

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1853

Summary Calendar

D. J. CHANCELLOR,

Plaintiff-Appellant,

v.

SHERIFF OF LUBBOCK COUNTY, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(5:93-CV-179-C)

(January 18, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

D. J. Chancellor appeals the district court's dismissal of his complaint pursuant to Federal Rule of Civil Procedure 41(b). We vacate the judgment of the district court and remand for further proceedings.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

D. J. Chancellor, proceeding pro se and in forma pauperis, filed a civil rights action against D. L. "Sonny" Keese, sheriff of Lubbock County, Texas, in the United States District Court for the Northern District of Texas. Chancellor, an inmate at the Lubbock County Jail and an amputee who uses an artificial leg, stated that he fell in the shower at the jail because the shower is not equipped with handrails. He alleged that this lack of handrails violated his rights under the Eighth Amendment. He also sought medical treatment for the back and hip injuries he allegedly sustained in the fall.

The district court determined that Chancellor's pleadings lacked "the factual specificity required to perform a meaningful review under 28 U.S.C. § 1915(d)" and on July 16, 1993, ordered Chancellor to amend his pleadings within twenty days to include specific facts and circumstances to support his claim. The district court also stated that Chancellor's failure to comply with its order within the specified time would result in the dismissal of Chancellor's complaint. Chancellor received the district court's order on July 26, 1993. Because Chancellor did not comply with the district court's order within twenty days as directed, the district court dismissed Chancellor's complaint on August 12, 1993. Chancellor then filed a timely notice of appeal.

II.

Chancellor implicitly argues that the district court abused its discretion in dismissing his complaint under Federal Rule of Civil Procedure 41(b). We agree.

Rule 41(b) allows the district court to dismiss an action upon the motion of a defendant, or upon its own motion, for failure to prosecute or for failure to comply with a court order. See FED. R. CIV. P. 41(b); Berry v. Cigna/RSI-CIGNA, 975 F.2d 1188, 1191 (5th Cir. 1992); McCullough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988). We review the district court's dismissal for an abuse of discretion. McCullough, 835 F.2d at 1127.

In the instant case, the district court's dismissal order was silent on whether the dismissal was with or without prejudice. Because the district court's order is thus unclear, we assume that the dismissal was with prejudice. See Nagle v. Lee, 807 F.2d 435, 442-43 (5th Cir. 1988).

Because a dismissal with prejudice for failure to prosecute or for failure to comply with an order of the court is an extreme sanction which deprives a plaintiff of the opportunity to pursue his claim, this court has limited the district court's discretion in dismissing such cases with prejudice. Berry, 975 F.2d at 1191. We affirm such a dismissal 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 a lesser sanction was not available or would prove futile. Id.

Applying these standards to the instant case, we determine that the district court abused its discretion in dismissing Chancellor's complaint. There is no record of delay by Chancellor. The district court's order requiring Chancellor to file amended pleadings within twenty days was dated and filed July 16, 1993, but the district court's docket sheet indicates that Chancellor did not receive the order until July 26, 1993. Although the district court's August 12 dismissal was effected more than twenty days from the date of the court's order for more specific pleadings, the dismissal was effected less than 20 days from the date Chancellor received the order. Moreover, there is no record of contumacious conduct by Chancellor and no indication that the district court even considered lesser sanctions. The district court thus abused its discretion in dismissing Chancellor's complaint.

III.

For the foregoing reasons, we VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion.