SIXTH DIVISION
May 13, 2016

No. 1-14-3775

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL SWISZCZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 11 L 13381
	)	
ILLINOIS CENTRAL RAILROAD COMPANY,	)	Honorable
	)	James P. Flannery,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the denial of plaintiff's petition under sections 2-1301 and, alternatively, 2-1401 of the Code of Civil Procedure to set aside the dismissal of his FELA claim for want of prosecution, finding that plaintiff's petition under both section 2-1301 and section 2-1401 was time-barred.

¶ 2 Plaintiff, Daniel Swiszcz, brought an action against defendant, the Illinois Central Railroad Company, under the Federal Employers' Liability Act (FELA) (45 U.S.C. §51 *et seq*.), to recover damages occasioned by defendant's alleged negligence. The circuit court dismissed the action without prejudice for want of prosecution. Plaintiff filed a petition pursuant to section 2-1301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(West 2012)), or, in the alternative, section 2-1401 of the Code, (735 ILCS 5/2-1401 (West 2012)) (hereinafter, the section 2-1301/2-1401 petition), to set aside the dismissal order and reinstate the action. The

circuit court denied the section 2-1301/2-1401 petition, and plaintiff filed this appeal. We affirm.[1]

¶ 3 Plaintiff began working for defendant in 1998 as a machinist. In January 2004, he was diagnosed with cancer in his right lung, which he had surgically removed. He underwent chemotherapy for several months and eventually returned to work.

¶ 4 In late 2010, plaintiff was diagnosed with cancer in his left lung. On December 13, 2011, plaintiff filed his three-count, FELA complaint against defendant, alleging that during the course of his employment with defendant, he was exposed to harmful and hazardous diesel exhaust and that as a result, he contracted lung cancer. Count I alleges that defendant's negligence caused or contributed to his right lung cancer. Counts II and III allege that defendant's negligence caused or contributed to his left lung cancer.

¶ 5 From the time plaintiff filed his complaint in December 2011 until July 2014, his case was primarily handled by attorney Kenneth Rudd from the C. Marshall Friedman firm in St. Louis, while attorney Anthony Elman in Chicago served as plaintiff's local counsel.

¶ 6 During the November 1, 2013, deposition of plaintiff's pulmonologist, Dr. Layous, Mr. Rudd questioned Dr. Layous about a document (the Layous document) he signed on April 4, 2011, in which he rendered an opinion about causation in this matter. Plaintiff had not previously produced the Layous document to defendant, even though the document was responsive to numerous requests defendant propounded on plaintiff nearly a year and a half earlier. As such, defendant was unprepared to question Dr. Layous about the document at the time of his deposition. Defendant was also denied the opportunity to question plaintiff about the

[1] This matter was previously assigned to another division of this court, but was recently transferred to the Sixth Division in April 2016.

Layous document, as plaintiff's deposition took place more than eight months prior to Mr. Rudd's disclosure of the document.

¶ 7 On December 11, 2013, one day before the scheduled deposition of one of plaintiff's other treating physicians, Dr. Jano, Mr. Rudd produced a document (the Jano document) that had not been previously produced despite defendant's numerous requests to which the document was responsive and despite defendant's repeated requests that plaintiff produce copies of the medical records in his possession. The Jano document included an opinion on causation in this matter and was identical to the Layous document except for the name of the doctor signing it and the date on which it was signed.

¶ 8 At the case management conference on January 2, 2014, defendant informed the court that plaintiff had not yet answered defendant's discovery requests related to the Layous document and also raised the issue of Mr. Rudd's withholding the Layous and Jano documents from defendant. The circuit court ordered: (1) plaintiff to answer defendant's Rule 213(f)(3) (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007)), interrogatories by February 18, 2014; (2) defendant to file a motion to compel relating to the issues surrounding its discovery requests relating to the Layous document; (3) Mr. Rudd to appear at the hearing on defendant's motion to compel; and (4) that Rule 213(f)(1) and (f)(2) discovery was closed for all other matters.

