

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-3254

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 12, 2017
DEBORAH S. HUNT, Clerk

JOSEPH MIGLIORI,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION; AMERICAN
FAMILY INSURANCE COMPANY; ALLSTATE
CORPORATION, dba Allstate Insurance
Company; UNIFIED INVESTIGATIONS &
SCIENCES, INC.,

Defendants-Appellees.

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) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE NORTHERN DISTRICT OF
) OHIO
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ORDER

Before: COLE, Chief Judge; DAUGHTREY and DONALD, Circuit Judges.

Joseph Migliori, an Ohio resident proceeding pro se, appeals the dismissal of his products-liability action for want of prosecution. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In June 2016, Migliori filed a complaint in the district court, alleging that, on August 12, 2006, his neighbor's house caught fire as a result of a defective power cord for an "Xbox" entertainment system located in the home. He stated that the fire spread to his home, causing more than \$425,000 in damage to his real property and more than \$300,000 in damage to his personal property. Migliori raised state-law products-liability and negligence claims against defendants Microsoft Corporation, American Family Insurance Company, Allstate Corporation, and Unified Investigations and Sciences, Inc.

On July 22, 2016, the district court entered an order directing Migliori to file a jurisdictional statement identifying the citizenship of every defendant and of Jo Ann Merritt—the neighbor whose house caught fire—because Migliori named her insurance carrier as a defendant. The court gave explicit instructions to Migliori, explaining that the addresses of the defendants' statutory service agents provided by Migliori did not suffice and that it needed to know each corporate defendant's state of incorporation and the state in which it has its principal place of business. The court gave Migliori until August 31, 2016, to file the jurisdictional statement and held all further proceedings in abeyance pending a determination on diversity jurisdiction. The docket sheet reflects that the order was sent to the address Migliori had provided in his complaint. In the meantime, each of the defendants filed motions to dismiss or for judgment on the pleadings.

On November 25, 2016, well after the court's August 31, 2016, deadline, Migliori filed a "Motion for Summary Judgment and No Further Delays." Migliori did not include a jurisdictional statement. On February 13, 2017, the district court again ordered Migliori to file a jurisdictional statement identifying the citizenship of each defendant and Jo Ann Merritt. The court ordered Migliori to file the statement by February 23, 2017, and advised that failure to do so would result in dismissal for want of prosecution.

On February 21, 2017, Migliori filed a "Motion for Dismissal of All Defendants Except Microsoft," in which he stated that "[t]he purpose of th[e] motion [wa]s to comply with the order of citizenship and [j]urisdiction." On February 28, 2017, the district court entered an order dismissing the action with prejudice for want of prosecution. The court noted that Migliori had filed a motion to dismiss all defendants except Microsoft, but explained that the submission did not comply with the previous order because it provided no information regarding Microsoft's citizenship.

Migliori now appeals. He argues that his motion to dismiss all defendants except Microsoft should have been accepted as a statement of jurisdiction that complied with the district court's order.

We review a district court's dismissal of a suit for want of prosecution for an abuse of discretion. *Link v. Wabash R.R.*, 370 U.S. 626, 633 (1962); *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999); *Jourdan v. Jabe*, 951 F.2d 108, 109 (6th Cir. 1991). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, when it improperly applies the law, or uses an erroneous legal standard." *Stough v. Mayville Cmty. Schs.*, 138 F.3d 612, 614 (6th Cir. 1998).

Federal Rule of Civil Procedure 41(b) provides for dismissal of an action where the plaintiff has failed "to prosecute or to comply with these rules or a court order." A district court has discretion to dismiss under Rule 41(b) if a party has actual "notice that dismissal is contemplated." *Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988). When a pro se plaintiff has "failed to adhere to readily comprehended court deadlines of which he [is] well-aware," a Rule 41(b) dismissal is appropriate. *Jourdan*, 951 F.2d at 110. Dismissal "'is a harsh sanction which the court should order only in extreme situations showing a clear record of delay or contumacious conduct by the plaintiff.'" *Carver v. Bunch*, 946 F.2d 451, 454 (6th Cir. 1991) (quoting *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980)).

When determining whether dismissal for failure to prosecute was an appropriate exercise of discretion, a reviewing court should consider: "(1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered." *Schafer v. City of Defiance Police Dep't*, 529 F.3d 731, 737 (6th Cir. 2008) (quoting *Knoll*, 176 F.3d at 363). The plaintiff "has the burden of showing that his failure to comply was due to inability, not willfulness or bad faith." *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002).

The district court did not abuse its discretion when it dismissed Migliori's case for failure to prosecute. First, the record reflects that Migliori's failure to respond to the court's orders to file a statement of jurisdiction was due to his own willfulness, bad faith, or fault. Migliori's complete failure to respond to the district court's first order directing him to file a statement of

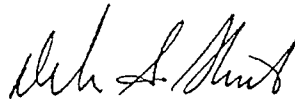
jurisdiction, his filing of a “Motion for Summary Judgment and No Further Delays” nearly three months after the court’s deadline and while the case was held in abeyance, and his filing of a non-responsive motion to dismiss all defendants except Microsoft after the court’s second order displayed a “reckless disregard for the effect of his conduct on those proceedings.” *Schafer*, 529 F.3d at 737 (quoting *Wu v. T.W. Wang, Inc.*, 420 F.3d 641, 643 (6th Cir. 2005)). Migliori argues that his motion to dismiss all defendants except Microsoft complied with the court’s second order. It did not. Both of the court’s orders imposed “readily comprehended court deadlines” and made clear that Migliori was to identify the citizenship of all defendants by providing each corporate defendant’s state of incorporation and the state in which it has its principal place of business. *See Jourdan*, 951 F.2d at 110. Migliori did not provide this information for Microsoft. Although he contended that his voluntary dismissal of all defendants except Microsoft sufficiently signaled to the court Microsoft’s citizenship information, it did no such thing. Even if Migliori could establish diversity of citizenship with Microsoft, seeking voluntary dismissal of those defendants for which he presumably could not establish diversity does not establish jurisdiction with respect to his claims against the defendant against whom he wished to proceed. Migliori has provided no explanation for his failure to comply with the district court’s orders and has therefore failed to satisfy his burden of showing that his noncompliance was not due to willfulness or bad faith. *See Reyes*, 307 F.3d at 458.

The second and third factors also support the Rule 41(b) dismissal. Although the defendants have not explained how they were prejudiced by Migliori’s failure to comply with the court’s orders, they have expended time and resources defending against Migliori’s claims by answering his complaint, filing dispositive motions, and responding to his motions. *See Schafer*, 529 F.3d at 737 (“[A] defendant is prejudiced by the plaintiff’s conduct where the defendant ‘waste[d] time, money, and effort in pursuit of cooperation which [the plaintiff] was legally obligated to provide.’” (quoting *Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 368 (6th Cir. 1997))). As for the third factor, the district court’s second order explicitly advised Migliori that failure to provide a statement of jurisdiction within the time allotted by the court would result in a dismissal for want of prosecution.

Finally, regarding the fourth factor, although the record does not reflect whether less-drastic sanctions were considered before dismissal was ordered, no single factor of these four is dispositive, and dismissal may be proper even if the court did not consider a lesser sanction when, as here, a clear record of delay is found in the record. *Harmon*, 110 F.3d at 368-69 (addressing lesser sanctions in the context of sanctioning counsel).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Re: Case No. 17-3254, *Joseph Migliori v. Microsoft Corporation, et al*
Originating Case No. : 3:16-cv-01320

Dear Mr. Migliori and Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Michelle M. Davis
Case Manager
Direct Dial No. 513-564-7025

cc: Ms. Sandy Opacich

Enclosure

Mandate to issue

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Joseph Migliori,

Case No. 3:16CV1320

Plaintiff

v.

JUDGMENT ENTRY

Microsoft Corporation, et al.,

Defendants

For the reasons stated in the order filed contemporaneously with this Judgment,

It is, hereby,

ORDERED THAT:

1. Migliori's complaint (Doc. 1) be, and the same hereby is, dismissed with prejudice for want of prosecution; and
2. All outstanding motions (Docs. 6, 15, 16, 22, 25, 26, 31) be, and the same hereby are, denied as moot.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge