Third Division
May 22, 2013

No. 1-12-2595

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE CANCER FOUNDATION, INC., *et al.*,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	09 L 004607
	)	
CERBERUS CAPITAL MANAGEMENT, L.P., *et al.*,	)	Honorable
	)	John C. Griffin,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it denied a plaintiff's motion to reinstate a case ten months after the appellate court issued its mandate remanding the case to the trial court, where the cause of action arose more than a decade before the issuance of the mandate. The plaintiff's alleged lack of the financial resources needed for the litigation did not excuse the ten-month delay, especially because the plaintiff exhausted much of his resources in fruitless litigation over many years.

¶ 2 After Morton Lapides won his prior appeal in this case, more than ten months elapsed between the issuance of the appellate court's mandate and the filing of a motion to reinstate the case in the trial court. Lapides explained that he used up all of his financial resources in the extensive litigation of his claim. The trial court denied the motion to reinstate, finding that Lapides did not reinstate the claim within a reasonable time after the issuance of the mandate. Because we cannot say that the trial court abused its discretion, we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 MML, Inc., a Maryland holding company, purchased Winterland Concessions Company, a California corporation, in August 1996. Gordon Brothers Group, together with Madeleine LLC, a subsidiary of Cerberus Capital Management, loaned $23,000,000 to Winterland, with Winterland's assets securing the loan. Winterland then agreed to lease, for a period of 10 years, plants and equipment from Transcolor Corporation, a subsidiary of MML. Morton Lapides, Sr., controlled both MML and Transcolor.

¶ 5 Although Winterland paid back much of the loan from Gordon and Madeleine within a few months, it needed more capital by early 1997. In April 1997, Lapides, MML, Winterland, Gordon and Madeleine entered into a contract extending to April 1999 the due date for the remaining balance of the loans from Gordon and Madeleine to Winterland. In exchange, MML agreed to reduce the term of the Transcolor lease to less than two years, and MML transferred to Gordon and Madeleine 80% of the equity in Winterland. The contract expressly provided that MML and Lapides could recover control of Winterland if they bought back the Winterland stock, at a price set by an independent appraiser, before April 1998. The parties agreed that New York law would govern the rights and obligations of the parties under the contract.

¶ 6 On August 8, 1997, Gordon and Madeleine caused Winterland to file a petition in California for reorganization in bankruptcy. The bankruptcy court confirmed a reorganization plan for Winterland without objection, and discharged Winterland from bankruptcy proceedings in 2000. In the reorganization, the bankruptcy court terminated Winterland's leases with Transcolor.

¶ 7 In 1998, some of Transcolor's creditors filed a petition in bankruptcy court in Maryland to declare Transcolor bankrupt. In the course of the Maryland proceedings, Transcolor sued Gordon and Madeleine (along with Cerberus because it controlled Madeleine), alleging that they unlawfully interfered with Transcolor's contract with Winterland when they forced MML to agree to reduce the term of the lease from ten years to two years, and when they caused Winterland to file for bankruptcy. The bankruptcy court in Maryland dismissed Transcolor's lawsuit against Gordon, Cerberus and Madeleine, finding it barred by the *res judicata* effect of the California bankruptcy court's decision. *In re Transcolor Corp.*, 258 B.R. 149, 159 (D. Md. 2001).

¶ 8 In July 2007, MML and Lapides tried a new forum. MML and Lapides, along with numerous other persons named as plaintiffs, sued Gordon, Cerberus and Madeleine in federal court in Illinois, alleging that the defendants engaged in racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§1961 *et seq.* (1994)). MML and Lapides also claimed that the defendants breached the April 1997 contract when they caused Winterland to file the bankruptcy petition. According to the complaint, Winterland's bankruptcy precluded MML and Lapides from exercising their rights under the April 1997 contract to regain control of Winterland by buying back its stock before April 1998. In an order dated April 4, 2008, the district court dismissed the RICO counts with prejudice, and it dismissed the pendent state claims, including the count for breach of contract, without prejudice. *Cancer Foundation, Inc. v. Cerberus Capital*

Management, LP, 2008 U.S. Dist. Lexis 27483 (N.D. Ill. 2008). The United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment in an opinion dated March 19, 2009. *Cancer Foundation, Inc. v. Cerberus Capital Management, LP*, 559 F.3d 671 (7th Cir. 2009).

¶ 9 Less than 30 days later, on April 17, 2009, the plaintiffs, including MML and Lapides, sued Gordon, Cerberus and Madeleine, alleging that the defendants breached the April 1997 contract when they eliminated MML's and Lapides's right to regain control of Winterland. The plaintiffs alleged that the contract implicitly included a covenant of good faith and fair dealing, which obligated the defendants not to place Winterland in bankruptcy before April 1998, so that MML and Lapides would have one year in which to regain control of Winterland by buying the stock from the defendants. MML and Lapides conceded that most of the named plaintiffs had no standing to sue. Only MML and Lapides remain plaintiffs in this lawsuit.

¶ 10 The trial court dismissed the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619(a)(4) (West 2008)), finding that the *res judicata* effect of the California bankruptcy decision barred the complaint. The defendants also argued that the *res judicata* effect of the Maryland bankruptcy decision barred the complaint, the Illinois statute of limitations barred the complaint, and the complaint failed to state a cause of action under New York contract law.

¶ 11 Lapides appealed. This court held that neither the California decision nor the Maryland decision barred this lawsuit as *res judicata*. We found that Lapides filed the lawsuit in an Illinois federal court within the ten-year limitation period applicable to this action for breach of contract, and he filed this action in an Illinois state court within the extended period permitted by federal law. We reversed the dismissal of the lawsuit and remanded the matter to the trial court for further proceedings. *MML, Inc. v. Cerberus Capital Management, LP*, No. 1-10-1793 (2011) (unpublished order under Supreme Court Rule 23). Our mandate issued on August 5, 2011.

¶ 12 Lapides filed his petition to reinstate the case, pursuant to Supreme Court Rule 369(c) (Ill. S. Ct. R. 369(c) (eff. July 1, 1982)) on June 18, 2012. Gordon, Cerberus and Madeleine asked the trial court to deny as untimely the petition to reinstate the case.

¶ 13 Lapides presented a written declaration to the court in support of his petition to reinstate the case. He stated that the extensive litigation exhausted his financial resources. He created a corporation, VR Holdings, to raise funds for the litigation against Gordon, Cerberus and Madeleine. After our mandate issued, the attorneys who represented Lapides in the prior appeal told Lapides that to litigate his claim against Gordon, Cerberus and Madeleine, he would need to depose 12 fact witnesses, retain experts to review records, and pay for extensive document production and review. The attorneys estimated that litigation could cost $750,000. Rather than attempting to raise the funds while litigating the case, Lapides decided not to pursue reinstatement until he had raised sufficient funds for the litigation. According to his affidavit, he relied solely on VR as the source for the needed funding. Lapides presented a financial statement from VR showing that it had virtually no assets. He also presented financial statements from other corporations that have not participated in this appeal. He did not present statements reflecting his personal financial situation.

¶ 14 The trial court held that Lapides's financial situation did not provide a reasonable excuse for the delay between the issuance of the mandate and the filing of the motion to reinstate the case. The court also found that the extensive delay from the time of the alleged breach of the contract to the filing of the motion to reinstate the case prejudiced Gordon, Cerberus and Madeleine. Accordingly, the court denied the motion to reinstate the case. Lapides now appeals.

¶ 15 ANALYSIS

¶ 16 In *People v. NL Industries, Inc.,* 297 Ill. App. 3d 297 (1998), the appellate court set out the standards for reviewing a decision on a motion to reinstate a case under Supreme Court Rule 369 (Ill. S. Ct. R. 369(c) (eff. July 1, 1982). The court said:

> "When a case is remanded to the trial court and this court's mandate issues, a prevailing party must reinstate the cause pursuant to Rule 369(c) within a reasonable time. [Citation.] In determining whether a party has reinstated a case within a reasonable time, a trial court should take into account the totality of the circumstances, particularly any reason proffered for undue delay. [Citations.] We will review a trial court's determination in these matters for an abuse of discretion." *NL Industries,* 297 Ill. App. 3d at 300-01.

¶ 17 Lapides argues that the court in *NL Industries* used the wrong standard of review, and that we should review the trial court's decision *de novo*. We disagree. Because a Rule 369 motion involves procedural matters, the trial court's control of its docket and the timely disposition of cases, we review the decision for abuse of discretion. See *People v. Coleman*, 183 Ill. 2d 366, 387 (1998) (decisions concerning control of the court's docket are reviewed for abuse of discretion); *National Underground Construction Co. v. E.A. Cox Co.,* 273 Ill. App.3d 830, 836 (1995) (Rule 369 motion involves control of court's docket);*Ryan v. Kontrick*, 335 Ill. App. 3d 225, 229 (2002) (review decision on Rule 369 motion for abuse of discretion).

¶ 18 The trial court relied on *NL Industries* as authority for denying the motion to reinstate the case. In *NL Industries*, the State successfully appealed from an adverse judgment, and our supreme court issued a mandate directing the trial court to rehear the case. Nine months later, the State filed a motion to reinstate the case. The State explained that it delayed reinstatement because of "serious time constraints under which [the State's] counsel labored at the time, the need to set priorities and the desire not to begin the active litigation of the case until counsel assigned to it had sufficient time to do a diligent job." *NL Industries,* 297 Ill. App. 3d at 301. The assistant state's attorneys had too much to do to focus on the remanded case. The trial court said,

> "The State's Attorney's Office could have very easily filed the motion and then come before the court and asked for a delay. It could have explained to the Court at that time what other pending and competing matters existed and could have asked for a delay in discovery. That wasn't done.
>
> In my opinion, this is not the way litigation is to be handled. I should not be confronted at this time with a case that was filed in 1988." *NL Industries,* 297 Ill. App. 3d at 302.

The trial court denied the motion to reinstate the case, and the appellate court held that the trial court did not abuse its discretion.

¶ 19 The case before this court, like *NL Industries*, involves litigation over incidents that took place long before the motion to reinstate, and a party who chose not to reinstate the case for almost a year after the issuance of the higher court's mandate, because that party claimed it lacked sufficient resources to devote to the case. Here, we face an added factor: Lapides complains that litigation used up his resources, but he expended those resources pursuing relief in ultimately fruitless litigation in Maryland, and the federal court in Illinois. His wilful depletion of his resources does not excuse his delay.

¶ 20 Lapides argues that the delay of ten months here had no prejudicial effect. When we assess Lapides's diligence in light of the totality of the circumstances, we must consider the delay from the time of the alleged breach of contract to the filing of the complaint. See *Kontrick*, 335 Ill. App. 3d at 228-29 (to determine whether a party has acted with diligence prior to filing a Rule 369 petition, the court may consider cases interpreting section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008))); *Cruz v. Columbus-Cuneo-Cabrini Medical Center*, 264 Ill. App. 3d 633, 639 (1994) (for a petition under section 2-1401, the petitioner must show diligence in pursuing the claim in the trial court, as well as diligence in presenting the 2-1401 petition). Almost 10 years elapsed between the alleged breach of contract and the filing of the complaint in federal court. Two more years passed before Lapides filed the complaint at issue in this case. The passage of an extended period of time since the incidents that gave rise to the cause of action warrants a presumption of prejudice. See *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 370 (1995).

¶ 21 In light of all the delays from the alleged breach of contract to the filing of the motion to reinstate the case, we find that the trial court did not abuse its discretion when it held that Lapides did not act with reasonable diligence when he delayed an extra ten months after the issuance of our mandate to file his petition to reinstate the case.

¶ 22 CONCLUSION

¶ 23 The trial court did not abuse its discretion when it denied Lapides's petition to reinstate the case due to his failure to file the petition within a reasonable time after this court issued its mandate disposing of the prior appeal.

¶ 24 Affirmed.