¶ 9 Defendant filed its motion to compel plaintiff's responses to discovery requests and sanctions on February 21, 2014. At the next case management conference on February 27, 2014, the court entered an order providing that plaintiff, who had not disclosed his Rule 213(f)(3) witnesses by the February 18, 2014, deadline, had waived his Rule 213(f)(3) disclosures.

¶ 10 On March 7, 2014, the circuit court: granted defendant's motion to compel, and entered an order providing that defendant had until April 23, 2014, to bring a petition for fees; barred plaintiff from using the Layous document at trial and barred Dr. Layous from giving testimony at trial relating to the document; required plaintiff to produce a privilege log to defendant by March 14, 2014; and ordered Mr. Rudd to appear at the April 23, 2014, case management conference. The order further stated that Mr. Rudd "failed to appear today despite being ordered to on January 2, 2014."

¶ 11 On April 17, 2014, plaintiff filed an emergency motion to reopen discovery and permit him to disclose experts pursuant to Rule 213 and Rule 218. The circuit court denied the motion on April 23, 2014.

¶ 12 At the case management conference on June 18, 2014, the court granted Mr. Elman and his firm leave to file a motion to withdraw as plaintiff's counsel and ordered that "[r]esponsible trial counsel is *** to appear at all future court hearings or the case will be [dismissed for want of prosecution]."

¶ 13 On June 24, 2014, Mr. Elman filed his motion to withdraw as plaintiff's local counsel. On July 9, 2014, the court granted Mr. Elman's motion and ordered that Scott Friedman, an attorney from Mr. Rudd's firm who is licensed in Illinois, file his appearance as plaintiff's counsel on or before July 16, 2014. In a separate order entered on that same date, the court ordered that both Mr. Rudd and Mr. Friedman appear at all court hearings or the case would be dismissed with prejudice, and that plaintiff's deposition of defense expert Dr. Rosenberg shall proceed on August 18, 2014, at 5 p.m. in Beachwood, Ohio. Dr. Rosenberg required prepayment of $500 from plaintiff prior to his deposition; plaintiff did not make the payment, and accordingly Dr. Rosenberg did not appear for the deposition. Neither Mr. Rudd nor Mr.

Friedman notified defendant ahead of time that Dr. Rosenberg would not be appearing for the deposition.

¶ 14 On July 18, 2014, the case came above the court's so-called "Black Line" established by General Administrative Order 03-1 of the Law Division (Cook Co. Ct. Admin. Order 03-1 (eff. March 20, 2004)) (hereinafter General Administrative Order 03-1), and was called for trial on that date. See paragraph 1.4d of General Administrative Order 03-1, providing that cases above the Black Line are subject to immediate trial assignment. Neither Mr. Rudd nor Mr. Friedman appeared in court on July 18, 2014, and as a result, the circuit court dismissed the case for want of prosecution (DWP).

¶ 15 On September 16, 2014, plaintiff filed his section 2-1301/2-1401 petition seeking to reinstate counts II and III of his complaint relating to his left lung cancer[2]. Plaintiff claimed therein that his counsel did not appear at the Black Line trial call because neither Mr. Rudd nor Mr. Friedman received any notice from the court that the case had come up on the Black Line. Plaintiff also claimed his counsel did not learn of the DWP until September 2, 2014.

¶ 16 Plaintiff argued that the circuit court should treat the DWP as an interlocutory order and set it aside pursuant to section 2-1301(e), which provides the court with the authority to set aside certain non-final orders or judgments. 735 ILCS 5/2-1301(e) (West 2012). Alternatively, plaintiff argued that if the court determined that the DWP was a final judgment, then it should vacate the judgment pursuant to section 2-1401, which provides for relief from final judgments after 30 days from the entry thereof. 735 ILCS 5/2-1401 (West 2012). In making his section 2-1401 argument, plaintiff contended that the three-year statute of limitations for FELA actions

[2] Plaintiff has thereby forfeited review of any right to reinstatement of count I, relating to his right lung cancer, by failing to raise the issue in the circuit court. See *Ritacca v. Girardi*, 2013 IL App (1st) 113511, ¶ 18 (an argument not raised in the circuit court is forfeited for review).

should be considered to have been tolled during the pendency of this case in the circuit court, such that resumption of the suit would be considered timely. We will discuss the statute of limitations argument in more detail later in this order.

¶ 17 On September 24, 2014, plaintiff noticed his section 2-1301/2-1401 petition for a hearing on October 23, 2014. On October 8, 2014, plaintiff served an amended notice of hearing, resetting the hearing date for November 13, 2014. In doing so, plaintiff did not seek leave of the court or strike the previously scheduled hearing and, thus, the October 23, 2014, hearing remained on the circuit court's docket and was stricken by the court when counsel failed to appear.

¶ 18 On October 9, 2014, defendant filed its response to plaintiff's section 2-1301/2-1401 petition. Defendant argued that a DWP in a FELA case is a final order, and that since plaintiff filed his petition more than 30 days after the entry of this final order, the court could not reinstate the case pursuant to section 2-1301. See 735 ILCS 5/2-1301(e) (West 2012) (providing that the court "may on motion filed *within 30 days after entry thereof* set aside any final order or judgment upon any terms and conditions that shall be reasonable). (Emphasis added.) Defendant further argued that the court did not have the power to reinstate plaintiff's case pursuant to section 2-1401 because plaintiff's petition constituted a new proceeding and, at the time it was instituted, the statute of limitations on plaintiff's FELA claim had expired.

¶ 19 Defendant further argued that, even if the court had the power to issue relief under section 2-1401, it should decline to do so given plaintiff's failure to show he had been diligent in presenting his claim to the court in the original action, which is a prerequisite to being awarded relief under section 2-1401. Specifically, defendant set forth the facts (recited earlier in this order) regarding plaintiff's failures to comply with discovery and attend hearings as required by

court order. In addition, defendant argued that Mr. Rudd and Mr. Friedman failed to properly enter their appearances in this case, and that Mr. Friedman violated Illinois Rules of Professional Conduct 3.5(b) (eff. Jan. 1, 2010), by contacting the circuit court's law clerk regarding his entry of appearance and the status of the case. Defendant also noted that, contrary to plaintiff's argument that he should be excused for failing to appear when the case came above the Black Line because he did not receive notice thereof from the court, plaintiff bore the responsibility of monitoring the Black Line progress *via* the court's online website or *The Chicago Daily Law Bulletin*. See paragraph 1.4 of General Administrative Order 03-1.

¶ 20 On October 23, 2014, three days after plaintiff's reply was due, plaintiff filed a motion for extension of time to reply, requesting that the court grant him until October 30, 2014, to file his reply. Plaintiff argued that he was entitled to the extra time because Mr. Friedman had been on vacation from October 8, 2014, through October 20, 2014, and did not "personally receive" a copy of defendant's response until October 22, 2014. Plaintiff made no mention in his motion as to why Mr. Rudd, the attorney who had the most involvement in plaintiff's case during the course of this litigation, and who still remained involved in the case, did not timely file plaintiff's reply. Plaintiff also did not support his motion for extension of time with an affidavit from Mr. Friedman or Mr. Rudd, and he did not file a notice of motion at the time of filing.

¶ 21 On October 30, 2014, plaintiff filed a notice of hearing for his motion for extension of time to reply, setting the hearing date for November 13, 2014. On October 31, 2014, without leave of court, plaintiff filed his reply. On November 5, 2014, Mr. Rudd sent correspondence to the circuit court attaching a copy of plaintiff's reply.

¶ 22 On November 12, 2014, defendant filed its emergency motion to strike plaintiff's reply, arguing that it was untimely and that it had been filed without leave of court.

¶ 23 On November 13, 2014, the circuit court entered two orders. The first order struck plaintiff's reply. The second order denied plaintiff's section 2-1301/2-1401 petition on the basis of the briefs, oral argument, and case law cited by defendant, thereby indicating that it agreed with defendant's argument that the DWP was a final order and that the section 2-1301 petition was untimely as it was filed more than 30 days after entry of the DWP, and that the section 2-1401 petition was untimely under the applicable FELA statute of limitations. Plaintiff filed this appeal from the denial of the section 2-1301/2-1401 petition.

¶ 24 Initially, defendant argues we should summarily affirm the November 13, 2014, order denying plaintiff's section 2-1301/2-1401 petition because plaintiff failed to provide a report of proceedings, including a transcript of the hearing at which his section 2-1301/2-1401 petition was denied, or a sufficient alternative such as a bystander's report or an agreed statement of facts. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Defendant cites *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), in which our supreme court held that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which arise from the incompleteness of the record will be resolved against the appellant." *Id*. at 391-92.

¶ 25 In the present case, having reviewed the written submissions at the hearing (which are part of the record on appeal), as well as the circuit court's ruling thereon, we are able to discern the arguments presented and the basis of the court's ruling. Thus, the record is sufficiently complete so as to allow for our review of the issues presented, and we proceed to address the appeal on its merits.

¶ 26 On appeal, plaintiff's only argument with regard to the denial of his section 2-1301 petition to set aside the DWP is that the circuit court should have found that the DWP was interlocutory and not final and, as such, the 30-day limitations period for filing the section 2-1301 petition after a final order did not apply.

¶ 27 Generally, a DWP is not considered final because section 13-217 of the Code (735 ILCS 5/13-217 (West 2012)), operates as a savings statute, allowing the plaintiff to refile his action within one year of the entry of the DWP or within the remaining period of limitations, whichever is greater.[3] *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497, 501-02 (1998). At the time the refiling period expires, the DWP constitutes a final judgment because, at this point, the order effectively " 'ascertains and fixes absolutely and finally the rights of the parties in the lawsuit.' " *Id*. at 502 (quoting *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982)).

¶ 28 However, the United States Supreme Court has limited the application of section 13-217 in FELA cases. In *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965), the trial court in Ohio dismissed an FELA lawsuit due to improper venue. *Id*. The plaintiff then filed a new suit in federal district court with proper venue, but the district court dismissed it because the new lawsuit was filed after the applicable three-year limitations period for FELA cases set forth in 45 U.S.C. § 56, which provides that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." *Id*. at 425. The plaintiff argued on appeal that the Ohio saving statute, which permitted refiling within one year of the dismissal without prejudice, gave him the right to bring the new case. *Id*. at 432-33. The

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[3] The current version of section 13-217 does not provide for refiling after a DWP. However, our supreme court has held that the amendments that removed the provisions for refiling after a DWP were unconstitutional. See *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Thus, the unamended version is the effective version. *Federal National Mortgage Ass'n v. Tomei*, 2014 IL App (2d) 130652, n.2.

Supreme Court rejected plaintiff's argument, finding that the incorporation of State saving statutes into the FELA time limitations would produce nonuniform periods of limitation in the several states, thereby "defeat[ing] the aim of a federal limitation provision designed to produce national uniformity." *Id*. at 433. The Supreme Court specifically listed the Illinois predecessor of section 13-217 as a saving statute that does not provide a plaintiff with the right to refile an FELA action after the three-year limitations period. *Id*. at 431, n. 9. This court has since held that "*Burnett* constrains us to hold that section 13-217 cannot protect plaintiff's cause of action under the FELA" when it is filed after the three-year limitations period. *Noakes v. National R.R Passenger Corp*., 312 Ill. App. 3d 965, 968 (2000).

