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DISTRICT IV

August 20, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2595

State of Wisconsin ex rel. Harlan Richards v. Danielle Lacost
(L.C. #2012CV1210)

Before Lundsten, Sherman and Kloppenburg, JJ.

Harlan Richards, pro se, appeals circuit court orders dismissing Richards' certiorari action for failure to prosecute and denying reconsideration. Richards contends that the circuit court erroneously exercised its discretion in dismissing for failure to prosecute while Richards' motion to stay the proceedings was pending. 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 (2011-12).¹ We summarily reverse.

In March 2012, Richards filed this certiorari action for review of a decision by the Wisconsin Parole Commission denying Richards release on parole. On June 4, 2012, the circuit court issued a scheduling order requiring Richards to file a brief by July 2, 2012. On June 14, 2012, Richards moved to stay the proceedings in this case pending the outcome of a separate action filed by Richards to challenge the validity of the Wisconsin Administrative Code governing parole. *See* WIS. STAT. § 227.40(3). On July 5, 2012, Richards filed a letter with the circuit court stating that he was unable to brief this case until his declaratory judgment action was decided, and requesting the court to grant his motion to stay these proceedings. On September 6, 2012, the circuit court dismissed this action for failure to prosecute. Richards moved for relief from the judgment, stating that he had been waiting for the court's order on his motion to stay and that, if the court had denied the motion, he would have filed his brief. Richards stated his belief that he could not act until the court decided his motion. The court denied the motion for relief from the judgment.

A circuit court has the discretion to dismiss an action as a sanction for failure to prosecute or for failure to comply with a court order. *See* WIS. STAT. § 805.03; *see also Monson v. Madison Family Inst.*, 162 Wis. 2d 212, 223, 470 N.W.2d 853 (1991). When a court dismisses an action as a sanction for a party's failure to comply with the court's scheduling order, the "conduct in failing to comply with the court's order must have been egregious to sustain the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

dismissal.” *Schneller v. St. Mary’s Hosp. Med. Ctr.*, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991). “[W]e will sustain the sanction of dismissal if there is a reasonable basis for the circuit court’s determination that the noncomplying party’s conduct was egregious and there was no clear and justifiable excuse for the party’s noncompliance.” *Id.* (quoted source omitted; internal quotation marks omitted). Even if a circuit court does not make an explicit finding of egregious conduct, “[a]n implicit finding of egregious conduct ... by the circuit court in dismissing a cause of action is sufficient if the facts provide a reasonable basis on review for the court’s conclusion.” *Id.* However, dismissal for failure to prosecute is an erroneous exercise of discretion “if there is no reasonable basis to support the circuit court’s determination that the aggrieved party’s conduct was egregious.” *Monson*, 162 Wis. 2d at 224.

“[F]ailure to comply with circuit court scheduling ... orders without clear and justifiable excuse is egregious conduct.’ Where the circuit court finds that failures to ... follow court orders are ‘extreme, substantial, and persistent’ it may dismiss the action with prejudice on the grounds that the conduct is egregious.” *Industrial Roofing Servs., Inc. v Marquardt*, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898 (quoted sources omitted; citation omitted). “The burden remains on the plaintiff throughout the course of litigation to see to it that the case is brought to trial within a reasonable period of time. If the plaintiff fails in sustaining this burden, ‘good cause’ for the delay in prosecution must be shown.” *Marshall-Wisconsin Co. v. Juneau Square Corp.*, 139 Wis. 2d 112, 128, 406 N.W.2d 764 (1987). “The principle is firmly established that in order to demonstrate that a dismissal order based upon the failure to prosecute was an [erroneous exercise] of discretion, the aggrieved party must show ‘a clear and justifiable excuse’ for the delay.” *Trispel v. Haefler*, 89 Wis. 2d 725, 733, 279 N.W.2d 242 (1979) (quoted source omitted).

The State contends that the circuit court properly exercised its discretion in dismissing this action for failure to prosecute because there was a reasonable basis for the dismissal and Richards has not shown a clear and justifiable excuse for failing to comply with the court's scheduling order. *See Schneller*, 162 Wis. 2d at 311. The State contends that Richards' reliance on his pending motion to stay the proceedings does not establish a justifiable excuse for failing to timely file his brief. The State argues that it was unreasonable for Richards to rely on the motion to stay as a basis to disregard the briefing schedule, and points out that Richards did not move to extend the time to file his brief.

We appreciate the circuit court's need to control its docket, and understand the motivation to hold experienced, persistent litigators such as Richards to a high standard. However, applying the standard of "egregious conduct" cited by the State and set forth above, we are unable to find support in the record for the drastic sanction of dismissal. The circuit court provided no explanation for why it believed dismissal was warranted, and the court made no finding of bad faith or egregious conduct. Moreover, our review of the record does not reveal a reasonable basis to support a determination that Richards' conduct was egregious.

The record and Richards' briefs to this court establish a possible justifiable excuse for failure to comply with the court's scheduling order: Richards' belief that the court would determine his pending motion to stay before his brief would be due. Richards filed his motion to stay around the same time the court issued its scheduling order, and he filed another letter pursuing the motion to stay around the time his brief was due. It appears the circuit court never responded to the motion prior to dismissing this case. Additionally, the circuit court made no findings regarding Richards' claimed excuse for his delay in filing his brief. Contrary to the State's assertion, the court did not explain in its order denying relief from the judgment that the

“motion to stay did not absolve [Richards] of his responsibilities under the scheduling order”; rather, the court stated: “The filing of a request for stay does not constitute a stay of statutory service requirements.” We do not agree that this can reasonably be interpreted as a reference to the court’s scheduling order, and it does not constitute a finding as to whether Richards provided a justifiable excuse for failing to timely file his brief.

We conclude that the facts of this case, on their face, do not amount to egregious conduct. The State has not cited anything in the record or analogous case law that would dictate a different result. Accordingly, we conclude that the record is insufficient to support the circuit court’s order for dismissal of this case. We reverse and remand for the circuit court to determine whether bad faith or egregious conduct occurred, and what sanction, if any, is appropriate.

Therefore,

IT IS ORDERED that the orders are summarily reversed and the cause is remanded with directions, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals