

Circuit Court for Wicomico County
Case No. 22-C-15-000770

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2655

September Term, 2015

KAREN JENKINS

v.

IN GEAR FASHIONS, INC., et al.

Meredith,
Reed,
Wallace, Sean D.,
(Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: July 9, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On May 21, 2015, Karen Jenkins, Appellant, filed suit in the Circuit Court for Wicomico County seeking damages for personal injuries she sustained. She alleged that the Appellees' unreasonably dangerous products, the dress she was wearing and an electrical heater close by, caused severe burns after the dress ignited. After several procedural delays leading up to trial, including two failed Motions for Continuance, Appellant moved for voluntary dismissal without prejudice. The circuit court denied that motion, granted summary judgment in all of the Appellees' favor, and dismissed the case with prejudice. Appellant noted this timely appeal and presents two questions for our review, which we rephrase as three:

- I. Did the trial court err in imputing to counsel knowledge of an order that was not mailed by the clerk's office?
- II. Did the trial court abuse its discretion in denying the motion for continuance?
- III. Did the trial court abuse its discretion in denying the motion for voluntary dismissal without prejudice?

For the reasons that follow, we answer each question in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Karen Jenkins ("Appellant") was working as a cashier at a car wash on May 25, 2013, when the dress she was wearing was ignited by an electrical heater, badly burning her. She filed suit against In Gear Fashions, Inc. ("In Gear"), Walgreen Company, Inc. ("Walgreens"), Electro-Mechanical Corporation ("Electro-Mechanical"), and H&M, LLC ("H&M") (collectively, "Appellees") for damages on May 21, 2015. The complaint alleged

that the dress, manufactured by In Gear and sold by Walgreens, was unreasonably dangerous, and that the heater, manufactured by Electro-Mechanical, was also unreasonably dangerous. The complaint alleged further that H&M owned the heater and the premises on which it was located, and that it knew or should have known that the heater was defective and unreasonably dangerous.

On July 23, 2015, the Circuit Court for Wicomico County issued a Notice of Civil Assignment, setting the case for a four-day jury trial to begin on January 19, 2016. With respect to requests to change the trial date, the order provided that “no request for postponement will be entertained after 30 days, except in cases of emergency.” It also stated that “all objections, or requests for different dates, shall be by written Motion with a copy to all Attorneys and/or Parties of Record.” Along with the Notice of Civil Assignment, the court issued a Scheduling Order, establishing deadlines tied to the trial date. Namely, Appellant was required to designate expert witnesses at least four months prior to trial, and discovery was scheduled to be completed at least two months prior to trial.

On August 17, 2015, Appellant mailed a Motion to Continue Trial Date to the court, which was received on August 20, 2015. The motion requested a new trial date and advised the court that Appellant’s Maryland counsel already had a trial scheduled for that time period. The motion did not, however, request that any date in the Scheduling Order be altered or extended. The court denied the motion on August 21, 2015, noting that Appellant was required to consult with opposing counsel and contact the Assignment Office for

alternative dates prior to submitting the motion. Appellant and H&M did not receive a copy of the order, and Appellant did not learn of the denial until October 2, 2015.

Meanwhile, In Gear and Walgreens filed a Motion for Summary Judgment based on Appellant's failure to designate any expert witnesses. Electro-Mechanical also filed a Motion for Summary Judgment, arguing that it was not the manufacturer of the heater in question and therefore owed no duty to Appellant.

Appellant filed a second motion for continuance on November 9, 2015, well after the 30 day deadline imposed by the Notice of Civil Assignment.¹ The motion pointed out that the order denying the earlier motion had not been sent to counsel, that there had been insufficient time to conduct discovery, and both of Appellant's Maryland and lead counsel were unavailable during the scheduled trial period. The circuit court denied the motion on December 1, 2015.

On December 21, 2015, Appellant moved, pursuant to Md. Rule 2-506, to voluntarily dismiss her case without prejudice, reciting the procedural history of the case. The hearing was held on January 7, 2016. The court attached no significance to the parties' delay of notice regarding the first motion for continuance, stating: "Black letter law is you're still responsible for what happens in the case regardless of notice or lack thereof."

After hearing argument, the court disposed of the motion as follows:

The Court blocked out four days on its calendar this month for this trial. It's a multi-party case, lots of attorneys, I'm sure the legal fees have been very high, and there's something called the orderly administration of justice. For that reason alone, and

¹ In fact, by this time Appellant missed the deadline to designate expert witnesses and failed to answer Appellees' discovery requests.

I don't believe you're entitled to dismiss this case, especially when the majority of the Defendants object to it. So I'm going to deny your motion for voluntary dismissal.

H&M then made an oral motion to dismiss the claims against it due to the Appellant's failure to answer interrogatories, which the court granted with prejudice. The court also granted the remaining Appellees' motions for summary judgment. This appeal followed.

STANDARD OF REVIEW

We review a motion for continuance, pursuant to Maryland Rule 2-508², and a motion for voluntary dismissal, pursuant to Maryland Rule 2-506³, under an abuse of discretion standard. “We review the trial court’s decision for an abuse of discretion and ‘unless [the] court acts arbitrarily in the exercise of that discretion, [its] action will not be

² The relevant portion of Maryland Rule 2-508 provides:

- (a) **Generally.** On motion of any party or on its own initiative, the court may continue a trial or other proceeding as justice may require.
- (b) **Discovery Not Completed.** When an action has been assigned a trial date, the trial shall not be continued on the ground that discovery has not yet been completed, except for good cause shown.

³ The relevant portion of Maryland Rule 2-506 provides:

- (c) **By Order of Court.** Except as provided in section (a) of this Rule, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss the claim only by order of court and upon such terms and conditions as the court deems proper. If a counterclaim has been filed before the filing of a plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who filed the counterclaim unless the counterclaim can remain pending for independent adjudication by the court.

reviewed on appeal.” *Serio v. Baystate Properties, LLC*, 209 Md. App. 545, 554 (2013) (citing *Das v. Das*, 133 Md. App. 1, 31 (2000)). There is an abuse of discretion “where no reasonable person would take the view adopted by the trial court or where the trial court acts without reference to any guiding principles.” *Aventis Pasteur*, 396 Md. at 418 (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005)).

DISCUSSION

A. Parties’ Contentions

Appellant argues that the circuit court made three errors. First, Appellant contends that the court erred by “imputing to counsel timely knowledge of the order denying [her] first motion for continuance.” According to Appellant, the court clerk failed to send the order dated August 21, 2015, which resulted in counsel not learning of the motion’s denial until six weeks later. Appellant concludes that the delay caused or contributed to her failure to file proper motions in a timelier manner and warrants relief. Second, Appellant contends that the circuit court erred by failing to continue the trial date in light of counsel’s unavailability and the complexity of the case. Appellant asserts that under Md. Rule 16-202(b), the scheduling order should have reflected a complex product liability case requiring more time for discovery than “a typical car crash case.” Lastly, Appellant argues that it was error for the court to deny her motion for voluntary dismissal. Citing Md. Rule 2-506 and *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405 (2007), Appellant asserts that her motion should have been granted due to an absence of “plain legal prejudice” to the opposing parties.

Appellees, In Gear and Walgreens, argue generally that Appellant was not diligent in pursuing her case and the denial of her motions for continuance were proper. Their brief is essentially a recount of missed deadlines, noncompliance, and general failures by Appellant. Likewise, Appellee H&M argues that “lack of diligence characterize[s] the entire prosecution of this case.” H&M, In Gear, and Walgreens all assert that the evidence of these shortcomings, support the denial of the Appellant’s motion to dismiss without prejudice. Appellee Electro-Mechanical does not address any of Appellant’s arguments. Instead, it asserts that its motion for summary judgment was properly granted because it neither manufactured, nor sold the electric heater which is the subject of Appellant’s complaint.

B. Analysis

I. Six-week Delay

Appellant argues that she lacked notice of the order denying her motion for continuance for six weeks as a direct result of the court clerk’s failure to send the order to counsel. This argument fails because of Appellant’s lack of accountability. We agree with Appellant that the court clerk was required to send the order to her address of record. However, the clerk’s error does not extinguish Appellant’s responsibility to monitor her case. As Appellees note, Appellant could have checked the docket or called the clerk’s office to ascertain the status of her motion well before six weeks had passed.

Appellant cites *Wormwood v. Batching Systems, Inc.*, 124 Md. App. 695, 723 (1999), in support of her position. Appellant argues that this Court “held that a circuit court clerk’s three-day delay in mailing out an order dismissing a petition for judicial review

caused or contributed to the late filing of a post-judgment revisory motion and therefore warranted relief.” This statement is inaccurate, and the facts of *Wormwood* are significantly different from the case before us. In *Wormwood*, the circuit court dismissed a petition seeking judicial review of an administrative agency’s decision on the ground that the record was not timely transmitted to the circuit court. *Id.* at 697. This Court reversed, holding, “a failure to transmit timely a record, in literal violation of [Maryland Rule], does not mandate dismissal of a petition for judicial review.” *Id.* The issue in that case was whether dismissal was mandatory when the appellant substantially complied with the Rule and the record was ultimately before the court in a timely manner. We are not presented with a similar issue here.

Appellant admits in her brief that had she known of the denial sooner, she would have promptly filed a proper motion for continuance. According to Appellant, receiving a new trial date was critical because counsel was not available on the date selected. Instead of acting diligently in handling this critical matter, Appellant waited six weeks before determining the status of the motion and then another five weeks before filing a second motion for continuance. The error here did not come from the trial court.

II. Motion for Continuance

Based on that analysis, we hold that the circuit court did not abuse its discretion in denying the motions for continuance. The Court of Appeals has emphasized that it has “consistently affirmed” the denial of motions to continue in instances where parties have made untimely requests or where procedural rules are ignored. *See Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 242–43 (2011) (citing *Dart Drug Corp.*

v. Hechinger Co., Inc., 272 Md. 15, 28 (1974) (untimely request) and *Abrams v. Gay Inv. Co.*, 253 Md. 121, 124 (1969) (failure to follow procedural rules)). Appellant’s initial motion for continuance did not comply with procedural rules, and the second motion was untimely. Under the circumstances of this case, it was not an abuse of discretion for the trial judge to deny these motions and proceed with the trial as scheduled.

III. Motion for Voluntary Dismissal

Appellant argues that her motion for voluntary dismissal without prejudice should have been granted in light of *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405 (2007). However, Appellant misapplies *Aventis Pastuer*, as it supports the trial court’s decision to deny the motion. We explain.

In that case, the trial court denied the plaintiff’s motion for voluntary dismissal without prejudice and granted summary judgment in the defendant’s favor. *Id.* at 409. The court considered several factors in deciding the motion, most critically, the significant time and money spent in preparing pleadings and preliminary motions, and the conduct of extensive discovery. *Id.* at 415. The Court of Appeals, in affirming the decision of the circuit court, held that a motion for voluntary dismissal pursuant to Md. Rule 2-506, should be granted unless there is “plain legal prejudice” to the defendants, and that a determination of whether such prejudice will result should be based upon the following four factors:

- (1) the non-moving party’s effort and expense in preparing for litigation;
- (2) excessive delay or lack of diligence on the part of the moving party;
- (3) sufficiency of explanation of the need for a dismissal without prejudice; and
- (4) the present stage of the litigation, i.e., whether a motion for summary judgment or other dispositive motion is pending.

Id. at 420. After considering each of these factors, the Court held that the trial court did not abuse its discretion in denying the motion for voluntary dismissal without prejudice. We review these factors under the facts of this case, and reach the same conclusion.

Appellant argues that the trial court did not carefully consider each factor in making its decision. Nevertheless, we have often held that a trial judge is not required to “articulate each item or piece of evidence she or he has considered in reaching a decision.” *John O. v. Jane O.*, 90 Md. App. 406, 429 (1992). Furthermore, “[t]he fact that the court did not catalog each factor and all the evidence which related to each factor does not require reversal.” *Id.*; *see also Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003) (holding that when a matter is reserved to the sound discretion of the trial court, “a trial judge's failure to state each and every consideration or factor in a particular applicable standard does not, absent more, constitute an abuse of discretion, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion.”) (internal citations omitted)). We shall consider each of the factors and discuss them in turn.

1. Effort and Expense of the Non-Moving Party in Preparing for Trial

The record before the circuit court at the time of its decision indicated that Appellees expended significant effort and expense in preparing for trial in this case. Appellees prepared discovery requests, interrogatories, oppositions to motions, and several preliminary and dispositive motions concerning this litigation. The record also includes evidence of Appellees spending time communicating to Appellant that she had not complied with Maryland Rules and subsequently, filing pleadings with the court based on

that noncompliance.⁴ The trial court acknowledged the expenses involved here by stating, “I’m sure the legal fees have been very high,” and noting the multiple parties and attorneys involved. Ultimately, this factor weighs in favor of Appellees.

2. Excess Delay or Lack of Diligence by Movant

Weighing even more heavily against dismissal without prejudice, is Appellant’s lack of diligence. Appellees indicated in their motions, and reiterated at the hearing, that Appellant did not act prudently in pursuing her case. The record provides a list of shortcomings by Appellant, including a failure to comply with discovery, designate expert witnesses, and answer interrogatories. In fact, several questions and statements from the trial judge illustrate the court’s concern: “[W]ouldn’t you have lined up an expert before filing suit?” A few moments later, still on the topic of expert witnesses, the trial court stated, “[t]hree days ago you named an expert in a trial that’s supposed to start next week;”

⁴ The timeline appears as follows:

- July 30, 2015 – In Gear served discovery requests on Appellant.
- September 16, 2015 – October 22, 2015 – A series of emails were exchanged between Appellees and Appellant regarding overdue discovery responses.
- October 26, 2015 – In Gear and Walgreens filed a Motion for Summary Judgment based on Appellant’s failure to designate expert witnesses or provide discovery responses.
- November 4, 2015 – H&M filed a Motion in *Limine* to preclude Appellant from introducing expert testimony at trial.
- November 12, 2015 – emails to Appellant pointing out that her interrogatories did not comply with Maryland Rules.
- November 12, 2015 – Electro-Mechanical filed a Motion for Summary Judgment.
- November 25, 2015 – H&M filed a Motion to Compel Appellant to complete answers to interrogatories.
- December 4, 2015 – In Gear and Walgreens filed Motion in *Limine*.

“You have a fire that takes place from a space heater in May of 2013, and you file suit in May of 2015 and you haven’t even sued the proper owner or manufacturer of the space heater?” “I just wonder, was this a case of shooting first and asking questions later?” Upon reviewing the trial court’s statements, it is reasonable for this Court to infer from the discussion and the documents that the trial court agreed with Appellees and found a lack of diligence by Appellant.

3. Sufficiency of Explanation for Need of Dismissal

Appellant’s explanation for need of dismissal is essentially that she was not afforded enough time to complete discovery in this “complex products liability case.” The trial court’s decision appears to have taken this argument into consideration when it questioned the Appellant about not finding an expert witness before filing suit, as well as the other remarks explained above. However, even if the court did not consider this factor, *i.e.*, neither found the explanation sufficient nor insufficient, “[e]ach of the factors need not endorse a particular disposition in order to rule in a certain way.” *Aventis Pasteur*, 396 Md. at 428; *see also Ohlander v. Larson*, 114 F.3d 1531, 1537 (1997) (“Each factor need not be resolved in favor of the moving party for dismissal to be appropriate, nor need each factor be resolved in favor of the opposing party for denial of the motion to be proper.”).

4. Pending Motions for Summary Judgment

The fourth factor counsels a trial judge to consider whether there were any motions for summary judgment pending at the time the motion for dismissal without prejudice was filed. “This factor is premised, at least in part, on the principle that a plaintiff confronting the potential for an adverse disposition of his, her, or its case may not dismiss unilaterally

the case in order to file again in the future at a time when the conditions may be more favorable.” *Aventis Pasteur*, 396 Md. at 428. Appellant filed her motion for dismissal on December 21, 2015. At that time, In Gear, Walgreens, and Electro-Mechanical had pending motions for summary judgment. In Gear and Walgreens argued that Appellant had not identified expert witnesses to establish causation, breach of care, strict liability, and/or breach of implied warranties. Electro-Mechanical argued that it did not manufacture or sell the heater involved in this case. It is reasonable to conclude that Appellant filed her motion in order to avoid a likely undesirable outcome of the litigation. Subsequently, a reasonable trial judge, given the status of the pending litigation at the time of the relevant hearing, could conclude that this fourth factor weighed in favor of Appellees.

CONCLUSION

Accordingly, we hold that neither the denial of the motion for continuance, nor the denial of the motion for voluntary dismissal without prejudice, constituted an abuse of discretion by the circuit court. Therefore, we affirm the Circuit Court for Wicomico County.

**JUDGMENTS OF THE CIRCUIT
COURT FOR WICOMICO COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**