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**IN THE
COURT OF APPEALS OF INDIANA**

SUSAN PEACH (BOOTHBY) and)
RENEE BOOTHBY,)
)
Appellants-Plaintiffs,)

vs.)

No. 27A02-0705-CV-389

JON MAULLER and ROBIN MAULLER,)
)
Appellees-Defendants.)

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0406-CT-99

November 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Susan Peach and Renee Boothby (collectively “the Boothbys”) appeal from the trial court’s order granting Jon Mauller and Robin Mauller’s Trial Rule 41(E) motion to dismiss the Boothbys’ complaint. The Boothbys raise two issues on appeal, namely, whether the trial court abused its discretion when it granted the motion to dismiss and when it denied the Boothbys’ motion to reinstate their complaint.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 15, 2003, the Boothbys were walking past the Maullers’ residence when the Maullers’ dog bit Susan’s arm. On June 3, 2004, the Boothbys filed a complaint for damages against the Maullers alleging negligence, and the trial court set a trial date of December 13, 2004. On June 11, the Maullers served discovery requests upon the Boothbys. When they did not receive responses to those requests by August 31, the Maullers filed a motion to compel, and the trial court granted that motion.

During a telephonic pretrial conference on November 19, the trial court continued the trial until April 18, 2005, and the court directed the parties to submit an agreed pretrial order. The parties had not submitted a pretrial order by March 2, and, on March 28, the Boothbys filed a motion to continue the trial. The trial court granted that motion and reset the trial date for May 16. But the parties had not submitted an agreed pretrial order by May 11, so the trial court again continued the trial until a date to be determined after further consultation with counsel.

On May 3, 2006, the Maullers' counsel sent a proposed pretrial order to the Boothbys' counsel, but the Boothbys' counsel did not sign and return the order. On October 20, the Maullers' counsel sent another proposed pretrial order to the Boothbys' counsel for signature and instructed the Boothbys' counsel to file the order with the trial court "ASAP." Appellants' App. at 91. But the Boothbys' counsel did not file the pretrial order with the court.

On January 26, 2007, the Maullers' counsel filed a motion to dismiss the Boothbys' complaint for failure to prosecute, and the trial court scheduled a hearing on that motion for February 28. The Boothbys' counsel did not attend that hearing, and the trial court granted the motion to dismiss following the hearing. Thereafter, the Boothbys' counsel filed a motion to reinstate the complaint, which the trial court denied following a hearing. This appeal ensued.

DISCUSSION AND DECISION

The Boothbys' complaint was dismissed with prejudice pursuant to Indiana Trial Rule 41(E), which provides:

Failure to prosecute civil actions or comply with rules. Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

A dismissal pursuant to Rule 41(E) for failure to prosecute will be reversed on appeal only in the event of an abuse of discretion, which occurs only where the decision of the

trial court is against the logic and effect of the facts and circumstances before it. Lee v. Pugh, 811 N.E.2d 881, 884-85 (Ind. Ct. App. 2004).

The purpose of Rule 41(E) is “to ensure that plaintiffs will diligently pursue their claims. The rule provides an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution.” Belcaster v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003) (quoting Benton v. Moore, 622 N.E.2d 1002, 1006 (Ind. Ct. App. 1993)), trans. denied. The plaintiff bears the burden of moving the litigation and the trial court has no duty to urge or require counsel to go to trial, even where it would be within the court’s power to do so. Lee, 811 N.E.2d at 885. “Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered. He should not be left with a lawsuit hanging over his head indefinitely.” Belcaster, 785 N.E.2d at 1167 (quoting Hill v. Duckworth, 679 N.E.2d 938, 939-40 (Ind. Ct. App. 1997)).

Our court generally balances several factors to determine whether a trial court abused its discretion in dismissing a case for failure to prosecute. Lee, 811 N.E.2d at 885.

These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff’s part.

Id. (citing Belcaster, 785 N.E.2d at 1167). “‘The weight each factor has in a particular case appears to depend upon the facts of that case.’ However, a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay.” Id. (quoting Belcaster, 785 N.E.2d at 1167).

Several of those factors support the trial court’s dismissal of the Boothbys’ complaint, including the length of the delay, the reason for the delay, and the extent to which the Boothbys were stirred to action by the threat of dismissal. See id. On January 26, 2007, the Maullers moved to dismiss the Boothbys’ complaint. Prior to that date, the last action the Boothbys took in the case, according to the CCS, was their counsel’s participation in a status conference on May 18, 2005.¹

Dismissal under Rule 41(E) requires only a sixty-day period of inaction. The Boothbys failed to take any action in this case for more than a year and a half. Further, the Boothbys’ counsel did not attend the hearing on the motion to dismiss, so the Boothbys did not offer any reason for their failure to prosecute. While we prefer to decide cases on their merits, Lee, 811 N.E.2d at 886, we cannot conclude that the trial court abused its discretion when it dismissed the Boothbys’ complaint.

The Boothbys also contend that the trial court abused its discretion when it denied their motion to reinstate their cause of action. We also review a trial court’s denial of a motion to reinstate for an abuse of discretion. Id. at 887. Trial Rule 41(F) provides in

¹ The Boothbys contend that their counsel took action to prosecute their claim in December 2006, but that evidence was not before the trial court when it ruled on the motion to dismiss.

relevant part: “A dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B).” Ind. Trial Rule 41(F) (2004).

A motion made under Trial Rule 60(B) is addressed to the equitable discretion of the trial court, circumscribed by the eight categories listed in Trial Rule 60(B). Lee, 811 N.E.2d at 887. In their motion to reinstate, the Boothbys argued that they are entitled to relief from judgment under Trial Rule 60(B)(1), which provides: “On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons: . . . (1) mistake, surprise, or excusable neglect[.]”

Here, the Boothbys allege that their counsel had expected the hearing on the motion to dismiss to be conducted telephonically. As such, they contend that their failure to attend the hearing was the result of excusable neglect. Further, the Boothbys contend that they did resume prosecution of their claim prior to January 2007. In particular, they point out that in December 2006, their counsel telephoned the trial court in an attempt to schedule a new trial date and that their counsel was also “pursuing a summary judgment motion” in December 2006. Brief of Appellants at 7. But there is no record of the alleged attempt to schedule the trial date, and the only evidence of preparations to file a summary judgment motion consists of two single-page affidavits by the Boothbys prepared in December 2006, but neither filed with the trial court nor submitted to the Maullers.

The trial court had discretion to disbelieve the Boothbys’ counsel’s self-serving statements regarding his absence from the dismissal hearing and alleged efforts to

prosecute the claim in December 2006. And the Boothbys do not offer any explanation for their lack of action from May 2005 until January 2007. We hold that the trial court did not abuse its discretion when it denied the Boothbys' motion to reinstate.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.