¶ 29 In the present case, the parties agree that under the three-year FELA limitations period, plaintiff was required to file his action by December 2013. Plaintiff filed his FELA complaint in December 2011, within the limitations period, but it was DWP'd on July 18, 2014. Plaintiff filed his section 2-1301/2-1401 petition on September 16, 2014, and it was denied on November 13, 2014. If section 13-217 were to apply, plaintiff would have had one year from the denial of the section 2-1301 portion of the petition to refile (*Wilson v. Evanston Hospital*, 257 Ill. App. 3d 837, 839 (1994)), that is, until November 13, 2015, which would be outside the three-year limitations period. Under *Burnett*, though, section 13-217 is inapplicable here as it cannot be so used to allow plaintiff to refile his FELA action outside the uniform, three-year limitations period; as section 13-217 is inapplicable to "save" plaintiff's complaint from the running of the FELA statute of limitations, the DWP was final when it was entered on July 18, 2014, meaning that under section 2-1301(e) he had 30 days within which to file his section 2-1301 petition. Plaintiff filed his section 2-1301/2-1401 petition on September 16, 2014, more than 30 days after

the entry of the DWP and, therefore, the circuit court correctly denied the section 2-1301 portion of the petition as untimely.

¶ 30 We proceed to address the denial of the section 2-1401 portion of the petition as untimely under the three-year statute of limitations for FELA actions.

¶ 31 "[A] section 2-1401 petition can present either a factual or legal challenge to a final judgment or order, and the nature of the challenge presented *** dictates the proper standard of review on appeal. When a section 2-1401 petition presents a fact-based challenge, it must allege facts to support the existence of a meritorious defense, due diligence in presenting this defense to the trial court, and due diligence in filing the section 2-1401 petition. The question of whether relief should be granted lies within the sound discretion of the circuit court and a reviewing court will reverse the circuit court's ruling on the petition only if it constitutes an abuse of discretion. On the other hand, when a section 2-1401 petition presents a purely legal challenge to a judgment, such as a claim that the earlier judgment was void, the standard of review is *de novo*. " (Internal quotation marks and citations omitted.) *Stolfo v. Kindercare Learning Centers, Inc*., 2016 IL App (1st) 142396, ¶ 22.

¶ 32 In the present case, the parties dispute the applicable standard of review regarding the circuit court's denial of plaintiff's section 2-1401 petition as untimely; plaintiff argues that his petition presented a fact-based challenge that should be reviewed for an abuse of discretion, whereas defendant argues that the petition presented a question of law subject to *de novo* review.

¶ 33 We need not resolve the issue of the proper standard of review in the present case, as our holding would be the same under either standard. We turn to the timeliness of plaintiff's section 2-1401 petition.

¶ 34 Three cases: *Noakes v. National R.R. Passenger Corp*., 312 Ill. App. 3d 965 (2000); *Kulhavy v. Burlington Northern Santa Fe R.R.*, 337 Ill. App. 3d 510 (2003); and *Klancir v. BNSF Railway Co*., 2015 IL App (1st) 143437, are informative, and we proceed to discuss them in detail.

¶ 35 In *Noakes*, the plaintiff sued his employer under FELA and later voluntarily dismissed the case. *Noakes*, 312 Ill. App. 3d at 966. He later tried to resurrect his case by filing a new lawsuit, which the circuit court dismissed under FELA's three-year statute of limitations. *Id*. On appeal, the plaintiff argued that the statute of limitations did not bar the new lawsuit because section 13-217 gave him the right to file the new lawsuit within one year of his voluntary dismissal of the original action. *Id*. at 967.

