IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1209

THANKSGIVING TOWER PARTNERS, ET AL.,

Plaintiffs-Counter Defendants-Appellees,

versus

ANROS THANKSGIVING PARTNERS, a California Limited Partnership,

Defendant-Counter Plaintiff-Third Party Plaintiff-Appellant,

and

ANTHONY T.C. GAW,

Defendant-Appellant,

versus

BEAR STEARNS REAL ESTATE GROUP, INC.,

Third Party Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas
(CA3-89-0399-F)

(February 5, 1993)

Before KING, WILLIAMS, and SMITH, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Anros appeals the District Court's decision to dismiss with prejudice as a sanction its counterclaim and third-party claim for violation of a court order. Anros also appeals the District Court's denial of a Motion to Reconsider filed pursuant to Federal Rule of Civil Procedure 60(b). After carefully reviewing the record, we hold that the District Court abused its discretion in dismissing the claims and in denying the Rule 60(b) motion. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PRIOR PROCEEDINGS

The Underlying Dispute

The Bear Stearns Companies, Inc. (Bear Stearns) is a New York corporation doing business in Texas. Bear Stearns invests in commercial real estate. In April 1988, Bear Stearns completed months of negotiations and entered into a contract to purchase an 80.5 percent condominium interest in Thanksgiving Tower, located in Dallas, Texas. A Texas limited partnership affiliated with Bear Stearns and named BSC Thanksgiving Partners, Ltd. (BSC) and a Delaware limited partnership named TMC Thanksgiving Partners, L.P. (TMC) formed a Texas general partnership named Thanksgiving Tower Partners (TTP) for the purpose of purchasing Thanksgiving Tower. TTP in turn sought an additional partner to contribute funds toward the purchase of the property.

Anros Thanksgiving Partners (Anros) is a California limited partnership that invests in commercial real estate. Anros's general partner is Anthony T.C. Gaw, who was born in China, but who is now a U.S. citizen living in Hong Kong. TTP solicited Anros to become a partner in the Thanksgiving Tower acquisition, and in June 1988 Anros agreed to contribute up to fifty million dollars in return for an eighty percent general partnership interest in TTP.

Under the agreement, Anros was to secure its obligations with a five million dollar letter of credit. If for any reason Anros failed to contribute its share of the purchase price by the funding deadline, TTP would be entitled to draw upon the letter of credit and to retain the proceeds as liquidated damages. Anros was unable to provide the letter of credit by the June 1988 date set by the agreement. Representatives of both TTP and Anros met in San Francisco to iron out their difficulties, and they currently dispute what agreements were reached at that meeting.

When Anros finally did provide a letter of credit, TTP objected to its form and required that Citibank confirm the letter. Citibank did so. As the parties approached the closing date, Anros complained of difficulty acquiring funds for its contribution and requested several extensions. Anros further maintained that TTP had agreed orally in San Francisco that BSC and TMC would fund twenty million dollars of Anros's fifty million dollar obligation. Just before closing the purchase of Thanksgiving Tower, TTP

declared that Anros had defaulted by failing to fund the closing contribution by the required deadline. TTP then presented the five million dollar letter of credit to Citibank, and it applied the proceeds in the manner provided in the parties' written agreement.

After TTP acquired Thanksgiving Tower, Anros contended on several occasions that TTP had drawn wrongfully on the letter of credit and should return the five million dollars to Anros. In response, on February 7, 1989, TTP, BSC, and TMC sought a declaratory judgment stating that TTP had drawn properly upon the letter of credit. Anros counterclaimed against the plaintiffs and impleaded Bear Stearns, claiming among other things breach of contract, interference with business relationship, fraud, negligent misrepresentation, breach of fiduciary duty, and promissory estoppel.

Circumstances Leading to this Appeal

The District Court established a Pretrial Scheduling Order, which required all discovery to be conducted by December 29, 1989. The parties were unable to meet the deadline. In particular, problems arose with respect to taking Gaw's deposition, to holding court-ordered mediation, and to obtaining new counsel after Anros's former counsel had withdrawn.

