STATE OF NEW MEXICO
COURT OF APPEALS

COPY

On appeal from the Seventh Judicial District, County of Torrance,
Hon. Edmund H. Kase III,
case number D-0722-CV-2007-11

Leonard M. Olmsted,

plaintiff-appellant,

v.

No. 31-131

San Miguel Hospital Corporation, dba Northeastern Regional Hospital, aka Alta Vista Regional Hospital, William Chaffee, its Medical Hearing Committee, Appellate Review Committee, and Board of Trustees, including Michael Gallegos, Jose Tito Chavez, Keith Tucker, C. K. Halverson, Nancy Dronen, G. Michael Lopez, Ruth D. Mares, Richard Grogan, Jennifer Townshend, Kingsley Ozoude, Franklin Miller, Tim Howard, Robby Daniel, John Doe 1–6, and Jane Roe 1–6,

defendants-appellees.

Brief in Chief of Plaintiff-Appellant Leonard M. Olmsted

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Oral Argument Requested

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Summary of Proceedings

This is a civil case by plaintiff-appellant Dr. Leonard M. Olmsted against San Miguel Hospital Corp. and various individuals. Plaintiff's claims include breach of contract, fraud and misrepresentation, intentional interference with contract and prospective advantage, defamation, conversion, prima facie tort, and punitive damages. (RP 19–22) The issues before the Court are whether the district court abused its discretion or otherwise erred in dismissing the case with prejudice for failure to prosecute.

Statement of the Facts

In December 2002, Olmsted contracted to work for San Miguel Hospital Corp. for two years and submitted an application for hospital privileges. (RP 5–18, 20) About a month after Olmsted began working under temporary privileges, some defendants accused him of poor work. (RP 20, count 2, ¶ 12; RP 106) Olmsted, a graduate of Cornell Medical School, voluntarily self-reported these events to the New Mexico Medical Board. (RP 20, count 2, ¶ 13; RP 106) The Board found in his favor by dismissing the case. (*Id.*)

On October 29, 2003, the hospital's Medical Hearing Committee rejected Olmsted's application for hospital privileges. (RP 86) The basis was that Olmsted allegedly misrepresented, in the subject application, a professional issue from many years before. (RP 20, count 2, ¶ 13) Olmsted denied making a misrepresentation, but had difficulty proving good faith thanks to the absence, from both his personal

records and from a third party's records, of an old document concerning the matter.[1] The hospital's Appellate Review Committee affirmed the denial of Olmsted's application for hospital privileges on January 27, 2004. (RP 86)

Defendants' conduct amounts to breach of contract and intentional interference with contract and prospective advantage (RP 20, 21). It also amounts to fraud, misrepresentation, and defamation, preventing Olmsted from obtaining other employment. (RP 21, 22, 107) Finally, after severance of the employment relationship, defendants failed to return to Olmsted some expensive medical instruments and other personal property that he had left at their facility. (RP 22, count 5) This case is Olmsted's last civil recourse to restore his good name, and to recover the personal property the defendants wrongfully converted.

Procedural History

Acting *pro se*, Olmsted filed a complaint in the Seventh Judicial District, Torrance County, on January 27, 2007. (RP 1) The record does not reflect whether he served the complaint. Olmsted filed an amended complaint on September 11, 2007 (RP 19), and served it on at least the hospital and defendants William Chaffee, Jose Tito Chavez, C. K. Halverson, Michael Lopez, Franklin Miller, and Jennifer Townsend. (RP 52) San Miguel Hospital Corp. and some individuals represented by the same counsel served an answer on Dr. Olmsted in December 2007 and allegedly

[1] This fact does not yet appear in the record below. Olmsted includes it here for the Court's understanding of the situation. The fact itself is not material to the issues on appeal.

attempted to file it by fax too (RP 74, ¶ 7), but the filing does not appear on the district court's docket back then.

On July 31, 2008, the district court filed an order *sua sponte*, striking the case from the trial docket. (RP 47) Olmsted was ill at the time and unaware of the order. (RP 48–49) He denies that he received a copy from the court. (RP 48) Between then and the end of 2009, Dr. Olmsted was occupied by another legal matter. (RP 48–49)

Desiring mediation to resolve the case and to clear his good name, on February 11, 2010, Dr. Olmsted wrote a letter to the district court to reopen the case. (RP 48) He followed this with a motion on February 16, 2010, both to reopen the case and to send it to mediation. (RP 49) The district court granted the motion by order filed February 18, 2010. (RP 50) Dr. Olmsted failed to serve defendants with either his motion or the order because he thought the court would do so, as he also thought the court would take charge of mediation. (RP 107) Defendants' attorney, Jeff L. Martin, Esq., alleges that he did not receive notice of the motion or the order at the time.[2] (RP 75, ¶ 11) Nonetheless, when defendants learned of them in autumn 2010, they did not file a motion for reconsideration of reinstatement, nor did they later file a cross-appeal

[2] It is noteworthy that plaintiff Olmsted was unaware of the earlier order striking the case from the trial docket in February 2008, and defendants allege that they were unaware of the court's later order reinstating the case in February 2010. On the record before it, this Court must treat both of these events similarly. Either the Court presumes that the district court served proper notices in both instances, or that it did not in either instance. There is no basis upon which to find that the district court served a proper notice for one but not for the other, especially when each party denies that it received the notice at issue.

to challenge reinstatement, so the issue of the reinstatement order is not before this Court.

On November 4, 2010, Olmsted filed a motion for default judgment based upon defendants' failure to file an answer. (RP 57) Attorney Christopher Carlsen made a limited entry of appearance to pursue this motion for Olmsted. (RP 60) On November 19, 2010, defendants San Miguel Hospital Corp. and individuals Lopez, Townshend, Miller, Chavez, Chaffee, and Halverson filed a response in opposition to the motion. (RP 62) Around this time and prior to defendants' motion to dismiss for failure to prosecute, Olmsted had at least one telephone call with defense counsel, in which he explained his desire to resolve the case through mediation (RP 92, fn 1), a point he reiterated in papers later filed with the district court. (RP 107)

On November 23, 2010, only nine months after Olmsted's motion for arbitration and just three weeks after his motion for default judgment, the appearing defendants filed a motion under Rule 1-041(E)(1) to dismiss with prejudice for failure to prosecute. (RP 87) They argued that the court's removal of the case from the trial docket in July 2008 and Dr. Olmsted's failure to serve them with his motion for reinstatement and mediation in February 2010 prevented them from making their motion to dismiss earlier. They also made a provisional motion to file their answer in the event of denial of their motion to dismiss. (RP 94, 98).

Still acting *pro se*, Dr. Olmsted responded on December 27, 2010, opposing the motion to dismiss for failure to prosecute on the ground that he took significant

action to bring the case to final resolution prior to the motion to dismiss. (RP 106) The moving defendants filed a reply on January 11, 2011. (RP 109) On February 7, 2011, the district court granted the motion to dismiss the case with prejudice. (RP 120) Olmsted filed his notice of appeal on February 18, 2011. (RP 121)

Argument

Olmsted makes three arguments for reversal of the dismissal of his case. First, excluding the period of inactivity when the case was dismissed without prejudice, two years had not elapsed before the motion to dismiss. Second and independently, Olmsted took significant action to bring the case to final resolution in the months and weeks prior to the motion to dismiss. Third and also independently, the order for mediation was a Rule 1-016 order that made dismissal unavailable under the plain, mandatory language of Rule 1-041(E)(1).

I. Dismissal for failure to prosecute was error or an abuse of discretion because two years had not elapsed before the motion to dismiss

The first issue is whether the district erred or abused its discretion under Rule 1-041(E)(1) because two years had not yet elapsed at the time of the motion to dismiss. Rule 1-041(E)(1) says, "Any party may move to dismiss the action ... with prejudice if the party asserting the claim has failed to take any significant action to bring such claim to trial or other final disposition within two (2) years from the filing of such action or claim."

