2018 IL App (1st) 171264-U
Order filed: December 14, 2018

FIRST DISTRICT
Fifth Division

No. 1-17-1264

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN T. WILLIAMS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 14 L 8920
	)	
CITY OF CHICAGO,	)	
	)	Honorable
	)	Cassandra Lewis,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hoffman concurred in the judgment. Justice Hall dissented.

ORDER

¶ 1 *Held*: Circuit court did not abuse its discretion in dismissing plaintiff's case, with prejudice, for want of prosecution where case had been dismissed for want of prosecution previously and plaintiff refused to proceed with the circuit court's order to proceed with opening statements.

¶ 2 Plaintiff-appellant, John Williams, sued defendant-appellee, the City of Chicago (the City) and three unidentified Chicago police officers on September 10, 2010 (circuit court case No. 10 L 009552). Plaintiff alleged that, on August 19, 2009, he was attacked from behind by an unknown Chicago police officer and suffered injuries requiring facial surgery. When he filed the lawsuit, plaintiff was represented by the law firm of Muslin & Sandberg. Plaintiff received discovery from the City, which included video footage from police observation devices (PODs),

also referred to as blue light cameras, summaries of the POD videos, and GPS records for police vehicles in the vicinity of the alleged incident.

¶ 3 Plaintiff initially identified Officer Geoffrey Baker as his assailant but, during Officer Baker's deposition on July 1, 2011, plaintiff told his counsel that Officer Baker was not the person who had attacked him. On June 13, 2012, plaintiff filed an amended complaint naming the City as the only defendant and alleging that the City was liable for the misconduct of an unknown police officer. The Fabbrini Law Group filed an appearance for plaintiff on November 19, 2012.

¶ 4 The case was dismissed for want of prosecution on May 15, 2013. On July 31, 2013, the circuit court entered an order vacating the dismissal. The order stated that the parties had certified that discovery in the case was complete and that they were ready for trial. The case was set for trial on August 26, 2013.

¶ 5 On August 26, 2013, the circuit court entered an order granting plaintiffs motion to voluntarily dismiss the lawsuit pursuant to section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2016) (Code).

¶ 6 Through the Fabbrini Law Group, plaintiff refiled his lawsuit on August 26, 2014 (circuit court case No. 2014 L 008920). It is this refiled lawsuit that is the subject of this appeal. The 2014 complaint named the City of Chicago, Officer Baker, and an unknown officer ("John Doe #2") as defendants. The complaint alleged that Officer Baker "walked up behind plaintiff and assaulted and battered plaintiff," and that the unknown officer observed and failed to stop the assault. Plaintiff charged the officers and the City with wilful and wanton misconduct.

¶ 7 On March 12, 2015, plaintiff filed a one-count first-amended complaint which named the City as the sole defendant. Plaintiff alleged that, on August 19, 2009, at approximately 2:30 a.m.,

Officer Baker and a second police officer stopped and searched him. Plaintiff claimed that he had recognized Officer Baker from the 14th District lockup. In addition, plaintiff alleged that, after the two officers left in an SUV, Officer Baker "walked up behind the plaintiff and assaulted and battered" him. The City answered the first-amended complaint, denying that the assault occurred or that plaintiff's alleged injuries were caused by a Chicago police officer.

¶ 8 On August 5, 2015, the circuit court granted plaintiff leave to issue supplemental discovery. In an attempt to identify the officer who assaulted him, plaintiff's supplemental discovery included a request for the production of "[a] photo array of all Chicago Police Department [CPD] officers working in the 14th District on the shift that included 1:00a.m. – 4:00 a.m. on August 19, 2009." In its response, the City objected to the request and maintained that the production of the photographs would pose a risk to the police officers and their families, and would invade the privacy of the officers. Plaintiff filed a memorandum in opposition to the City's objection and asked the court to compel the production of the photo array. The City, in a memorandum in support of its objection, argued that plaintiff had given conflicting descriptions of his alleged attacker and failed to identify the officer despite having been provided with all information about the incident obtained by the City and the Independent Police Review Authority (IPRA), including vehicle activity summaries, an officer attendance log, and the POD videos. On April 14, 2016, the circuit court ordered the photo array be produced.

