

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60559
Summary Calendar

DARIES F. MITCHELL,

Plaintiff-Appellant,

VERSUS

LORANCE LUMPKIN,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Mississippi

(1:89-CV-746)

(January 30, 1995)

Before THORNBERRY, DAVIS, and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:*

Facts and Prior Proceedings

This is an appeal from the district court's disposition of Mississippi inmate Daries F. Mitchell's 42 U.S.C. § 1983 claims against Sheriff Lorance Lumpkin and Warden James Holden. The district court *sua sponte* dismissed the suit without prejudice

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pursuant to Fed. R. Civ. P. 41(b) on the ground that Mitchell failed to respond to a disclosure form sent to him by the clerk of the court. The disclosure form was part of the district court's new procedures for Section 1983 complainants which were implemented on November 17, 1993, some four years after Mitchell filed his cause of action. At the time that the disclosure form was sent to Mitchell, two pre-trial conferences had been held, but the case had not been set for trial.

Subsequent to the dismissal of his suit, Mitchell filed a motion for reconsideration in which he alleged that he had responded to the disclosure form with a statement that "no disclosure remained to be resolved" because the matter was ready for trial.¹ Mitchell's motion was denied. He timely appeals to this Court. Finding that the district court abused its discretion, we vacate and remand the case to the district court.

Discussion

A district court may, on its own motion, dismiss an action for failure of a plaintiff to prosecute an action or to comply with any order of the court. Fed. R. Civ. P. 41(b); **Berry v. Cigna/RSI-Cigna**, 975 F.2d 1188, 1191 (5th Cir. 1992). We review a Rule 41(b) dismissal for abuse of discretion. **Berry**, 975 F.2d at 1191. This Court's review, however, is exacting when a Rule 41(b) dismissal would bar reprosecution of a suit dismissed without prejudice. **Berry**, 975 F.2d at 1191. In this case, Mitchell's suit would be

¹ Neither the disclosure form nor Mitchell's response are included in the record, and there is not a docket entry indicating that a form was sent to Mitchell.

barred from reprosecution by the statute of limitations relevant to his cause of action.² In our review, therefore, we will treat Mitchell's dismissal as one with prejudice. **Berry**, 975 F.2d at 1191.

The district court may only dismiss an action with prejudice under Rule 41(b) if: (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the court employed lesser sanctions which proved to be futile. **Colle v. Brazos County, Tex.**, 981 F.2d 237, 243 (5th Cir. 1993). 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 (internal citations omitted).

Applying the standards pertaining to Fed. R. Civ. P. 41(b) to this case, we find that the district court abused its discretion by involuntarily dismissing Mitchell's suit for failure to prosecute. The record provides no clear reason for the dilatory proceedings in the district court, nor does the record indicate that the delays were primarily caused by Mitchell or that he intended to delay trial. The record does show that two pre-trial hearings were held,

² Mitchell filed suit on October 19, 1989 based on the alleged attack of July 9, 1989. Mississippi's three-year statute of limitations applies to this suit. Miss. Code. Ann. § 15-1-49 (Supp. 1994); **see James by James v. Sadler**, 909 F.2d 834, 836 (5th Cir. 1990).

all parties announced ready for trial, and Mitchell requested a jury trial.³ The defendants have not suggested that they were prejudiced by Mitchell's alleged failure to respond to the disclosure form. **See Batson v. Neal Spelce Associates, Inc.**, 765 F.2d 511, 514 (5th Cir. 1985)(if other party not substantially prejudiced, dismissal may well be inappropriate). The district court simply dismissed the suit based on Mitchell's alleged failure to comply with a single order. There is no evidence that the district court considered the imposition of a lesser sanction. **See Marshall v. Segona**, 621 F.2d 763, 768 (5th Cir. 1980)(dismissal with prejudice appropriate only when deterrent value cannot be achieved by use of lesser sanctions).

Finally, Mitchell's contention that the district court should have entered summary judgment in his favor is frivolous. Mitchell did not move for summary judgment and there is no indication that the material facts in this case are undisputed. **See Fed. R. Civ. P. 56.**

Conclusion

Based on the foregoing, we vacate the judgment of dismissal by the district court and remand the case for further proceedings.

VACATED AND REMANDED.

³ The first pre-trial conference was held on September 12, 1991 whereupon the record indicates that the parties were ready for trial. The second pre-trial conference was held June 2, 1993, and again, the record indicates that all parties were ready for trial.