MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lisa B. Gonzalez,
Appellant-Petitioner,

v.

Hector O. Gonzalez,
Appellee-Respondent.

April 1, 2021

Court of Appeals Case No. 20A-DR-1729

Appeal from the Hamilton Circuit Court

The Honorable Paul A. Felix, Judge

The Honorable Todd L. Ruetz, Magistrate

Trial Court Cause No. 29C01-0810-DR-1818

Altice, Judge.

Case Summary

[1] The marriage of Lisa B. Gonzalez (Wife) and Hector O. Gonzalez (Husband) was dissolved in 2009 with entry of an agreement as to property division, child support, and custody. About three years later, Wife filed a petition in which she sought modification of the property division, alleging that Husband fraudulently represented at the time of the dissolution that he had never had any interest in certain businesses owned by his father in Puerto Rico. Thereafter, Wife also filed a motion to modify child support.

[2] Wife initiated aggressive discovery in Puerto Rico and elsewhere, much of which led to extensive disputes between her and nonparties, as well as Husband. These discovery matters were litigated in Indiana through late 2014. Additionally, courts in Puerto Rico tackled many discovery matters and issued a final order in October 2018.

[3] After years of inaction in the case, in May 2020, the trial court issued an Indiana Trial Rule 41(E) notice for lack of prosecution and scheduled a hearing. Both parties filed written responses to the notice, and Wife appeared pro se at the hearing. Thereafter, the trial court dismissed Wife's pending motions with prejudice. On appeal, Wife contends that the trial court abused its discretion when it entered the dismissal pursuant to T.R. 41(E).

[4] We affirm.

Facts & Procedural History

[5] Wife and Husband married in 1999 and had a son that year. After they separated in 2007, their marriage was dissolved pursuant to an Agreement of Property Settlement and for Child Custody and Support (the Agreement) on June 11, 2009. In addition to dividing the couple's multi-million-dollar estate, the Agreement provided for Wife to receive six years of spousal maintenance at $5902 per month and weekly child support of $325.

[6] Of particular interest here, the Agreement included the following covenants provision:

> The Husband and the Wife hereby represent and warrant to each other that there has been a full disclosure of the identity and value of all marital assets and liabilities and that the property referred to in this Agreement represents all of the property of any sort whatsoever and wheresoever situated, real, personal and mixed, in which either of them has any interest or to which either of them has any right, whether legal or equitable. The Husband further warrants and represents to the Wife that the identity and value of all of his assets and liabilities are expressly disclosed in his formal discovery responses in this action. *The Husband further warrants and represents to the Wife that he has no ownership, equity, beneficial interest, stock, partnership, stake, membership, family limited partnership, master limited partnership, or any other interest and has never had any such interest in (a) Ventek Group, Inc., and/or Ventek Corporation and/or Ventek Corp. and/or Ventek (no matter how organized) and any subsidiaries, affiliates, and any other related entities, (b) Teleponce Cable and/or TPC and/or TPC, Inc (no matter how organized) and any subsidiaries, affiliates, and any other related entities*, and (c) Popular Securities account (xx1740). Husband warrants that Credit Suisse – First Boston Account (xx1255) no longer exists.

Appellant's Appendix Vol. II at 63 (emphasis supplied). The specific entities set out in the italicized portion are businesses in Puerto Rico owned, in whole or in part and currently or at one time, by Husband's father, who originally owned all the cable television rights in Puerto Rico.

[7] On April 19, 2012, Wife filed her Verified Petition to Modify Property Division Based Upon Fraud (the Fraud Petition). She amended the Fraud Petition twice over the next two months. In sum, Wife claimed that Husband fraudulently misrepresented in the covenants provision of the Agreement that he had never had any interest in TPC, Inc. (no matter how organized) and Ventek Group, Inc. In this regard, she alleged in part:

> 7. Petitioner has learned that, contrary to Respondent's representation in the Agreement, Respondent did at one time have a 5.42% interest in TPC Communications PR Inc., which ownership interest had a value of approximately Five Million Dollars ($5,000,000.00) when the company was sold in 2001. In addition, Petitioner has learned that Respondent received a distribution of approximately Five Million Dollars ($5,000,000.00) as payment for his interest in the company.
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> 8. In addition, Petitioner has learned that at least as recently as 2004, Respondent had an ownership interest in Ventek Group, Inc.
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> 9. Petitioner relied to her detriment upon the false representation of the Respondent in the Agreement, on his financial declaration, and throughout the pendency of the dissolution action that he had never had any interest in his family's cable company.

Id. at 82.

[8] On October 3, 2012, Husband filed a response in which he denied Wife's allegations of fraud and claimed that she was engaging in a "fishing expedition" that was causing him to incur "extensive and unwarranted attorney fees." *Id*. at 89. Husband noted that since filing the Fraud Petition, Wife had engaged in expansive discovery requests upon him and multiple nonparties. Thereafter, Wife continued obtaining subpoenas for various nonparties through the end of 2012.

[9] On January 8, 2013, Wife filed a Motion to Modify Child Support (the Child Support Motion). Wife noted that she had recently become unemployed and alleged that Husband had "significantly greater income than was used to calculate [child support] at the time of the divorce." *Id*. at 97. The trial court scheduled a hearing on the Child Support Motion for April 1, 2013, but that hearing was continued several times, and no action was ultimately taken on the Child Support Motion.

[10] With respect to the Fraud Petition, Wife continued to pursue expansive discovery and began, in early 2013, to focus much of her discovery efforts on nonparties located in Puerto Rico, an unincorporated territory of the United States. These nonparties included members of Husband's family, businesses owned by his family, and Puerto Rican financial institutions. Such discovery efforts eventually required the involvement of courts in Puerto Rico.

[11] Meanwhile, back in Indiana in February 2013, the trial court scheduled a two-day hearing for June. The hearing was later rescheduled to July by agreement of

the parties to allow additional time to complete discovery. Wife's attempt to take various depositions in Puerto Rico hit roadblocks along the way, as several of the nonparties had engaged counsel and were not properly served by Wife. As a result, on May 17, 2013, Wife requested an expedited pretrial conference in Indiana to address the delayed discovery and seek an extension. Husband filed a lengthy written response, pointing to missteps and delays by Wife in obtaining discovery in Puerto Rico. In sum, Husband argued that Wife had "refuse[d] to accept any responsibility for the long, drawn out and costly nature of this litigation to date." *Appellee's Appendix Vol. II* at 88. He described the action as a "fishing expedition" and Wife's pursuit of "an incredibly expensive mulligan", which had already resulted in him incurring well over $300,000 in legal fees. *Id.* Following the pretrial conference in June, the trial court rescheduled the two-day final hearing for October 7 and 8, 2013, with a new discovery deadline of September 13, 2013.

[12] In July 2013, Wife filed a motion to compel Husband to produce responsive documents. Husband opposed the motion and argued that "the categories of documents sought by [Wife] are not in [his] control and he has no legal right to obtain the documents from the persons or entities who in fact possess and control the documents." *Id.* at 116. The trial court initially granted Wife's motion to compel but then, after Husband filed a motion to reconsider, the court, on August 22, 2013, stayed the bulk of the order (that is, as it related to a securities account owned by Husband's father and documents controlled by Ventek Group and Ventek Partners in Puerto Rico) "until [Wife] notifies the Court that referenced

material could not be obtained through alternative discovery requests." *Appellant's Appendix Vol. II* at 157.

[13] On September 9, 2013, the trial court held a pretrial conference at which Wife requested a ninety-day continuance of the final hearing due to her difficulty in obtaining discovery in Puerto Rico, as several deponents had refused to appear and filed an "urgent motion" in a court in Puerto Rico. *Transcript* at 7. The trial court questioned Wife's counsel at the hearing and stated:

> You commented that you don't know when you might get a ruling in Puerto Rico. Are you concerned that you may never, and/or even though you think there's no legal reason for the motion to be granted, that you may still, that motion may be denied, or granted, the motion to quash would be granted anyway[?] In other words …, as opposed to setting this three months from now, which is kind of the reason why I wanted to do this hearing, this is now the second or third time I've given you a day-and-a-half on my court's calendar. And one of the things I wanted to do last time is I wanted to make sure all discovery was done before we proceeded and you talked me into giving you another day-and-a-half and then putting deadlines. Without having to respond to my thoughts about if you'll ever get a court order in Puerto Rico or if it will be ruled in your favor, I again believe that I would like to have a notice of completion of discovery before I set this.

Id. at 9. Counsel responded that the discovery being sought in Puerto Rico was "very important … given the circumstances of this case." *Id*. at 10. The trial court granted a continuance over Husband's objection but, in doing so, explained to Wife's counsel:

> I understand you're having a difficult time with the discovery. When you seem to have retained one attorney after another attorney who accepted the case and then rejected the case, I understand you're having a difficult time in Puerto Rico. But I have 2,000 other cases that are pending in this court and I could, in the day-and-a-half that I give you I could fit six or seven different cases on those days…. While I understand that there's a lot of money at stake here, I don't think, and it certainly hasn't been presented to me that this is an emergency or expedited reason to continue to set this hearing for a day-and-a-half. So I'm going to wait for a notice of conclusion of discovery before I reset this.

Id. at 14. Thereafter, the trial court issued a written order continuing the trial and vacating all other deadlines. The order further provided in part:

> 2. Trial will not be reset until Court receives notification of completion of all discovery, including pending discovery by [Wife] in Puerto Rico. If [Wife] is unable to obtain discovery in Puerto Rico, [Husband] shall either produce the materials that the Court previously ordered or if he does not do so, submit an Affidavit explaining why he cannot do so and describing his efforts to obtain such records from his Father or from other sources.
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> 3. When counsel requests that the trial be rescheduled, counsel shall include in the request proposed deadlines for filing witnesses and exhibit lists, and all other deadlines ….

Appellant's Appendix Vol. II at 159. Additionally, in the order and on Husband's request, the court directed future discovery to be limited to pending requests and depositions or discovery directly related to information developed therein.

[14] Wife's discovery efforts continued into 2014, and she encountered additional delays in Puerto Rico with nonparties challenging her subpoenas for depositions and documents, including the initiation of an appeal to the Court of Appeals of the Commonwealth of Puerto Rico (the COA). The COA issued an opinion on May 29, 2014, revoking an order of the Court of First Instance, Superior Part of San Juan (the CFI) in which the CFI ordered the summons of various parties[1] to the taking of depositions and the production of multiple documents.[2] In doing so, the COA explained:

> What is stated convinces us that the request for documents formulated by the promoting party are [sic] *clearly excessive and onerous*. Since they do not particularize periods of time or qualify the documents that should be produced in light of the main controversy raised, the requests for documents in question *constitute a clear fishing expedition*. In the comprehensive context of what is requested, the generic claim of the privileges formulated by the petitioners is understandable. Since what is requested was practically "all the documents", the discovery required could potentially have an effect on privileged matters.
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> The information subject to discovery by [Wife] should be circumscribed to evidence reasonably related to the controversy

[1] These parties included Ventek Group, Inc., Hector R. Gonzalez (Husband's father and president of Ventek Group), Maria Providencia Torres de Gonzalez, Leticia M. Gonzalez, Jacob E. Roig, and Roberto Vargas.

[2] While the appeal was pending, Wife also filed against Husband an emergency motion for rule to show cause, essentially claiming that Husband was obstructing the discovery process in Puerto Rico. The trial court did not find Husband in contempt but did partially lift the stay that had been entered on August 22, 2013. Husband timely complied with the order to provide certain limited documents.

> involved or which by its nature can lead to other pertinent evidence. It should also be reasonably circumscribed to the relevant period of time for the matter involved. Thus, it cannot pretend to have access to all of the documents of the activities of the Corporation Ventek Group, Inc., or of its officers and stockholders. The action which gave basis to the procedure [of] the CFI which generated the order that we revoke today has a precise scope: to clarify if [Husband] concealed assets during the proceedings related to her divorce. Such a scope is the basis of the discovery that she may request. Pursuant to this, [Wife] must restrict the requests for the documents that she is interested in formulating.
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> Based on the above, the CFI may [on remand] take the measures that are necessary to maintain the discovery of the evidence within said scope and to protect any probative privilege which the petitioning parties herein are to be accredited after adequately giving the basis for the same….

Appellee's Appendix Vol. II at 210-12 (emphases supplied).

[15] Two months after the remand to the CFI, Wife filed a motion to compel in Indiana, seeking to have the trial court order Husband to sign a broad consent for the release of financial records from Banco Popular de Puerto Rico, Popular Securities, Inc. and Jose Blasini. Wife made the request purportedly to "get discovery back on track in Puerto Rico." *Appellant's Appendix Vol. II* at 199. Husband filed a detailed response in opposition to Wife's motion. On September 10, 2014, the trial court denied Wife's motion. Thereafter, Wife

took no further action in Indiana related to the Fraud Petition, and her attorneys all eventually withdrew their appearances.[3]

[16] On May 13, 2020, the trial court sua sponte issued a T.R. 41(E) notice to the parties due to Wife's failure to prosecute. The court set a hearing for August 12, 2020, and the court indicated in the notice that it "shall enter an order of dismissal if [Wife] shall not show sufficient cause in writing on or before such hearing why this case should not be dismissed." *Id.* at 37. The trial court later rescheduled the hearing to August 19, 2020.

[17] On the eve of the hearing, Wife filed a pro-se written response to the T.R. 41(E) notice. She indicated that her discovery efforts had continued in Puerto Rico for several years, with delays caused by Husband, before the potential dismissal (of the Puerto Rican action) became an issue in 2016 and 2017. While Wife acknowledged that a final order had been issued in Puerto Rico in 2018, she suggested that she had experienced difficulty obtaining information on her case because she had been proceeding pro se there since 2017. Wife claimed that she did not receive that order until August 11, 2020.

[18] On the day of the hearing, Husband filed a verified "strenuous" written objection to Wife's response, and he requested dismissal with prejudice. *Appellant's Appendix Vol. II* at 211. Regarding the Child Support Motion, Husband noted

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[3] Wife's attorneys in Indiana withdrew in December 2015 and October 2018. At some point, at least by 2017, she also lost local representation in Puerto Rico.

that Wife had taken absolutely no steps to further her request since 2013 and that their son was now well past the age of emancipation. With respect to the Fraud Petition, Husband alleged in his response:

> 6. [Husband] has been unemployed for several years and yet has had to spend hundreds of thousands of dollars defending [Wife's] spurious claims of fraud. Depositions have been taken all over the United States, and numerous, extensive proceedings in Puerto Rico have not produced any evidence of the fraud alleged by [Wife].
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> 7. [Wife] makes vague assertion of stall tactics that [Husband] has engaged in but[] does not provide a single example of anything that [he] has done to impede her fishing expedition. [Husband] has had to step in when [Wife] constantly tried to "color outside the lines" and pursue unnecessary information, or she engaged in abusive discovery tactics, but he has otherwise allowed her fishing expedition to proceed.
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> 8. [Wife] has engaged in wild speculation and deposed [Husband's] family and others that has not led to any evidence to further her claim of fraud.

Id. at 212. Husband also set out a detailed summary of relevant proceedings in Puerto Rico since 2016. Of particular note, Husband indicated the last of Wife's local attorneys had resigned as counsel of record in Puerto Rico in May 2017, and Wife had taken no action in Puerto Rico between August 2016 and June 2017. Thereafter, the CFI requested that Wife obtain new local counsel by June 30, 2017. Wife requested an extension of time to obtain counsel, which was granted over Ventek's objection. Ventek also pursued a motion to dismiss

for lack of prosecution. On January 8, 2019, the CFI gave Wife another thirty days to obtain counsel. When nothing apparently happened, Ventek filed a renewed motion to dismiss, which the CFI granted on October 9, 2018, thus, concluding the discovery proceedings in Puerto Rico and constituting the final order there.

[19] In sum, Husband argued in his written response that Wife had not prosecuted her case in good faith or used due diligence and that Wife had failed to show that she currently had any more evidence of fraud than she did when initiating the action in 2012. Husband asked the trial court to dismiss with prejudice.

[20] Wife appeared pro se at the T.R. 41(E) hearing, which was short. She indicated that she would like the Fraud Petition and the Child Support Motion to remain pending. Wife did not dispute the summary of proceedings in Puerto Rico since 2016 as set out in Husband's response, and she acknowledged that the CFI had entered a final order in October 2018. She told the court, "I've done all I can do in Puerto Rico." *Transcript* at 20. When Wife indicated that she had not obtained the discovery she wanted in Puerto Rico, the trial court asked, "So are you prepared at this time to go forward with the matter or not?" *Id*. at 21. Wife responded, "I think I'm prepared to at least have a conference hearing, something to move the case forward here." *Id*. Upon further questioning by the court, Wife indicated that she did not currently have counsel and noted, "I mean it's hard to keep an attorney for this period of time." *Id*. at 22. The trial court took the matter under advisement.

