UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1548
Summary Calendar

LORRAINE HASTINGS, AARON HASTINGS, and EQUISYSTEMS CALIFORNIA, INC.,

Plaintiffs-Appellants,

VERSUS

KENNETH LITTLEFIELD, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(CA4-89-357-A)

(March 11, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Lorraine Hastings and Aaron Hastings (the Hastings), *pro se*, and Equisystems California, Inc. (Equisystems), wholly owned by them, appeal the district court's dismissal of their action with prejudice, pursuant to Fed. R. Civ. P. 41(b). Finding no abuse of discretion, we **AFFIRM**.

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

The Hastings, through Equisystems, contracted with Security Trust Company of Arlington, Texas, to handle its secured credit card program. In 1988, the Texas Banking Department determined that Security Trust was under-capitalized and took control of it. On May 1, 1989, the Hastings and Equisystems filed suit in the Northern District of Texas, alleging that the Texas Banking Department attempted to blame the Hastings for the failure of the Security Trust and undertook a course of action that destroyed their business, thereby depriving them of their property without due process of law and damaging their personal reputations. Appellants also asserted supplemental state-law claims for tortious interference with business relations and slander.[2]

Appellants were represented by Donald Eugene Mason of Florida, who was not admitted to practice in the Northern District. On July 12, 1989, the district court granted their motion to proceed without local counsel. The defendants served a first set of interrogatories and first request for production of documents on April 27, 1990; but appellants refused to respond, despite numerous requests. On September 25, 1990, the defendants moved to compel; and the Hastings answered the interrogatories and produced the requested documents.

On November 21, 1990, the district court withdrew its earlier order permitting appellants (and their counsel from Florida) to appear without local counsel. This action was motivated, in part,

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[2] Appellants amended their complaint after the district court granted the defendants' motion to dismiss, and thereafter the court in part granted defendants' second motion to dismiss.

by conduct of appellants and that counsel in a parallel action involving the liquidation of Security Trust.[3] Although ordered to inform the court by December 15, 1990, of their future plans for representation, appellants failed to do so. As a result, the district court dismissed the action with prejudice on December 18, 1990, stating that "based on repeated failures by plaintiffs and their counsel to comply with orders of this court, plaintiffs' claims should be dismissed". Appellants timely appealed.

Upon reviewing the record, this court found only two major missteps: appellants' failure to respond to interrogatories and to comply with the November 21 order. ***Hastings v. Littlefield***, 946 F.2d 892 (5th Cir. Oct. 28, 1991) (unpublished). Concerning the former, our court held that the conduct did not reflect a pattern of abuse or neglect of the discovery orders and therefore could not form the basis for involuntary dismissal. Concerning the latter, we held that although the failure to obtain local counsel could justify dismissal, it was not warranted under the facts. This court stressed that "disregard of one order does not reveal a clear

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[3] The order stated:

> During a pretrial conference held in Civil Action No. CA4-89-482-A on November 20, 1990, the Court's attention was drawn to the fact that the plaintiffs in this Civil Action No. [CA]4-89-357-A are represented by the same counsel who is representing two of them as defendants in Civil Action No. CA4-89-482-A. In view of the conduct of such counsel and such parties in Civil Action No. CA4-89-482-A and the fact that such counsel is not admitted to practice before this Court, the Court hereby sets aside effective December 5, 1990, the Court's order of July 12, 1989....

pattern of delay by the plaintiffs"; nor does it "rise to that level of disregard for the directives of the court we have found warrants the extreme sanction of dismissal". In addition, we emphasized that the district court did not warn that failure to respond might result in dismissal; and, the order was not "of such a critical nature that failure to respond merited dismissal without" such a warning. Accordingly, concluding that "the wide variety of lesser sanctions to which district courts often have resorted before dismissing, would have been a more appropriate first step toward reminding the plaintiffs of their obligations to the orderly administration of justice",[4] we reversed and remanded, stating that "[t]he Hastings deserve *one more chance* in this case to show that they can proceed with their lawsuit". (Emphasis added.)

