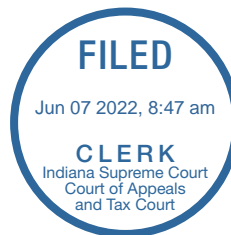


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Linda D. Daugherty,
Appellant-Plaintiff,

v.

Casual Lifestyles Realty, Inc.
and Rauleigh J. Ringer,
Appellees-Defendants.

June 7, 2022

Court of Appeals Case No.
21A-CT-2866

Appeal from the Madison Circuit
Court

The Honorable Andrew R.
Hopper, Judge

The Honorable Christopher A.
Cage, Master Commissioner

Trial Court Cause No.
48C03-1504-CT-41

Tavitas, Judge.

Case Summary

[1] Linda Daugherty rented a home that was owned by Rauleigh Ringer and managed by Casual Lifestyles Realty Inc. (“Casual”). Daugherty filed a complaint against Ringer and Casual alleging that she was injured as a result of Ringer’s and Casual’s negligence in maintaining the house. Several years later, Ringer and Casual filed a motion to dismiss for failure to prosecute pursuant to Indiana Trial Rule 41(E), which the trial court initially denied without a hearing. Then, following a required hearing on the matter, the trial court granted the motion to dismiss. Daugherty appeals and claims that the trial court erred by granting the motion to dismiss. Because we conclude otherwise, we affirm.

Issues

- [2] Daugherty raises two issues, which we restate as:
- I. Whether the trial court erred as a matter of law by granting the Trial Rule 41(E) motion to dismiss after Daugherty had resumed prosecution of her case.
 - II. Whether the trial court abused its discretion by granting the Trial Rule 41(E) motion to dismiss.

Facts

[3] The facts as alleged in Daugherty’s complaint are as follows: At the time relevant to this appeal, Ringer owned a home in Alexandria, Indiana. Daugherty rented the home from Ringer, and Casual acted as the property

manager for Ringer. On March 28, 2014, Daugherty was injured when she fell off the porch on the house, which she alleges was deteriorating due to the negligence of Ringer and Casual.

[4] Daugherty filed her initial complaint alleging negligence on April 16, 2015. On June 12, 2015, the Defendants filed a motion for a more definite statement pursuant to Indiana Trial Rule 12(E). The Defendants also filed an answer, including counterclaims, on July 28, 2015. In apparent response to the motion for a more definite statement, Daugherty filed an amended complaint on July 31, 2015.

[5] On August 20, 2015, Daugherty filed an answer to the counterclaims, and on September 16, 2015, she filed a motion to strike the Defendants' third counterclaim. The trial court held a hearing on this motion on November 24, 2015, and issued an order granting the motion on December 18, 2015.

[6] Daugherty took no action on the case for 634 days—from December 18, 2015, until September 12, 2017—when she filed a motion requesting that the trial court hold a “Telephonic PTC to Set Trial Dates and Deadlines.” Appellant’s App. Vol. II p. 4. The judge granted the request and, on February 28, 2018, issued an order setting a jury trial date of January 28, 2019. On March 1, 2018, the trial court held a pretrial conference and confirmed the jury trial date. After the parties filed their witness and exhibits lists pursuant to the court’s pretrial order, the trial court, on its own motion, vacated the jury trial on January 2,

2019, and instructed counsel for both parties to contact the court to reschedule the jury trial.

[7] On January 3, 2019, Daugherty filed a motion to continue the jury trial, which had already been continued per the trial court's order the day before. On January 28, 2019, the trial court again issued notice to the parties to contact the court to set the matter for a hearing. The trial court then, on April 17, 2019, set the case for a jury trial for April 6, 2020.

[8] On March 9, 2020, Daugherty filed a motion for leave to file another amended complaint and requested a pretrial conference. The trial court granted the motion for a conference, and a telephonic conference was held on March 12, 2020. The trial court granted Daugherty's motion for leave to file an amended complaint and vacated the scheduled April 6 jury trial date. Daugherty filed her second amended complaint on March 16, 2020. Then, on March 18, 2020, the parties filed a joint motion to extend the deadline for mediation, which the trial court granted until May 22, 2020. The mediator filed a report on August 27, 2020, which reported that mediation was unsuccessful. The parties were responsible for requesting further hearings after mediation. No further action was taken in the case for nine months.

[9] On May 27, 2021, the Defendants filed a motion to dismiss for failure to prosecute pursuant to Indiana Trial Rule 41(E). Daugherty filed a response to this motion the following day and requested a telephonic pretrial conference to set a date for trial. The trial court denied the Defendants' motion to dismiss on

June 3, 2021, and set the matter for a telephonic attorney conference to be held on July 19, 2021. The trial court held a telephonic status conference on that date. The next day, the trial court issued an order to set the matter for a hearing on the Defendants' motion to dismiss, which it had earlier denied. The trial court also set the matter for a jury trial for August 29, 2022, with March 27, 2023, as a secondary setting. The trial court also approved a case management plan on August 9, 2021.

[10] The trial court held a hearing on the Defendants' motion to dismiss on August 16, 2021, and issued an order granting the motion to dismiss on September 30, 2021. This order provides in pertinent part:

Having reviewed the record, the pleadings and considering the same, the Court now finds that Defendant/Counter Plaintiff's request for dismissal pursuant under Indiana Trial Rule 41(E) is appropriate and warranted as sufficient cause has not been shown for any delay in prosecuting said claim. As such, the Defendant's Motion to Dismiss is hereby GRANTED. All counterclaims herein are also ordered DISMISSED.

Appellant's App. Vol. II p. 13. Daugherty now appeals.

Analysis

[11] On appeal, Daugherty claims that the trial court erred as a matter of law and abused its discretion when it granted the Defendants' motion to dismiss for failure to prosecute. The decision to grant a Trial Rule 41(E) motion to dismiss is left to the discretion of the trial court, and, on appeal, we review the trial court's decision only for an abuse of that discretion. *Petrovski v. Neiswinger*, 85

N.E.3d 922, 924 (Ind. Ct. App. 2017) (citing *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*). A trial court abuses its discretion if its decision is against the logic and effect of the facts and circumstances before it. *Id.*

[12] Indiana Trial Rule 41(E) 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.

[13] The purpose of Trial Rule 41 is to ensure that plaintiffs will diligently pursue their claims. *Petrovski*, 85 N.E.3d at 924 (citing *Belcaster*, 785 N.E.2d at 1167). Trial Rule 41 provides an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution. *Id.* (citing *Belcaster*, 785 N.E.2d at 1167). The burden of moving the litigation forward is upon the plaintiff, not the court. *Id.*; *see also Belcaster*, 785 N.E.2d at 1167 (“It is not the duty of the trial court to contact counsel and urge or require him to go to trial, even though it would be within the court’s power to do so.”). Trial courts cannot be asked to carry cases on their dockets indefinitely and the rights

of the adverse party must be considered. *Petrovski*, 85 N.E.3d at 924. “[The adverse party] should not be left with a lawsuit hanging over his head indefinitely.” *Id.* Although we do not require trial courts to impose lesser sanctions before applying the ultimate sanction of dismissal, we view dismissals with disfavor because dismissals are extreme remedies that should be granted only under limited circumstances. *Id.* (citing *Caruthers v. State*, 58 N.E.3d 207, 211 (Ind. Ct. App. 2016)).

I. Granting Motion to Dismiss Was Not Contrary to Law

[14] Daugherty first argues that the trial court erred as a matter of law when it granted the Defendants’ motion to dismiss for failure to prosecute after Daugherty had resumed prosecution of her case. Daugherty notes that, after the trial court initially denied the Defendants’ motion to dismiss,¹ the court held an attorney conference to set a trial date. The trial court then scheduled a hearing² on the Defendants’ motion to dismiss for failure to prosecute. Before the hearing on the motion to dismiss was held, the trial court set jury trial dates and approved a case management plan. Only after this did the trial court hold a hearing on the motion to dismiss and ultimately grant the motion. Daugherty

¹ Daugherty acknowledges that the trial court could revisit its earlier decision denying the Defendants’ motion to dismiss. See *Johnson v. Est. of Brazill*, 917 N.E.2d 1235, 1239 n.5 (Ind. Ct. App. 2009) (“[A] trial court has the inherent power to reconsider any previous ruling so long as the action remains *in fieri*.”) (citing *Stephens v. Irvin*, 734 N.E.2d 1133, 1135 (Ind. Ct. App. 2000)).

² Such a hearing is required by Trial Rule 41(E), which provides that a trial court “shall order a hearing for the purpose of dismissing such case,” referring to a case where no action has been take for a period of at least sixty days. “The Indiana Supreme Court and this Court have held that a court must generally hold a hearing prior to entering an order of dismissal under Trial Rule 41(E).” *Somerville Auto Transp. Serv., Inc. v. Auto. Fin. Corp.*, 12 N.E.3d 955, 962 (Ind. Ct. App. 2014) (collecting cases), *trans. denied*.

argues that “[i]t was contrary to law to dismiss the action after prosecution had been resumed by [] mutually agreed upon trial dates after the motion to dismiss had been denied.” Appellant’s Br. at 8. We are unable to agree.

[15] A similar argument was rejected by this Court in *Benton v. Moore*, 622 N.E.2d 1002 (Ind. Ct. App. 1993). In *Benton*, the plaintiffs resumed prosecution of their action only after the defendant filed a motion to dismiss for failure to prosecute. The trial court granted the motion to dismiss six days after the plaintiffs resumed prosecution. On appeal, the plaintiffs claimed that this was improper, citing *State v. McClaine*, 261 Ind. 60, 300 N.E.2d 342 (1973). In *McClaine*, our Supreme Court held that a Trial Rule 41(E) motion to dismiss should not be granted if the plaintiff resumes prosecution of the action before the motion is filed. 261 Ind. at 63, 300 N.E.2d at 344. Specifically, the *McClaine* court held:

The burden is clearly on the defendant to timely file a motion to dismiss pursuant to TR. 41(E). That is to say, the defendant must file his motion *after* the sixty-day period has expired and before the plaintiff resumes prosecution. The defendants in this case moved to dismiss *after* the plaintiff filed its request for trial and thereby failed to meet the requirements of TR. 41(E).

Id. (emphasis in original). This Court in *Benton* therefore concluded that “*McClaine* clearly holds that to avoid a T.R. 41(E) dismissal, a plaintiff must resume prosecution **before** the filing of the T.R. 41(E) motion.” 622 N.E.2d at 1005 (emphasis added).

[16] Per both *Benton* and *McClaine*, a plaintiff must resume prosecution of their action **before** the filing of a Trial Rule 41(E) motion to dismiss to avoid dismissal. Daugherty, however, did not resume prosecution of her action until **after** the Defendants filed a motion to dismiss. Daugherty's argument that the trial court could not, as a matter of law, grant the motion to dismiss because she resumed prosecution of her case is, therefore, unavailing.

II. Granting Motion to Dismiss Was Not an Abuse of Discretion

[17] Daugherty also argues that the trial court abused its discretion by granting the Defendants' motion to dismiss. Indiana trial courts must balance nine factors when determining whether to dismiss a case for failure to prosecute:

(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.

Petrovski, 85 N.E.3d at 924 (quoting *Belcaster*, 785 N.E.2d at 1167). The weight to be given to any particular factor depends upon the facts of the case. *Id.* Considering the pertinent factors, we are unable to say that the trial court abused its discretion by granting the Defendants' motion to dismiss.

[18] The first factor to be considered is the length of the delay in prosecution of the case. The parties here filed a joint motion to extend the deadline for mediation on March 18, 2020. This was the last action taken by Daugherty until May 28, 2021, when she filed a response to the Defendants' motion to dismiss, which had been filed the day before. This is a period of 436 days. Even if we consider the filing of the mediator's report on August 27, 2020, as continuing the prosecution of the case, a delay of nine months still exists. Trial Rule 41(E) permits the court or a party to file a motion to dismiss after a mere sixty days of inaction in a case. Here, Daugherty delayed the case by at least four and one-half times this period. Suffice it to say that the length of the delay weighs heavily in favor of dismissal. *See Belcaster*, 785 N.E.2d at 1168 (holding that a ten-month delay was unreasonable); *Smith v. Harris*, 861 N.E.2d 384, 385 (Ind. Ct. App. 2007) (holding that a five-month delay was excessive).

[19] The next factor is the reason for the delay. Daugherty claims that the delay was attributable to the Covid-19 pandemic and the resulting restrictions placed on jury trials. Daugherty notes there were few trials scheduled during 2020. This does not, however, negate the fact that Daugherty took no action in the case for months, not even to set a trial date at some point in the future. The fact that a trial date might have been delayed due to Covid-19 restrictions did not relieve her of the burden of moving forward with the prosecution of her claims. This factor does not weigh in favor of Daugherty.

[20] Next, we consider the degree of personal responsibility on the part of Daugherty as the plaintiff and the degree to which the plaintiff will be charged

for the acts of her attorney. Although there is little indication that Daugherty is personally responsible for the delay in her case, we cannot overlook the fact that this case has been pending with little progress since 2015. Either Daugherty or her counsel has allowed this relatively straightforward negligence case to drag on for nearly seven years.

[21] The amount of prejudice to the defendant caused by the delay is our next consideration. Here, Ringer filed an affidavit in which he averred that he was eighty-nine years old and that the pending action had negatively affected his health. It is also evident that having a lawsuit pending for years on end results in some prejudice. *See Allstate Ins. Co. v. Kepchar*, 592 N.E.2d 694, 698 (Ind. Ct. App. 1992) (holding, in context of the failure to give notice to insurer of an accident, that prejudice can be presumed from an unreasonable delay); *see also McMahan v. Deutsche Bank AG*, 892 F.3d 926, 932 (7th Cir. 2018) (“An unreasonable delay [in failure to prosecute] gives rise to a presumption of prejudice.”); 9 Wright & Miller, FED. PRAC. & PROC. § 2370 (4th ed. 2022 Update) (“It has been said that prejudice may be presumed from an unreasonable delay.”).

[22] There was also a lengthy history of proceeding in a dilatory fashion. Daugherty took no action whatsoever on the case during all of 2016 and most of 2017. This factor alone would not necessarily justify dismissal, but when combined with the additional delay of at least nine months between the mediation and the filing of the Rule 41(E) motion to dismiss, it demonstrates a history of

proceeding in a dilatory fashion. Furthermore, Daugherty was stirred into action only by the threat of dismissal, not diligence on her part.

[23] The only factors that can be said to weigh in favor of Daugherty are the desirability of deciding the case on the merits and the existence of sanctions less drastic than dismissal. Given Daugherty's history of proceeding in a dilatory fashion, the length of the delay in prosecution, and the fact that Daugherty was only spurred into action by the filing of the motion to dismiss, the trial court was well within its discretion to dismiss Daugherty's action for failure to prosecute.

Conclusion

[24] The trial court did not err as a matter of law by granting the Defendants' motion to dismiss for failure to prosecute after Daugherty resumed prosecution of her case because Daugherty did not act until after the Defendant's filed their motion to dismiss. The trial court did not abuse its discretion in granting the Defendants' motion to dismiss. Accordingly, we affirm the judgment of the trial court.

[25] Affirmed.

Riley, J., and May, J., concur.