Affirmed and Opinion filed October 11, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00435-CV

RONNY RAY DALEY, LONNY EARL DALEY, AND LARRY CARL DALEY, INDIVIDUALLY AND AS PARTNERS OF DALEY BROTHERS TRUCKING AND W.C. DALEY TRUCKING, INC., Appellants

V.

POWERSCREEN TEXAS HOLDINGS, INC., POWERSCREEN TEXAS, INC., POWERSCREEN OF AMERICA, INC., POWERSCREEN INTERNATIONAL PLC, AND POWERSCREEN INTERNATIONAL DISTRIBUTION, LTD., Appellees

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On Appeal from the 2ND 25th District Court
Colorado County, Texas
Trial Court Cause No. 17,243

O P I N I O N

This is a second appeal after two successive orders dismissing the case for want of prosecution. In two points of error, appellants argue: (1) the trial court abused its discretion in determining that "plaintiffs did not use reasonable diligence in prosecuting their lawsuit to judgment" and (2) that the trial court improperly dismissed this action as a sanction. We affirm.

Background

The suit underlying this appeal originated as an action by appellants, Ronny Ray Daley, Lonny Earl Daley, and Larry Carl Daley, individually and as partners of Daley Brothers Trucking and W.C. Daley Trucking, Inc., (collectively, "the Daleys") against appellees, Powerscreen Texas Holdings, Inc., Powerscreen Texas, Inc., Powerscreen of America, Inc. Powerscreen International PLC, and Powerscreen International Distribution, Ltd., (collectively "Powerscreen") for breach of contract, fraud and violations of the Texas Deceptive Trade Practices Act. The Daleys filed suit on September 27, 1990. Over the seven-year period in which the case was on the trial court's docket, the court granted six continuances.[1] On April 2, 1996, the Daleys' lead counsel was diagnosed with health problems and the trial court granted the last continuance in the case on April 3, 1996. In doing so the trial court noted: "Discovery is ordered ceased. The matter will not be reset without the Court's approval." On April 15, 1996, Powerscreen filed a motion to dismiss for want of prosecution. Despite this motion, the Daleys made no attempt to contact the trial court for a new trial setting. Seventeen months later, on August 15, 1997, Powerscreen filed a second motion to dismiss for want of prosecution. Following a hearing, the case was dismissed on October 17, 1997. The Daleys moved for reinstatement, but the trial court rejected the Daleys' motion on the ground that the motion was unverified. We reversed and remanded, holding that the Daleys were procedurally entitled to a reinstatement hearing. *Daley v. Powerscreen Texas Holdings, Inc.*, no. 14-98-00132-CV (Tex. App.–Houston [14th Dist.] September 30, 1999, no. pet.) (not designated for publication), 1999 WL 771283. On remand, the trial court held a reinstatement hearing on February 18, 2000. The court again denied the Daleys' motion to reinstate.

Standard of Review

We review both a district court's decision to dismiss a case for want of prosecution

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[1] Of the six continuances, four were requested by the Daleys, one was by joint motion and one continuance was requested by Powerscreen.

and its decision not to reinstate a case under an abuse of discretion standard. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997) (per curiam); *State v. Rotello*, 671 S.W.2d 507, 509 (Tex. 1984). Under this standard, we reverse a judgment only if the trial court acted arbitrarily and unreasonably, or if it acted without reference to any guiding principles. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991); *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex. 1985). The appellant bears the burden of producing a record that shows the trial court abused its discretion. *Simon v. York Crane & Rigging Co*., 739 S.W.2d 793, 795 (Tex. 1987).

Discussion

In their first point of error, the Daleys contend the trial court abused its discretion by denying their motion to reinstate after determining that "plaintiffs did not use reasonable diligence in prosecuting their lawsuit to judgment."[2]

When reviewing a judgment dismissing a case for want of prosecution, the primary issue is whether the plaintiffs exercised reasonable diligence.[3] *MacGregor*, 941 S.W.2d at 75; *Veterans' Land Bd. v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976) (per curiam). In evaluating diligence, a district court is entitled to consider the entire history of the case. *Rotello*, 671 S.W.2d at 509. Factors generally considered by the trial court before dismissing

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[2] Powerscreen argues the Daleys waived any argument dealing with the trial court's denial of the motion to reinstate. It suggests the Daleys' brief only addresses the trial court's dismissal for want of prosecution. However, the Daleys' brief references both the September 18, 1997 order dismissing the case for want of prosecution, as well as the reinstatement order denying the motion to reinstate. We find that the Daleys' point of error fairly includes the argument that the trial court abused its discretion in denying their motion to reinstate. TEX. R. APP. P. 38.1(e) ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.") *see also* TEX. R. APP. P. 38.9 (directing appellate courts to liberally construe briefing rules).

[3] Powerscreen asks this court to consider the findings of fact signed by the trial court in reviewing whether the trial court abused its discretion in denying the motion to reinstate. However, where, as here, a case is dismissed for want of prosecution without an evidentiary hearing "findings and conclusions can have no purpose …[and] should not be requested, made, or considered on appeal." *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997). Therefore, we will not consider the trial court's findings in our review.

a case include: (1) the length of time the case has been on file; (2) the extent of activity in the case; (3) whether a trial setting was requested; and (4) the existence of reasonable excuses for the delay. *MacGregor*, 941 S.W.2d at 75-76; *Rotello*, 671 S.W.2d at 509; *see also Bilnoski v. Pizza Inn, Inc.*, 858 S.W.2d 55, 58 (Tex. App.–Houston [14th Dist.] 1993, no writ). A decision to dismiss for want of prosecution is fact-specific and should be based on an evaluation of all the circumstances of a case. *Rotello*, 671 S.W.2d at 509. No single factor is dispositive, and a belated trial setting or stated readiness to proceed to trial does not conclusively establish diligence. *Ozuna v. Southwest Bio-Clinical Labs.*, 766 S.W.2d 900, 902 (Tex. App.–San Antonio 1989, writ denied), *overruled on other grounds, Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 633 (Tex. 1999).

Over the seven-year period in which this case was on the trial court's docket, the record shows periods of inactivity and a history of delays sought by the Daleys. The Daleys argue, however, that "while the 'history of the case' may reflect periods of inactivity, the conduct in the time period leading up to the dismissal is highly probative of a plaintiff's diligence in prosecuting its case." Even taking into consideration only the Daleys' conduct in the time preceding the dismissal, we find no abuse of discretion.

The Daleys contend the trial court's April 3 letter granting the continuance ordered discovery to be ceased, which the Daleys interpreted as an abatement of the entire case. The Daleys further argue that they were prepared to proceed to trial but for their counsel's health problems. The record, however, suggests the Daleys were not ready to proceed. On April 2, 1996, the Daleys filed an emergency motion for continuance of the April 8 trial setting based on counsel's conflicting trial schedule and the inability of one of the plaintiffs, Larry Daley, to attend the trial. That afternoon, following a telephone hearing on this motion, the Daleys informed the court of their lead counsel's health problems. On April 3 the court granted the continuance.

The record indicates the Daleys did nothing following the April 3 continuance, even in light of Powerscreen's first motion to dismiss on April 15, 1996. During the next

seventeen months the Daleys sent the court two letters regarding their lead counsel's health. After the last letter, sent on May 7, 1996, there was no activity for over fourteen months. The Daleys did not attempt to contact the court for a trial setting and even as late as the dismissal hearing, failed to request a trial setting. Due diligence in prosecuting a case includes attempting to request a trial setting in the face of a motion to dismiss for want of prosecution. *See Moore v. Armour & Co*., 660 S.W.2d 577 (Tex. App.–Amarillo 1983, no writ) (reversing dismissal of case on file twelve years because plaintiff had *requested a trial setting* and announced ready for trial); *William T. Jarvis Co. v. Wes-Tex Grain Co.,* 548 S.W.2d 775 (Tex. Civ. App.–Waco 1977, writ ref'd n.r.e.) (reversing dismissal of case because plaintiff filed amended pleadings and *obtained a trial setting* before dismissal).

Many courts have refused to find an abuse of discretion where a party's activity declines in the months prior to dismissal. *See Rampart Capital Corp. v. Maquire*, 974 S.W.2d 195, 198 (Tex. App.–San Antonio 1998, pet. denied) (finding no abuse of discretion where no activity for sixteen months prior to dismissal); *Ozuna*, 766 S.W.2d at 902 (finding no abuse of discretion in dismissing suit where, during a nineteen month delay, plaintiff pursued separate grievance); *Christopher v. Fuerst*, 709 S.W.2d 266 (Tex. App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.) (finding no abuse of discretion where no activity one year prior to dismissal). We find the trial court did not abuse its discretion in finding the Daleys failed to use reasonable diligence in prosecuting their claim. The Daleys' first point of error is overruled.

In their second point of error, the Daleys contend that the dismissal for want of prosecution was "a death penalty sanction" and urge that it was error for the trial court to dismiss the case without exploring a lesser sanction. In support of their argument, the Daleys rely on *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex.1991), which addressed the validity of death penalty sanctions in a discovery context. However, in a case similar to this one, the Texas Supreme Court declined to apply the *TransAmerican* analysis where the court found no abuse of discretion in dismissing the case for want of prosecution.

MacGregor, 941 S.W.2d at 75. The Daleys' second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed October 11, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.[4]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] Senior Justice Don Wittig sitting by assignment.