¶ 9 The circuit court set the case for trial on January 19, 2017.

¶ 10 Plaintiff viewed the requested photo array on June 17, 2016; he identified an individual from the array as his alleged attacker. On June 24, 2016, plaintiff filed additional supplemental discovery requests seeking production of the identifying information and personnel file of the person he had identified in the photo array. The City responded to this supplemental discovery

request on July 27, 2016, stating that the officer identified by plaintiff was not employed by the City on August 19, 2009, the date of the occurrence.

¶ 11 Plaintiff moved to "strike" the admissibility of the photo array and compel the City to disclose the name of the individual he had identified in the photo array. In response, the City re-asserted that plaintiff had identified an individual in the photo array who was not employed by CPD at the time of the alleged attack. The City attached the affidavit of Chicago police sergeant Eric Winstrom, Supervising Attorney, Special Projects, General Counsel, CPD, which attested that the identified individual was not a CPD employee in 2009. On January 5, 2017, the circuit court denied plaintiff's motion to strike the photo array, but ordered the City to provide plaintiff with redacted personnel file information showing the initial employment date of the individual identified in the photo array.

¶ 12 Plaintiff's attorneys noticed an emergency motion to withdraw as counsel for hearing on January 17, 2017. The motion stated that plaintiff and his attorneys "were unable to reach an agreement in how to proceed with" plaintiff's case. On that date, circuit court Judge James P. Flannery, Presiding Judge of the Law Division, denied the motion to withdraw. The case was again set for trial on January 19, 2017. The case was assigned to a trial judge on January 19, 2017. On that date, the trial judge addressed pretrial matters and motions. The trial judge set two motions for January 20, 2017, and asked for additional legal authority. Jury selection was to begin on January 23, 2017.

¶ 13 On January 20, 2017, during preparation for trial, plaintiff's counsel realized that he was missing a disc that contained video footage from a POD. The City had produced several videos from PODs in the vicinity of the alleged incident in 2011, along with summaries of their contents. Plaintiff's counsel had the summary of the contents of the missing POD video, but not

the video itself. On the afternoon of January 20, 2017, at about 1 p.m., plaintiff's counsel asked the City's attorney for a copy of the disc containing the video. The City's attorneys hand-delivered to plaintiff's counsel a copy of the disc between 4 and 4:30 p.m. that same day. Plaintiff's counsel claimed he was unable to play the POD video on the replacement disc. He did not contact the City's attorneys for assistance in opening the file, but took it to a computer store that night. The store's employees were unsuccessful in opening the video. On Monday, January 23, plaintiff's counsel informed the court that he had been unable to view the POD video.

¶ 14 The circuit court directed the City's attorneys to assist plaintiff's counsel in viewing the POD video by providing a working disc and a laptop to view it. After a jury was selected, the court recessed at approximately 2:20 p.m. and reconvened at 3:45 p.m., after an extended lunch break intended to afford plaintiff's attorney time to view the video. At the beginning of the recess, the City's attorneys told plaintiff's counsel that they would bring a laptop from their office to the courtroom so that he could watch the video. One of the City's attorneys returned to the courtroom with the video and a laptop at approximately 2:45 p.m., but plaintiff's counsel did not return to the courtroom until 3:25 or 3:30 p.m. During the recess, the circuit court observed the City's attorney sitting in the courtroom with the laptop, waiting for plaintiff's counsel.

¶ 15 At 3:45 p.m., the trial judge reconvened the trial, plaintiff's counsel told the circuit court he had not had time to watch the POD video, and plaintiff's counsel asked permission to do so before proceeding to trial. The court responded:

> THE COURT: "So I prevailed upon the City to bring the actual disk in for you and to arrange a laptop to be brought in so that you could review the tape here. And we took an extremely long lunch break. We broke at 2:15, and I said we would reconvene at 3:45. That was so you would have an opportunity to review the tape.

> However, when I came back through here twice, on two separate occasions, the last one at 3:30, [the City's counsel] was sitting here and indicated that he hadn't seen you and that you hadn't taken the opportunity to review the tape.
>
> So my position is that I tried my best to accommodate you so that you could review the tape before we began openings, but you chose to do whatever you did, which is completely your right; however, since you did not utilize the time that I specifically set aside for you to review the tape so that you would be able to make your opening with that information at hand, then you have to deal with that consequence.
>
> So that being said, we are ready to start."

The circuit court informed the parties that the jury would be brought in and that the attorneys were to begin opening statements. Plaintiff's attorney refused to proceed, stating: "Your Honor, I'm not starting the trial without watching the tape." The jury was brought out, and the circuit court again told plaintiff' attorney: "We're about to begin opening statements." Plaintiff's counsel again refused to proceed with his opening statement, stating: "Your Honor, I stand on my original position that until I watch the video, I am not proceeding forward with trial."

¶ 16 The circuit court then asked the City if it was going to proceed with an opening statement or had a motion. The City orally moved to dismiss the case for want of prosecution, because plaintiff's attorney was "not ready to proceed to trial." The parties and the circuit court then retired to a separate room outside the presence of the jury with the court reporter.

¶ 17 In response to the explanation of plaintiff's counsel that he had not watched the video because he had returned to his office during the lunch break for other trial preparation, the circuit court stated that he should have come to court prepared for trial, and that it had accommodated him with the lengthy lunch break to allow him to watch the video. The court added that

plaintiff's attorney still did not know whether the video contained anything pertinent to his opening statement, and that he would have time to watch the video later that day, after opening statements. The circuit court again asked plaintiff's counsel if he was ready to proceed, and he said "no." The court then entered an order granting the City's motion to dismiss the case for want of prosecution.

¶ 18 Plaintiff filed a motion to vacate the dismissal order on February 22, 2017, in which plaintiff primarily contended that the circuit court had improperly punished him for the City's unreasonable failure to disclose evidence in a timely matter. The circuit court denied the motion to vacate on April 20, 2017. This appeal followed.[1]

¶ 19 On appeal, plaintiff contends that the circuit court improperly dismissed this case for want of prosecution and incorrectly denied his motion to vacate that dismissal. We affirm.[2]

¶ 20 "Under Illinois law, trial courts have the power to dismiss civil actions 'for inexcusable delay and lack of diligence,' which is referred to as a dismissal for want of prosecution." *People v. Kruger*, 2015 IL App (4th) 131080, ¶ 11 (quoting *City of Crystal Lake v. Sak*, 52 Ill. App. 3d 684, 688 (1977)). The determination of whether or not to dismiss a case for want of prosecution is governed by the particular facts of the case and rests within the circuit court's sound discretion. *Department of Revenue v. Steinkopf*, 160 Ill. App. 3d 1008, 1018 (1987).

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[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

[2] The dismissal of a case for want of prosecution is generally not a final order which can be appealed, because a plaintiff has an absolute right to refile the case within one year of the dismissal. 735 ILCS 5/13-217 (West 2016); *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 375-6 (2001). However, because plaintiff here had already voluntarily dismissed and refiled this action once, we have jurisdiction to review the circuit court's now final orders dismissing this case for want of prosecution and denying plaintiff's motion to vacate that dismissal. *Id.*

¶ 21 In addition, a circuit court has the inherent authority to control its docket and impose sanctions for the failure to comply with court orders. *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 65, 651 N.E.2d 1071, 1081 (1995) “The recognition of the court's inherent authority is necessary to prevent undue delays in the disposition of cases caused by abuses of procedural rules, and also to empower courts to control their dockets.” *Id.* at 66; *J.S.A. v. M.H.*, 224 Ill. 2d 182, 196 (2007) (inherent authority allows a court to “prevent undue delays in the disposition of cases caused by abuses of the litigation process”). Pursuant to this inherent power, a court may dismiss a cause of action with prejudice where a party has deliberately and contumaciously disregarded the court's authority. *Sander*, 166 Ill. 2d at 68. As our supreme court has explained, “[w]here it becomes apparent that a party has willfully disregarded the authority of the court, and such disregard is likely to continue, the interests of that party in the lawsuit must bow to the interests of the opposing party.” *Id.* at 69. Such a dismissal is also reviewed for an abuse of discretion. *Id.* at 67

¶ 22 An abuse of discretion occurs only if no reasonable person could agree with the position taken by the trial court. *Brax v. Kennedy*, 363 Ill. App. 3d 343, 355 (2005).

¶ 23 In contending that the circuit court’s dismissal of his suit was an abuse of discretion, plaintiff asserts on appeal that neither a history of inexcusable delay and lack of diligence nor a deliberate and contumacious disregard for the court's authority were presented below so as to justify that decision. We disagree.

¶ 24 With respect to plaintiff’s history of inexcusable delay and lack of diligence, we note that this matter was dismissed for want of prosecution *twice* in the circuit court. Then, less than a month after the first dismissal was vacated, plaintiff voluntarily dismissed his prior suit on the day it was scheduled for trial. Upon refilling this action, plaintiff’s counsel again took an action

that would have caused significant delay, by unsuccessfully seeking to withdraw as counsel two days before trial was to commence. Then, when plaintiff's counsel concluded that he could not view the POD video on a Friday night before a jury was to be selected the following Monday, he did not inform the City or the circuit court of the issue until that Monday. Plaintiff's counsel then used this now last-minute issue as another basis to delay proceeding to opening arguments, after having failed to take advantage of a lengthy lunch recess specifically intended to provide him an opportunity to view the video.

¶ 25 With respect to deliberate and contumacious disregard for the court's authority, plaintiff primarily asserts on appeal that the record is not clear that his counsel actually violated a direct order from the circuit court to view the video during the recess held prior to the scheduled opening statements. Even if we accepted plaintiff's reading of the record, however, we would find this argument to be irrelevant. Regardless of what occurred beforehand, it is quite clear that following the extended lunch recess on January 23, 2017, the circuit court informed the plaintiff and the City that the matter would proceed directly to opening statements, despite plaintiff's request for a further delay. Plaintiff's counsel then steadfastly refused to continue without first viewing the POD video. Even when confronted with the City's motion to dismiss for want of prosecution, plaintiff's counsel continued in his refusal to proceed with trial. This refusal was made repeatedly, deliberately, and there was no indication that it would not continue.

¶ 26 In light of this record, we conclude that this matter presented a sufficient history of inexcusable delay and lack of diligence, as well as deliberate and contumacious disregard for the circuit court's authority, such that the circuit court did not abuse its discretion in dismissing this matter for want of prosecution.

¶ 27 We also reject plaintiff's challenge to the denial of his motion to vacate that dismissal. A dismissal for want of prosecution should be set aside where: (1) a satisfactory explanation of the apparent delay has been given; (2) there was no intentional or willful disregard of any directions of the court; (3) and any further delay of the controversy would not result in prejudice to the parties. *In re Marriage of Dague*, 136 Ill. App.3d 297, 299 (1985). We review the circuit court's ruling on a motion to vacate for an abuse of discretion. *Guiffrida v. Boothy's Palace Tavern, Inc.*, 2014 IL App (4th) 131008, ¶ 31.

¶ 28 Here, we need only discuss the second prong noted above to affirm the circuit court's decision to deny the motion to vacate. In order to be entitled to a favorable ruling on his motion to vacate, plaintiff was required to show that 'there was no intentional or willful disregard of any directions of the court." For all the reasons discussed above (*supra* ¶ 25), the record on appeal cannot support such an assertion.

¶ 29 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.

¶ 31 JUSTICE HALL dissenting:

¶ 32 The majority concludes that the trial court's dismissal of the plaintiff's case for want of prosecution was not an abuse of discretion. I respectfully dissent because the particular facts of the present case demonstrate otherwise.

¶ 33 "[A] trial court, pursuant to its inherent authority, is empowered to dismiss a cause of action with prejudice for violations of court orders." *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 65 (1995). Because dismissal of a case with prejudice is a drastic sanction, it should only be imposed when the party's conduct shows a deliberate, contumacious or unwarranted disregard of the trial court's authority. *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632, ¶ 45.

Such a sanction should be imposed reluctantly and only as a last resort. *Cronin*, 2012 IL App (1st) 111632, ¶ 45. The "sanction of dismissal with prejudice runs contrary to public policy of this state and the underlying spirit of our system of civil justice that suits should be decided on their merits." (Internal quotation marks omitted.) *Cronin*, 2012 IL App (1st) 111632, ¶ 45 (quoting *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 471 (2006), quoting *Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1054-55 (1998)). These concerns and requirements are applicable where dismissal is imposed as a sanction for a discovery violation or as an exercise of the trial court's inherent authority. *Cronin*, 2012 IL App (1st) 111632, ¶ 45 (citing *Sander*, 166 Ill. 2d at 67-68).

¶ 34 In determining the propriety of any particular sanction, the reviewing court focuses on the particular behavior of the offending party that gave rise to the sanction and its effect on the opposing party. *Smith*, 299 Ill. App. 3d at 1052. Where sanctions are imposed on a party as the result of conduct by the party's attorney, "care must be taken in fashioning a sanction that both adequately addresses the offending conduct and to the extent possible, preserves the right of the party to be heard on the merits of [the] case." *Smith*, 299 Ill. App. 3d at 1055.

¶ 35 A review of the record on appeal does not reveal a specific order that the plaintiff's attorney violated. While it may have been the trial court's intention that the attorney view the disc during the extended recess, there was no order to that effect. The court did not order the attorney to remain in the courtroom while they sent for a computer. There is no indication that in dismissing the case with prejudice, the court gave any consideration to the concerns and requirements set forth in *Sander* or *Smith*. Instead, the court imposed the sanction of dismissal with prejudice as if it had ordered the attorney to view the disc within a specified period of time.

The court's dismissal of the case was based on what it assumed the attorney would and should do as opposed to what it actually ordered the attorney to do.

¶ 36 The majority finds that the history of this case is one of inexcusable delay and lack of diligence. That finding is belied by the majority's statement of the facts reflecting a stream of activity by the plaintiff's attorney following the re-filing of the case. The majority views the plaintiff's attorney's motion to withdraw as another inexcusable delaying tactic "that would have caused significant delay." The fact is that motion was denied, and the case proceeded on the trial date set months before with the plaintiff's attorney fully participating in resolution of the pretrial motions. Finally, the majority maintains that the plaintiff's attorney's refusal to proceed was made "repeatedly, deliberately, and there was no indication that it would not continue." There was no history of failure to comply with the trial court's orders. The plaintiff's attorney did not refuse to comply with multiple court orders over the course of the litigation; his refusals pertained to the single issue of proceeding to trial without viewing the disc. Compare *Sander*, 166 Ill. 2d at 69 (sanction of dismissal with prejudice proper where the plaintiffs violated four separate court orders setting forth deadlines for the filing of their amended complaint, failed to reply to a defendant's motion for a protective order and continued to replead matters in the amended complaints that had been previously stricken by the trial court).

¶ 37 "An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view." *Logan v. U.S. Bank*, 2016 IL App (1st) 152549, ¶ 11. However, [i]f a trial court's orders are unclear, any sanction entered for their perceived violation is an abuse of discretion and subject to reversal on appeal." *Smith*, 299 Ill. App. 3d at 1055. In hindsight, if the trial court and the attorneys for both parties had the same understanding of what was expected of them in moving the case forward,

resort to this court could have been avoided. Under the facts of this case, the trial court's decision to impose dismissal with prejudice as a sanction for the plaintiff's attorney's refusal to proceed to opening statements without viewing the disc was arbitrary and unreasonable. Therefore, it is unnecessary to address whether the trial court erred in denying the plaintiff's motion to reconsider the dismissal with prejudice.

¶ 38 I would reverse the dismissal with prejudice and remand the case to the circuit court for further proceedings. Therefore, I respectfully dissent.