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2017 IL App (3d) 170054-U

Order filed October 25, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

PROGRESSIVE NORTHERN INSURANCE)	Appeal from the Circuit Court
COMPANY ASO LORI OSBORNE,)	of the 9th Judicial Circuit,
)	Fulton County, Illinois,
Plaintiff-Appellant,)	
)	Appeal No. 3-17-0054
v.)	Circuit No. 16-SC-158
)	
MANDY KOSOWSKI,)	Honorable
)	Patricia Anne Vander Meulen-Walton,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Holdridge concurred in the judgment.
Justice Carter dissented.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it dismissed plaintiff's complaint with prejudice when plaintiff failed to appear on the date of trial.

¶ 2 On December 10, 2015, plaintiff filed a complaint against defendant in Fulton County case No. 15-SC-393. On October 3, 2016, the trial court set the case for a bench trial on November 7, 2016, at 1:30 p.m. On the date of trial, plaintiff's attorney did not arrive until 1:56:50 p.m., by which time the trial court had already dismissed the case with prejudice and

dismissed the parties and witnesses. On appeal, plaintiff requests that we review the propriety of the trial court's decision to dismiss the case with prejudice.

¶ 3

FACTS

¶ 4

On December 10, 2015, Progressive Northern Insurance Company (plaintiff) filed a complaint as a subrogee in Fulton County case No. 15-SC-393 against Mandy Kosowski (defendant) seeking indemnification for amounts paid to plaintiff's insured, Lori Osborne, as a result of an auto collision on June 12, 2014. Plaintiff's attorney failed to appear for a scheduled status hearing on January 4, 2016, and the trial court dismissed the case without prejudice.

¶ 5

On May 16, 2016, plaintiff refiled the complaint in Fulton County case No. 16-SC-158. Plaintiff appeared in court on June 28, 2016, and again on August 29, 2016. On the latter date, plaintiff filed a memorandum addressing the trial court's *res judicata* concerns. Eventually, by written order dated October 3, 2016, the trial court scheduled the matter for a bench trial on November 7, 2016, at 1:30 p.m.

¶ 6

On the date of trial, plaintiff's attorney called Osborne and notified her that he would be arriving 10 to 15 minutes late for the trial due to traffic difficulties. Osborne relayed this information to the trial court. Acting on this information, the court postponed the bench trial until 1:45 p.m. The trial court's docket entries reveal that defendant, an insurance adjuster, and an officer were present and ready for trial. However, at 1:45 p.m., plaintiff's attorney was not present in court and had not contacted the court or the clerk's office to indicate when counsel would arrive. Consequently, the trial court excused the parties and witnesses. The trial court also dismissed the case with prejudice. The record reflects that plaintiff's attorney arrived at the courthouse at 1:56:50 p.m. that day, after the trial court dismissed the case with prejudice.

¶ 7 On December 1, 2016, plaintiff filed a motion to vacate the trial court’s dismissal order. In the unverified motion, plaintiff’s attorney asserts that he traveled more than 200 miles to attend court in Fulton County on the day of trial and encountered unexpected construction on the roadways. Following a hearing, the trial court denied plaintiff’s motion to vacate the court’s dismissal order. A transcript of the hearing does not appear in the record on appeal.

¶ 8 Plaintiff filed a notice of appeal on January 23, 2017.

¶ 9 ANALYSIS

¶ 10 On appeal, plaintiff contends the trial court’s decision to dismiss the matter with prejudice on the date of trial constitutes an abuse of discretion. Defendant has not submitted a brief for our consideration. However, because the record on appeal is simple and the purported errors are clear and readily decidable, we are able to address the merits of the appeal without the aid of appellee’s brief. *Lynn v. Brown*, 2017 IL App (3d) 160070, ¶ 7.

¶ 11 The trial court’s decision to impose a sanction by dismissing a matter with prejudice is reviewed under an abuse of discretion standard. See *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632. A trial court abuses its discretion only when its ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Anderson*, 367 Ill. App. 3d 653, 664 (2006).

¶ 12 The record reflects that the witnesses were present and waiting for trial to begin on November 7, 2016, at 1:30 p.m., as scheduled. At some point, the court received information from plaintiff that counsel was running late due to traffic. Based on this information, the trial court delayed the trial by 15 minutes. However, during the delay, counsel did not contact the court or clerk to explain the nature of counsel’s delay or give an estimated time of arrival. It

appears from the record that when counsel did not appear at 1:45 p.m., the court excused the witnesses and dismissed the complaint with prejudice.