This rule was unavailable to the district court because at the time of the dismissal motion, two years had not elapsed. The time between the filing of the amended complaint (September 11, 2007; RP 19) and the dismissal without prejudice (July 31, 2008; RP 47) was 324 days. The time between reinstatement of the case (February 18, 2010; RP 50) and the motion to dismiss with prejudice (November 23, 2010; RP 87) was 278 days. This amounts to 602 days, which is not two full years. *See Benally v. Pigman*, 78 N.M. 189, 429 P.2d 648 (Sup.Ct. 1967) (two-year period commences to run at filing of amended complaint).

The period of time in which the case was dismissed without prejudice under Rule 1-041(E)(2) (*i.e.*, July 2008 through February 2010) does not count toward the two-year period under Rule 1-041(E)(1). These two subsections of the same rule necessarily work in tandem. When a case is filed, the two-year period begins to run under Rule 1-041(E)(1). When a case is dismissed without prejudice under Rule 1-041(E)(2), a different time period begins to run, as the plaintiff can reinstate only within 30 days, or afterward for good cause shown. *See* Rule 1-041(E)(2). There is no reason to allow the two-year period under 1-041(E)(1) to continue to run while the plaintiff cannot take significant action thanks to dismissal without prejudice under Rule 1-041(E)(2).

There is a substantial reason to toll the two-year period during the period of dismissal without prejudice. There are times, such as in *Summit Elec. Supply Co. Inc. v. Rhodes & Salmon, P.C.*, 2010-NMCA-086, 148 N.M. 590, 241 P.3d 188 (Ct. App.

2010), when a satellite case makes it necessary to put a core case on hold indefinitely. This period can last longer than two years, through no fault of the plaintiff. Dismissal without prejudice allows the plaintiff to resurrect the case later for good cause shown without falling victim to the statute of limitations. Holding that the two-year period under Rule 1-041(E)(1) is tolled during a period of dismissal without prejudice under Rule 1-041(E)(2) is most consistent with the bedrock policy underlying the rule: to clear the docket of truly abandoned cases while allowing active cases to proceed. *Sewell v. Wilson*, 97 N.M. 523, 530, 641 P.2d 1070, 1077 (Ct.App. 1982); *Summit Elec. Supply Co. Inc.*, 2010-NMCA-086, ¶ 14, 241 P.3d at 193. Defendants remain protected from undue delay by the fact that reinstatement of a case dismissed without prejudice must happen within 30 days, or for good cause shown.

Olmsted, who represented himself *pro se* in the district court, did not make this argument below, but there is no waiver. Waiver is not applied mechanically, but in the court's discretion in the interest of substantial justice. *Mayeux v. Winder*, 2006-NMCA-028, ¶ 16-17, 139 N.M. 235, 240–41, 131 P.3d 85, 90–91 (Ct.App. 2006); *Allen v. Tong*, 2003-NMCA-056, ¶37, 133 N.M. 594, 604, 66 P.3d 963, 973 (Ct.App. 2003). When a party asserts a legal issue and only changes the basis of his argument on appeal, there is no waiver. *Weststar Mortgage Corp. v. Jackson*, 2002-NMCA-009, ¶ 50, 131 N.M. 493, 507–08, 39 P.3d 710, 724–25 (Ct.App. 2002). There also is no waiver where the defense is not prejudiced by a lack of opportunity to develop pertinent facts. *In re*

Estate of Baca, 1999-NMCA-082, ¶ 15–16, 127 N.M. 535, 538, 984 P.2d 782, 785 (Ct.App. 1999).

Olmsted clearly contested dismissal with prejudice, the two-year period is fixed by rule, and the fact that only 602 active days passed is irrefutable, requiring no factual development. Finding waiver would force the Court to move to the next issue: whether the fact that dismissal without prejudice happened earlier than two years affects the "significant action" analysis under Rule 1-041(E)(1). Properly applying subsections (E)(1) and (E)(2) in tandem eliminates this quagmire, because when a court dismisses without prejudice prior to the running of two years, there is no basis for an (E)(1) motion until after the case is reopened and the balance of the two years runs.

