

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1849
Conference Calendar

JEFFREY S. BALAWAJDER,

Plaintiff-Appellant,

versus

DON CARPENTER, Tarrant County
Sheriff, ET. AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:91-CV-640-A
- - - - -
(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

A district court may dismiss an action sua sponte for failure to prosecute or to comply with any order of the court. Fed. R. Civ. P. 41(b); McCullough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988). A reviewing court will reverse the district court only on finding an abuse of discretion. McCullough, 835 F.2d at 1127.

The district court did not state whether its dismissal operated with or without prejudice. The dismissal therefore

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

presumptively operates with prejudice. See Fed. R. Civ. P. 41(b). A reviewing court will ordinarily affirm a dismissal with prejudice only "(1) upon a showing of 'a clear record of delay or contumacious conduct by the plaintiff' and (2) when 'lesser sanctions would not serve the best interests of justice.'" Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1159 (5th Cir. 1985) (emphasis original) (citations omitted). Dismissal with prejudice is "[t]he ultimate sanction for the litigant," and "should be imposed only after full consideration of the likely effectiveness of less-stringent measures." Hornbuckle v. Arco Oil & Gas Co., 732 F.2d 1233, 1237 (5th Cir. 1984).

The district court did not abuse its discretion in dismissing Jeffrey Balawajder's complaint. Balawajder was warned by this Court that sanctions would be imposed if he used his lawsuit "to harass or vex the courts." Even after being given additional time by the district court in which to file an amended complaint and expressly warned, for a second time, that non-compliance could result in dismissal, Balawajder chose to ignore the court's order. In dismissing the lawsuit, the district court stated that it had considered alternative sanctions and determined that they would not be sufficient to prompt diligent prosecution. Under these circumstances evincing "delay or contumacious conduct," dismissal was the only reasonable alternative available to the court.

AFFIRMED.