

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-1736  
Summary Calendar

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WINSTON LEE, Individually and on Behalf  
of the Estate of ALYSON LEE,

Plaintiff-Appellant,

VERSUS

DELTA AIRLINES, INC.,

Defendant,

RON ALLEN, C.A. SMITH, HARRY ALGER, and JAMES KATER,

Defendants-Appellees.

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Appeal from the United States District Court  
For the Northern District of Texas  
(4:87 CV 97 A c/w 92 CV 245 & 92 CV 251)

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(March 9, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.  
PER CURIAM:<sup>1</sup>

Winston Lee appeals the district court's dismissal of his action against defendants without prejudice based on his failure to prosecute his case. Because the court's dismissal amounted to a dismissal with prejudice, we vacate the dismissal and remand to the district court to determine whether Rule 41(b) authorizes such a

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismissal.

I.

Winston Lee (appellant) filed suit against Delta Air Lines, Inc. in February 1987 and added Ron Allen, C.A. Smith, Harry Alger, and James Kater (individual defendants) in July 1987. The individual defendants filed a motion to dismiss for lack of personal jurisdiction in December 1987, and the district court denied the motion in April 1988. The individual defendants made no further appearance in the action. In July 1992, the district court dismissed the action against the defendants without notice and without prejudice pursuant to Rule 3.1(h) of the Local Rules of the Northern District of Texas. Rule 3.1(h) provides that when a plaintiff fails to move for default judgment after the defendant has been in default for a period of ninety days, the action will be summarily dismissed as to the defendant without prejudice and without notice.

II.

Appellant argues that the court's dismissal amounted to a dismissal with prejudice because the statute of limitations barred the refileing of his action. He then argues that the court abused its discretion because this case did not warrant the extreme sanction of dismissal with prejudice.

Although appellant's suit initially was timely filed within the two-year statute of limitations period for wrongful death actions, the dismissal of the suit prevented the tolling of the statute of limitations. Appellant is now time-barred from reasserting his claim against defendants. "Where further

litigation of [a] claim will be time-barred, a dismissal without prejudice is no less severe a sanction than a dismissal with prejudice, and the same standard of review is used." **Berry v. CIGNA/RSI-CIGNA**, 975 F.2d 1188, 1191 (5th Cir. 1992) (quoting **McGowan v. Faulkner Concrete Pipe Co.**, 659 F.2d 554, 556 (5th Cir. 1981)). We therefore agree that we must treat the dismissal of appellant's suit as a dismissal with prejudice for failure to prosecute. **Id.** at 1190-91. Fed. R. Civ. P. 41(b) authorizes a district court to involuntarily dismiss an action for failure to prosecute. **Id.** at 1190. We review a Rule 41(b) dismissal with prejudice for failure to prosecute under an abuse of discretion standard. **Id.** at 1191.

Because a dismissal with prejudice for failure to prosecute is an extreme sanction, we affirm such dismissals only when "(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 prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." **Id.** (footnotes and citations omitted). This Court also looks for the presence of at least one aggravating factor, such as delay caused by the plaintiff and not the attorney, actual prejudice to the defendant, or delay caused by intentional conduct. **Id.**

The district court's order of dismissal does not contain express findings on any of the factors recited above. Also, we find nothing in the record that clearly supports such a severe sanction. Accordingly, we remand the case to the district court to

make findings consistent with Rule 41(b) and **Berry** and to evaluate in light of these authorities whether appellant's case should be dismissed for failure to prosecute.

VACATED and REMANDED.