II. Dismissal for failure to prosecute was an abuse of discretion because plaintiff took significant action to bring the case to final disposition prior to the motion to dismiss

The second issue is whether the district court abused its discretion under Rule 1-041(E)(1) because Olmsted took significant action prior to the dismissal motion? The Court need not reach this issue, and the procedural quagmire lurking under it, if the Court reverses under the first issue.

Summit Elec. Supply Co. Inc. makes clear that even after a period of inactivity exceeding two years, it is an abuse of discretion to dismiss for failure to prosecute when the plaintiff takes "significant action" to bring the matter to final disposition

before defendant moves for dismissal under Rule 1-041(E)(1).[3] *See also Martin v. Leonard Motor-El Paso*, 75 N.M. 219, 402 P.2d 954 (1965) (significant action taken by plaintiff after expiration of two years yet prior to defendant's motion to dismiss is timely); *Beyer v. Montoya*, 75 N.M. 228, 402 P.2d 960 (1965) (same).

Here plaintiff filed a motion for mediation (RP 48–49) just nine months before the motion to dismiss (RP 87–95), and filed a motion for default judgment (RP 57–59) just three weeks before the motion to dismiss. Also in the weeks before the motion to dismiss, he had a telephone call with defense counsel in which he reiterated his wish for mediation. (RP 92, fn 1) Seeking mediation and default judgment plus trying to negotiate resolution constitutes "significant action" under Rule 1-041(E)(1), each individually as well as together, making dismissal for failure to prosecute unwarranted. *See Jones v. Montgomery Ward & Co.*, 103 N.M. 45, 702 P.2d 990 (Sup.Ct. 1985) (negotiation between counsel looking toward conclusion of the case is significant action); *Foundation Reserve Ins. Co. v. Johnston Testers, Inc.*, 77 N.M. 207, 421 P.2d 123 (1966) (single request for hearing in two years and four months preceding motion to dismiss was significant action); *Jimenez v. Walgreens Payless*, 106 N.M. 256, 741 P.2d 1377 (1987) (just two subpoenas for discovery in three-and-a-half years sufficient to make dismissal an abuse of discretion).

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[3] Olmsted's failure to cite this case while *pro se* below is of no effect. *See Howse v. Roswell Independent School Dist.*, 2008-NMCA-095, ¶ 19, 144 N.M. 502, 509, 188 P.3d 1253, 1260 (as long as party asserts legal principle and develops facts, failure to cite significant case is not waiver).

Defendants' alleged inability to move for dismissal earlier because they lacked notice of the motion for reinstatement in February 2010 is immaterial to application of Rule 1-041(E)(1) to their November 2010 motion to dismiss. The situation here is the same as in *Summit Elec. Supply Co. Inc.* There two plaintiffs filed their complaint July 18, 2002. On May 23, 2006, the district court closed the case without prejudice. On May 25, 2007, while the case still was closed, plaintiffs filed a motion to reopen the case and simultaneously requested a trial setting. In response, the defendant filed a motion to dismiss for failure to prosecute under Rule 1-041(E)(1). The district court granted the motion, but this Court reversed. It said plaintiffs' request for a trial setting, made at a time when the case was closed and simultaneously with their motion to reopen, was "significant action" making dismissal an abuse of discretion. *Summit Elec. Supply Co. Inc.*, 2010-NMCA-086, ¶¶ 3–4, 11-14, 241 P.3d at 189–90, 192–93.

Hence in this case, even if the defendants had notice of plaintiff's February 2010 motion to reopen and simultaneous motion for mediation, the motion for mediation would have been "significant action" that precluded dismissal for failure to prosecute. This result is called for by, and consistent with, the well-settled policy underlying Rule 1-041(E)(1), which is to protect the rights of litigants to have their day in court and their cases decided on the merits.[4] *Sewell v. Wilson*, 97 N.M. 523, 530,

[4] The case before the Court differs from *Summit Elec. Supply Co. Inc.* in one respect. In *Summit*, the defendant raised before the district court the issue whether reinstatement after dismissal without prejudice was proper under Rule 1-041(E)(2). Here the defendants did not raise that issue, either by filing a motion for reconsideration of the February 2010 order of reinstatement after learning of it,

641 P.2d 1070, 1077 (Ct.App. 1982); *Summit Elec. Supply Co. Inc.*, 2010-NMCA-086, ¶ 14, 241 P.3d at 193.

In their memorandum on the summary calendar, defendants distinguished *Summit* by saying there, plaintiffs sought a trial setting prior to the motion for dismissal, whereas here plaintiff sought just mediation. The rule does not require plaintiff to seek a trial setting, but to take significant action to bring the case to final disposition. In one case, just two subpoenas for discovery were sufficient (*Jimenez v. Walgreens Payless*, 106 N.M. 256, 741 P.2d 1377 (1987)). In another case, negotiations between counsel to settle only some defense issues were part of plaintiff's significant action. *State ex rel. Reynolds v. Molybdenum Corp. of America*, 83 N.M. 690, 692–93, 496 P.2d 1086, 1088–89 (Sup.Ct. 1972). Clearly a request for mediation, a motion for default judgment, and efforts to negotiate are more substantial yet, as significant as requesting a trial setting, all designed to finish the case.

Defendants also distinguish *Summit* by saying there, the case lay fallow for over two years before the district court closed it without prejudice. Here, the court closed the case without prejudice before two years had elapsed, so defendants could not have filed a rule 1-041(E)(1) motion prior. Defendants' alarm over this procedural difference unduly focuses on the timing of the district court's closure without prejudice. This was not the pivotal moment for the *Summit* decision. The pivotal

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or by cross-appealing that order to this Court. Thus the reinstatement order is not within this Court's jurisdiction for review.

moment was when plaintiff took significant action. This is the moment of focus because the policy under Rule 1-041(E)(1) is to dismiss truly abandoned cases while allowing active cases to continue.

It is true that in cases in which the court closes without prejudice in under two years, the defendant does not get to move for dismissal with prejudice. There is a strong reason the rule is this way. Sometimes, as in *Summit* where a satellite bankruptcy case prevented the core case from moving forward for many years, it is important to close a case just without prejudice to preserve the plaintiff's ability to reopen later without falling victim to the statute of limitations. Defendants in such cases are protected by the fact that reopening a case must be done either within the required time period or else for good cause. *See* Rule 1-041(E)(2). Accepting defendants' argument will require the Court eventually to decide whether two years and one week gives the defense enough time to move for dismissal. Or two years and one day. The bedrock policy underlying Rule 1-041(E)(1) makes it unnecessary for the Court to take its jurisprudence down this path. Whether a district court dismisses without prejudice before or after two fallow years, in both instances it cuts off the defense ability to move for dismissal with prejudice, and there is no reason under the policy driving Rule 1-041(E)(1) to treat such cases differently.[5]

[5] As explained earlier under the first issue for review, this whole procedural quagmire disappears when the Court properly rules that the two-year period is tolled by dismissal without prejudice under Rule 1-041(E)(2).

III. The district court's order for mediation was a Rule 1-016 order making dismissal for failure to prosecute unavailable under Rule 1-041(E)(1)

The third issue is whether the district court committed an abuse of discretion or error of law by invoking Rule 1-041(E)(1), because the February 2010 order for mediation made dismissal under Rule 1-041(E)(1) unavailable to the court? Like the second issue, this is one the Court need not reach if it reverses under issue one.[6]

Rule 1-041(E)(1) says, "An action or claim shall not be dismissed if the party opposing the motion is in compliance with an order entered pursuant to Rule 1-016 NMRA." The language "shall not" is proscriptive, meaning dismissal for failure to prosecute is unavailable under these circumstances. The first half of Rule 1-041(E)(1) already makes dismissal for failure to prosecute a matter of judicial discretion. The second half must restrict that discretion, else it is meaningless. This interpretation is consistent with the well-settled policy underlying the rule, which is to give plaintiffs their day in court unless they have entirely abandoned the case.

The phrase "order entered pursuant to Rule 1-016" plainly includes not only scheduling orders under Rule 1-016(B), but also any other pretrial orders under the rule. *See., e.g., Blumenthal v. Concrete Constructors Co. of Albuquerque Inc.*, 102 N.M. 125, 131, 692 P.2d 50, 56 (Ct.App. 1985) ("The principle is well settled that a pretrial order,

[6] Issue number three also was not raised below, but again, it is purely legal with a fully developed set of facts, so finding waiver would not do substantial justice to this *pro se* plaintiff. *See supra* pp. 7–8.

made and entered without objection, and to which no motion to modify has been made, 'controls the subsequent course of the action.'")

On February 18, 2010, the district court entered an order saying, "I hereby order that the cause listed above be reopened and that the case be subjected to mediation." (RP 50). The portion of this order subjecting the case to mediation must be a pretrial order for court-sponsored mediation under Rule 1-016(A)(5), which says, "In any action the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as ... (5) facilitating the settlement of the case." This subsection of Rule 1-016 is the only applicable source of authority for the district court's February 2010 mediation order. The fact that the order does not direct the parties to appear for the usual pretrial conference and does not address the scheduling issues normally covered under Rule 1-016(B) is immaterial to the Rule 1-041(E)(1) analysis. The order must be a Rule 16 order nonetheless. *See, e.g., Carlsbad Hotel Assoc. LLC v. Patterson-VTI Drilling Co. LP, LLLP*, 2009-NMCA-005, ¶ 8, 145 N.M. 385, 388–89, 199 P.3d 288, 292 (Ct.App. 2008) (wherein the district court ordered mediation in the wake of a Rule 1-016 conference).

Olmsted was in compliance with the February 2010 order for mediation, hence dismissal for failure to prosecute was unavailable under the plain language of Rule 1-041(E)(1). True he moved for default judgment in early November 2010. Yet when, three weeks later, defendants provisionally filed their answer and simultaneously

moved for dismissal for failure to prosecute, Olmsted said in his opposition brief, "Dr. Olmsted seeks to mediate his claims.... Thus what he has sought from the inception is an opportunity to meet with Defendants in a mediation setting." (RP 107) He still seeks mediation today and stands ready to engage in the court-sponsored mediation ordered below, both to clear his good name for the sake of future employment, and to recover the valuable personal property the defendants still have not returned.

Conclusion

For these reasons, plaintiff-appellant Leonard M. Olmsted respectfully asks the Court for an order reversing the district court's order of February 7, 2011, and remanding the case to the district court for further proceedings, including court-sponsored mediation.

Request for Oral Argument

Olmsted respectfully requests oral argument. The issue whether the two-year period under 1-041(E)(1) is tolled during the period of dismissal under 1-041(E)(2) seems to be one of first impression. Separately, the Court may wish to discuss policy pertaining to whether the timing of a court's dismissal without prejudice affects, upon later reopening, the significant action analysis under a motion to dismiss with prejudice. Finally, the issue whether and how Rule 1-041(E)(1) eliminates the district court's discretion when there is an outstanding Rule 1-016 order seems to be an issue of first impression too.

Respectfully submitted,
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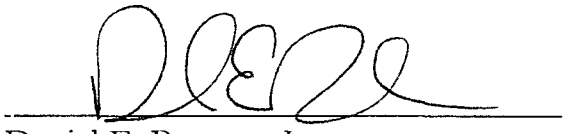
Certificate of Service

I, Daniel E. Brannen Jr., certify that on 19 August 2011, I served the foregoing "**Brief in Chief of Plaintiff-Appellant Leonard M. Olmsted**" on the parties and others identified below by placing copies addressed to them into U.S. first-class mail in Santa Fe, New Mexico.



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