Volume 65 | Issue 2 Article 18

February 1963

Procedure--Involuntary Dismissal--An Interpretation of Rule 41(b) of the Federal Rules of Civil Procedure

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Looking at some West Virginia decisions, it would appear that the court might well construe the statutes liberally in the best interests of the child. See *Hammond v. Dept. of Pub. Assistance,* 142 W. Va. 208, 95 S.E.2d 345 (1956), a custody case, wherein the court consistently adhered to two principles: first, the infant's welfare is of paramount importance, and second, the legal rights of a parent will be respected if the welfare of the infant is not impaired. Another custody case, *Stout v. Massie,* 140 W. Va. 731, 88 S.E.2d 51 (1955), held that the "welfare of the child is the polar star by which the discretion of the court will be guided." In the *Stout* case the court sustains a position, similar to that taken by the Missouri court in *Morrison v. State, supra,* that the equity court has jurisdiction even without benefit of statutory enactments. HOGGS, EQUITY PRINCIPLES, § 226 (1st ed. 1900), is cited to substantiate the contention that: " 'The powers of a court of chancery in England to act as the guardian of infants, and to exercise a general supervision over all matters pertaining to their persons . . . is generally exercised by courts of chancery in this country without dispute.' "

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P's automobile collided with a train owned by *D. P* brought an action on August 24, 1954 to recover for injuries alleged to have been received in the collision. After various delays, of which more than 20 months were directly attributable to actions of *P's* attorney, the district court notified both parties that a pre-trial conference would be held on October 12, 1960. *P's* counsel informed the judge's secretary that he could not attend the conference because of unfinished business and requested a delay. The request was denied and the court, without having previously notified *P* or his council of its intended action, dismissed the case with prejudice for failure to prosecute. *Held,* affirmed. Where all of the circumstances indicate *P's* attorney has been dilatory in pursuing his claim and, without acceptable excuse, fails to appear at a pre-trial conference, the court is within its power and discretion in dismissing the case with prejudice without notifying *P* or his counsel of such contemplated action. *Link v. Wabash R.R.,* 379 U.S. 626 (1962).

This case presents a timely illustration of the power of a federal trial court, under Rule 41(b) of the Federal Rules of Civil Procedure, to dismiss a case with prejudice for failure to prosecute. Rule 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for a lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

West Virginia has recently adopted new rules governing civil procedure, and the decision in this case should provide a reliable guide for the interpretation of the comparable section of these rules.

Trial courts have inherently had the power to dismiss cases placed on their dockets because of the failure of plaintiffs to pursue their claims with due diligence. *Shotkin v. Westinghouse Electric & Mfg. Co.,* 169 F.2d 825 (10th Cir. 1948). Rule 41(b) is a recognition of this inherent power of the court, but a trial court's actions are not limited to the explicit wording of the rule. While rule 41(b) only indicates that a claim may be dismissed on a motion initiated by the defendant, it is well established that a trial court may, on its own initiative, dismiss a claim for failure to prosecute. *Shotkin v. Westinghouse Electric & Mfg. Co., supra; American Nat. Bank & Trust Co. v. United States,* 142 F.2d 571 (D.C. Cir. 1944).

In the principal case two main areas of consideration are indicated as the controlling reasons why the court was within its power and discretion to dismiss the claim with prejudice. First, the dilatory manner in which *P's* attorney pursued his claim; secondly, *P's* attorney's failure to appear at the pre-trial conference and his inability to submit an acceptable excuse.

