

On November 15, 2016, Merriweather filed a motion to dismiss the plaintiffs' action. As a ground for her motion, Merriweather stated that the complaint in this action was "essentially the same" as a complaint the plaintiffs had filed on March 2, 2016. That complaint had been dismissed without prejudice on August 24, 2016, because of the plaintiffs' counsel's failure to attend two scheduled hearings and a mandatory docket call. Merriweather also objected to service by publication of the September 6, 2016, complaint, among other things.

On February 28, 2017, the plaintiffs filed an amendment to their complaint. That amendment did not include naming or specifying any additional defendants. The plaintiffs again sought an order allowing service by publication on all unknown defendants. Nothing in the record indicates that the trial court ruled on that motion.

On September 29, 2017, the plaintiffs filed another amended complaint, this time adding defendants Anthony D. Bell, Daphne V. Bell, Willie Bell Braxton, and fictitiously named defendants A through Z "as persons claiming any present, future, contingent, remainder, reversion, or other interest" in the property. The September 29, 2017, amended complaint included an alternative claim for ejectment. On October 20, 2017, Merriweather filed a motion to dismiss that amended complaint. Anthony Bell and Daphne Bell, each appearing pro se, filed their own respective motions to dismiss. The trial court held a hearing on the motions to dismiss, and, on January 24, 2018, it entered an order directing the plaintiffs to "add all necessary Party Defendants to adjudicate the issues complained of in their Complaint, amend the description

of the real property at issue in this case," and respond to outstanding discovery within 45 days of the date of the order.

On March 10, 2018, the plaintiffs filed yet another amended complaint, this one naming defendants in the place of fictitiously named defendants. Specifically, in the March 10, 2018, amended complaint, in addition to Merriweather, Anthony Bell, Daphne Bell, and Braxton, the plaintiffs named as defendants the heirs of Jay Cee Vincent, Jr. (Jason Douglas Vincent, Valeria Yvette Vincent, and Sonja Michelle Vincent), Jerry Vincent, Brenda Vincent Cross, Regina Vincent Clark, Carol A. Vincent, Calvin D. Vincent, Rogers Vincent, William F. Martin, Larry E. Martin, Ralph B. Martin, and the heirs of Sharon Martin Daniels (Karmon Daniels, Karl Daniels, and Kevin Daniels). In identifying the parties in the complaint, the plaintiffs indicated that the named defendants lived throughout the United States. Additionally, the plaintiffs attempted to demonstrate how each individual was connected to the property. The complaint indicated that only four of the defendants--Merriweather, Braxton, Anthony Bell, and Daphne Bell--had been served with the March 10, 2018, amended complaint.

On July 26, 2018, the trial court entered an order stating that, at the docket call held on that day, it had taken judicial knowledge of its file and had noted that the plaintiffs had not perfected service on the "Defendant." Therefore, the trial court directed, the plaintiffs were given 60 days from the date of the order to perfect service or the case would be dismissed.

On October 16, 2018, Merriweather filed a motion to dismiss, pointing out that the time in which the plaintiffs had to perfect service had expired on September 27, 2018, and, furthermore, that the plaintiffs had not requested an extension of time. Because the action had been pending "for an unusually long period of time," and all of the necessary parties had not yet been "identif[ied] or served," Merriweather said, the action was due to be dismissed.

The next day, October 17, 2018, the plaintiffs filed a motion for additional time to perfect service on the defendants. In their motion, the plaintiffs asserted that they had identified all the people who had an interest in the property and that they had "made diligent attempts to perfect service within the 60 days." However, the plaintiffs said,

some of the defendants had refused service by certified mail, and, the plaintiffs alleged, the delay in perfecting service was because of the defendants' avoidance of service. The plaintiffs stated that they had "researched" process servers in the hope of being able to perfect service by employing process servers. The plaintiffs identified nine individuals who had been served and, as noted, sought additional time to complete service.

After a hearing, the trial court entered an order on February 25, 2019, directing the plaintiffs to identify and properly name or substitute all parties in the litigation within 45 days. The trial court further ordered the plaintiffs to perfect service on all defendants within 45 days or the case would be dismissed.

On April 11, 2019, the plaintiffs filed yet another amended complaint. Also on April 11, 2019, the plaintiffs filed a motion seeking additional time to perfect service on the one defendant, Brenda Cross, who had not yet been served. In the motion, the plaintiffs asserted that they had learned that afternoon that Cross's previous address had "been vacated" and that they had located another address for her.

On April 24, 2019, the trial court entered an order allowing the plaintiffs seven days to perfect service on Cross and to provide the court with proof of such service.

On May 2, 2019, the trial court stated in a judgment that it had reviewed its file and that the plaintiffs had not yet served all the party defendants as ordered. Accordingly, the trial court dismissed the action with prejudice. The plaintiffs did not file a postjudgment motion. Instead, on June 11, 2019, the plaintiffs filed a timely notice of appeal to the Alabama Supreme Court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975. The defendants did not favor this court with a brief on appeal.

On appeal, the plaintiffs contend that the trial court abused its discretion in dismissing their action for lack of prosecution. Involuntary dismissal of an action is governed by Rule 41(b), Ala. R. Civ. P. That rule provides:

> "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, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19,

> [Ala. R. Civ. P.,] operates as an adjudication upon the merits."

In Smith v. Wilcox County Board of Education, 365 So. 2d 659 (Ala. 1978), which is one of the opinions the plaintiffs rely on in support of their argument, our supreme court discussed the application of Rule 41, writing:

> "The general rule, of course, is that a court has the inherent power to act sua sponte to dismiss an action for want of prosecution. Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). However, since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations. Brown v. Thompson, 430 F.2d 1214 (5th Cir. 1970); Durham v. Florida East Coast Ry. Co., 385 F.2d 366 (5th Cir. 1967).
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> "Therefore, appellate courts will carefully scrutinize such orders and occasionally will find it necessary to set them aside. 9 Wright & Miller, Federal Practice & Procedure, § 2370, p. 203, n. 1; see, e. g., Connolly v. Papachristid Shipping, Ltd., 504 F.2d 917 (5th Cir. 1974); Flaksa v. Little River Marine Construction Co., 389 F.2d 885 (5th Cir.) cert. den. 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed.2d 1387 (1968).
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> "The Fifth Circuit Court of Appeals follows the rule that a trial judge may dismiss with prejudice an action 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.' Durham v. Florida East Coast Ry. Co., supra, followed in Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972); Boazman v. Economics Laboratory, Inc., 537 F.2d 210 (5th Cir. 1976). Several other circuits follow that rule. See 9 Wright & Miller, Federal Practice & Procedure, § 2369, p. 194-95, n. 70. Other courts refer to a

> 'serious showing of willful default.' Gill v. Stolow, 240 F.2d 669 (2nd Cir. 1957); Dabney v. Burrell, 67 F.R.D. 132 (D. Md. 1975).
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> "Consequently, it appears that the plaintiff's conduct must mandate the dismissal. Brown v. Thompson, supra. ...
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> "....
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> "...[E]ven where there has been a period of inactivity, present diligence has barred dismissal. Raab v. Taber Instrument Corp., 546 F.2d 522 (2d Cir. 1976); Morales v. Lionel Corp., 439 F. Supp. 53 (S.D. N.Y. 1977); United States v. Myers, 38 F.R.D. 194 (N.D. Cal. 1964). Second, the rule is that a lengthy period of inactivity may justify dismissal in the circumstances of a particular case. Thus, a period of inactivity is generally coupled with some other act to warrant the severe penalty of dismissal. See, e.g., Link v. Wabash R. Co., supra (inactivity coupled with counsel's failure to appear at a pre-trial conference); Forest Nursery Co. v. Crete Carrier Corp., 319 F. Supp. 213 (E.D. Tenn. 1970) (failure of defendant to answer a summons 6 months after required by statute); Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir.) cert. den. 393 U.S. 1050, 89 S.Ct. 688, 21 L.Ed. 2d 692 (1968) (failure to obey court order coupled with lapse of activity for 14 years)."

Smith, 365 So. 2d at 661-62(first emphasis added).

In Blake v. Stinson, 5 So. 3d 615, 618 (Ala. Civ. App. 2008), this court explained:

> "'"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[, Inc.], 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."
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> "'Selby v. Money, 403 So. 2d 218, 220-21 (Ala. 1981); see also Burton v. Allen, 628 So. 2d 814, 815 (Ala. Civ. App. 1993).'
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> "HICA Educ. Loan Corp. v. Fielding, 953 So. 2d 1261, 1263 (Ala. Civ. App. 2006)."

(Emphasis added.)

In this case, the record demonstrates that, since the filing of the original complaint in September 2016, the plaintiffs have pursued the litigation by, among other things, filing motions, responding to the motions to dismiss, and taking part in various hearings. Thus, a lack of activity could not have been a proper basis for the trial court's

dismissal of the action. Accordingly, there had to be "'"a clear record of delay, willful default or contumacious conduct by the plaintiff[s]"'" to warrant the dismissal. Blake, 5 So. 3d at 618.

In its judgment, the trial court cited the plaintiffs' failure "to serve all party Defendants" as the reason for its dismissal. According to the record, the plaintiffs ultimately named 19 individuals as defendants. The case-action summary in the State Judicial Information System indicates that a summons and complaint were sent by certified mail to each of the named defendants. It also shows that several of those defendants' addresses were changed during the course of the litigation. As mentioned, the 19 defendants lived throughout the country. The record indicates that, although there were delays in serving some of the defendants, the plaintiffs made progress in the number served each time the trial court allowed an extension of time in which the plaintiffs were to accomplish service. The plaintiffs' last request for an extension was in their April 11, 2019, motion for additional time to perfect service on defendant Brenda Cross. At that time, the plaintiffs said, they had "made diligent attempts to

perfect service" within the time allowed but had learned on that date that Cross's "address has been vacated." The "vacated address" was in Virginia. In their motion, the plaintiffs said that they had located another address for Cross in Illinois. The address was set forth in the motion.

On April 24, 2019, the trial court granted the plaintiffs a seven-day extension. The order stated that if "all defendants have not been served and proof of such service is not filed with this Court within seven (7) days, then this case is dismissed with prejudice." The plaintiffs made no other filings or submissions to the court, and, eight days after the entry of the April 24, 2019, order, the trial court entered its May 2, 2019, judgment of dismissal.

As mentioned, involuntary dismissal under Rule 41(b) is a "drastic sanction." Smith, 365 So. 2d at 661. We recognize that the original complaint in this matter was filed in September 2016 and that the judgment dismissing the action was entered more than two years later, in May 2019. However, we note that the plaintiffs initially attempted to serve the defendants by publication but, instead, followed the trial court's directive to ascertain the identities of anyone who

may have had an interest in the property and to serve them my methods other than by publication. There is no evidence in the record of a period of inactivity, willful default, or contumacious conduct on the part of the plaintiffs in attempting to identify and serve the 19 named defendants. The plaintiffs appear to have followed, or attempted to follow, the court's directives. There is no explanation in the record as to why the plaintiffs were unable to serve Cross during the last seven-day extension granted by the trial court. The trial court has been patient with the plaintiffs during the time it has taken them to identify and attempt to serve each of the 19 named defendants. Nonetheless, we cannot say that a failure to serve someone within the 9 days the plaintiffs had between learning of Cross's new address and the trial court's judgment dismissing the action in its entirety rises to the level of warranting dismissal of the action, especially when the 18 other named defendants appear to have already been served. Accordingly, we conclude that the trial court abused its discretion in dismissing the action based on the lack of service of 1 of 19 named defendants.

The judgment of the trial court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.