

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9553

Summary Calendar

DODIE DUYS, Jockey,

Plaintiff-Appellant,

versus

JEFFERSON DOWNS CORP. et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 89 1192 M

June 3, 1993

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Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

For the second time in sixteen months, Duys appeals a dismissal of her lawsuit for failing to comply with local rules of the district court. On her first appeal, we concluded that the record did not support a de facto dismissal with prejudice and remanded. The district court considered our opinion and once more dismissed the action. We now affirm.

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Duys, a licensed jockey, alleged that she was suspended from racing at Jefferson Downs on the basis of unfounded charges. In 1989, she sued the Downs, its officers, and state racing stewards alleging civil rights violations and tort claims. On December 6, 1990, the magistrate judge conducted a preliminary conference. A May 2, 1991, trial date was set. Deadlines were also set for the filing of witness lists, filing of exhibit lists, and exchange of expert reports. Duys was charged with preparing a Pre-Trial Order to be delivered to the court. Duys failed to comply with any of these pre-trial deadlines.

The Pre-Trial Order was due on April 30, 1991. When no Order had been filed by the end of May 1, the district court sua sponte dismissed Duys's lawsuit without prejudice.¹ We previously recognized that this dismissal without prejudice was "tantamount to a dismissal with prejudice due to the effect of prescription." Duys v. Jefferson Downs Corp., No. 91-3707, slip op. at 2 (5th Cir. Oct. 13, 1992) (unpublished opinion). When Duys appealed, we reversed because the district court abused its discretion by failing to indicate that it considered lesser sanctions or the existence of aggravating circumstances. We noted that the district court's original dismissal did not rely on the missed deadlines regarding witness lists, exhibit lists, and expert reports.

On remand, the district court noted its consideration of the reasons for our decision and once more dismissed Duys's claims.

¹The district court granted summary judgment for defendants on Duys's constitutional claims on April 19, 1991.

The district court stated that Duys's counsel "has caused several delays and has shown a disregard for the orders and rules of this Court." Intentional delay is an aggravating factor that may justify a dismissal under Rule 41, Fed. R. Civ. P. McNeal v. Papasan, 842 F.2d 787, 790 (5th Cir. 1988).

Supporting this ruling, defendants emphasize the pre-trial requirements that Duys did not meet before failing to file the Pre-Trial Order. Defendants note that, under local rules, each of these failures implicitly resulted in a lesser sanction. For example, as a result of the failure to file a witness list, Duys would be barred from presenting witnesses at trial without leave of court. Thus, defendants maintain, it was established that lesser sanctions were not sufficient to ensure Duys's compliance with the court's rules and orders.

We review a dismissal under Rule 41 for failing to comply with court orders for abuse of discretion. McCollough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988). We have vacated one dismissal and drawn the district court's attention to the proper factors to evaluate before applying dismissal as a sanction. Despite the terseness of the second dismissal order, we are persuaded that the district court has taken them into account. Defendants have directed us to facts in the record sufficient to conclude that the district court has acted within its discretion.

AFFIRMED.