2011-CA-00760 RT

Contents

TABLE OF CASES AND OTHER AUTHORITIES

Cases

ARGUMENT

The Beneficiaries trust that the Court will devote sufficient time and attention to their principal brief such that no benefit will come to anyone by repeating those same arguments again. The brevity of this Reply should not infer a lack of concern, or an absence of opposition, by the Beneficiaries. Rather the Beneficiaries pray the Court will appreciate their getting right to the point of explaining why the Brief of the Appellee is unreliable, mistaken, and unpersuasive.

1. The Beneficiaries' arguments are not procedurally barred; Defendant mis-cites applicable law

Defendant's Brief argues that "Plaintiffs never properly raised some of these issues [the trial court's factual findings] with the trial court" and thus is barred for raising them for the first time on appeal.[1] Defendant cites *Southern v. Miss. State Hosp.*, 853 So. 2d 1212 (¶5) (Miss. 2003), in which the appellant raised several constitutional arguments for the first time on appeal. However, the present case is distinguishable as the Beneficiaries had no opportunity to raise these concerns before the trial court's decision. This matter is discussed on page 19 of the Appellant's Brief, incorporated herein to avoid prolixity.

Furthermore, in none of the other Rule 41 cases on record was such a bar found to apply; to the contrary, the reviewing court is charged with the findings of fact to determine if they were manifestly wrong.[2] For instance, in *Barry v. Reeves*, 47 So. 3d 689, 693 (Miss. 2010) a case was reinstated despite proceedings spanning seven and one-half years because the trial court was found to have made improper factual findings.

[1] Brief of Appellee at page 19. *See also* pages 23-24.
[2] *Watson v. Lillard*, 493 So.2d 1277, 1279 (Miss.1986).

2. The two cases are not "the same"

It is patently untrue that the 2005 suit "alleged the same accusations as the present case."[3] In his Brief, Defendant argues that "Both cases accuse the Defendant of exerting undue influence over this mother"[4], "both cases alleged "the same damning accusations"[5], "which put forward the very same allegations"[6], "made by "the same parties"[7] with "the same damning accusations" on "the same subject matter" with "the same substantive arguments" based on "the same circumstantial evidence".[8] Defendant cites not a single page in the trial court transcript or the record to support his statements, or to show why the trial court's statement that "the defendant has faced similar allegations since 2005"[9] is correct. This omission alone should be sufficient to show that the assertions are unsustainable. In reality, it can be said that the two cases are "similar" only if one means that they are not completely different.

It strains credulity to say that the cases are "the same subject matter" and involving "proof on the same circumstantial evidence"[10] when the largest conveyance, $500,000.00, from the Trust to Defendant (not to mention the entire situation involving Defendant hiring attorneys to interview Loleta while she was in the hospital[11]) had not even taken place when the 2005 suit was voluntarily dismissed without prejudice.

As Defendant's Brief acknowledges, the 2005 suit was a "conservatorship action"[12] while the present matter asserts claims for undue influence, breach of a fiduciary duty, self-dealing/conversion, deception concerning material facts involving the Trust, waste, etc. This suit

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[3] Brief of Appellee at page 7.
[4] *Id.*
[5] *Id.*
[6] Brief of Appellee at page 16.
[7] Brief of Appellee at page 20.
[8] *Id.*
[9] Record at page 591; Record Excerpts at page 13.
[10] Brief of Appellee at page 20.
[11] See Brief of Appellant at page 9.
[12] Brief of Appellee at page 9.

demands an accounting, voidance of transactions which were the product of self-dealing, and compensatory and punitive damages.[13] The 2005 suit did not ask for damages, nor did it make any allegations against Jimmy for tortious conduct.[14] The relief requested in the 2005 suit was the appointment of a conservatorship, an accounting, and an injunction restraining Defendant from removing Loleta from the nursing home.[15] The present case did not ask for a conservatorship or pray for an injunction to prevent Defendant from moving Loleta's person.

The cases do not involve "the same parties."[16] The 2005 conservatorship involved twelve plaintiffs, the Defendant, and Loleta Wing.[17] The present matter involves two plaintiffs and the Defendant, but not the other ten family members or Loleta.

Furthermore, even assuming the cases are similar, the 2005 suit has no preclusive effect as there was no adjudication of the 2005 case. The present matter certainly is not *res judicata*, as alleged.[20] For *res judicata* to apply, there must be an: (1) identity of the subject matter of the action, (2) an identity of the cause of action, (3) an identity of the parties to the cause of action, and (4) an identity of the quality or character of a person against whom the claim is made.[21] If one identity is missing, such as the identity of subject matter, *res judicata* does not apply.[22] As discussed herein, all four identities are lacking.

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[13] Record at pages 1-5.
[14] *See Petition for Appointment of Conservator* at Record pages 667-670. An accounting was asked for from Defendant for all purchases made as attorney for Loleta, but no damages or repayment was demanded. *See also Complaint for Temporary Restraining Order and Preliminary Injunction* or *Petition for Appointment of Conservator* at Record pages 673-676 which simply asks the trial court to prohibit Defendant from moving Loleta out of the nursing home and from further abusing the home's staff and administration.
[15] *Id.*
[16] Brief of Appellee at page 20.
[17] See *Petition for Appointment of Conservator* at Record pages 667-670; *Complaint for Temporary Restraining Order and Preliminary Injunction or Petition for Appointment of Conservator* at Record pages 673-676.
[20] Brief of Appellee at page 20.
[21] *Pursue Energy Corp. v. Abernathy*, 2009-CA-01794-SCT (¶19) (Miss. 2011).
[22] *Id.* at ¶¶ 20-21.

There is no question that the 2005 case was voluntarily dismissed without prejudice.[23] Defendant has speculated as to the motivation behind this dismissal, boldly proclaiming it was because "it became obvious they would be unsuccessful".[24] In support of this allegation Defendant cited the *Notice of Dismissal Pursuant to Rule 41* which says nothing of the sort. In fact, Defendant knows this assertion to be untrue. In the depositions taken on May 4, 2011, of Barbara Cohen, Sue Broussard, and Mary Gabler (each a plaintiff in the 2005 suit) none of those sisters admitted they felt the suit was without basis. To the contrary, even in the years afterward the sisters maintained their concern for Loleta's competency, about Jimmy's behavior, and objected to the "system" imposed upon them by Defendant's counsel. While Defendant terms *them* a "quarrelsome bunch"[25] the sisters testified that they felt so harangued by Defendant that they eventually quit or reduced their attempts to interact with their own sister simply to avoid dealing with him.

3. Defendant's accounting was not found to be complete

In his Brief it is said "Defendant agreed . . . to provide Plaintiffs with a detailed accounting prepared in accordance with all the records and information as to which Defendant had reasonable access, dating back as far as 1999."[26] This is different from what the court's agreed order actually stated, which was to

> provide an accounting of all trust transactions, activities, assets, income, debits, etc. of the Loleta B. Wing Trust from July 17, 2005, the point at which he became a Co-Trustee, to the present. In addition, Jimmy Wing shall provide such an accounting for the period January 1, 1999 to July 16, 2005 and shall make such requests as necessary to gather as much information about such period as reasonably necessary to produce such an accounting.[27]

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[23] Record at page 733. "Notice of Dismissal Pursuant to Rule 41" filed by Plaintiffs without court order.
[24] Brief of Appellee at page 11.
[25] *Id.*
[26] Brief of Appellee at page 12. *See also* page 21 ("Thus, Defendant consented to make reasonable efforts to provide information related to the Trust . . ."); page 22.
[27] Record at page 72; Record Excerpts p. 21.

The agreed order was not limited to those records for which Defendant had "reasonable access".

When Defendant protested that certain records were unavailable during the June 11, 2009, hearing on the Beneficiaries' motion to compel, the trial court commented that Defendant could only provide records to which he had "reasonable access". The trial court instructed Defendant to file a motion for protective order if the records could not be produced.[28] No motion was ever filed by Defendant. Regardless of whether his duty was absolute or limited to what was reasonably available, Defendant simply did not produce any more records and the trial court erred in finding he did.

Additionally, Defendant asserts a factual finding which cannot be located. On page 23 of the BRIEF OF APPELLEE, Defendant writes "In his Opinion, the trial court concluded that Defendant had provided an acceptable accounting based on a totality of the circumstances."[29] The Beneficiaries have thoroughly searched page 588 and all other pages of the Opinion, as well as the transcript from the hearing. Nowhere is such a finding located. The closest we come is paragraph XXIV of the Opinion[30], which says "Defendant consented to provide *and did provide* certain information, to the extent reasonable and practical, and the Court held defendant's Motion [for summary judgment] in abeyance." (Emphasis added.) The trial court repeated this finding on page 7.[31] Later in the Opinion the trial court discusses the adequacy of the accounting, only to refrain from making any finding at all.[32]

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[28] Transcript at page 112; Record Excerpts at page 24..
[29] Defendant cited Record page 588; Record Excerpts at page 10.
[30] Record page 588; Record Excerpts at page 10.
[31] Record at page 589; Record Excerpts at page 11. ("But defendant responded to this request").
[32] Record at page 590; Record Excerpts at page 12. The court said *if* the accounting was incomplete it was the Plaintiffs' obligation to bring the matter to the court's attention earlier.

