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STATE OF NEW MEXICO
COURT OF APPEALS

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.

Reply Brief of Plaintiff-Appellant Leonard M. Olmsted

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Oral Argument Requested

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Plaintiff-appellant Leonard Olmsted replies to defendants' answer brief as follows. On whether the time limits under Rule 1-041(E)(1) and (E)(2) run consecutively or concurrently, plaintiff's interpretation is most rational and most consistent with the clear policy of the rule while avoiding the procedural quagmire of defendants' interpretation. On whether plaintiff took significant action prior to the (E)(1) motion at issue here, the case law is against defendants, and Olmsted's *pro se* missteps are irrelevant to application of the rule. On whether the district court's mediation order was a Rule 1-016 order that made dismissal under Rule 1-041(E)(1) unavailable, the plain language of the rule says any Rule 1-016 order suffices, not only scheduling orders under Rule 1-016(B).

Reply Argument

The parties agree that the standard of review on Rule 1-041(E)(1) motions is abuse of discretion. The parties also agree that there is no reported case law in New Mexico on whether the time limits under (E)(1) and (E)(2) run consecutively or concurrently. Nor on whether a mediation order is a Rule 1-016 order that makes dismissal unavailable under Rule 1-041(E)(1). The district court will have abused its discretion if dismissal was inconsistent with this Court's resolution of these matters of procedural interpretation.

I. Applying Rule 1-041(E)(1) and (E)(2) consecutively instead of concurrently is the most rational interpretation of the Rule under the policy of dismissing dead cases while preserving active ones

The parties agree that the policy underlying Rule 1-041(E) is to protect defendants from truly dead cases while preserving for plaintiffs truly active ones. *Sewell v. Wilson*, 97 N.M. 523, 530, 641 P.2d 1070, 1077 (Ct.App. 1982); *Summit Elec. Supply Co. Inc. v. Rhodes & Salmon*, 2010-NMCA-086, ¶ 14, 241 P.3d 188, 193 (Ct.App. 2010). Their first point of disagreement is on the harmonious interpretation of (E)(1) with (E)(2). Plaintiff argues that when a court dismisses a case without prejudice under (E)(2), the two-year time limit under (E)(1) is tolled until reinstatement of the case. In other words, the subparts run consecutively, not concurrently.

On the merits, defendants argue that plaintiff's interpretation is absurd because it rewards dilatory plaintiffs. This plainly is not so. After a case is dismissed without prejudice under (E)(2), a plaintiff can have the case reinstated only within thirty days for good cause by motion under (E)(2), or after thirty days with a "reason justifying relief" by motion under Rule 1-060(B)(6). Either way the plaintiff must justify reinstatement, so dilatory plaintiffs—those lacking good cause—will not succeed. Hence it is unnecessary that the two-year period under (E)(1) run concurrently.

Defendants' position, that the time periods run concurrently, is the troublesome one. It means that after dismissal without prejudice under (E)(2), a defendant may oppose reinstatement by invoking (E)(1) if less than two full inactive years passed prior to dismissal under (E)(2), but may not oppose reinstatement if

more than two full inactive years passed prior to dismissal. Where is the dividing line? Is the passage of two years and one month enough? Two years and one week? And one day?

The proper, plain language interpretation of Rule 1-041(E) avoids this quagmire, as well as the inconsistency under which some defendants, but not others, will be able to oppose reinstatement with (E)(1). The two-year period under (E)(1) only runs when the case is on the trial docket, both prior to dismissal without prejudice, and after reinstatement. When the case is dismissed without prejudice, (E)(2) applies. In the case at bar, because less than two active years passed prior to defendants' (E)(1) motion, dismissal with prejudice was an abuse of discretion.

Defendants argue that Olmsted failed to preserve this issue under Rule 12-216. Defendants are splitting hairs. They plainly moved for dismissal in the district court under Rule 1-041(E), plaintiff plainly opposed dismissal under the same rule (R. 106), and he filed a timely appeal from the order of dismissal (R. 121). This is not a case in which plaintiff seeks to raise a new statute, regulation, rule, or claim not raised below.

It is true that before the district court, this *pro se* plaintiff did not cast his Rule 1-041(E) argument in terms of whether the time limits under (E)(1) and (E)(2) run consecutively or concurrently. Case law makes clear that in such instances, the question for this Court is whether Olmsted waived that particular argument, or whether he is free to make it here. When a party asserts an issue under a particular statute or rule (here opposing dismissal under Rule 1-041(E)), but only changes the

basis for his argument on appeal (here whether (E)(1) and (E)(2) run concurrently), he does not waive the argument. *Weststar Mortgage Corp. v. Jackson*, 2002-NMCA-009, ¶ 50, 131 N.M. 493, 507–08, 39 P.3d 710, 724–25 (Ct.App. 2002). This is especially true when the defendant is not prejudiced by an inability to develop facts pertinent to the argument. *In re Estate of Baca*, 1999-NMCA-082, ¶ 15–16, 127 N.M. 535, 538, 984 P.2d 782, 785 (Ct.App. 1999).

