Hazelwood v. Bishop, 12 ROP 180 (Tr. Div. 2004)

DONALD HAZELWOOD,
Plaintiff,

v.

WILBUR A. BISHOP, JR., 1992 JONES FAMILY TRUST, and VIRGINIA S. JONES,
Defendants.

CIVIL ACTION NO. 01-116

Supreme Court, Trial Division
Republic of Palau

Decided: November 12, 2004

ARTHUR NGIRAKLSONG, Chief Justice:

Attorney Donald R. Hazlewood initiated this lawsuit in May 2001, seeking to recover from what he alleged was tortious interference with a contractual relationship. Although he filed his complaint pro se, he secured representation of counsel Clara Kalscheur in February 2002. Other than a few early motions regarding service and default, however, neither Hazlewood nor Kalscheur has done much to advance the case. Accordingly, defendants' motion to dismiss is granted.

BACKGROUND

According to the first amended complaint, Hazlewood represented Brian Foster and Airai State as plaintiffs in *Foster v. Illman-Jones*, Civil Action 416-92, and he secured a substantial judgment in their favor. While the appeal was pending, Wilbur A. Bishop, Jr.,[1] a defendant in this case and, according to the complaint, a representative of the defendants in the *Foster* action, directly contacted Foster and Airai State about settlement possibilities. As a result, Hazlewood alleges, Foster and Airai State discharged him as their attorney. Hazlewood seeks damages for intentional interference with his contractual relationship with his clients, and he also maintains that defendants' actions were "wilful, oppressive, and malicious," justifying an award of punitive ⊥181 damages.

Initially, both parties participated in the progress of the case. Hazlewood obtained an entry of default judgment against one of the defendants. Defendants filed motions to quash the

[1] The other defendants in this case are 1992 Jones Family Trust, Robert L. Jones, and Virginia S. Jones. Apart from the general statement that "Defendants intentionally engaged in acts and conduct inducing Foster and Airai State to breach the attorney-client contracts," however, the complaint fails to allege any particular action on their part. The complaint also names as defendants Does I through V, explaining that they "are additional parties, as yet unknown, who have responsibility for the acts alleged." Although the complaint states that "Plaintiff will amend this complaint when identities and roles become known," no such amendment has been tendered.

service and dismiss the complaint and a motion to vacate the default judgment, and once Kalscheur filed her notice of appearance, she responded to defendants' pending motions. This court heard argument on the motions, after which it vacated the default judgment and entered a pretrial order, providing that discovery was to be completed by December 15, 2002, and trial was to begin on April 2, 2003.

In October 2002, defendants filed a motion for summary judgment. In response, plaintiff asked that the summary judgment proceedings be postponed until after the December 15 discovery deadline passed. Defendants opposed this request, but this court granted the motion to postpone, noting that the summary judgment motion would be deemed renewed on December 15, 2002. It appears, however, that the parties did not receive notification of this order.

Despite not receiving this court's order granting his motion to postpone summary judgment proceedings until after the close of discovery, plaintiff did not file *any* response to the summary judgment motion even after the December 15 discovery deadline passed. Instead, plaintiff opted to file, on February 20, 2003, a request for a status conference to set a new schedule for discovery and motions.

The next entry in the file is an order from the court dated September 9, 2003, six months after the status conference, noting that plaintiff has been inactive and instructing him to advise how he intends to proceed. Plaintiff's counsel responded two months later, explaining that she had been preoccupied with a personal matter, and also referencing confusion about the motion for summary judgment and the discovery deadline, noting that since the court had not ruled on that motion, plaintiff wanted to complete discovery before responding to the summary judgment motion but defendants were waiting to respond to discovery requests until their motion was decided. Plaintiff requested yet another status conference to review and set the case schedule. Three months later, in February 2004, after hearing nothing from plaintiff, defendants filed a motion for judgment and to dismiss, arguing that their motion for summary judgment should be denied as unopposed and that, alternatively, the case should be dismissed for failure to prosecute.

Kalscheur submitted an affidavit in opposition to defendants' motion for judgment, attempting to explain why she had not responded to the motion for summary judgment. She again commented on the motion to postpone summary judgment proceedings that had not been ruled on,[2] and said that she still wanted to proceed with discovery before responding to the summary judgment motion. Kalscheur maintained in her affidavit that, in requesting that the summary judgment proceedings be postponed until discovery was completed, she had attempted to explain the factual disputes between the parties that would render summary judgment improper. And, as further explanation for her failure to prosecute this case, she also mentioned a personal situation that resulted in a restraining order and litigation that forced her to move her home ⊥182 and office.

On September 2, 2004, after six months with no further action from plaintiff, defendants renewed their motion for judgment and to dismiss, reiterating plaintiff's failure to respond to the

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[2] As noted above, the court did in fact rule on that motion, but it appears that neither party was served with the order.

summary judgment motion and also contending that plaintiff has failed to prosecute this case. Plaintiff has filed seven motions for extensions of time to respond, most recently asking for an extension of the deadline to October 15, which this court granted. That deadline has quite clearly passed now, and plaintiff has filed neither a response to the motion for judgment nor a request for more time in which to respond.

ANALYSIS

Civil Procedure Rule 41(b) provides that a defendant may seek a dismissal "[f]or the failure of the plaintiff to prosecute" an action. ROP R. Civ. P. 41(b)(2). Such dismissal is an extreme sanction, however, and should only be used "where there exists a clear record of delay or contemptuous or recalcitrant conduct by the Plaintiff." *Maidesil v. Besebes*, 2 ROP Intrm. 189, 192 (1991). Parties who demonstrate a clear record of delay or a long pattern of dilatory conduct risk having their cases dismissed for failure to prosecute. *Kruger v. Apfel*, 214 F.3d 784, 787 (7th Cir. 2000).

It is fair to say, after reviewing the three-and-a-half-year-old case file, that plaintiff has demonstrated a clear record of delay. The record shows extensive periods of time -- several six-month stretches -- where plaintiff seemingly did nothing to advance his case. Deadline after deadline passed -- including the discovery deadline and numerous response deadlines -- with no filings from plaintiff.

Admittedly, a small degree of plaintiff's delay can possibly be attributed to a breakdown in the service process, resulting in the parties being unaware of the court's ruling on the motion to postpone summary judgment proceedings. And, to plaintiff's credit, there does appear to be a genuine dispute between the attorneys about whether they should or could conduct additional discovery prior to fully briefing the summary judgment issues. But it seems unreasonable for plaintiff to merely sit and wait without making forward progress on this case, particularly since discovery closed in December 2002. At any time plaintiff could have filed a motion to extend the discovery deadline or to compel additional discovery if he wished to conduct depositions but was encountering resistance from defendants.

In addition to plaintiff's failure to respond to the summary judgment motion, defendants' first motion for judgment prompted no action beyond an affidavit opposing the motion. And plaintiff has not filed any substantive response to the latest motion to dismiss, despite the fact that the deadline to do so, after seven extensions of time, passed many weeks ago. This failure alone would warrant dismissal. ROP R. Civ. P. 7(c)(1) ("Failure to timely file an opposing brief or opposition [to a motion] authorizes the court, in its discretion, to deem the matter confessed and to enter the relief requested.").

CONCLUSION

Given the length of time this case has dragged on with seemingly no activity from plaintiff, it is appropriate now to grant defendants' motion and dismiss this case for failure to prosecute. As provided in the rules, this dismissal "operates as an adjudication on the merits."

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ROP R. Civ. P. 41(b)(3).