UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20918

(Summary Calendar)

RAYMOND LANG,

Plaintiff-Appellant,

versus

DELOIS D. COOPER, CARL A. SWANSON, and SIDNEY E. PRUITT,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-92-3859)

June 21, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Raymond Lang, an inmate of the Texas Department of Criminal Justice ("TDCJ"), appeals from the district court's dismissal, for failure to prosecute, of his civil rights suit. We reverse.

Lang filed a complaint under 42 U.S.C. § 1983 (1988) against three TDCJ corrections officers, alleging that they had violated his constitutional rights by destroying his property. A United

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

States magistrate judge ordered Lang to file a more definite statement in the form of answers to a questionnaire. *See Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976). After Lang filed his answers to the questionnaire, the magistrate judge entered an order allowing Lang to proceed *in forma pauperis* and ordering that a summons be issued and served on the named defendants. Although the magistrate's order was mailed to Lang, it was returned to the court stamped "Undeliverable." Three months later, the district court dismissed Lang's complaint without prejudice for want of prosecution. The court's dismissal order must have reached Lang, however, because he filed a notice of appeal eleven days later.

A district court possesses inherent authority to dismiss a complaint *sua sponte* for failure to prosecute. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-32, 82 S. Ct. 1386, 1388-89, 8 L. Ed. 2d 734 (1962); *McCullough v. Lynaugh*, 835 F.2d 1126, 1127 (5th Cir. 1988). We review a dismissal for failure to prosecute for abuse of discretion. *McNeal v. Papasan*, 842 F.2d 787, 789-90 (5th Cir. 1988); *McCullough*, 835 F.2d at 1127.

Although the district court stated in its Dismissal Order that it dismissed Lang's complaint without prejudice, we treat its order as a dismissal with prejudice because the applicable statute of limitations has run on Lang's claims.[1] *See Berry v. CIGNA/RSI-*

[1] Because Congress has not provided a statute of limitations in § 1983 cases, federal courts borrow the forum state's general personal injury limitations period. *See Owens v. Okure*, 488 U.S. 235, 249-50, 109 S. Ct. 573, 581-82, 102 L. Ed. 2d 594 (1989). In Texas, the pertinent limitation period is two years. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986); *see also Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir. 1992) (borrowing two-year statute of limitations from Texas law for § 1983 case). Lang's claims stem from events that he alleges occurred on or about September 17, 1992, and thus they

CIGNA, 975 F.2d 1188, 1191 (5th Cir. 1992). Because a dismissal with prejudice for want of prosecution "is an extreme sanction that deprives a litigant of the opportunity to pursue his claim," *id.* (quoting *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 247 (5th Cir. 1980)), "this Court has limited the district court's discretion in dismissing cases with prejudice," *id.* We will 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 lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." *Id.* (footnote omitted).[2]

Here, as in *Berry*, there is no clear record of delay or contumacious conduct by the plaintiff,[3] and the court did not expressly find that lesser sanctions would be futile. *See id.* at

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would be time-barred if he were required to file a second complaint.

[2] "Additionally, in most cases where this Court has affirmed dismissals with prejudice, we found at least one of three 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)).

[3] The defendants argue on appeal that Lang "neglected his duty to the district court" by taking no action in his case during the sixteen months prior to the court's dismissal of his complaint. We note, however, that the court had prohibited Lang from filing any motions until it ruled on his motion to proceed *in forma pauperis*, and Lang spent thirteen of those sixteen months waiting for the court to rule on that motion. Then, when the court had ruled on his motion, Lang did not learn of the court's ruling because the order was not delivered to him for some reason. The record does not disclose why the court's order was returned stamped "Undeliverable." Lang filed a notice of a change of address in a separate proceeding that is docketed in his suit against the TDCJ corrections officers, and while the docket lists the new address, the actual filing is not in the district court record. It is also unclear to what address the order was sent and where Lang was being held at the time. Consequently, we hold that there is no clear record of delay or contumacious conduct by Lang.

1191-92. In addition, the record contains none of the aggravating factors discussed in *McGlathery*. *See id.* Consequently, we hold that the district court abused its discretion in dismissing Lang's complaint. *See id.* at 1192.

For the foregoing reasons, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings.

ROBERT M. PARKER, dissenting:

I would affirm on the basis articulated in the district court's order dismissing this cause for want of prosecution.