

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-30249  
Summary Calendar

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CONOCO, INC.,

Plaintiff-Appellee,

VERSUS

RONALD MAGEE,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Eastern District of Louisiana

(CA-93-2111-N)

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(January 13, 1995)

Before JOLLY, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:\*

Conoco, Inc., filed a complaint for declaratory judgment in the district court seeking a holding that it was not liable for an alleged injury to seaman Ronald Magee. Magee filed an answer and a counterclaim in which he alleged that he was injured while working on a Conoco tanker.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court held a preliminary pretrial conference on August 20, 1993, at which the attorneys for Conoco and Magee appeared. The court ordered counsel to file and serve on opposing parties their witness lists no later than 60 days before the pretrial conference. The court set the final pretrial conference for February 23, 1994, and the trial of the case for March 7, 1994.

Conoco notified Magee on November 3, 1993, that it would depose Magee on December 9, 1993, at the office of Magee's attorney, Charles M. Hughes, Jr. On December 16, Hughes filed a motion to withdraw from representation of Magee on the ground that Magee had dismissed him. The district judge granted Hughes's motion. Conoco filed its witness list and exhibit list on December 23.

Conoco filed a motion on January 14, 1994 for summary judgment. In its statement of material facts, Conoco alleged, inter alia, that Magee had discharged his attorney on December 9, 1993, and was not present when Conoco's attorney appeared for Magee's deposition that same day. Conoco also alleged that Magee had not filed and served his witness or exhibit lists in the time allowed by the district court's scheduling order. Conoco also contended that depositions of Magee's physicians indicated that Magee had not been injured.

The district judge, on January 24, set Conoco's summary judgment motion for consideration on February 2, 1994. On February 17, the judge continued the hearing until March 2, on the ground that she had "been advised that Ronald Magee has just recently

retained new counsel." The judge wished to give Magee's unnamed new attorney time to respond to Conoco's motion.

On February 7, Conoco's attorney sent Magee a letter. He informed Magee that he had scheduled a pretrial meeting for February 11 at the attorney's New Orleans office. He explained that "[t]his is the meeting where we are to exchange exhibits and Pre-Trial Order inserts or stipulations." On February 14, Conoco's attorney sent Magee a letter indicating that he was sending Magee a copy of the pretrial order, absent any contributions from Magee. The attorney asked Magee to sign the pretrial order and return it.

The district judge entered an order on February 28, dismissing Magee's counterclaim with prejudice for failing to comply with the court's orders. The judge explained:

A pre-trial conference was held on February 23, 1994. Although plaintiff's counsel appeared at the conference, defendant did not. Further, defendant did not attend the face-to-face conference scheduled and notice by plaintiff to prepare the pre-trial order nor did defendant provide plaintiff with his inserts for the pre-trial Order. Defendant has failed to file a witness list and an exhibit list and has failed to comply with this Court's scheduling order. As the Pre-Trial order was incomplete it was not signed.

The district judge dismissed Conoco's original complaint as moot and, on March 2, 1994, entered a separate judgment dismissing Magee's counterclaim.

Attorneys Gino Rendeiro and B. Gerald Weeks moved to enroll as Magee's counsel of record. The district judge granted their motion.

Magee also filed a motion, on March 11, for a rehearing or to vacate the judgment. Magee contended that it was a miscarriage of justice for the district court to dismiss Magee's counterclaim while Magee was unrepresented by counsel. Magee alleged that Hughes had fired him as a client in December 1993, and that Hughes had misled him by misstating the trial date as March 7, 1993. Magee also alleged that Hughes told Magee that Conoco's attorney would seek a continuance of the trial date because Magee was unrepresented. Magee also alleged that he had attempted to procure representation in January and February 1994, but had been unable to do so because of the rapidly approaching court-imposed deadlines. Attorney Weeks alleged that he had refused to enroll as counsel in February 1994. According to Weeks, when he discussed time constraints with the district court, the court responded that a motion to enroll was necessary before the court would consider a continuance. Magee alleged that he was unlearned in the law, and concluded by contending that seamen enjoy special protection in the judicial system. Magee attached to his motion, inter alia, a letter from Hughes and an undated, unsworn letter to the judge from Magee's wife.

Conoco opposed Magee's motion. Conoco attached to its memorandum an affidavit sworn by Hughes. Hughes swore that he had represented Magee. According to Hughes, Magee and his wife appeared at Hughes's office on December 9, 1993, the date of Magee's scheduled deposition. The Magees fired Hughes and departed. Magee retrieved his case file from Hughes on January 24,

1994. Conoco attached a copy of a notarized statement signed by Magee indicating that he had retrieved the files on January 24. Conoco also attached a "process verbal," recorded by its attorney at Hughes's office on December 9. According to the attorney, he was at Hughes's office for the scheduled deposition. Magee was not there, having dismissed Hughes while Conoco's attorney was en route to Hughes's office.

The district judge denied Magee's post-judgment motion. The judge noted Conoco's case was not stayed when Magee fired Hughes. The judge also noted Magee's failure to appear at his pretrial conference, despite an attempt by the court to reach him by telephone. The judge noted Magee's failure to participate in the formulation of the pretrial order. The judge also stated:

Mr. Weeks, defendant's new attorney, contacted the Court about taking on defendant's representation. In fact, in anticipation of Mr. Weeks enrolling in the case the Court continued the hearing on plaintiff's motion for summary judgment. Nonetheless, counsel did not attend the Pre-Trial Conference, despite being advised by the Court of the time and date. Further, counsel did not enroll until the Court had dismissed defendant's counterclaim. Counsel may not now assert that defendant was unaware of the Court's deadlines.

The judge concluded that it would be unjust to require Conoco to relitigate its case against Magee, thus rewarding Magee's "dilatory behavior." Magee filed a timely notice of appeal from the "Final Judgment entered on March 30, 1994," which was actually the district court's order denying Magee's post-judgment motion.

## OPINION

Conoco moves for this Court to dismiss Magee's appeal of his post-judgment motion for lack of jurisdiction. Denial of a motion for a new trial pursuant to FED. R. CIV. P. 59(a) is not appealable. *Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 73 (5th Cir. 1991). To the extent that Magee sought a rehearing or new trial in his post-judgment motion, the denial of his motion is not appealable.

Nevertheless, the denial of Magee's motion for relief from the judgment properly is before this Court, to the extent that he sought relief independent of a new trial or rehearing. Because his motion was filed within 10 days of the entry of judgment, see FED. R. CIV. P. 6(a), it was a motion governed by FED. R. CIV. P. 59(e). *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir.), *cert. denied*, 479 U.S. 930 (1986). Denial of a motion for relief from judgment pursuant to Rule 59(e) is appealable. *Youmans v. Simon*, 791 F.2d 341, 349 (5th Cir. 1986). Additionally, Magee's notice of appeal, filed after the denial of his post-judgment motion, brought up the underlying dismissal of his counterclaim for appellate review. *Osterberger*, 921 F.2d at 73.

Magee, who is represented by Weeks, contends that the district court erred by dismissing his counterclaim with prejudice and denying his post-judgment motion. Magee contends that the district court should not have dismissed the counterclaim because he was not represented by counsel and because the federal courts owe special solicitude to the rights of seamen. Because the legal standards

governing the dismissal and the denial of the post-judgment motion are identical and the evidence supporting the denial of the motion also supports the dismissal, we will discuss the denial and the dismissal together.

A district court may sanction a party or the party's attorney, inter alia, "[i]f a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference[.]" FED. R. CIV. P. 16(f). "The same criteria developed for evaluating dismissals for failure to prosecute under FED. R. CIV. P. 41(b) are to be applied in a rule 16(f) case." *Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986). This Court reviews a district court's Rule 16(f) dismissal pursuant to the abuse-of-discretion standard. *Id.*

However, since dismissal is a harsh sanction, [this Court] will affirm only if a "clear record of delay or contumacious conduct by the plaintiff" exists and "lesser sanctions would not serve the best interests of justice." Additionally, most courts affirming dismissals have found at least one of three aggravating factors: (1) delay caused by plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct.

*Id.* (internal and concluding citations omitted). Generally, the reviewing court will remand a case for express findings on the efficacy of lesser sanctions when the district court neglects to make such findings. *Hornbuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233, 1237 (5th Cir. 1984). Additionally, this Court reviews denials of Rule 59(e) motions pursuant to the abuse-of-discretion standard. *Youmans*, 791 F.2d at 349.

The record does not reflect that the district judge considered sanctions less severe than a dismissal with prejudice. Magee's conduct was clearly sanctionable -- he failed to appear at his deposition; failed to meet with Conoco's attorney to discuss the pretrial order; failed to file his exhibit and witness lists; failed to contribute to the pretrial order; and failed to appear at the pretrial conference. On the other hand, the district court dismissed Magee's counterclaim with prejudice just slightly more than two months after Magee dismissed Hughes as his attorney. Additionally, Hughes had informed Magee that Conoco would seek a continuance, although Hughes suggested that Magee contact Conoco's attorney. Moreover, Magee's efforts to prepare for trial and to obtain representation may have been hampered while he was at sea during December and January. Magee alleges that he actively sought representation upon his return from sea duty.

Magee's conduct does not clearly demonstrate such contumacious conduct or a such "clear record of delay," see *Price*, 792 F.2d at 474, as would warrant dismissal without consideration of other sanctions. This Court will not affirm a dismissal with prejudice unless the district court expressly considered alternative sanctions and determined that they would not be sufficient to prompt diligent prosecution or dismissal. Calip v. Harris County Child Welfare Dep't, 757 F.2d 1513, 1521 (5th Cir. 1985); Hornbuckle, 732 F.2d at 1237; McNeal v. Papasan, 842 F.2d 787, 793 (5th Cir. 1988). Accordingly, we VACATE the judgment of the trial



court and remand the case for further proceedings to determine the efficacy of lesser sanctions.