¶ 13 Plaintiff's counsel previously failed to appear for a status hearing in Fulton County case No. 15-SC-393 on January 4, 2016, resulting in a dismissal of the cause without prejudice. Once the matter was refiled as Fulton County case No. 16-SC-158 on May 16, 2016, plaintiff's counsel repeated the same pattern by failing to appear before the court in a timely fashion on the date set for a trial on the merits.

¶ 14 Plaintiff's counsel filed a motion to vacate the dismissal with prejudice. The record on appeal does not include a transcript of the hearing on the motion to vacate. However, the written motion to vacate filed by plaintiff ignores the fact that defendant and other witnesses were present on time and ready for trial. The written motion to vacate alleges that since defendant had not entered an appearance before trial, defendant lacked standing to complain about the inconvenience caused by plaintiff's counsel's untimely appearance. Plaintiff's counsel's motion to vacate implies that because the court set aside one and one-half hours for trial, the trial court should not have imposed sanctions since counsel arrived at the courthouse during this designated one and one-half hour time slot.

¶ 15 The record on appeal does not contain any information regarding why counsel did not begin the 200-mile trip earlier that day or explain why counsel failed to provide updated information to the court when it became obvious he would be delayed more than 15 minutes as previously reported to Osborne. In short, there is no basis in the record to conclude counsel's delay on the date of trial was either unavoidable or attributable to unforeseen circumstances beyond his control.

¶ 16 Based on the recurring nature of plaintiff’s counsel’s failure to appear in this particular matter, we conclude the trial court’s dismissal does not constitute an abuse of discretion. See *Lange v. City of Chicago*, 9 Ill. App. 3d 1082 (1973).

¶ 17 CONCLUSION

¶ 18 The judgment of the circuit court of Fulton County is affirmed.

¶ 19 Affirmed.

¶ 20 JUSTICE CARTER, dissenting.

¶ 21 I respectfully dissent. I have no doubt that a trial court, pursuant to its inherent authority, is empowered to dismiss a cause of action with prejudice for violation of court orders, and the reversal of the trial court’s decision to impose that particular sanction is only justified when the record establishes a clear abuse of that discretion. See *Sanders v. Dow Chemical*, 166 Ill. 2d 48, 65, 67 (1995) (a trial court has the inherent authority to dismiss a cause of action with prejudice for violations of court orders and reversal is justified only where the record establishes a clear abuse of discretion). A dismissal of a cause of action is a drastic sanction and is only justified when a party has shown a deliberate and contumacious disregard for the court’s authority. *Id.* at 68.

¶ 22 A review of the record in this case leads me to respectfully conclude that the trial court abused its discretion by imposing the sanction of a dismissal with prejudice because it does not appear that the attorney for the plaintiff was shown to have willfully disregarded the authority of the court. See *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632, ¶ 45 (an order of dismissal with prejudice is a drastic sanction used only where a party's actions show a deliberate, contumacious, or unwarranted disregard of the court's authority). On October 3, 2016, the cause of action was set for a bench trial to take place on November 7, 2016, at 1:30 p.m., and 1.5 hours

was allocated for the trial. The docket sheet shows that the plaintiff's insured indicated to the court that the plaintiff's attorney would be 10 minutes late. The defendant and the subpoenaed police trooper witness were present for trial at that time. After waiting until 1:45 p.m. to begin the trial and after the attorney failed to contact the trial court or the clerk's office to indicate when he would be arriving, the trial court dismissed the case with prejudice. On December 1, 2016, a motion to vacate the dismissal order was filed, which was heard and denied on December 27, 2016. The docket sheet for December 27, 2016, which was provided in plaintiff's supplemental appendix on appeal, indicates the trial court found that the plaintiff's attorney had arrived at 1:56:50 p.m. for trial on November 7, 2016, when the trial had been scheduled to take place at 1:30 p.m. and the plaintiff's attorney did not contact the circuit clerk's office or the judge's assistant directly regarding any travel issues he may have been experiencing.

¶ 23 In this case, it does not appear to me that the plaintiff's attorney willfully disregarded the authority of the court in such a manner that showed a deliberate and contumacious disregard for the court's authority in order to justify the dismissal of the action with prejudice. Accordingly, I would reverse the trial court's order dismissing this case with prejudice.