

September 11, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21167
Summary Calendar

JACKIE SMITH,

Plaintiff-Appellant,

versus

TEXAS CHILDREN'S HOSPITAL;
UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-98-CV-2341

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

PER CURIAM:*

Jackie Smith appeals the district court's order that granted Texas Children's Hospital's motion filed pursuant to FED. R. CIV. P. 41(b) to dismiss the complaint for lack of prosecution. Smith asserts that the delay was not the result of her conduct, was not intentional, and did not cause the defendants prejudice. Smith argues that the delay was due to confusion caused by Texas Children's Hospital's procedural maneuvers and the inability to

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

locate the record and determine the status of the case. Smith asserts that the district court did not issue a warning prior to the dismissal and that the dismissal with prejudice is a harsh result.

This court reviews a FED. R. CIV. P. 41(b) dismissal for an abuse of discretion. Dorsey v. Scott Wetzel Servs., 84 F.3d 170, 171 (5th Cir. 1996). A FED. R. CIV. P. 41(b) dismissal may be affirmed "only upon a showing of a clear record of delay or contumacious conduct by the plaintiff, . . . and where lesser sanctions would not serve the best interest of justice." Id.

A stay was ordered in the proceedings pending resolution of Texas Children's Hospital's appeal in No. H-94-2723. The opinion dismissing that appeal was issued in June 1999. The instant case, however, remained inactive until April 2002.

Smith does not allege that she did not receive notice of this court's 1999 opinion dismissing Texas Children's Hospital's appeal in No. H-94-2723. Smith has been represented by the same attorney in this matter since 1994. Smith has not shown that she attempted to prosecute her case diligently from June 1999 to April 2002. Accordingly, the district court's order dismissing the action is AFFIRMED. Texas Children's Hospital's motion to strike affidavit is GRANTED; the requests for costs and fees are DENIED.