[21] The following day, August 20, 2020, the trial court entered an order dismissing the Fraud Petition and the Child Support Motion with prejudice. The court found that Wife had "not shown sufficient cause to justify her lack of prosecution or shown sufficient cause to pursue her prosecution of the pending petitions at issue." *Appellant's Appendix Vol. II* at 41. Wife now appeals.

Discussion & Decision

[22] Wife argues that the trial court abused its discretion when it dismissed her claims pursuant to T.R.41(E), which provides:

> 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.

A trial court's authority to dismiss a case under T.R. 41(E) stems not only from considerations of fairness for defendants but is also rooted in the administrative discretion necessary for a trial court to effectively conduct its business. *Baker Mach., Inc. v. Superior Canopy Corp.*, 883 N.E.2d 818, 823 (Ind. Ct. App. 2008), *trans. denied*. Indeed, plaintiffs have the burden of moving litigation forward,

and trial courts cannot be asked to carry cases on their dockets indefinitely. *Bank of Am., N.A. v. Cong.-Jones*, 122 N.E.3d 859, 863 (Ind. Ct. App. 2019).

[23] In this case, the trial court did not issue findings of fact or conclusions thereon in the course of entering the dismissal.

> In general, we will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the decision of the trial court is against the logic and effect of the facts and circumstances before it…. The judgment below is presumed to be valid, and an appellant bears the burden of proving otherwise. Consequently, the judgment will be affirmed if there is any evidence to support the trial court's decision.

Id. (internal citations omitted).

[24] We generally balance several factors when determining whether a trial court erred in dismissing a case for failure to prosecute. These factors include:

> (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 the 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.

Id. at 864. The weight any factor has in a case depends upon the particular facts of that case. *Id*. Further, dismissal may be justified alone by a lengthy period of inactivity in a particular case, especially if the plaintiff has no excuse for the delay. *Baker Mach., Inc.*, 883 N.E.2d at 823; *Lee v. Pugh*, 811 N.E.2d 881, 885 (Ind. Ct. App. 2004).

[25] Several of the above factors support the trial court's dismissal here. The length of delay was staggering. At the time of the T.R. 41(E) hearing, Wife had filed nothing regarding child support claim for nearly eight years, with their son having become emancipated two years prior, and she had failed to pursue the fraud claim in Indiana for six years. Wife does not dispute that the discovery issues were dismissed by the CFI in October 2018 for failure to prosecute, after she had failed to obtain new local counsel since May 2017.[4] Despite the final order in Puerto Rico, Wife had still not reinitiated prosecution in Indiana when the trial court issued the T.R. 41(E) notice in May 2020. Even then, she waited over three months to respond to the notice and did not have counsel at the time of the hearing (and had not for well over a year). The transcript of the hearing reveals that Wife had no plan to diligently prosecute the action if the trial court were to withhold dismissal. Her years of discovery in Puerto Rico – by her own account – had been essentially fruitless and her only plan moving forward was

[4] On appeal, Wife focuses much of her argument on the roadblocks she encountered attempting to obtain discovery in Puerto Rico in 2013 and 2014, for which she has consistently blamed Husband and his family, but she does not address the substantial period of lack of prosecution in Puerto Rico starting in 2016 through the dismissal by the CFI in 2018.

to "at least have a conference hearing". *Transcript* at 21. In other words, not even the threat of dismissal had stirred Wife to much action. While Wife engaged in what the COA described as "clearly excessive and onerous" discovery requests constituting a "fishing expedition" in Puerto Rico, *Appellee's Appendix Vol. II* at 210, Husband has incurred extensive legal fees and has had fraud allegations hanging over his head for about a decade.

[26] In sum, we conclude that there is ample evidence in the record to support the trial court's dismissal order.[5] Accordingly, Wife has failed to establish an abuse of discretion.

[27] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.

[5] We find no merit in Wife's suggestion that the dismissal order is entitled to less deference because it was entered by the magistrate, as opposed to the trial judge who had presided over the earlier portions of the case. As she acknowledges on appeal, the magistrate had the authority to hear the T.R. 41(E) dismissal and to enter the order. *See* Ind. Code § 33-23-5-8.5 (as amended effective July 1, 2020). Moreover, she did not raise any concerns below regarding whether the magistrate should hear the matter.