Defendants fail adequately to distinguish this case law. For example, in *Weststar Mortgage*, the claimant asserted a right to post-judgment interest on the punitive damages portion of his award. In the district court, he merely argued that such interest was not barred by prior case law related to pre-judgment interest on punitive damage awards. On appeal he made a new argument, that the post-judgment interest he sought was mandatory under a particular statute. This Court found that claimant did not fail to preserve the issue because the assertion was the same (the right to post-judgment interest), and only the basis for the argument had changed. Identically in this case, Olmsted preserved his opposition to dismissal for failure to prosecute under Rule 1-041(E)(1), and has changed only the basis for his position under that very rule, with assistance from appellate counsel.

The defense is not prejudiced here. They can make their argument that (E)(1) and (E)(2) run concurrently. The facts—that only 602 active days passed prior to the motion to dismiss with prejudice—are irrefutable and require no further development. If this Court agrees as a matter of procedural law that (E)(1) and (E)(2) run

consecutively, then it must reverse for abuse of discretion. In the interest of substantial justice, there is no reason to apply the time limits concurrently to a *pro se* plaintiff if the rule was written and adopted by the Supreme Court to act consecutively. [1]

II. Plaintiff took significant action to bring the case to final disposition prior to the motion to dismiss, and his *pro se* missteps are irrelevant to the analysis

If the Court decides that (E)(1) and (E)(2) run concurrently, then it must decide whether the district court abused its discretion under clear, well-settled case law. Again, the policy at issue is protection of defendants from truly dead cases and preservation for plaintiffs of truly active ones. *Summit* makes clear that even long after the passage of two inactive years, if plaintiff takes significant action before defendant moves for dismissal for failure to prosecute, it is an abuse of discretion to dismiss. *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). Hence the taking of significant action makes it irrelevant how long the delay was, or the reasons for it.

Prior to the motion to dismiss here, plaintiff Olmsted took significant action in his motion for mediation, in his motion for default judgment, and in his telephone

[1] Plaintiff Olmsted does not seek here to invoke tolling as an equitable remedy under a statutory or other limitation. The question is the proper interpretation of (E)(1) and (E)(2) for all litigants in all cases. Equity is not at issue.

effort to negotiate with defense counsel. (Brief in chief, p. 9) Defendants say plaintiff did not preserve these arguments under Rule 12-216. This is not so. Plaintiff clearly opposed dismissal under Rule 1-041(E)(1). (R. 106) And in his brief before the district court, plaintiff both explained that he sought mediation (R. 107) and addressed the motion for default judgment (R. 107). This was enough for this *pro se* litigant to preserve the issues for review here.

On the merits, defendants make various arguments. First they say that as the case had been dismissed without prejudice when the two-year period passed in November 2009, they could not make a motion under Rule 1-041(E)(1) before the case was reopened. This is not so. A defendant who has an order of dismissal without prejudice under (E)(2) may move for relief under Rule 1-060(B)(6) to change it into one of dismissal with prejudice under (E)(1). The moment a defendant files such a motion, the plaintiff cannot save the case by suddenly taking significant action. But *Summit* makes clear that the moment a plaintiff takes significant action, the defense motion is too late. This necessarily means that after the expiration of two years and prior to the moment of significant action, even when a case has been dismissed without prejudice, defendants can file under R 1-060(B)(6) to change it into a dismissal with prejudice. Diligent defendants who wish to protect themselves from

stale cases will do so.[2] Hence the defendants' motion here, ripe in November 2009 at the expiration of two years from filing of the Amended Complaint, was too late in November 2010 after the plaintiff took significant action.

Defendants next say that Olmsted's failure to give notice of his motion for reinstatement in February 2010 prevented them from opposing reinstatement under the issue of good cause. This argument is irrelevant to the appeal at bar. If the defendants wanted to be heard on reinstatement of the case in February 2010, they had to file a motion for reconsideration in the district court when they learned of it, or cross-appeal reinstatement to this Court. They did neither. Hence the issue whether there was good cause for reinstatement is final. And it is irrelevant to the question whether plaintiff took significant action prior to the later motion to dismiss for failure to prosecute.

Defendants next argue that Olmsted's February 2010 motion for mediation was not significant action because it was *ex parte*. Again this confuses the issues. The *ex parte* nature of the motion would have been grounds for either reconsideration or cross-appeal of the order granting the motion. That is the process that was due. But the *ex parte* nature of the motion did not alter that it was significant action, designed to bring the case to final disposition through mediation. *See, e.g., Jones v. Montgomery Ward*

[2] Another way of looking at this issue is this: if a defendant may oppose a motion for reinstatement, prior to reinstatement, by invoking (E)(1), then the defendant also may make its own motion, prior to reinstatement, to apply (E)(1).

& Co., 103 N.M. 45, 702 P.2d 990 (Sup.Ct. 1985) (negotiation between counsel looking toward conclusion of the case is significant action)

Defendants next argue that Olmsted's November 2010 motion for default judgment was not significant action because it was frivolous. This is not true. Defendants admit that their answer failed to get onto the docket. (Answer brief, p. 1) The New York case law cited by defendants does not change that in New Mexico, a motion for default judgment is proper when defendant fails to plead. (Rule 1-055(A)) The district court never ruled on the motion for default judgment, and defendants never asked for sanctions, so there is no record on which to find the motion frivolous, especially as this Court reviews such rulings for abuse of discretion, which has not yet been exercised. *See Gallegos v. Franklin*, 89 N.M. 118, 547 P. 2d 1160 (Ct.App. 1976) (whether default judgment should be granted rests within sound discretion of trial court). Yet a motion for default judgment is clearly significant action, designed to bring the matter to final disposition.

Plaintiff Olmsted cites ample case law supporting his argument that a motion for mediation, a motion for default judgment, and efforts to negotiate with counsel, individually and together, are significant action under Rule 1-041(E)(1). *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

is 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).

Defendants distinguish these cases on the ground that they were decided under an old version of the rule, when only "any action" was required to avoid dismissal for failure to prosecute instead of "significant action." This is not a fair reading of the case law. Despite the wording of the prior rule, the cases interpreted the rule to require "significant action," just as the current rule requires. For example, in *Jones* our Supreme Court said "discovery alone is not sufficient to avert dismissal" but that the court must consider "factors indicating activity to bring litigation to a final determination." *Jones*, 103 N.M. at 47, 702 P.2d at 992. And in *Foundation Reserve*, the Court said that to avoid dismissal, plaintiff's letter writing activity had "to establish diligence on the part of plaintiff to bring the case to final disposition." *Foundation Reserve*, 77 N.M. at 208, 421 P.2d at 124. Hence the current rule, which requires "significant action," reflects the Court's Rule 1-041(E)(1) jurisprudence under the prior rule. The cases cited by defendants say the rule was substantially rewritten in 1990 only to shorten the time limit under (E)(1) and to add (E)(2) to allow trial judges to clear their dockets; there is no suggestion that the language "significant action" was a substantial rewriting.

Because Olmsted engaged in significant action prior to the motion to dismiss for failure to prosecute, *Summit* makes clear that dismissal was an abuse of discretion.

III. The district court's order for mediation did not have to be a scheduling order under Rule 1-016(B) to make dismissal unavailable under Rule 1-041(E)(1)

Plaintiff's third issue on appeal is that the February 2010 mediation order made dismissal under 1-041(E)(1) unavailable to the district court. The rule clearly says dismissal is unavailable when plaintiff is in compliance with "an order entered pursuant to Rule 1-016." Plaintiff was in compliance with the mediation order, still standing ready for mediation today; defendants do not say otherwise.

Instead defendants argue that Olmsted failed to preserve this under Rule 2-216. Again, however, plaintiff clearly opposed dismissal under R 1-041(E)(1) (R. 106), and clearly mentioned mediation in his opposition brief in the district court. (R. 107) This was enough for this *pro se* litigant to do. Olmsted is not arguing that his *pro se* status excused him from preserving issues, but rather that the Court ought to read his papers liberally in favor of preservation when reasonable, because he is not an attorney.

On the merits, defendants merely argue that the mediation order was not a scheduling order. It did not have to be. Rule 1-041(E)(2) mentions scheduling orders, but (E)(1), the applicable rule here, does not. It makes dismissal for failure to prosecute unavailable when there is any outstanding order under Rule 1-016. The mediation order was such an order, under Rule 1-016(A)(5). The defendants cite no other rule under which the district court could have issued it.

Because there was a Rule 1-016 order in effect, dismissal for failure to prosecute under Rule 1-041(E)(1) was an abuse of discretion.

Conclusion

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.

Respectfully submitted,
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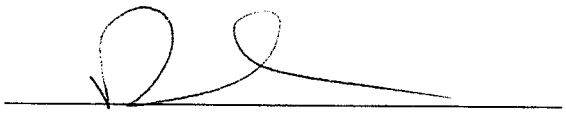
Certificate of Service

I, Daniel E. Brannen Jr., certify that on 28 October 2011, I served the foregoing "**Reply Brief 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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