

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 15, 2015 Session

**METROPOLITAN DEVELOPMENT AND HOUSING AGENCY v.
HOWARD ALLEN, JR.**

**Appeal from the Circuit Court for Davidson County
No. 14C2733 Amanda Jane McClendon, Judge**

No. M2015-00079-COA-R3-CV- Filed November 20, 2015

A former tenant of Metropolitan Development and Housing Agency (“MDHA”) appeals the decision of the circuit court dismissing the case for failure to prosecute pursuant to Tenn. R. Civ. P. 41.02(1). We have concluded that the trial court erred in dismissing the case for failure to prosecute. The order is reversed and the matter is remanded to the trial court for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, P.J., M.S., joined. W. NEAL MCBRAYER, J., filed a dissenting opinion.

William W. Hunt, III, Nashville, Tennessee, for the appellant, Howard Allen, Jr.

Tyler Chance Yarbrow, Nashville, Tennessee, for the appellee, Metropolitan Development and Housing Agency.

OPINION

FACTUAL AND PROCEDURAL HISTORY

The Metropolitan Development and Housing Agency (“MDHA”) is a governmental agency that provides affordable housing to low-income individuals in Nashville, Tennessee. Howard Allen, Jr. is a former tenant of MDHA housing.

On May 13, 2014, MDHA obtained a detainer warrant to recover possession of the property Mr. Allen was renting. The general sessions court issued the warrant on May 14, 2014. The warrant reflects that personal service was obtained on Mr. Allen by Deputy Chris Prater on May 19, 2014. The warrant summoned Mr. Allen to appear before the general sessions court on May 29, 2014, at 8:45 a.m. The matter was reset for a hearing on June 5, 2014. Mr. Allen did not appear on June 5, 2014, and judgment for possession was entered by the general sessions judge.¹

On June 20, 2014, Mr. Allen filed a Motion for Stay and to Reopen for Insufficient Service alleging, among other things, that he was “aware that [MDHA] might be pursuing a detainer warrant, but he was never served the warrant either personally or by certified mail.” Mr. Allen requested the court to “reconsider its prior grant of a default judgment on grounds of insufficient service of process and failure to be advised as to the hearing date.” On that same day, the general sessions court denied his motion. On June 26, 2014, Mr. Allen filed an affidavit of indigency and appealed the general session court’s denial of his motion to circuit court.

On July 7, 2014, MDHA filed an Issuance of Writ of Restitution on General Sessions Appeal, asserting that Mr. Allen had not posted a bond in the amount of one year’s rent of the premises, as required by Tenn. Code Ann. § 29-18-130(b)(2). The writ of restitution was executed on July 22, 2014, by Deputy Sheriff John Smith, IV.

On July 22, 2014, Mr. Allen filed (1) a motion to set the matter for a hearing; (2) a motion to stay eviction or restore him to his apartment; and (3) a motion to proceed as an indigent in the circuit court. These motions were noticed for a hearing on August 8, 2014. On September 5, 2014, the circuit court entered an order holding:

It appears to the Court that a Detainer Warrant was filed by Plaintiff against Defendant on May 14, 2014. The detainer warrant reflects that personal service was obtained on Howard Allen[,] Jr[.] by Deputy Chris Prater on May 19, 2014. The Court date was preset for May 29, 2014 and reset to June 5, 2014, at which time a judgment for possession was obtained by Plaintiff. This Judgment was not timely appealed.[footnote omitted]

On June 20, 2014 Defendant filed a “Motion for Stay and to Reopen for Insufficient Service.[”] This Motion was heard in General Sessions Court on June 20, 2014 and denied. It is from this denial that Howard Allen[,] Jr. appealed.[footnote omitted]

¹ The word “APPEALED” is stamped twice upon the face of the original detainer warrant; however, in both instances, the word appears to be stricken through with a pen.

It appears to the Court that the Motion for Stay and to Reopen for Insufficient Service was untimely filed in General Sessions. The appeal to this Court is likewise untimely, however, the Court declines to dismiss this matter until Plaintiff files a motion to dismiss.

The court denied the three motions filed by Mr. Allen.

MDHA filed a motion to dismiss the appeal on September 11, 2014. MDHA's motion included a "NOTICE" which informed Mr. Allen that the motion would be heard on October 24, 2014, at 9:00 a.m. On September 19, 2014, Mr. Allen filed a response to the motion to dismiss and a motion to allow proof. Mr. Allen's response requested relief under Tenn. R. Civ. P. 60.02 and requested "a hearing limited to the question of service and afford the Defendant the right to testify about this issue."

The trial court held a hearing on October 24, 2014. Neither Mr. Allen nor his lawyer appeared at the hearing. On December 9, 2014, the circuit court entered an Order of Dismissal stating, in full:

On October 24, 2014, Plaintiff/Appellee, Metropolitan Development and Housing Agency requested a hearing for purposes of seeking dismissal of Defendant/Appellant's Motions for Stay and to Reopen for Insufficient Service. On June 20, 2014, Defendant/Appellant's Motions were denied by the General Sessions Court, and on September 05, 2014, this court denied the Defendant/Appellant's same Motions. On October 24, 2014, the Defendant/Appellant did not answer the first docket call, and at 9:58 am the Defendant/Appell[ant] did not answer the second docket call. Pursuant to Rule 41.02 of the Tennessee Rules of Civil Procedure, Plaintiff/Appellee's requested Motion for Dismissal was well-taken as Defendant/Appellant did not appear to prosecute or defend the appeal filed with this Court.

Accordingly, for the reasons stated above, it is ORDERED, that the Plaintiff/Appellee's motion for dismissal is granted with prejudice and that judgment be entered in favor of Plaintiff/Appellee and against Defendant/Appellant, with costs taxed to Defendant/Appellant.

Mr. Allen appeals from the circuit court's December 9, 2014 order dismissing his appeal for failure to prosecute.

STANDARD OF REVIEW

We review a trial court's decision to dismiss an action for failure to prosecute under the abuse of discretion standard. *White v. Coll. Motors, Inc.*, 370 S.W.2d 476, 477 (Tenn. 1963); *Osagie v. Peakload Temp. Servs.*, 91 S.W.3d 326, 329 (Tenn. Ct. App. 2002). Under this standard, we will reverse a trial court's decision to dismiss for failure to prosecute "only when it has acted unreasonably, arbitrarily, or unconscionably." *Hodges v. Tenn. Attorney Gen.*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000) (citing *Friedman v. Belisomo*, No. 02A01-9304-CH-00094, 1993 WL 498504, at *3 (Tenn. Ct. App. Dec. 1, 1993)).

ANALYSIS

The circuit court dismissed the case for failure to prosecute pursuant to Tenn. R. Civ. P. 41.02 after Mr. Allen failed to appear to argue his motion entitled "Response to Motion to Dismiss and Motion to Allow Proof."² Tennessee Rule of Civil Procedure 41.02(1) states: "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 of any claim against the defendant." This Court has explained that, "[t]rial courts may, on their own motion, dismiss cases for lack of prosecution, but this authority should be exercised sparingly and with great care." *Hodges*, 43 S.W.3d at 921 (citing *Harris v. Baptist Mem'l Hosp.*, 574 S.W.2d 730, 731 (Tenn. 1978)).

A dismissal for failure to prosecute "run[s] counter to the judicial system's general objective of disposing of cases on the merits." *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003). Thus, courts disfavor dismissals for failure to prosecute. *Id.*; see *Tenn. Dep't of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985) (quoting *Sec. & Exch. Comm'n v. Seaboard Corp.*, 666 F.2d 414 (9th Cir. 1982)) (noting that "the interests of justice are best served by a trial on the merits").

We have reviewed the record and have determined that the trial court erred in dismissing this case for failure to prosecute.³ On September 5, 2014, the trial court entered an order in which the court stated: "It appears to the Court that the Motion for Stay and to Reopen for Insufficient Service was untimely filed in General Sessions. The appeal to this Court is likewise untimely, however, the Court declines to dismiss this matter until Plaintiff files a motion to dismiss." In response, MDHA filed a motion to dismiss. Mr. Allen

² The record on appeal does not contain a transcript from the October 24, 2014 hearing; thus, it is unclear whether the trial court *sua sponte* dismissed the case pursuant to Tenn. R. Civ. P. 41.02 or whether MDHA made an oral motion requesting the court to dismiss the case on that basis.

³ We note that the matter was not dismissed for failure to file a timely appeal or for failure to comply with Rule 20 of the Local Rules of Practice Courts of Record, Twentieth Judicial District of Tennessee ("Local Rules") regarding the time for setting a trial on appeal from general sessions court.

responded to the motion to dismiss and filed a motion to allow proof. When Mr. Allen failed to appear at the hearing to argue his motions, the court dismissed the appeal for failure to prosecute.

Mr. Allen's failure to appear to argue his motions at the hearing on October 24, 2014 was certainly ill-advised and disrespectful of the court's time; however, we have concluded that it is not an appropriate circumstance under which a dismissal for failure to prosecute under Tenn. R. Civ. P. Rule 41.02 is warranted. This is not a matter that was allowed to "languish" on the docket for months without any attention from the plaintiff.⁴ See *Hessmer v. Hessmer*, 138 S.W.3d 901, 905 (Tenn. Ct. App. 2003) (upholding circuit court's dismissal of an appeal for failure to prosecute where plaintiff allowed the case to languish for seven months). Rather, Mr. Allen, the defendant/appellant, filed motions on July 22 and September 19 requesting a hearing. His September 19 motion was filed less than one month prior to the court's hearing on MDHA's motion to dismiss and his motion to allow proof. Because dismissals for failure to prosecute are disfavored and should be issued "sparingly" and "with great care," we hold that the trial court's December 9, 2014 ruling dismissing the case for failure to prosecute was erroneous and an abuse of discretion. See *Jones v. Mortg. Menders, LLC*, No. M2014-00140-COA-R3-CV, 2014 WL 7069665, at *8 (Tenn. Ct. App. Dec. 12, 2014) (reversing trial court's dismissal for failure to prosecute).

CONCLUSION

We reverse the decision of the trial court and remand the case for further proceedings consistent with this court's option. Costs of the appeal are assessed against the appellee, Metropolitan Development and Housing Agency.

ANDY D. BENNETT, JUDGE

⁴ Local Rule 18 discusses time standards for the disposition of cases and states, in section 18.01, that "[a]ll civil cases must be concluded or an order setting the case for trial obtained within twelve (12) months from the date of filing unless the court has directed a shorter or longer period." Local Rule 18.02 allows the court to "take reasonable measures including dismissal or entering a scheduling order to enforce the time standard set forth" in Local Rule 18.01.