CHAVEZ V. BOARD OF REGENTS

STEVEN M. CHAVEZ,
Plaintiff-Appellant,
v.
BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO,
Defendant-Appellee.

NO. 33,785

COURT OF APPEALS OF NEW MEXICO

December 8, 2015

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Clay Campbell, District Judge

COUNSEL

Law Offices of E. Justin Pennington, E. Justin Pennington, Albuquerque, NM, for Appellant

Park & Associates, L.L.C., Alfred A. Park, Lawrence M. Marcus, Albuquerque, NM, for Appellee

JUDGES

RODERICK T. KENNEDY, Judge. WE CONCUR: CYNTHIA A. FRY, Judge, LINDA M. VANZI, Judge

AUTHOR: RODERICK T. KENNEDY

MEMORANDUM OPINION

KENNEDY, Judge.

{1} The issue in this case is a purely procedural one. Over the course of three years, Steven Chavez's actions in this case consisted of making two Rule 1-016 requests, one of which was improperly filed, and a response to one set of discovery requests. The district court dismissed Chavez's case for failure to prosecute pursuant to Rule 1-041(E)(1) NMRA. Chavez appealed. Based on the record reflecting these facts, we conclude that the district court did not abuse its discretion in dismissing Chavez's case, and we affirm.

I. BACKGROUND

{2} On June 18, 2010, Chavez filed a complaint of employment discrimination against the Board of Regents of the University of New Mexico (the Board) in district court. Four months later, on October 18, 2010, Chavez amended the complaint. The Board answered Chavez's complaint on November 23, 2010. On April 29, 2011, Chavez requested a hearing for a Rule 1-016 scheduling conference. The district court held a hearing, and although the record does not reflect what was said during that hearing, the parties agree that the district court sent the parties away with instructions to further consider amending the pleadings and for acceptable trial dates. Almost five months later on September 21, 2011, the Board issued discovery requests, which Chavez answered. In March 2012, the district court consolidated Chavez's case with another case filed by Marvin Martinez and Peter Nieto that alleged similar employment discrimination claims against the Board.[1] In December 2012, the district court dismissed the consolidated case, without prejudice, for lack of prosecution.

{3} Chavez, Martinez, and Nieto (collectively, Plaintiffs) filed a motion to reinstate the case. Plaintiffs attached a proposed pretrial scheduling order to the motion and stated that they intended to file a separate request for a Rule 1-016 scheduling conference once the court granted reinstatement. On January 31, 2013, the district court granted the motion to reinstate, issuing an order, to which the parties stipulated. The district court's order acknowledged Plaintiffs' request for a Rule 1-016 scheduling conference and ordered the parties to file a request for a Rule 1-016 scheduling conference "as soon as they have met and conferred on all relevant deadlines and potential trial date[s.]" Almost ten months later, on November 20, 2013, Plaintiffs submitted a request for a Rule 1-016 scheduling conference. A hearing was set, and a subsequent stipulated order was entered vacating and rescheduling the hearing.

{4} On the same day that the scheduling conference hearing was rescheduled, the Board filed a motion to dismiss with prejudice for failure to prosecute. In that motion, the Board asserted that Plaintiffs had not taken adequate steps to move the case forward and that the delay in the case caused prejudice through the death of an important witness. Plaintiffs answered the motion, pointing to their various requests for a Rule 1-016 scheduling conference and to the actions that Martinez and Nieto took in their case prior to consolidation.

{5} The district court held a hearing on both the motion to dismiss and the Rule 1-016 scheduling conference. After hearing arguments from both parties, the court

granted the Board's motion to dismiss with respect to Chavez's claims and denied it with respect to Martinez and Nieto's claims. In explaining its reasons for doing so, the court pointed out that Plaintiffs did not submit a request for trial or a "valid" request for a Rule 1-016 scheduling conference. The court based the invalidity of the Rule 1-016 on the parties' failure to meet and confer regarding dates and times pertinent to a trial setting, as required in the order granting reinstatement. Although the district court seemed willing to equate a Rule 1-016 scheduling request to a request for trial, it concluded that Plaintiffs had not taken significant action to move the case forward.

II. DISCUSSION

{6} Rule 1-041(E)(1) allows the district court to dismiss an action with prejudice when "the party asserting the claim has failed to take any significant action to bring such claim to trial or other final disposition within two (2) years from the filing of such action or claim." An action may not be dismissed "if the party opposing the motion [to dismiss] is in compliance with an order entered pursuant to Rule 1-016[.]" Rule 1-041(E)(1). In contemplating a Rule 1-041(E) motion, the district court should determine whether, based on the court record and the matters presented at the hearing, the plaintiff has taken significant action to move the case toward a final determination and, "if not, whether [the plaintiff] has been excusably prevented from taking such action." *State ex rel. Reynolds v. Molybdenum Corp. of Am.*, 1972-NMSC-027, ¶ 24, 83 N.M. 690, 496 P.2d 1086.

{7} Appellate courts have not created any fixed standard of what action is sufficient to satisfy the "significant action" requirement of Rule 1-041(E)(1). "[E]ach case must be determined upon its own particular facts and circumstances." *Martin v. Leonard Motor-El Paso*, 1965-NMSC-060, ¶ 7, 75 N.M. 219, 402 P.2d 954. As such, "[i]t is within a trial judge's inherent power to dismiss a cause of action for failure to prosecute . . . . Such an order will be reviewed for abuse of discretion." *Cottonwood Enters.*, 1989-NMSC-064, ¶ 13. "An abuse of discretion in this context occurs when the court exceeds the bounds of reason, all the circumstances before it being considered." *Sewell v. Wilson*, 1982-NMCA-017, ¶ 16, 97 N.M. 523, 641 P.2d 1070 (internal quotation marks and citation omitted).

{8} Among other things, pretrial conferences under Rule 1-016 are held in order to expedite the disposition of the action and allow the district court to establish "early and continuing control so that the case will not be protracted because of lack of management." Rule 1-016(A)(1)-(2). A pretrial scheduling order "shall be filed as soon as practicable but in no event more than one hundred twenty (120) days after filing of the complaint." Rule 1-016(B). In the event that a pretrial scheduling order is not entered, the district court "shall set the case for trial in a timely manner, but no later than eighteen (18) months after the filing of the complaint." *Id.* Through the scheduling order, the district court can limit the amount of time that the parties have to join other parties, amend the pleadings, file and hear motions, and complete discovery. Rule 1-016(B)(1)-(3).

A. Significant Action

{9} The record in this case indicates that Chavez filed two requests for a Rule 1-016 scheduling conference [2] and complied with the Board's discovery requests. A plaintiff's filing of a request for a trial setting before a defendant's filing of a motion to dismiss is generally considered action significant enough to prevent dismissal for failure to prosecute. *See Procter v. Fez Club*, 1966-NMSC-083, ¶ 2, 76 N.M. 241, 414 P.2d 219; *see also Summit Elec. Supply Co. v. Rhodes & Salmon, P.C.*, 2010-NMCA-086, ¶ 13, 148 N.M. 590, 241 P.3d 188 (stating the rule that "a plaintiff's filing of a request for a trial setting before a defendant's filing of a motion to dismiss has been consistently viewed as a good faith action to prosecute a case").

{10} Chavez's argument in support of his assertion that he took significant action to bring his claims to trial depends largely on his requests for a Rule 1-016 scheduling conference and his participation in discovery. Even if we were to assume that a request for a Rule 1-016 scheduling conference is equivalent to a request for trial, Chavez's requests are not sufficient to establish an abuse of discretion. Inexplicably the district court refused to enter a scheduling order pursuant to Rule 1-016 following a hearing on the April 2011 request, and instead directed the parties to request another scheduling conference after determining whether the pleadings would be further amended. The parties never conferred. After the case was dismissed without prejudice pursuant to Rule 1-041(E)(2), and subsequently reinstated, the district court issued an order explicitly requiring the parties to meet and confer "on all relevant deadlines and potential trial date[s.]" Again, the parties never discussed deadlines and dates pertinent to the case. Rather than contact opposing counsel, Chavez filed another request for a Rule 1-016 scheduling conference without first satisfying the criteria set forth in the court's reinstatement order.

{11} The district court declined to consider Chavez's November 2013 Rule 1-016 request in deciding the motion to dismiss. In refusing to consider that request, the district court explained that Chavez's failure to follow the order stripped the request of any validity. The district court pointed out that the failure to comply with the court's order, to which Chavez had stipulated, indicated that the failure was not in good faith. As such, the district court declined to consider Chavez's November 2013 request for a Rule 1-016 scheduling conference hearing, based on Chavez's failure to act in good faith to comply with the court's order. Although the district court did not strike Chavez's November 2013 request from the record, Rule 1-016 lends support to the district court's refusal to consider it.

{12} Rule 1-016 provides sanction remedies for instances in which a party's attorney, during the pretrial phase of a case, "fails to participate in good faith." Rule 1-016(F) (stating that the court may impose sanctions in an order, including those listed in Rule 1-037(B)(2)(b)-(d) NMRA). Such sanctions include a refusal to allow the party to support or oppose certain claims or defenses, prohibiting a party from introducing certain evidence, striking or staying further pleadings until the order is obeyed, or placing the party in contempt of court. Rule 1-037(B)(2)(b)-(d). Based on the available sanction

remedies, as well as Chavez's admission that his conduct was sanctionable, the district court could have stricken the November 2013 request. Its decision to refuse to consider the request is the functional equivalent to striking it, and does not constitute an abuse of discretion, as it is supported by Rule 1-016(F).

{13} A plaintiff's filing of discovery requests generally constitutes sufficient action to avoid dismissal for failure to prosecute. *See Jimenez v. Walgreens Payless*, 1987-NMSC-082, ¶ 9, 106 N.M. 256, 741 P.2d 1377; *see also Jones v. Montgomery Ward & Co.*, 1985-NMSC-062, ¶ 12, 103 N.M. 45, 702 P.2d 990 (acknowledging that although discovery alone is insufficient to avert dismissal, discovery efforts should be considered along with other factors). Although Chavez answered the Board's discovery requests, he did not promulgate any requests of his own. Chavez's discovery participation, in conjunction with the April 2011 Rule 1-016 request, still does not rise to the level of significant action under Rule 1-041(E).

{14} Chavez's initial request, filed in April 2011, and his discovery answers from October 2011 and February 2012, do not remedy the fact that nothing more occurred to move the case forward prior to the Board's motion to dismiss filed in December 2013. Given that the most significant actions to which Chavez points were two scheduling conference requests, one of which could have been stricken, and answers to a discovery request during a three-year period, his actions were not "actual and bona fide efforts" to have his case finally determined, *Schall v. Burks*, 1964-NMSC-232, ¶ 8, 74 N.M. 583, 396 P.2d 192, nor were they "a good-faith attempt" to obtain a trial setting. *Foundation Reserve Ins. Co. v. Johnson Testers, Inc.*, 1966-NMSC-257, ¶ 7, 77 N.M. 207, 421 P.2d 123.

B. Excusably Prevented

{15} Having determined that significant action was not timely taken by Chavez in pursuit of his claims, we next determine whether Chavez has been "excusably prevented from taking such action." *Molybdenum Corp.*, 1972-NMSC-027, ¶ 24. Chavez points to no evidence that he was excusably prevented from diligently pursuing his case. At most, he asserts that the district court's repeated refusal to enter a scheduling order excusably prevented him from conducting significant action. It is clear from the record that notwithstanding the district court's refusal to enter a scheduling order, the case could have moved forward with a brief meeting, email, or phone call between the parties. Based on our review of the record and the briefs of the parties, we therefore hold that the district court did not abuse its discretion in dismissing Plaintiff's amended complaint with prejudice under Rule 1-041(E).

{16} While we conclude Chavez has not met the necessary standard to show an abuse of discretion under *Reynolds*, we also acknowledge that the district's court's actions in this case were far from exemplary. Chavez's request for a Rule 1-016 scheduling conference gave the district court discretion to enter a scheduling order. It is within the district court's authority, pursuant to Rule 1-016(B), to limit the time available to join other parties or amend the pleadings. Through a scheduling order, the district

court could have—and in our view should have—controlled the same subjects that the parties were left to resolve on their own. The objective behind scheduling and pretrial conferences is to expedite the disposition of the case and allow the court to establish control over the case and prevent the case from becoming protracted because of a lack of management. Rule 1-016(A)(1)-(2). That objective was not accomplished in this case. Rather than expediting the disposition of the case, the district court turned the parties away without giving any guidance or time frame to follow. Additionally, Rule 1-016(B) *requires* the district court to set a case for trial within eighteen months of the filing of the complaint where there is no pretrial scheduling order entered. *See* Rule 1-016(B). That was not done in this case.

{17} We also note that in *Howell v. Anaya*, this Court explicitly rejected the invitation to consider prejudice to a defendant when deciding a motion to dismiss for failure to prosecute. 1985-NMCA-019, ¶¶ 8-9, 102 N.M. 583, 698 P.2d 453. The district court in this case nonetheless considered prejudice suffered by the Board in making its conclusion to dismiss for failure to prosecute. Doing so was improper. As it was not the district court's sole basis for dismissing Chavez's case, however, the consideration of prejudice alone does not warrant reversal for abuse of discretion.

{18} Despite the district court's failings in this case, the burden of bringing a case to trial lies squarely on a plaintiff's shoulders. *Cottonwood Enters.*, 1989-NMSC-064, ¶ 11 (acknowledging that "a plaintiff has an affirmative duty to bring the case to a conclusion and cannot rest on motions for trial settings that are not being acted upon by the court"). Chavez failed to move his case toward a conclusion, and the district court's dismissal of Chavez's claims was in accord with Rule 1-041(E)(2). We affirm the district court's order.

{19} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

LINDA M. VANZI, Judge

1Martinez and Nieto's separate case had a trial date set prior to consolidation. [RP (33785) 139, 142] *See Cottonwood Enters. v. McAlpin*, 1989-NMSC-064, ¶ 14, 109 N.M. 78, 781 P.2d 1156 (acknowledging that the district court commits an abuse of discretion in dismissing a case where the plaintiff has obtained a trial setting).

2Although Chavez's brief asserts that he requested a scheduling order on January 9, 2013, the record reflects that Chavez actually filed a motion to reinstate. To that motion, he attached a proposed scheduling order pursuant to Local Rule 2-301. The motion stated an intent to file a separate request for a scheduling request upon reinstatement, in recognition of the court's preference for a different form of order under Rule 1-016. We therefore do not consider the January 9, 2013 motion a request for a Rule 1-016 scheduling conference.