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DISTRICT III

October 16, 2018

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Robert W. Wilson
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You are hereby notified that the Court has entered the following opinion and order:

2017AP1112 Robert W. Wilson v. John Miller Carroll (L. C. No. 2015CV65)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Robert W. Wilson, pro se, appeals the dismissal for failure to prosecute an action against attorney John Miller Carroll. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

This case arose after a jury's conviction of Wilson for first-degree sexual assault of a child under the age of thirteen, as a repeater. After a ***Machner***[2] hearing, the circuit court found Carroll provided ineffective assistance as Wilson's trial counsel and it granted a postconviction motion for a new trial. Wilson subsequently commenced a pro se civil "Tort Action Lawsuit" against Carroll, which is the matter at issue in the present appeal.

Two years after Wilson's civil action was filed, the circuit court issued a conditional dismissal order finding the lawsuit had not been diligently prosecuted, and ordering the case dismissed unless good cause was shown within twenty days as to why the order should not take effect. Wilson filed an objection to the conditional dismissal order, alleging he took no action to prosecute the case because Carroll had not divulged the identity of his malpractice insurance carrier despite a request in Wilson's complaint seeking the "name and address of Defendant's 'Malpractice' Insurance provider." Wilson also contended his "last request for action" was a motion filed upon receipt of Carroll's answer for the court to "grant an order of default" and award $13 million in damages on the grounds that Carroll's answer to the complaint was legally insufficient.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Referring to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The circuit court found no good cause had been shown "why plaintiff did not take action for close to two years to move this case from its bare pleading stage." The court further determined:

> There is no allegation of any effort to undertake any discovery or take any type of objective steps to include writing for a scheduling conference or explaining why no action had been taken for two years to prosecute this case. It is a litigant[']s sole responsibility to prosecute a case by him/herself and the responsibility for that can not be foisted upon an opposing party for not helping the other party prosecute his/her case.

Wilson subsequently filed a motion for default judgment "for the reason of the Defendants willfoe [sic] failure to properly and correctly answer the Complaint/Summons filed Jan. 20th, 2015." Wilson also filed a motion for reconsideration of the circuit court's dismissal order. Wilson argued, "It is the Plaintiffs [sic] understanding—as acting PRO-SE, that it is strictly up to the court to both make dates for [a] jury trial—already demanded by Plaintiff in the original Complaint, and to find 'Default' in the Defendants [sic] 'Answer.'" The court denied the motions, finding Wilson "has provided no substantive information in either of the recent motions that would change my decision." Wilson now appeals.

Circuit courts have both statutory and inherent power to dismiss an action for failure to prosecute. *See* ***Trispel v. Haefer***, 89 Wis. 2d 725, 737, 279 N.W.2d 242 (1979). WISCONSIN STAT. § 805.03 permits the court to "make such orders in regard to the failure as are just." We will sustain such a decision to dismiss if there was a reasonable basis for the court to determine the party's conduct was egregious and there was no clear and justifiable excuse for the delay. ***Trispel***, 89 Wis. 2d at 732-33. The decision to dismiss is within the sound discretion of the circuit court. ***Id.*** at 733. We will sustain a discretionary act if the court examined the relevant facts, applied a proper standard of law, and reached a conclusion a reasonable judge could reach.

Liddle v. Liddle, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). An implicit finding of egregiousness is sufficient if the facts provide a reasonable basis for the court's conclusion. ***Schneller v. St. Mary's Hosp.***, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991). Moreover, we generally look for reasons to sustain a discretionary decision. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). The test is not whether we would have granted or denied the motion; it is whether the circuit court erroneously exercised its discretion in doing so. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991), *overruled on other grounds by* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898.

Here, we cannot conclude the circuit court erroneously exercised its discretion by dismissing Wilson's case. The court noted the case had been inactive for two years. While the court never explicitly used the word "egregious," there was a reasonable basis for the court to implicitly find that a delay in prosecuting the case for two years was egregious conduct. Wilson argues that it was not his burden to move the case forward as a pro se litigant, and that he was waiting for the court to act. However, Wilson is incorrect in arguing that he was not responsible to move the case forward, pro se or not, and his decision to wait for the court to do so for as long as he did is not the type of clear and justifiable excuse that would warrant reversal of the court's exercise of discretion.

Wilson concedes "that no party has requested action since [the] initial pleadings." Wilson's last pleading—filed prior to the conditional dismissal order—as a self-styled "Plaintiff Response to Defendants answer of Original Complaint." In this pleading, Wilson noted that his original complaint "does specifically request 'information/disclosure' of [Carroll's] 'Malpractice

Insurance Company.'" Wilson argues on appeal that he was "clear and decisive in the request for Attorney Carroll's 'malpractice insurance provider.'"

However, the circuit court correctly observed that it is not the defendant's obligation to prosecute the plaintiff's case; the obligation to bring a case to trial within a reasonable time lies with the plaintiff. *See* ***Taylor v. State Highway Comm'n***, 45 Wis. 2d 490, 494, 173 N.W.2d 707 (1970). Here, although Wilson's original complaint included a request for Carroll's insurance provider, Wilson employed no formal discovery procedures, such as serving interrogatories under WIS. STAT. § 804.08; nor did he apply for an order to compel discovery under WIS. STAT. § 804.12(1). Wilson took no depositions, and he did not take steps to request a scheduling conference. For two years the case was dormant.

Wilson also asserts that his "last request for action" was a written request for the court to find Carroll's answer to his complaint in "default." In this request, Wilson contended Carroll's answer failed to "fully, legally comply with the answering of the original complaint/summons." Wilson also noted that Carroll's answer had requested as relief dismissal of Wilson's complaint. Wilson's "response" to the answer then culminated with the following paragraph:

> **Therefore**, the Plaintiff hereby moves the court to not only not dismiss this legal action—but, to find default with the Defendant and the demands he requests in his answer, and grant an order of default for the full amount of relief requested by the Plaintiff in the amount of $13 million dollars for all damages stated in complaint.

Wilson contends the court "should not have gone almost (2) two years without issuing a decision on his request of 'default,'" and he asserts he "has been patiently waiting a judgment of one way or the other."[3]

However, Wilson's request in his "Response to Defendants answer Of Original Complaint" to find Carroll in default was not a proper motion noticed before the court, and Wilson did not request a hearing on the purported motion. While this court recognizes that Wilson was proceeding pro se, it also recognizes that the circuit court had no duty to walk him through the procedural requirements of his claim. *See* ***Waushara Cty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Wilson was responsible for prosecuting his case in a reasonable manner, and the court had authority to dismiss the case for his failure to do so. Wilson also argues "there was no explicit warning" that his case may be dismissed for failure to prosecute. However, Wilson was provided notice by the court through the conditional order to show cause, and he had adequate opportunity through written response to show why his case should not be dismissed for want of prosecution.

Finally, Wilson contends the circuit court was acting with bias and "upon its personal beliefs rather than the letter of the law." Wilson also argues the court was "advocating on behalf of Attorney Carroll." The record on appeal belies these serious allegations. The circuit court

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[3] Wilson also argues the circuit court should have construed his filing "as a summary judgment [motion] pursuant to [WIS. STAT.] § 802.08(1)." This argument is undeveloped and unsupported by citation to legal authority. We will therefore not further address the issue. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

properly exercised its discretion following a reasoned conclusion applying the applicable law to the facts of record.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals