

FILED
Court of Appeals
Division III
State of Washington
11/30/2017 10:35 AM

No. 35495-4

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

JOHN OROZCO,

Appellant,

v.

TEAMSTERS LOCAL UNION NO. 760, *et al.*

Respondents.

RESPONDENTS' BRIEF

REID, McCARTHY, BALLEW &
LEAHY, L.L.P.

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I. INTRODUCTION

Orozco appeals from the trial court's dismissal of his case without prejudice under CR 41(b)(1). The core cases cited by Orozco, however, simply have nothing to do with a dismissal under CR 41(b)(1). Washington law under CR 41(b)(1) is long-settled. When the provisions of the rule apply, dismissal of an action is mandatory; there is no room for the exercise of a trial court's discretion. The trial court may not generally consider the merits of the case, nor the hardship which application of the rule may bring.

Here all of the elements of CR 41(b)(1) were met. By the time the motion was filed, more than a year of inactivity after the issues had been joined had occurred. The motion was filed with more notice than required by the rule. By the time the trial court held the hearing on Defendant's Motion to Dismiss, Orozco had still not noted the action for trial. Accordingly, the trial court's dismissal was mandated under CR 41(b)(1). There was no error.

II. ISSUE PRESENTED FOR REVIEW

Was the trial court's dismissal of the case without prejudice appropriate under CR 41(b)(1) when Orozco had failed to note the action

for trial within one year of joining issues of law or fact and failed to note the case for trial before the timely noted hearing on the motion?

III. COUNTER-STATEMENT OF THE CASE

In derogation of RAP 10.3(a)(5), Orozco's Statement of the Case is replete with broad factual statements without any citation to the record.

Orozco filed his underlying wrongful termination action in the Yakima County Superior Court on July 8, 2014. CP 3 – 9. Defendants filed Answers on July 30, 2014. CP 10 – 18. Defendants Answers did not contain a cross-claim. *Id.* Orozco filed an Amended Complaint on December 7, 2015. CP 20 – 27. Defendants Answers to the Amended Complaint were filed on December 14, 2015. CP 30 – 39. Defendants Answers to the Amended Complaint did not contain a cross-claim. *Id.*

Following Notice of Recusals filed by the Yakima County Superior Court judges, CR 40 – 48, the case was assigned to Kittitas County Judge Scott R. Sparks. CP 51. The Preassignment Notice specifically provided "Trial Notice Not Yet Filed". *Id.* The parties submitted briefing to Judge Sparks in advance of a Case Scheduling Conference held by the court on May 31, 2016. CP 52 – 60. Three days after the Case Scheduling Conference, Maria V. Espinoza of the Yakima

County Court Administrator's Office sent an email to Orozco's counsel, Brian Dolman, with a copy to defendants' counsel. CP 82 – 83. In this June 2, 2016 e-mail, Ms. Espinoza stated:

Mr. Dolman:

Did parties agree on a Civil Case Schedule Order and on a trial date? If yes, the Order needs to be presented to the Judge, file with court and copy me so that I may send out trial notices.

CP 82.

Orozco's counsel did not respond to Ms. Espinoza's email. CP 80, ¶ 7. More than two months later, the undersigned emailed Orozco's counsel noting that since the case still had no trial date, Defendants were releasing the date previously discussed for summary judgment. CP. 85. Orozco's counsel did not respond to this email. CP 80, ¶ 9.

Defendants filed the underlying Motion to Dismiss on June 13, 2017. CP 59 - 66. This was more than a year after the Case Scheduling Conference and email from the Yakima County Court Administrator's Office. The hearing on Defendants' Motion to Dismiss was noted for June 26, 2017, thirteen days following the filing of the motion. CP 59.

The hearing on Defendants' Motion to Dismiss took place on June 26, 2017 commencing at 10:38 a.m. before the Honorable Scott Sparks.

RP 1 – 3. It is undisputed that by the date and time of the hearing on the motion, Plaintiff still had not noted the case for trial. Following oral argument of the parties, Judge Sparks granted defendants’ motion. RP 11. The Order Granting Defendants’ Motion to Dismiss was entered on July 11, 2017. CP 87 – 88. The dismissal was without prejudice. CP 88.

Following the filing of Appellant’s Opening Brief, Mr. Dolman filed a Notice of Withdrawal with the Court. His firm did not withdraw.

IV. ARGUMENT

A. Standard of Review

Interpretation of a court rule is a question of law reviewed *de novo*. *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, 174 Wn.2d 304, 307 (2012).

B. Dismissal Without Prejudice Was Mandated Because All of The Elements of CR 41(b) (1) Were Met.

The dismissal of an action for want of prosecution “is in the discretion of the court in the absence of a guiding statute or rule of court.” *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 167 (1988). Here, the trial court dismissed Orozco’s action pursuant to a “guiding” rule of the court; specifically CR 41(b)(1). CP 87 – 88. (Order Granting Motion).

CR 41(b)(1) states in full:

Want of prosecution on motion of party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

Where the provisions of CR 41(b)(1) apply, dismissal of an action is mandatory; there is no room for the exercise of a trial court's discretion. *Thorp Meats*, 110 Wn.2d at 167; *Also see, Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, 174 Wn.2d 304, 308 (2012) (“[D]ismissal is mandatory if CR 41(b)(1) applies.”). The trial court may not generally consider the merits of the case, nor the hardship which application of the rule may bring. *Thorp Meats*, 110 Wn.2d at 167.

As this Court previously held, once a hearing on a properly supported Motion to Dismiss under CR 41(b)(1) is commenced, it is error for the trial court to grant additional time for a party to note the case for trial. *Polello v. Knapp*, 68 Wn. App. 809, 817 (Division III, 1993). (Where conditions for mandatory dismissal were met, trial court erred by granting plaintiff additional two weeks to note matter for trial). In an unpublished decision, Division One cited to *Polello* when affirming a trial court's

dismissal of an action under CR 41(b)(1) even though the plaintiff requested additional time to properly note the action for trial. *King v. Rice*, 2013 Wash. App. LEXIS 1358, *9 (Division I, June 13, 2013).¹

Here, the elements of CR 41(b)(1) were met. After more than a year of inactivity, Plaintiff had not noted the case for trial prior to the filing of the Motion to Dismiss. The Motion to Dismiss was filed more than 10 days before the noted hearing. It is undisputed that the case was not noted for trial before the hearing on the Motion.

Likewise, the failure to note the case for trial was not the fault of the defendants. It is well settled that the obligation of going forward to escape the operation of the dismissal rule always belongs to the plaintiff (or cross-complainant) and not to the defendant. *McDowell v. Burke*, 57 Wn.2d 794, 796 (1961).

C. Orozco’s Belated Claim That Defendants Were Equitably Estopped From Pursuing the CR 41(b)(1) Motion Fails Both Procedurally and Substantively.

For the first time on appeal, Orozco raises an “equitable estoppel” argument. He claims that by providing available future dates for trial the

¹ Under GR 14.1, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

defendants thereby gave “tacit consent” to his failure to note the case for trial. Appellant’s Brief at pg. 16.

At the outset, the Rules of Appellate Procedure generally prohibits an appellant from raising issues for the first time on appeal. RAP 2.5(a). Raising an “equitable estoppel” argument for the first time on appeal is procedurally inappropriate. *In re Estate of Tuttle*, 2015 Wash. App. LEXIS 1892, *11 (2015)(Persuasive authority under GR 14.1) A review of Orozco’s briefing before the trial court and his comments during the hearing confirms that he never once claimed that his failure to note the case for trial was based on any statements or by the “tacit consent” of defendants’ counsel. CP 72 – 73; RP 1 – 13.

Orozco made an entirely different and equally baseless claim before the trial court. In his briefing to the trial court Orozco claimed that he had “made several calls” to the undersigned sometime in January 2017 about a trial setting. CP 72:18 -21. He conceded that his normal practice would have been to send a confirming e-mail but that he had no record of such an email. *Id.* To the extent that Orozco was attempting to cast blame on the defendants for his failure to note this case for trial prior to the hearing on the Motion to Dismiss, the time frame of the alleged phone calls was seven months after the Yakima County Court Administrator had

emailed Orozco's counsel requesting an update on trial setting. It was six months before the underlying Motion to Dismiss was filed.

In response to Orozco's counsel's allegation of having made "several calls", defendants' submitted evidence that no such calls were received including the fact that a review of the computerized phone logs of the undersigned's firm confirmed that no calls were received from Orozco's counsel during the entirety of 2017 until the June 16, 2017 call made following the filing of the underlying motion. CP 77:1-6 and 79: 23-24 - 80:1-5. Orozco abandoned this allegation on appeal.

Even if the Court were to consider Orozco's belated "equitable estoppel" claim, it fails substantively. Equitable estoppel is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence. *Mercer v. State*, 48 Wn. App. 496, 500 review denied, 108 Wn.2d 1037 (1987). The elements to be proved are: first, an admission, statement, or act inconsistent with a claim afterward asserted; second, action by another in reasonable reliance on that act, statement, or admission; and third, injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Robinson v. Seattle*, 119 Wn.2d 34, 82 (1992).

According to the Declaration submitted to the trial court, Orozco alleged that after receiving the underlying Motion to Dismiss he conducted a teleconference with the undersigned on June 16, 2017. CP 73: 2-3. This was ten-days prior to the noting date of the Motion to Dismiss. The Declaration filed by Orozco does not allege any agreement to withdraw the Motion or representation that the Motion would be abandoned. Instead, Orozco simply alleges that during the phone call the undersigned “did not voice any objection to the setting of a trial date”. CP 73:7. This is the very type of cooperation by defendants addressed in the Yakima County Superior Court Local Rule regarding the procedure that must be followed for noting a case for trial. Specifically, Yakima LCR 40 provides, in pertinent part:

(a) Notice of Trial and Civil Case Scheduling Order

(1) Any party may note a case for trial by completing and filing either Exemplar 2 or Exemplar 3. **Exemplar 2 is required for cases which require a Case Scheduling Order. Exemplar 3 is required for cases which do not require a Case Scheduling Order.** The form shall be filed with the Clerk, with a copy to the Court Administrator and to all parties.

(2) Unless exempted by LCR 40(a)(3), a party noting a case for trial **shall consult** with all counsel toward filing a Civil Case Scheduling Order for Trial substantially in the form provided in Exemplar 2. Upon the order being entered, it shall be filed with the Clerk, with a copy to the Court Administrator and to all parties. **If the parties cannot**

agree on how or if Exemplar 2 is to be completed, any party may note the issue for a hearing.

(emphasis added).

Based on Orozco's representation that the undersigned "did not voice any objection to the setting of a trial date", he would have arguably only needed to complete and file the form specifically required by the trial court's local rule to note the case for trial at any point between the June 16, 2017 phone call and the hearing on the motion noted for ten days later. *See, e.g. Thorp Meats*, 110 Wn.2d at 168. (a notice of trial setting interposed after the motion to dismiss and before the hearing on the motion is the exception to what would otherwise be a mandatory dismissal under CR 41(b)(1)). Orozco did not do so.

Even if a hearing to set a trial date under Yakima LCR 40 would have been necessary, Orozco's representation as to when that hearing could have occurred is false. Orozco claims that "[i]t is undisputed that noting a separate hearing for a trial date scheduling conference would occur *after* the hearing on Defendant's Motion to Dismiss." Appellant's Brief at pg. 9, footnote 9. (emphasis in original). There is no basis in the record for this assertion. In fact, under the Yakima County Superior Court Local Rules, Orozco could have noted such a hearing on 5-days' notice. LCR 7(A)(i)(1).

Yet, as conceded in Orozco’s Opening Brief, the decision not to note the case for trial before the hearing on the Motion to Dismiss was Mr. Orozco’s counsel’s. In his words, “Mr. Orozco’s counsel felt that it was inappropriate to attempt a selection of a trial date without first conferring with Judge Sparks at the scheduled hearing.” Pg. 9. This admission confirms that there is no basis for the belated “equitable estoppel” contention. Orozco was the author of his own misfortune.

D. The Authorities Relied Upon By Orozco Do Not Apply

Because of the discreet nature of CR 41(b)(1), the cases at the core of plaintiff’s arguments are inapposite. Cases addressing unconscionable contracts, *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446 (Division III, 2002), and discovery sanctions, *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997) (dismissal under CR 26); *Anderson v. Mohundro*, 24 Wn. App. 569 (Division I, 1979)(dismissal under and 37(b)(2)(C)), lend nothing to the analysis of this case. The law under CR 41(b)(1) is clear; when the provisions of the rule are met there is no room for the exercise of a trial court's discretion. Dismissal is mandatory. *Thorp Meats, supra*.

E. Orozco's Misrepresentations Are Improper

Orozco's counsel's firm is no stranger to controversy. *Weiss v. Lonquist*, 173 Wn. App. 344 (Division I, 2013), *rev. denied*, 178 Wn.2d 1025 (2013). His counsel's decision to cite to the WSBA Creed of Professionalism in this case is an irony. Appellant's Brief at pg. 18. The claim of making phone calls to defendants counsel in the winter of 2017 was false and resulted in the defendants expending unnecessary time and cost in reviewing phone logs to confirm what was already known. No such calls were made. The allegations of *ex parte* contact with the trial court are unsubstantiated and reckless. Appellant's Brief at pg 8. The claim that the parties "proceeded to litigate the case" following the Scheduling Conference is simply false. Appellant's Brief at pg 7. Orozco's counsel ignored emails from the Yakima County Superior Court Administrator's Office and from the undersigned. The Motion to Dismiss was filed more than a year after any activity. Even then, Orozco ignored his obligation to note the case for trial prior to the hearing on the Motion to Dismiss. His failure results in mandatory dismissal without prejudice.

F. Orozco Is Not Entitled to Fees

Orozco's request for fees fails for two reasons. First, and most fundamental, under RAP 18.1 the party must prevail on his or her claim to

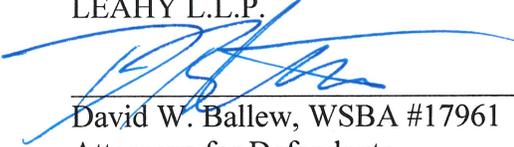
receive attorney fees. Here, the trial court properly dismissed Orozco's claims under CR 41(b)(1) because he did not note the case for trial before the hearing on the Motion to Dismiss. There was no error and fees are not appropriate. Second, and for the sake of completeness, the very case Orozco cites in support of his request provides that when a party has yet to prevail on the merits of a discrimination claim the appellate court should not award fees. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 153 (2004).

V. CONCLUSION

There are no legal grounds to be broken in this case. The law on CR 41(b)(1) is unquestionably clear. The undisputed facts of this case fall squarely within each element of the rule. Because the provisions of CR 41(b)(1) applied, the trial court had no room for the exercise of discretion. The trial court's dismissal of the action was mandatory and should be affirmed.

Dated this 30th day of November, 2017.

REID, McCARTHY, BALLEW &
LEAHY L.L.P.



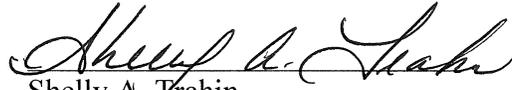
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CERTIFICATE OF SERVICE

I, Shelly A. Trahin, an employee of Reid, McCarthy, Ballew & Leahy L.L.P., declare under of perjury that on this date I caused a copy the foregoing Respondents' Brief to be served by email and electronic service upon Appellant's Counsel:

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November 30, 2017 - 10:35 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: John Orozco v. Teamsters Local Union No. 760, et al
Superior Court Case Number: 14-2-02075-8

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