The length of delay, attributable to a party, that will be tolerated before his claim will be dismissed with prejudice varies with individual courts and the factual situation, but certain guide lines may be established. In *Birdsong v. United States,* 262 F.2d 105 (9th Cir. 1958), it was held that there had been no abuse of the court's discretion in dismissing a case with prejudice for failure to

prosecute when no steps had been taken to bring the case to trial for a period of six months. However, a contrary result was reached in *Sykes v. United States,* 290 F.2d 555 (1961), where a dismissal with prejudice was held improper when the plaintiff was inactive for approximately seven months. Therefore, although there is some conflict as to whether a trial court can properly dismiss a claim for failure to prosecute it during a six month period without other circumstances being present, a plaintiff is placing his claim in jeopardy of dismissal if due diligence is not displayed soon thereafter. See *Salmon v. City of Stuart,* 194 F.2d 1004 (5th Cir. 1952). In the instant case a continuous delay of nineteen months was attributable to the actions of *P's* attorney. It would seem from the previously mentioned cases that such a delay in itself would be sufficient to support a dismissal with prejudice.

The second criterion which the trial court relied upon in the principle case in dismissing the claim with prejudice was the failure of *P's* attorney to appear at the pre-trial conference. While the Court refused to decide whether the failure of counsel to so appear would of itself be sufficient cause for dismissal with prejudice, there are indications that such a course of action by the court would be sustained. A trial court may be within its discretionary power to dismiss a case with prejudice for the failure of a plaintiff to appear at the time of the trial, *Jameson v. Du Comb,* 275 F.2d 293 (7th Cir. 1960), or at a pre-trial conference. *Wisdom v. Texas Co.,* 27 F. Supp. 992 (N.D. Ala. 1939). It would not, therefore, seem to be an illogical extension of a trial court's power to dismiss a case with prejudice for the failure of plaintiff's counsel to appear at the time of the pre-trial conference.

Two further questions raised in the principal case merit consideration. While there may be sound logic to support the contention of Justice Black, in the dissenting opinion, that a plaintiff should be warned of the contemplated dismissal with prejudice if counsel should fail to appear or due diligence is not observed, the overwhelming weight of authority is to the contrary. See *Janousek v. French,* 287 F.2d 616, 622 & n.5 (8th Cir. 1961).

Though there has been little litigation dealing with the question of what will constitute sufficient reason to excuse a party or his counsel from appearing at the time of the trial or pre-trial conference, it would seem that the reason must be of such a nature that it could not have reasonably been foreseen at the time the date

of the proceeding was established. When a plaintiff's attorney left practice to become a judge and the attorney that succeeded him had no knowledge that an order to list the matter for the trial had not been complied with, the court held that under such circumstances there was good cause for delay. *Marquette Appliances, Inc. v. Wexler,* 27 F.R.D. 484 (E.D. Pa. 1960). However, where either the plaintiff, *Jameson v. Du Comb,* 275 F.2d 293 (7th Cir. 1960), or his attoney, the situation in the principal case, fail to appear at a court proceeding because of business elsewhere at that time, such an excuse will be insufficient.

In conclusion it is to be remembered that, while the federal decisions concerning the rules are not binding upon the courts of West Virginia, they are valuable guides until the West Virginia Supreme Court of Appeals has established a more definite and authoritative course to follow.

Lee Ames Luce

ABSTRACTS

Procedure—Importance of Including All Grounds in Motion for New Trial Under Federal Rules of Civil Procedure

Following a verdict for *P* in a personal injury suit, a judgment was entered on April 20. On April 25, *D* filed a timely motion for a new trial assigning various grounds, but did not include excessive verdict. Motion was denied on September 20. On October 18, *D* filed a petition for "reargument and reconsideration" of his motion for a new trial and on the same day, without notice to *P* or any hearing, the court entered an order granting a new trial unless *P* remit a part of the sum awarded. *Held,* reversed. The district court was without power to enter an order granting a new trial on the issue of damages where such order was not made within ten days after entry of judgment and where excessiveness of verdict was not stated as ground in *D's* motion for a new trial. *Demeretz v. Daniels Motor Freight, Inc.,* 307 F.2d 469 (3rd Cir. 1962).

The issue in the principal case concerned Fed. R. Civ. P. 59 (d) which has been incorporated into the new West Virginia rules.

> Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any