Numerous delays developed during the attempt to take Gaw's deposition. Although Gaw lives and works primarily in Hong Kong,

he makes frequent trips to Anros's San Francisco office. The parties thus agreed to schedule Gaw's deposition to take place on his next trip to San Francisco, set originally for June 27 and 28, 1989. The deposition did not actually occur, however, until February 1990. Gaw postponed the deposition six times for business reasons. He claims that his trip to San Francisco was delayed both because of the 1989 riots in China that led to a crisis in the Hong Kong business community and because of the 1989 San Francisco earthquake. After the sixth delay, Gaw informed the plaintiffs that he would be available for a deposition in Hong Kong.

In December 1989, the plaintiffs filed a motion to compel Gaw's appearance and requested sanctions. U. S. Magistrate Sanderson issued an Order to Compel Appearance for Deposition dated January 12, 1990, in which he reprimanded Gaw for delaying his deposition and warned that violation of the Order would support the "most extreme sanctions." As a result, Gaw appeared for a three-day deposition in February 1990. The plaintiffs charge that during the taking of the deposition, Gaw refused to answer a few apparently relevant questions, refused to disclose the identity of witnesses who could prove another party had lied, and insulted an opposing attorney. No action was taken to support these charges.

In November 1989, the District Court had also ordered the parties to proceed to mediation. The court later became upset about several delays in the mediation, which did not take place

until November 1990. The parties had mutually agreed to postpone the initial mediation date to allow for further discovery. Anros then requested a second delay in the mediation because its former counsel had withdrawn and new counsel needed additional time to prepare. The final delay was precipitated by the plaintiffs' counsel, who postponed two depositions that Anros needed to take before proceeding to mediation.

A final stumbling block to meeting pretrial deadlines was the fact that Anros went through three sets of attorneys. In June 1990, Anros's first attorney filed a motion to withdraw, claiming that Gaw had failed to cooperate, had not made himself available until February 1990 for deposition, and had refused to pay attorneys' fees. On June 19, 1990, Judge Porter granted the motion conditioned upon the requirement that Anros obtain substitute counsel within thirty days. Anros did not obtain a new attorney until seven days past the deadline.

On April 15, 1991, Anros's second counsel withdrew, citing Anros's failure to pay attorneys' fees. On May 30, 1991, the court granted the motion to withdraw on the condition that Anros obtain new counsel by June 29, 1991. The court warned that failure to comply with the order might result in dismissal or entry of a default judgment. Anros finally obtained new counsel, but not until July 24, 1991, nearly a month after the prescribed deadline.

As Anros's general partner, Gaw undertook the task of finding new counsel for Anros. Gaw presents several reasons in this second replacement of counsel for his failure to obtain a new attorney for Anros by June 29. He did not receive the order by mail until mid-June, and he contacted an Anros attorney who was on vacation until late June. He then approached another attorney who could not represent Anros because his firm had a conflict of interest. Gaw informed the District Court that he was having trouble hiring a new attorney for Anros. On July 18, 1991, he learned that the firm of his choice had resolved its conflict and could represent Anros.

While Gaw was attempting to locate a new attorney for Anros, the plaintiffs filed an amended complaint and a motion to dismiss Anros's counterclaim and third-party complaint. The amended complaint added for the first time claims for actual damages of fifteen million dollars and punitive damages of fifty million. The plaintiffs also added Gaw as an individual defendant. The plaintiffs' motion to dismiss asked the District Court to strike Anros's counterclaim and third-party complaint as a sanction for Anros's disregard of the court's orders. In its response, Anros's new counsel offered no explanation for Anros's conduct, merely asserting that the court should impose lesser sanctions. On September 23, 1991, the District Court dismissed with prejudice and without a hearing Anros's counterclaim and third-party complaint.

On October 7, 1991, Anros filed a Motion for Relief from the Order of Dismissal pursuant to Federal Rule of Civil Procedure 60(b)(1) and (6). On October 15, 1991, because of the serious illness of Judge Robert W. Porter, the case was transferred from his docket to the docket of Judge Jorge A. Solis. On January 24, 1992, the District Court, again without a hearing, denied Anros's request for reconsideration and relief from the order granting dismissal. The District Court certified as final the September 1991 order of dismissal and the January 1992 order denying reconsideration. Anros has timely appealed both orders.

II. DISCUSSION

Standard of Review

The District Court dismissed Anros's counterclaim and third-party complaint pursuant to Federal Rule of Civil Procedure 41(b). Although Anros was the defendant in the original action, Rule 41 applied because it also covers counterclaims, crossclaims, and third-party claims. We review an involuntary dismissal pursuant to Rule 41(b) under the abuse of discretion standard. Rogers v. Kroger Co., 669 F.2d 317, 320 (5th Cir. 1982). The District Court's denial of Anros's Rule 60(b) motion to reconsider and grant relief from the dismissal is also reviewed under the abuse of discretion standard. Williams v. Brown & Root, Inc., 828 F.2d 325, 328 (5th Cir. 1987).

Before considering whether the District Court was justified in granting the dismissal, however, we must first decide if six affidavits filed by Anros with its Rule 60(b) motion properly supplemented the record. The facts alleged in the affidavits were available to Anros when the plaintiffs moved for dismissal, but Anros did not present the evidence to the judge at that time. The plaintiffs argue that Rule 60(b) is not a vehicle for supplementing the record. Lelsz v. Kavanagh, 112 F.R.D. 367, 371 (N.D. Tex. 1986). Anros answers that a Rule 60(b) motion is an appropriate means to supplement the record. Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974). Each case is far short of strong authority on its facts.

The issue raised by the plaintiffs has been rarely litigated. It is proper to conclude, however, that the court has broad discretion to accept or reject such supplemental affidavits. See, e.g., Link v. Wabash R.R. Co., 370 U.S. 626, 635, 82 S.Ct. 1386, 1391, 8 L.Ed.2d 734 (1962); Williams v. Brown & Root, Inc., 828 F.2d 325, 329 (5th Cir. 1987). In the case before us, the District Court accepted and considered the six affidavits submitted by Anros. Their acceptance by the District Court was within its discretion. They are part of the record.

Dismissal

Rule 41(b) provides for involuntary dismissal of a claim when a party violates a court order. Nevertheless, dismissal with prejudice is a harsh sanction that is reserved for egregious cases. Under Rogers v. Kroger Co., 669 F.2d 317, 320 (5th Cir. 1982), involuntary dismissal with prejudice (or dismissal without prejudice of a claim that is time-barred) is appropriate only when there is also (1) a clear record of delay or contumacious conduct, and (2) a determination that lesser sanctions would not serve the best interests of justice.

1. Delay or Contumacious Conduct

The plaintiffs filed their motion to dismiss because of Anros's and Gaw's alleged three instances of misbehavior. First, Anros was late in complying with the court's two orders to retain new counsel within thirty days. Second, Gaw postponed his deposition six times in six months. Third, Anros contributed to the delay of the court-ordered mediation. In sum, the plaintiffs contend that Anros violated four court orders.

In dismissing Anros's claims, however, the District Court relied basically upon the violation of only one court order: Anros's failure to comply within the time limit with the District Court's 1991 order to obtain new counsel. This was the order involving the second withdrawal of counsel. To justify imposing the harsh sanction of dismissal with prejudice, the District Court

also added, however, that it had faced a pattern of delay and contumacious conduct in Anros's postponement of Gaw's depositions, in the rescheduling of the court-ordered mediation, and in the late appearance of Anros's second counsel. Then, in considering the Rule 60(b) motion, the District Court found no abuse of discretion and upheld the dismissal.

On appeal Anros concedes that it deserved sanctions for its defaults, but it contends that dismissal was too harsh a punishment under the circumstances. After a thorough review of the record, we agree with Anros that the dismissal with prejudice was too extreme a sanction.

To justify its dismissal with prejudice of Anros's claims for failure to comply with the May 1991 order, the District Court looked to Anros's and Gaw's other behavior to find a pattern of delay or contumacious conduct. A review of the record reveals that on five occasions the District Court warned the parties that sanctions could result from a failure to comply with a court order, but it always mentioned alternatives to dismissal as well. The first warning seems to have been a part of Judge Porter's standard pretrial scheduling order. It referred only to the availability of sanctions without limiting or enumerating them.

The second warning from the magistrate related to Gaw's failure to make himself available for a deposition. The magistrate

said that the facts warranted "the extreme sanction of striking Defendant's pleadings and entering default judgment in Plaintiffs' favor." But the magistrate went on to say that, because Gaw had declared himself available for a deposition in this country, he would simply order the appearance. He further stated that if Gaw failed to appear, the noncompliance would "clearly support the most extreme sanctions being imposed." Anros complied with this order by producing Gaw for a three-day deposition conducted in San Francisco in February 1990. Although the plaintiffs argue that Gaw violated the court order by refusing to answer several questions, Gaw nevertheless complied with the order by appearing and answering most of the questions over a three-day period. Moreover, the plaintiffs neither filed a motion to compel answers nor further deposed Gaw when he offered to submit to more questioning.

Judge Porter's June 1990 order contained a third warning. The order permitted withdrawal of Anros's counsel on condition that new counsel be hired within thirty days. This is the first of two such orders, and it referred to possible sanctions for failure to comply as "dismissal of this action, entry of default, or other appropriate sanction." Anros's new counsel filed an appearance seven days after the court's deadline. The court imposed no sanctions.

The fourth warning occurred when the District Court ordered the mediation. The order referred to sanctions for noncompliance

as “including monetary sanctions, the striking of pleadings, entry of default judgment, or the dismissal of this case from the court's docket.” This threat of sanctions was address to “all parties and counsel.” The parties proceeded to mediation in November 1990, but failed to settle the suit.

The fifth warning came in Judge Porter's order permitting the second replacement of counsel within a thirty day time limit. This order also specifically referred to sanctions. It said: “Failure to comply with this order may result in dismissal of this action, entry of default, or other appropriate sanction as to the noncomplying party.” New counsel filed an appearance twenty-five days after the court's deadline. By this time, Gaw was in the United States indefinitely and had offered to submit to further deposition questioning.

In determining whether a party's behavior constitutes the requisite pattern of clear delay or contumacious conduct, we have held that dismissal is proper only when the party's noncompliance is due to intentional misconduct. McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 557 (5th Cir. 1981). Although Anros's and Gaw's behavior contributed to delay in the suit, their defaults do not suggest the intentional misconduct required to sustain the involuntary dismissal with prejudice.

First, although Anros failed to retain new counsel within thirty days of the court's May 1991 order, it did retain new counsel shortly thereafter. Additionally, Anros claims that it did not willfully disregard the order. Rather, Anros was unable to comply promptly because Gaw was in Hong Kong, Gaw received the order approximately two weeks before the deadline, and the counsel of Gaw's choice had a conflict that initially precluded it from representing Anros. Gaw also informed the court shortly before the deadline that he was attempting to retain the counsel of his choice, but that he had run into some difficulties. Despite those problems, less than two months after the order the counsel of Gaw's choice had cleared up the conflict and filed an appearance, indicating Anros's and Gaw's readiness to proceed.

This court has acknowledged the difficulties faced by parties who live out of the country. In Connolly v. Papachristid Shipping Ltd., 504 F.2d 917, 920 (5th Cir. 1974), the district court dismissed with prejudice a seaman's Jones Act suit when the seaman's new counsel filed an appearance one day late. After Connolly's original attorney had withdrawn, the court gave him two weeks to find new counsel in Alabama; Connolly was a resident of the British West Indies. In reversing the district court's dismissal, we noted, “We cannot ignore the practical realities that a foreign national who pursues the occupation of seaman might find it difficult to comply with an order giving him only a very few days to find new counsel in Mobile, Alabama when he receives it in

the British West Indies." More recently we reversed a dismissal of an employment discrimination claim when the plaintiffs' two-year absence from the country made it difficult for them to demand prompt prosecution by their attorney. Hildebrand v. Honeywell, Inc., 622 F.2d 179, 181-82 (5th Cir. 1980). Gaw's presence in Hong Kong, the short time he had to locate new counsel, the timely notice he gave to the court that he was actively seeking new counsel, and the fact that not long after the deadline the attorney of his choice filed an appearance all suggest that Anros and Gaw did not willfully disregard the court's order.

Second, Anros's postponement of Gaw's deposition does not constitute a pattern of contumacious conduct. Gaw was on business in Hong Kong and had scheduled his deposition to occur upon an upcoming trip to San Francisco. For various reasons, however, he postponed his trip to San Francisco six times. We have affirmed dismissal where a party has failed to appear at deposition. See, e.g., Hepperle v. Johnston, 590 F.2d 609 (5th Cir. 1979) (plaintiff failed to appear for deposition four times in five months, disobeying three orders to appear). Instead of failing to appear, however, Anros contacted the plaintiffs in advance on each occasion to reschedule the deposition. Additionally, Gaw postponed his trip to San Francisco because of business problems and some events beyond his control. Finally, the frustrated plaintiffs filed a motion to compel Gaw's appearance, which the court granted. Gaw duly appeared. This suit has been pending for approximately four

years; a delay of six months, which was then cured, does not establish a pattern of delay or contumacious conduct.

Third, Anros's contribution to the delay in court-ordered mediation does not establish the contumacious conduct that calls for involuntary dismissal. The record shows that both parties were responsible for delaying the mediation. On November 20, 1989, the District Court ordered the parties to mediate their dispute. After initially scheduling the mediation, the parties agreed (without obtaining court approval) to postpone it until after further discovery. Anros then requested a second postponement because it had just retained new counsel, who was unfamiliar with the case. Finally, the parties agreed to reschedule the mediation a third time because the plaintiffs had postponed Anros's deposition of two of the plaintiffs' witnesses, and Anros wanted to complete those depositions before proceeding to mediation. When the mediation actually took place, the plaintiffs apparently violated the court's order by sending a representative who lacked full authority to settle the case.

Anros's and Gaw's behavior contributed to delay in the case and clearly was negligent and improper. See McGowan, 659 F.2d at 554 (reversing dismissal when plaintiffs were merely negligent by failing to reimburse defendants for copying costs, by filing a pretrial order six days late, by failing to exchange exhibits, and by filing proposed findings of fact and conclusions of law forty-

three days late). Nevertheless, their actions do not amount to the kind of willful misconduct that justifies an involuntary dismissal. Examples of willful misconduct are found in the following cases. In Callip v. Harris County Child Welfare Department, 757 F.2d 1513 (5th Cir. 1985), we affirmed a dismissal when the plaintiff's attorney had failed to comply with nine deadlines, especially after receiving extensions in five instances. In Lopez v. Aransas County Independent School District, 570 F.2d 541 (5th Cir. 1978), dismissal was affirmed when the plaintiff's attorney had announced ready, then moved for a continuance on the eve of trial. When his motion was denied, the plaintiff's attorney refused to continue with the trial.

2. Lesser Sanctions

In addition to finding a pattern of delay or contumacious conduct, the district court must find that lesser sanctions were or would be ineffective. Rogers v. Kroger Co., 669 F.2d 317, 320 (5th Cir. 1982). Moreover, the court must make these findings on the record. Boudwin v. Graystone Ins. Co., Ltd., 756 F.2d 399, 401 (5th Cir. 1985). The District Court did not make such findings in its dismissal order. We have "excused the absence of express findings concerning alternative sanctions when the district court had previously imposed lesser sanctions and had issued an ultimatum." S.E.C. v. First Houston Capital Resources Fund, Inc., 979 F.2d 380, 383 (5th Cir. 1992) (citing Callip, 757 F.2d at 1521-22). Such a sequence had not here taken place with Anros.

A court has a wide range of lesser sanctions from which to choose. See, e.g., Price v. McGlathery, 792 F.2d 472, 475 (5th Cir. 1986) (stay, dismissal and reinstatement); Callip, 757 F.2d at 1522 (award of attorneys' fees); Boudwin, 756 F.2d at 401 (assessment of fines, costs, or damages); McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 558 (5th Cir. 1981) (fining the party or disciplining the attorney); Hepperle v. Johnston, 590 F.2d 609, 613 (5th Cir. 1979) (warning); Lopez v. Aransas County Indep. Sch. Dist., 570 F.2d 541, 544 (5th Cir. 1978) (conditional reinstatement). The District Court granted the plaintiffs' motion to compel Gaw to make himself available for a deposition and warned of dismissal if Gaw violated the order. Gaw complied. The District Court also issued a strong warning to all parties when it ordered mediation in 1990. Gaw and Anros again complied. When the court ordered Anros to retain new counsel within thirty days, in both instances new counsel filed late appearances. The court imposed no sanction the first time, and all problems were cured by the time the court dismissed the action for the second violation.

Anros's case is not the same as that in Callip. Each of the District Court's warnings was met with compliance by the parties. No warning, ultimatum, and subsequent default occurred here. The District Court properly then should have considered lesser sanctions before dismissing Anros's claims. The District Court also considered and denied Anros's Rule 60(b) motion for reconsideration. Because Anros had supplemented the record with

affidavits explaining the reasons why it took more than thirty days to retain new counsel, and because Anros's and Gaw's behavior did not rise to the level of willful misconduct, the District Court erred in denying the motion.

We, of course, do not excuse Anros's and Gaw's behavior. But we find that the circumstances of the case do not call for them to lose their claims. Additionally, we see of significant importance that our holding works no injustice on the plaintiffs. First, at no time throughout the proceedings did the District Court set a trial date and then postpone it because of a party's delaying tactics, as occurred in Lopez. Second, at least five million dollars are at issue in this case, and the plaintiffs' claim will continue to trial regardless. Third, just before the court dismissed Anros's claims, the plaintiffs filed an amended complaint that for the first time named Gaw as an individual defendant and requested both compensatory damages of fifteen million dollars and punitive damages of fifty million. Thus the parties necessarily will be pursuing discovery on the amended claims. Fourth, by the time the District Court ruled on the motion to dismiss, Anros and Gaw had cured the behavior complained of in the motion. Dismissal was improper when Anros and Gaw were then prosecuting their claims with diligence. See, e.g., Appelbaum v. Ceres Land Co., 546 F. Supp. 17, 21-22 (D. Minn. 1981), order aff'd, 687 F.2d 261 (8th Cir. 1982) and United States v. Myers, 38 F.R.D. 194, 197 (N.D. Cal. 1964).

Despite our holding that the District Court abused its discretion in dismissing Anros's claims and in denying the motion to reconsider, we stress that the court showed great patience and may properly sanction Anros's and Gaw's negligent behavior. On remand, the District Court may use its discretion to impose on Anros those reasonable sanctions, short of dismissal, that it finds appropriate for Anros's past behavior. The district court, of course, may consider dismissal as a sanction for future misconduct by following the guides set out in this opinion.

Hearing

The District Court did not hold a hearing prior to either the dismissal or the denial of Anros's Rule 60(b) motion. Anros alleges this is an error requiring reversal. It claims a party subject to sanctions must be afforded fair notice and an opportunity for a hearing on the record. Roadway Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980). There is no such requirement. In considering a dismissal under Rule 41(b), a district court need not hold an adversarial hearing when the parties and their attorneys know of the circumstances leading up to the dismissal. Link v. Wabash R.R. Co., 370 U.S. 626, 632, 82 S.Ct. 1386, 1389-90, 8 L.Ed.2d 734 (1962); Price v. McGlathery, 792 F.2d 472, 475 (5th Cir. 1986). In any event, because we are remanding the case for consideration of lesser sanctions, this issue is moot.

III. CONCLUSION

The record in this case does not reveal the clear pattern of delay or contumacious conduct necessary to justify an involuntary dismissal. The District Court also failed to give express consideration to lesser sanctions. We reverse the dismissal of Anros's counterclaim and third-party claim. We remand to the District Court for consideration of appropriate sanctions, short of dismissal of those claims.

REVERSED AND REMANDED.