The absence of this factual finding is significant for two reasons. First, Defendant did not provide the accounting information the court says he did, compounding the factual mistakes made by the trial court in dismissing the claim.[33] Second, Defendant attempts to use this supposed finding as proof that he was not delinquent in his obligation to provide the court-ordered accounting. The Beneficiaries have argued that Defendant's failure to cooperate and participate in the litigation was a substantial contributing factor to the delay. Defendant in turn has attempted to deflect the blame by saying, essentially, he has done all he was required to do. Notwithstanding that argument, the Beneficiaries' accountant asked for documents to explain over $123,414.99 in expenditures that could not be explained or documented.[34] As shown, this position is not meritorious.

4. Defendant takes no responsibility for his contribution to the delay

In his Brief, Defendant argues the date of his deposition (incorrectly found by the trial court to be three months earlier than it actually was) is "irrelevant."[35] In point of fact, Defendant apparently contends his deposition was not "substantive action."[36]

Defendant does not dispute that he suspended his own deposition or that he never offered a time to reschedule the same despite multiple inquiries from the Beneficiaries.

As discussed above, Defendant's court-ordered accounting was not found to be complete even though he represents that it was. Defendant does not dispute that multiple motions to compel were filed and granted either by the court or by agreement.[37]

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[33] Beneficiaries' expert sent an itemized list of deficiencies in the accounting on June 15, 2009, to which Defendant never responded. Record at page 559; Record Excerpts at page 25; *Answer to Motion to Compel Information Relevant to Court Ordered Accounting*, Record, Vol. 4, page 578 (in particular, paragraphs 3-4 acknowledge receiving the email but implicitly concedes it was never answered).

[34] Record at page 560; Record Excerpts at page 26.

[35] Brief of Appellee at page 24.

[36] Brief of Appellee at page 29. Just a few pages after conceding the trial court incorrectly stated Defendant was deposed in October 2009, not January 2010, Defendant argues "no substantive action had taken place for an even longer period of time – almost fifteen months" preceding his December 21, 2010, motion to dismiss.

Defendant does not dispute that he refused to set the matter for trial even though dates were proffered *prior to* the filing of his motion to dismiss.[38]

Defendant argues that the Beneficiaries' "Motion to Compel was filed in response to Defendant's Motion to Dismiss."[39] He does acknowledge that the email preceded the motion to dismiss by eight days (leaving one to wonder how demanding information Defendant had an affirmative duty to provide could be reactionary when it happened pre-emptively), and that parties to litigation have a duty to cooperate, but then suggests that "Simple correspondence . . . is not sufficient prosecution". What else were the Beneficiaries to do? Surely it is not suggested that litigants take every matter directly to the trial court before making any attempt to work it out themselves? Would Defendant concede the trial court's dismissal was improper had the Beneficiaries immediately filed motions to compel on these issues?

In trying to reflect blame back on the Beneficiaries, Defendant only highlights the reasons why this dismissal should be reversed. For instance, on page 31 of the BRIEF OF THE APPELLEE he writes "Plaintiffs failed to depose *any witness*, other than Defendant, until after the Motion to Dismiss was filed." Defendant cites the trial court's Opinion. Neither document recognizes that Dr. Cooper McIntosh had previously been deposed[40] or that the Beneficiaries had attempted to schedule the deposition of James Justice the week before the motion was filed.[41]

5. Case law does not support this dismissal

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[37] Despite this fact Defendant represents each motion to compel was "nothing more than a baseless fishing expedition." Brief of Appellee at page 32.
[38] Record at page 571, Record Excerpt at page 27.
[39] Brief of Appellees at page 25.
[40] Taken January 28, 2010. In fairness, it should be noted that this deposition was originally scheduled by the Beneficiaries but then canceled; Defendant then noticed the deposition when it was actually taken.
[41] See Record at page 571, Record Excerpt at page 27.

Those cases where dismissal has been upheld differ from the present matter in at least one remarkable respect, that being the amount of work which was performed during the litigation. The Court's review of the relevant precedent will show that those cases in which dismissal was upheld involved delays of seven,[42] even seventeen years,[43] or they were cases in which nothing of substance was done to prosecute the case at all.[44] *Holder v. Orange Grove Medical Specialties, P.A.*, 54 So.3d 192, 199 (Miss. 2010), cited by the trial court, involved a dismissal of a shorter litigation than that at present, but review of that case indicates the *delay* was much more profound. In *Holder* the plaintiff did not respond to discovery until after the motion to dismiss was filed, more than a year after the responses were due, and then he was late in responding to the motion to dismiss. *Holder* is discussed in detail in the BRIEF OF THE APPELLANT at pages 23-24 is easily distinguished from this case.

In the present case the Beneficiaries issued twenty-eight subpoenas and four sets of discovery, filed three motions to compel and had several hearings on those motions, collected and reviewed literally tens of thousands of documents, and consulted with several experts (including but not limited to the deposition of Dr. Cooper McIntosh, an accountant, a handwriting expert, and a geriatric expert). Were that not enough, the Plaintiffs took affirmative steps BEFORE Defendant's Motion to Dismiss to try to set this case for trial. See supra.

6. There are no aggravating factors

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[42] *Illinois Cent. R. Co. v. Moore*, 994 So. 2d 723 (Miss. 2008). Even then the dismissal was *without* prejudice.

[43] *Shepard v. Prairie Anesthesia Associates*, 2009-CA-01267-COA (Miss. Ct. App. 2011). The clerk alone filed four separate motions to dismiss over eight years.

[44] *Hasty v. Namihira*, 986 So. 2d 1036 (¶ 13) (Miss. Ct. App. 2008). In that case the plaintiff was given a second chance to prosecute the case but still delayed for more than a year. The plaintiff also "repeatedly delayed discovery, disregarded requests to comply with scheduling orders, and failed to respond to the motion for dismissal in a timely manner."

For a dismissal to be upheld there must be at least one aggravating factor present in addition to a clear record of delay and ineffective lesser sanctions.[45] Aggravating factors include whether the party or counsel caused the delay, whether the other party suffers actual prejudice, or whether the delay was an intentional attempt to abuse the judicial process.[46]

The only aggravating factor cited by Defendant is that Mrs. Wing is deceased and "it would be gullible to assume that memories have not faded over a decade."[47] Defendant does not argue the Beneficiaries were personally responsible for the delay or that this was an attempt to abuse the judicial process.

In response the Beneficiaries would show that the March 29, 2007, transfers of $244,577.75 and $547,190.72, plus very valuable land through an unrecorded warranty deed, were unknown to the Beneficiaries until after Mrs. Wing's death[48] and were not disclosed on Defendant's initial accounting.[49] To fault the Beneficiaries for a condition which preceded this suit (Mrs. Wing's death) and lack of knowledge of something Defendant failed to disclose on his own accounting would be unfair. Defendant had exclusive control over Mrs. Wing and her finances, and thus, had better knowledge and access to the relevant evidence surrounding these disputed conveyances than the Beneficiaries. Moreover, Defendant concedes no proof of actual prejudice was provided as evidenced by the fact he asks that the Court "assume" memories have faded while he fails to provide complete information about what had occurred.[50]

Just as in *Miss. D.H.S. v. Guidry*, 830 So. 2d 628 (Miss. 2002), which involved a delay of seven and one half years, there are no aggravating factors present in this matter which were not

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[45] *Jackson Public School District v. Head*, 2009-IA-02022-SCT ¶ 11 (Miss. 2011)
[46] *Id.* at ¶ 19.
[47] Brief of Appellee at page 40.
[48] Record at page 327 (request for admission responses establishing that the acts of self-dealing were not disclosed until the court-ordered accounting produced in the present litigation).
[49] Record at page 9.
[50] Brief of Appellee at page 40. Defendant did assert he "presented substantial evidence proving he would suffer actual prejudice due to the inability of certain witnesses to testify" but no record citations are provided in support.

already present when the litigation was initiated. In the absence of aggravating factors the case cannot and should not be dismissed.

CONCLUSION

This is not a most egregious case worthy of the "extreme and harsh sanction" of dismissal which would deprive the Beneficiaries' of the opportunity to pursue their claim, ignore the Appellee's obligation for a complete, transparent disclosure of what Defendant had done with Mrs. Wing's finances toward the end of her life, reward him for his delay and obfuscation, never affording the Beneficiaries a day in which the facts might be heard and decided. Thus, under the test set forth in *Am. Tel. and Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178, 181 (¶12) (Miss. 1998), the trial court erred and this matter should be remanded for an immediate trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Appellants, do hereby certify that I have this day served a true and correct copy of the forgoing Brief of Appellants upon the following persons via United States Mail, postage pre-paid, at the following addresses:

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This the 9th day of January, 2012.

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