2013 IL APP (1st) 121554-U

FIFTH DIVISION
JUNE 14, 2013

No. 1-12-1554

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STATE FARM FIRE & CASUALTY INSURANCE COMPANY, Plaintiff-Appellant, v. TANYSHIA L. ANDERSON Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 10 M1 11777 Honorable Dennis M. McGuire Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Where dismissal of plaintiff's action was based on its refusal to proceed with trial on the set trial date due to the unavailability of a necessary witness, the dismissal should be without prejudice; thus, the trial court abused its discretion in entering a dismissal with prejudice.

¶ 2 On appeal, plaintiff, State Farm Fire & Casualty Insurance Company, contends that the

trial court erred in dismissing its action with prejudice and that the order should have been a dismissal without prejudice because its refusal to proceed to trial on the set trial date was caused by the unexpected unavailability of a necessary witness. Plaintiff also contends the trial court abused it's discretion when it entered a dismissal with prejudice because the case was never adjudicated on its merits.

¶ 3 BACKGROUND

¶ 4 On March 3, 2010, plaintiff filed a complaint against defendant, Tanyshia Anderson, alleging that she stole certain items from the residence of Nina Williams, the insured. In the complaint, plaintiff alleges that defendant, on or about July 1, 2009, stole personal property from the residence of the insured with a value of approximately $9,900. Plaintiff further alleged that the insured was covered under an insurance policy with plaintiff, which provided, in part, that after a certain deductible, plaintiff was to pay the excess. Under the insurance policy, the insured transferred to plaintiff all claims against any other party connected with the loss.

¶ 5 On July 1, 2009, Officer Daniel of the Maywood Police Department interviewed Andre Williams, son of the insured, who reported the theft. Officer Daniel then wrote a theft report. On August 30, 2010, defendant was served a summons and she filed her *pro se* appearance on September 20, 2010. The case was on the court's call on November 10, 2010, at which time defendant and plaintiff's attorney appeared and a status was set for January 31, 2011. At the status hearing on January 31, 2011, plaintiff's attorney was present, but defendant did not appear and was defaulted. The matter was set for trial on April 18, 2011, and on March 29, 2011, Officer Daniel was subpoenaed to appear at trial.

¶ 6 On April 18, 2011, the day of trial, plaintiff, plaintiff's attorney and defendant were present. Available as witnesses for plaintiff were a State Farm claim representative, the insured and her son. However, plaintiff counsel's office received a call from Officer Daniel on the morning of trial, stating that her car broke down and she might not be able to make the trial. Plaintiff contends Officer Daniel was essential to plaintiff's ability to prove its case against defendant.

¶ 7 When this matter was called for trial, plaintiff stated it could not go forward with the trial because a crucial witness was not present, and informed the court of the possible inability of Officer Daniel to attend the trial. Plaintiff asked for a continuance and the issuance of a rule to show cause to compel the police officer's appearance for trial. Plaintiff's motion to continue was denied. The court then ordered plaintiff's case dismissed with prejudice.

¶ 8 On April 19, 2011, plaintiff filed a motion to reconsider and on April 26, 2011, after a hearing, the motion to reconsider was denied. In its written order, the trial court found that plaintiff had other witnesses present on the day of trial besides the police officer, with which the plaintiff could have gone to trial.

¶ 9 ANALYSIS

¶ 10 On appeal, plaintiff contends that the trial court abused its discretion in entering an order of dismissal with prejudice when plaintiff could not go forward on the set trial date because of the unavailability of a necessary witness.

¶ 11 We first note that we have taken this appeal on plaintiff's brief only. A court of review is not compelled to serve as an advocate for the appellee, nor should it be required to search the

record for the purpose of sustaining the judgment of the trial court. *First Capital Mortgage Corp., v. Talandis Construction Corp*., 63 Ill. 2d 128, 133 (1976). However, if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. *Id*. Further, if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record, the judgment of the trial court may be reversed. *Id.*

¶ 12 We review a trial court's decision to dismiss a complaint with prejudice for an abuse of discretion. *Capital v. Antaal*, 2012 IL APP (2d) 110904, ¶ 28, see also *Ingold v. Irwin,* 302 Ill. App. 3d 378, 383 (1998); *Knight v. Van Matre Rehabilitation Center, LLC*., 404 Ill. App. 3d 214, 216 (2010). The test to be applied by a reviewing court is whether the trial court took "particular facts and unique circumstances of the case into consideration before determining that the complaint should be dismissed with prejudice." *Ingold*, 302 Ill. App. 3d at 384; *Peterson*, 233 Ill. App. 3d. at 330. Where this has been done, the trial court 's determination is not an abuse of discretion and will not be reversed on appeal. *Id*. Absent a manifest abuse of discretion, the trial court's determination will not be reversed on appeal. *Id.; McCastle v Sheinkop*, 121 Ill. 2d 188, 194 (1987).

¶ 13 Plaintiff relies on *Michael J. Farrar et al., v. Mildred Jacbazzi*, 245 Ill. App. 3d 26 (1993), (citing *Roberto Flores et al., v. Theresa Dugan*, 91 Ill. 2d 108 (1982)), for the proposition that a trial court does not have the authority to dismiss a cause of action with prejudice when the plaintiff refuses to proceed at trial because a necessary witness is unavailable. We agree. In *Farrar,* plaintiff was a home buyer suing defendant, the seller, for

misrepresentations which induced the purchase of the home. *Id.* at 29. There were several continuances due to procedural delays and the death of one defendant. *Id*. Three days before trial, plaintiffs filed an emergency motion to continue trial due to their inability to locate a necessary witness, which the court denied. *Id*. The plaintiff renewed their motion to continue trial or, in the alternative, ask for a voluntary dismissal. *Id.* The trial court orally dismissed the case for want of prosecution on the morning of trial and then later, in response to a motion to vacate, entered a written order declaring that the dismissal for want of prosecution had been entered with prejudice. *Id.* at 30. On appeal, the *Farrar* court overturned the trial court's dismissal, stating that it is established law in Illinois that a trial judge does not have the power to dismiss a cause of action with prejudice for want of prosecution. *Id.* at 34. Unquestionably, this case was dismissed because plaintiffs simply were unable to proceed with trial on the set trial date due to the absence of a necessary witness. *Id*. at 34. If a trial judge dismisses a plaintiff's cause of action as a result of his refusal to proceed with trial due to the unavailability of a necessary witness, the proper order of dismissal is one for want of prosecution. *Id.;* see *Flores*, 91 Ill. 2d at 111. As the *Farrar* court found, this was a dismissal for want of prosecution and the trial judge did not have the authority to enter such an order with prejudice. *Id.*

¶ 14 In the instant case, when called for trial, plaintiff's counsel answered that they were not ready to proceed for the express reason that an indispensable witness was unavailable. Plaintiff asked for a continuance which was denied, and the case was dismissed with prejudice. Since Plaintiff's sole reason for not going forward with trial was simply its inability to proceed after it had subpoenaed a necessary witness, in holding with *Farrar*, we reverse the trial court's order

and remand for a dismissal order without prejudice.

¶ 15 Plaintiff further relies on *O'Reilly v. Gerber*, 95 Ill. App. 3d. 947, 950 (1981), for the proposition that because there was no trial or adjudication on the merits, it was an abuse of discretion to enter a dismissal order with prejudice. The appellate court has repeatedly held that a dismissal with prejudice is synonymous to an adjudication on the merits. *Brady v. Joos*, 273 Ill. App. 3d 793, 797, (1995); see *O'Reilly*, 95 Ill. App. 3d at 950; *In re Cranes Estate*, 343 Ill. App. 327, 342 (1951). In *O'Reilly*, the trial court issued an order stating that the cause was dismissed with prejudice because of plaintiff's failure to file an amended complaint within the stipulated time. *Id.* at 949. The appellate court found that while the trial court did not use the words "dismissal for want of prosecution" in its order, that a suit may be dismissed for want of prosecution for the failure or refusal to file an amended complaint (3 Nichols Illinois Civil Practice § 2848), and it seemed clear that was what the court was doing here. *Id* at 950. The appellate court held that where it was clear that the trial court dismissed the case for want of prosecution for failure to file an amended complaint, the dismissal should have been without prejudice. *Id* at 950. Moreover, a dismissal for want of prosecution has been considered not to be an adjudication on the merits, not to prejudice the case of the party against whom it is entered, and not to act as a bar to a subsequent suit on the same issues. *Id*. In addition, the *O'Reilly* court found that Illinois law gives a plaintiff whose action is dismissed for want of prosecution the right to refile within one year. *Id.* at 950; see 735 ILCS 5/13-217 (West 1992). This right specifically conferred by statute would be defeated if the court were allowed to dismiss with prejudice. *Id*.

¶ 16 Plaintiff argues that its refusal to go forward was completely out of its control. Plaintiff contends that the fact that an indispensable witness was not available meant that plaintiff was not ready for trial. In its order dated April 18, 2011, the court found "Plaintiff had a State Farm representative and State Farm insured as witnesses. Plaintiff served police officer Daniel with a trial subpoena and said officer failed to appear. Plaintiff requested a 'Rule to Show Cause' and a continuance so that plaintiff could compel the officer to appear." The order further states, "Plaintiff's motion to continue denied. Court orders case dismissed with prejudice." Plaintiff filed a motion to reconsider on April 19, 2011 which was denied on April 26, 2011. The court found, "Plaintiff had other witnesses present on the day of trial besides the police officer with which the plaintiff could have gone to trial." Thus, there was never an adjudication on the merits and the order should have been without prejudice so as to allow the plaintiff to refile and have its day in court.

¶ 17 CONCLUSION

¶ 18 In light of the foregoing, it is clear that the trial court erred in dismissing the cause of action with prejudice. Accordingly, the judgment is reversed and the cause remanded to the trial court with instructions to enter an order dismissing the cause without prejudice.

¶ 19 Reversed and remanded.