On remand, the district court issued an order on October 31, 1991, informing the Hastings that, until they filed an appropriate written designation of counsel with the district clerk and complied with Loc. R. 13.4(a)(1), the court considered them proceeding *pro se*. But, because the corporate plaintiff, Equisystems, could not appear in that capacity, it was ordered to file a designation of counsel no later than November 22, 1991, in compliance with the

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[4] We also expressed concern that the district court based its decision, in part, on the conduct of appellants and their counsel in the parallel case. We stated that "[w]hile we can understand the district judge's exasperation with the Hastings's conduct in the Security Trust case, we cannot countenance dismissal of this entirely separate action based on that conduct".

local rule. On November 22, 1991, local counsel appeared for Equisystems and the Hastings.

On April 13, 1992, appellants' lead (non-local) counsel moved to withdraw, citing his retirement from the practice of law three months earlier. He informed the court, by letter on April 2, 1992, that he had notified appellants of his intent to withdraw. Appellants opposed the motion. Four days later, on April 20, 1992, appellants' local counsel also moved to withdraw, stating that he lacked the desire and experience to serve as lead counsel.[5]

The district court held a settlement conference on May 1, 1992, at which it also heard the motions to withdraw. Appellants' lead counsel did not appear at the hearing, despite the court's orders of April 10 and 16, 1992; accordingly, the court held his motion to withdraw in abeyance.[6] The court ordered that Milner be withdrawn as local counsel as of May 7, 1992, and that "[o]n or before Thursday, May 7, 1992, plaintiffs shall retain new local counsel, who shall file an entry of appearance on or before that

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[5] Local counsel informed the court that "both Mr. Mason (lead counsel) and Plaintiffs knew that he had a predominantly criminal practice and did not have the requisite experience to serve as lead counsel in the case" and that he "agreed to serve as local counsel on the basis of Mr. Mason's express representations that he (Mr. Mason) would assume primary responsibility for every aspect of the litigation...."

[6] On April 22, 1992, lead counsel filed a request to reschedule the settlement conference, but the motion was not in compliance with Loc. R. 5 and 2.1(c) and therefore was stricken by the district court. Counsel later explained that he was unable to attend the May 1 conference because riots erupted in Los Angeles on April 29.

date".[7] The court authorized defendants to serve notice of depositions on local counsel Milner, and informed the parties that it expected the depositions to proceed as noticed. An order to this effect was signed on May 5, 1992, in which the court warned appellants that "[f]ailure to comply with the terms of this order will result in the imposition of sanctions, including dismissal of plaintiffs' claims without further notice".

That May 7, appellants, through lead counsel, filed a motion for a protective order preventing their being deposed on May 11 and 12. Counsel asserted that it was "impossible" for them to replace local counsel in the ordered short time frame, and that, by order of the court, he could not represent them at the depositions without local counsel. He deemed the court's order to obtain counsel by May 7 to be "arbitrary, unreasonable and an abuse of

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[7] The court explained,

> The court is requiring that plaintiffs have local counsel because of problems experienced with plaintiffs' counsel, Donald Eugene Mason. Mr. Mason has demonstrated that he is not familiar with the Local Rules of the United States District Court for the Northern District of Texas by attempting to file documents not in compliance therewith. Additionally, Mr. Mason failed to appear at the May 1, 1992, hearing as ordered by the court. At the hearing, plaintiffs and Christopher Lee Milner informed the court of other troubles that they had experienced in dealing with Mr. Mason, especially in attempting to communicate with him. The court is not requiring that defendants' counsel retain local counsel because the court has not experienced any difficulty in dealing with defendants' counsel.

discretion". Counsel also maintained that defendants' deposition notice failed to comply with Fed. R. Civ. P. 34.

On May 8, the court denied appellants' motion, but granted them an extension until May 15, to obtain local counsel. It warned that "[f]ailure to timely designate local counsel *will* result in the dismissal of plaintiffs' claims without further notice". (Emphasis added.) The same day, the court struck a "contingent" motion by the Hastings to proceed *pro se* because of their failure to comply with Loc. R. 5 and 2.1(c).[8]

The appellants did not attend their depositions noticed for May 11 and 12. They also failed to designate local counsel by May 15, as ordered by the court; nor did they apprise the court of their difficulties, if any, in obtaining local counsel. Although they contend that they did not receive notice of the striking of their "contingent" motion to proceed *pro se* until May 15, they did not attempt to refile that motion in conformance with the local rules.

Accordingly, on May 20, the court dismissed appellants' complaint with prejudice, noting that "there has been no designation of anyone to replace Christopher Lee Milner as local counsel", and concluding that it had "no choice but to dismiss this action as the court had previously advised the parties it would do in the event of failure to timely designate local counsel".[9]

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[8] The Hastings had not included a certificate of conference, a proposed order, or the requisite number of copies.

[9] The court also took note of defendants' motion for sanctions filed on May 19, 1992, for (1) appellants' failure to attend

II.

Under Rule 41(b), a district court, on defendant's motion, may dismiss an action for failure to prosecute or comply with its orders;[10] and, of course, it may do so *sua sponte*. *See* ***Link v. Wabash R.R. Co.***, 370 U.S. 626, 630-31 (1962) (holding that court's authority to act on its own motion is based on the courts' power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases").[11] We review Rule 41(b) dismissals only for abuse of discretion, ***Berry v. Cigna/RSI-Cigna***, 975 F.2d 1188, 1191 (5th Cir. 1992); however, because of the severity of the sanction, we affirm only where (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not "serve the best interests of justice" or the record shows

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depositions on May 11 and 12; (2) filing of incomplete answers to interrogatories on or about March 31, 1992, in response to defendants' motion to compel granted on March 6, 1992; and (3) filing partial answers on October 10, 1990, in response to defendants' motion to compel granted on September 25, 1990. The court stated that, "[i]f the recitations in the motion for sanctions are factually correct, those facts probably would provide independent basis for dismissal of this action in its entirety". It emphasized, however, that its dismissal was not based on the motion for sanctions.

[10] Fed. R. Civ. P. 41(b) provides:

> (b) Involuntary Dismissal: Effect Thereof.... For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against the defendant.

[11] Although the district court did not state that its order was pursuant to Rule 41(b), we treat a dismissal with prejudice for failure to comply with orders of the court as such a dismissal.

that the district court employed lesser sanctions that proved to be futile. ***Callip v. Harris County Child Welfare Dept.***, 757 F.2d 1513, 1519-21 (5th Cir. 1985) (internal citations and quotations omitted). In addition, in close cases, we also look for proof of one of the following aggravating factors: "(1) delay caused by [the] plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct". ***Berry***, 975 F.2d at 1191 (quoting ***Price v. McGlathery***, 792 F.2d 472, 474 (5th Cir. 1986)). This case, however, does not require examining for such additional, aggravating factors.

Appellants contend that the district court abused its discretion in dismissing with prejudice. They maintain that the record does not contain evidence of contumacious conduct, and that the court failed to consider lesser sanctions. We disagree.

Appellants acted with blatant disregard to the orders of the district court, as well as this court. In our first review, we determined that their failure to obtain local counsel did not merit dismissal with prejudice; but, rather, they deserved "one more chance" to prosecute their action. Nevertheless, in the same factual context, appellants once again failed to comply with an order to obtain local counsel, despite the district court's warning that failure to do so could result in dismissal with prejudice. Rather than explain through affidavit their difficulty in obtaining local counsel, appellants simply attacked the order as "arbitrary". Continuing to exercise patience, the district court granted them a seven-day extension but, this time, warned that failure to comply

would result in such dismissal. Appellants still failed to respond. And, in the five days subsequent to the deadline, they made no effort to provide an explanation for their failure to obtain counsel.

Accordingly, this is not a case where the record reflects a reasonable attempt to comply with orders to obtain local counsel. ***S**ee* ***Cohen v. Carnival Cruise Lines, Inc.***, 782 F.2d 923, 925 (11th Cir. 1986) (finding no willful contempt where appellant's counsel filed an affidavit describing efforts to obtain counsel, advised court in motion for rehearing that she had obtained local counsel, and continued to diligently prosecute her case); ***Donnelly v. Johns-Manville Sales Corp.***, 677 F.2d 339, 343 (3d Cir. 1982) (holding plaintiff's counsel did not engage in contumacious conduct where the record contained evidence of efforts to locate local counsel within the necessary time); ***Connolly v. Papachristid Shipping Ltd.***, 504 F.2d 917, 920 (5th Cir. 1974) (holding dismissal for failure to timely secure local counsel improper where plaintiff made substantial efforts to comply with an order to secure new local counsel).