¶ 36 Noting that federal law controls the application of the limitations period (*id*.), the appellate court cited *Burnett*'s holding that a state saving statute such as section 13-217 could not provide a plaintiff with the right to refile an FELA action after the three-year limitations period. *Burnett*, 380 U.S. at 431 n. 9, 433 (cited in *Noakes*, 312 Ill. App. 3d at 967-68). To hold otherwise "would defeat the aim of a federal limitation provision designed to produce national uniformity." *Burnett*, 380 U.S. at 433 (quoted in *Noakes*, 312 Ill. App. 3d at 967). Following *Burnett*, the appellate court held that section 13-217 did not save the plaintiff's cause of action under FELA. *Noakes*, 312 Ill. App. 3d at 971.

¶ 37 In *Klancir*, the plaintiff filed an FELA complaint against his employer which he later voluntarily dismissed. *Klancir*, 2015 IL App (1st) 143437, ¶ 1. Relying on section 13-217, the plaintiff subsequently filed a second FELA complaint against defendant which the circuit court dismissed because it was filed outside the three-year limitations period. *Id*. ¶¶ 12, 13. On appeal, the appellate court cited *Burnett* and *Noakes* and found that since the second FELA

complaint was filed outside the three-year statute of limitations, section 13-217 did not save his FELA claim. *Id*. ¶ 17.

¶ 38 In *Kulhavy*, the plaintiff filed an FELA complaint against his employer, which the court later DWP'd. *Kulhavy*, 337 Ill. App. 3d at 511-12. The plaintiff filed a section 2-1401 petition to set aside the dismissal which the court denied because it was filed after the three-year statute of limitations. *Id*. at 513.

¶ 39 On appeal, the appellate court noted that the filing of a section 2-1401 petition is considered a new proceeding, not a continuation of the old one, and that the plaintiff had filed his section 2-1401 petition nine months after FELA's three-year statute of limitations expired. *Id*. at 517. The appellate court cited the holdings in *Noakes* and *Burnett* that a saving statute such as section 13-217 could not provide a plaintiff with the right to refile an action after expiration of FELA's three-year limitations period. *Id.* at 517. The appellate court held that section 2-1401 serves the same "saving" function as section 13-217, and that pursuant to *Noakes* and *Burnett*, section 2-1401 did not provide the plaintiff with the right to file an FELA suit after the expiration of the three-year limitations period. *Id*. Accordingly, the appellate court affirmed the denial of the plaintiff's section 2-1401 petition. *Id*. at 518.

¶ 40 In the present case, plaintiff filed his section 2-1401 petition, which is considered a new proceeding, not a continuation of the old one, after FELA's three-year limitations period. Section 2-1401 serves the same "saving" function as section 13-217 and, as such, pursuant to *Burnett*, *Noakes*, *Klancir* and *Kulhavy* which held that saving statutes are not applicable to provide a plaintiff with the right to refile an FELA action after the three-year limitations period, the circuit court correctly properly denied the petition[4].

[4] Plaintiff cites *Lingerman v. Elgin, Joliet & Eastern Railway Co*., 24 Ill. App. 2d 1 (1959),

¶ 41 Plaintiff argues that in *Burnett*, the Supreme Court applied equitable tolling to the FELA statute of limitations, and plaintiff asks us to do the same here and find his case was tolled while it was pending in the circuit court from the time he filed his FELA complaint in December 2011 to the entry of the DWP in July 2014, and as such that his section 2-1401 petition was timely.

¶ 42 As discussed earlier in this order, *Burnett* held that a state saving statute, such as section 13-217, cannot be used to extend the three-year limitations period in an FELA action because to do so would defeat the aim of a federal limitation provision designed to produce national uniformity. *Burnett*, 380 U.S. at 433. However, *Burnett* also addressed a second issue, whether when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made on the opposing party, and the state court action subsequently is dismissed because of improper venue, should the three-year limitations period be considered to have been equitably tolled during the pendency of the state action? *Id*. at 428.

¶ 43 To answer this question, the Supreme Court first noted that statutes of limitations are primarily designed to assure fairness to defendants, and that such statutes promote justice by preventing the revival of claims that were allowed to slumber until evidence was lost, memories faded, and witnesses disappeared. *Id*. The Supreme Court recognized, though, that this policy designed to protect defendants is outweighed where the interests of justice require vindication of the plaintiff's rights. *Id*. Thus, an FELA action was held not to be barred where a defendant misled the plaintiff into believing he had more than three years in which to bring the action, or when war prevented a plaintiff from bringing his suit, because in such cases plaintiff has not slept on his rights, but, instead, has been prevented from asserting them. *Id*. at 428-29 (citing

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which affirmed the trial court's application of the predecessor to section 2-1401 to vacate an order dismissing an FELA action. *Lingerman* predates the Supreme Court decision in *Burnett*, as well as the appellate court opinions in *Noakes*, *Kulhavy* and *Klancir* applying *Burnett*, and thus does not compel a result different than the one reached here.

Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959); *Osbourne v. United States*, 164 F. 2d 767 (2d Cir. 1947); and *Frabutt v. New York, Chicago & St. Louis R. Co*., 84 F. Supp. 460 (W.D. Pa. 1949)).

¶ 44 The Supreme Court stated that in the case before it plaintiff "did not sleep on his rights but brought an action within the statutory period in the state court of competent jurisdiction. Service of process was made upon the [defendant] notifying him that [plaintiff] was asserting his cause of action. *** [Plaintiff], then, failed to file an FELA action in the federal courts, not because he was disinterested, but solely because he felt that his state action was sufficient." *Id*. at 429.

¶ 45 The Supreme Court noted that federal and state jurisdictions have recognized the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run. *Id*. at 430. Specifically, federal statute 28 U.S.C. § 1406(a), allows for a case that plaintiff timely filed in the wrong federal district court to be subsequently transferred to the correct district court even after the statute of limitations has run. *Burnett*, 380 U.S. at 430. Some state statutes also allow for a case that plaintiff timely filed in the wrong state court to be transferred to the correct state court even after the statute of limitations has run. *Id*. at 431.

¶ 46 However, a similar plaintiff in a state court without a transfer statute would be barred from further actions by the running of the limitation period, producing, in effect, a "nonuniform limitation provision." *Id*. at 434. To avoid such nonuniformity, the Supreme Court concluded that "when a plaintiff brings a timely FELA action in a state court having jurisdiction, and serves the defendant with process and plaintiff's case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit." *Id*. at 434-35.

¶ 47 Unlike *Burnett*, in which the plaintiff there did not sleep on his rights but, instead, inadvertently brought his FELA action within the statutory period but in the wrong court, and in which equitable tolling was necessary to *prevent* a nonuniform application of the limitation provision, the present case does not involve a dismissal for improper venue. Nor does it involve one of the other situations (discussed in *Burnett*) that allows for equitable tolling, such as where defendant misled plaintiff about the limitations period, or an extraordinary circumstance prevented him from timely asserting his rights. Rather, the present case involves plaintiff's repeated failures to comply with discovery and abide by court orders, culminating in the grant of defendant's motion to compel and for sanctions, as well as plaintiff's failure to follow the case pursuant to General Administrative Order 03-1 and to appear when the case came above the Black Line and was called for trial. The court's equitable powers will not be invoked where plaintiff's failure to appear at the hearing was due to the negligence of plaintiff in failing to follow the progress of the case as opposed to a misrepresentation by defendant or some extraordinary circumstance preventing him from timely asserting his rights. *Dudek, Inc. v. Shred Pax Corp.*, 196 Ill. App. 3d 720, 725 (1990); *Klancir*, 2015 IL App (1st) 143437, ¶¶ 20-23. Accordingly, equitable tolling is not applicable here.

¶ 48 *Billings v. Chicago, Rock Island & Pacific R.R. Co.*, 581 F. 2d 707 (8th Cir. 1978), also cited by plaintiff, is inapposite as it, too, involved a dismissal for improper venue.

¶ 49 For all the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 50 Affirmed.