Rather, appellants' disregard for court orders resembles that of the *pro se* plaintiff in ***Hulsey v. State of Tex.***, 929 F.2d 168, 171 (5th Cir. 1991). There, the district court ordered Hulsey to serve the state by serving its Secretary of State; and the court clerk sent Hulsey clear instructions on this process. Rather than comply, Hulsey moved to dismiss the order, arguing that he was not responsible for the error in service. The district court dismissed

Hulsey's claims against the state for failure to prosecute; and we affirmed, stating that Hulsey "disregarded a clear and reasonable court order" after the district court "not only allowed him a second chance at obtaining service but also instructed him on the proper procedure". ***Id.*** at 171. *See also* ***Bristol Petroleum Corp. v. Harris***, 901 F.2d 165, 167-68 (D.C. Cir. 1990) (holding no abuse of discretion for dismissal with prejudice where plaintiff displayed a lack of any effort to comply with an order to replace counsel).

Similarly, appellants were made more than well-aware of the importance of obtaining local counsel, and the consequences of their failure to do so; yet, the record reflects that no efforts were made to comply. Their request for an extension of time was based on an attack on the order as "arbitrary" and an "abuse of discretion". Nor do we agree with the Hastings that their unsuccessful attempt to file a motion to proceed *pro se* excuses their conduct. Even if they did not receive notice that their motion was stricken until May 15, the final deadline for compliance, they were aware on that day that they were in violation of court orders and that their suit was subject to dismissal; yet, they made no attempt to amend their motion or request for a continuance. We also find this contention unavailing, because we refuse to distinguish the conduct of the Hastings from that of

Equisystems, the corporate plaintiff wholly owned by them. Accordingly, we conclude that the conduct was contumacious.[12]

As discussed, our inquiry does not end with finding contumacious conduct; the record must also indicate that lesser sanctions would not serve "the best interests of justice". Because the district court did not expressly determine that alternative sanctions would not be sufficient to prompt diligent prosecution, we can affirm only if "the record reveals that the district court employed lesser sanctions prior to dismissal ... that in fact proved to be futile". ***Callip***, 757 F.2d at 1521. We have held, however, that where "`plaintiff was fully and repeatedly apprised of the possible imposition of the ... sanction [of dismissal with prejudice],' it was not necessary for the district court to consider `other possible sanctions, such as conditional orders of dismissal or disciplinary action against the attorney'". ***Id.*** (quoting ***Ramsay v. Bailey***, 531 F.2d 706, 709 n.2 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977)). After having earlier had their case dismissed, then reinstated on appeal, but with the equivalent of a warning by this court, appellants received at least two warnings from the district court that failure to comply may result in dismissal with prejudice. Nonetheless, they failed to comply, or even provide justification for non-compliance.

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[12] The district court based its dismissal solely on appellants' failure to obtain local counsel. As discussed above, we agree. Therefore, we need not consider additional instances of possible improper conduct contained in the record, such as, (1) failure of appellants' counsel to attend the May 1 conference; (2) failure of appellants to attend their depositions; and (3) failure to timely respond to interrogatories.

Accordingly, the failure to impose alternative sanctions was not an abuse of discretion.

In addition, and although, as noted, it is not necessary to examine additional, aggravating factors, we disagree with appellants' contention that they should not be held responsible for the failure to obtain counsel, or that this failure cannot be characterized as intentional. Appellants were responsible for obtaining local counsel, or, at a minimum, plausibly and promptly accounting for their inability to do so; and they were well-aware of the possibility of dismissal. *See* ***Bristol***, 901 F.2d at 167-68 (stating that where plaintiff was aware of the need to retain new counsel and was on notice for at least a week that case would be dismissed for failure to do so, plaintiff cannot be said to be a victim of the sins of her attorney). Moreover, because we have no indication in the record that appellants made any reasonable effort to obtain local counsel, we view their non-compliance as intentional.[13]

III.

[13] Appellants contend that their conduct should not be viewed as intentional because the district court, in its order of October 31, 1991, stated that it assumed that the Hastings were proceeding *pro se*. This contention is without merit. The court's assumption no longer applied once the Hastings obtained local counsel on November 22, 1991. And, the court clearly directed its subsequent orders to replace local counsel toward both the Hastings and Equisystems. In so doing, it did not prohibit the Hastings from proceeding *pro se* "in violation of their constitutional rights", as the Hastings contend; rather, the court directed that they obtain local counsel so long as they continued to be represented by lead counsel.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.