Reversed and Remanded and Majority and Concurring Opinions filed September 30, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00132-CV

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RONNY RAY DALEY, LONNY EARL DALEY, and LARRY CARL DALEY, Individually and as Partners of DALEY BROTHERS TRUCKING and W.C. DALEY TRUCKING, INC., Appellants

V.

POWERSCREEN TEXAS HOLDINGS, INC., POWERSCREEN TEXAS, INC., POWERSCREEN OF AMERICA, INC., POWERSCREEN INTERNATIONAL, PLC, and POWERSCREEN INTERNATIONAL DISTRIBUTION, LTD., Appellees

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On Appeal from the 25th District Court (2nd)
Colorado County, Texas
Trial Court Cause No. 17,243

M A J O R I T Y O P I N I O N

In this breach of contract, fraud, and deceptive trade practices case, Ronny Ray Daley, Lonny Earl Daley, and Larry Carl Daley, individually and as partners of Daley Brothers Trucking and W.C. Daley Trucking, Inc. (collectively, "Daley") appeal a dismissal for want of prosecution entered in favor of

Powerscreen Texas Holdings, Inc., Powerscreen Texas, Inc., Powerscreen of America, Inc., Powerscreen International, PLC, and Powerscreen International Distribution, Ltd. (collectively, "Powerscreen") on the grounds that: (1) Daley used reasonable diligence in prosecuting its lawsuit; and (2) Daley's attaching of sworn affidavits to its motion to reinstate satisfied the requirement that the motion be verified.[1] We reverse and remand.

Denial of Hearing on Motion to Reinstate

Daley's second point of error argues that the trial court erred in refusing to conduct a hearing on Daley's motion to reinstate because the affidavits attached to the motion satisfied the verification requirement of Texas Rule of Civil Procedure 165a. We address this point of error first because it is dispositive of the appeal.

Rule 165a(3) provides, in part:

> A motion to reinstate shall set forth the grounds therefor and *be verified* by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. . . . The clerk shall deliver a copy of the motion to *the judge, who shall set a hearing on the motion as soon as practicable*. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.
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> The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

TEX. R. CIV. P. 165a(3) (emphasis added). An oral hearing is required on *any* timely filed, verified, motion to reinstate even if the grounds stated in the motion do not warrant mandatory reinstatement of the case. *See Thordson v. City of Houston*, 815 S.W.2d 550, 550 (Tex.1991).[2]

In this case, after the trial court granted Powerscreen's motion to dismiss for want of prosecution, Daley filed a motion to reinstate and request for oral hearing. The trial court denied both. As reasons for

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[1] The trial court granted an agreed order dismissing all claims by and against appellant, W.C. Daley Trucking, Inc., on November 2, 1993. That dismissal order has not been made a part of this appeal.

[2] Thus, contrary to the concurring opinion, (1) such a motion to reinstate cannot simply be taken up on a submission docket without oral hearing; and (2) a hearing must be held on a motion to reinstate even where a hearing was already held on the dismissal.

doing so, the trial court's findings of fact state only that Daley's motion to reinstate was not verified, and its conclusions of law state only that the motion failed to comply with the requirements of rule 165a. Because it is undisputed that Daley's motion to reinstate was timely filed, a hearing on the motion could have properly been denied only if the motion was not verified.

Daley's motion to reinstate does not contain a verification paragraph. However, attached to Daley's motion to reinstate, and referenced therein, are affidavits of Lonny, Ronny, and Larry Daley, the individual appellants in this case, and Thomas Adams, III, appellants' lead counsel in the trial court action. Each of these affidavits states that the affiant has personal knowledge of the matters in the affidavit and that all such matters are true and correct. The Daleys' affidavits state that trial had been continued from the April 8, 1996, trial setting due to Adams's heart condition, that they otherwise had remained ready to proceed to trial since that time, but had understood that no further action was to be taken unless instructed by the court.

Adams's November 4, 1997, affidavit discusses the diagnosis of his heart condition on April 2, 1996, and by-pass surgery on April 16, 1996. As soon as Adams learned of his heart condition, he had asked for a continuance which the trial court granted on April 3, 1996. Adams further stated that he had remained under a doctor's care until as recently as June 3, 1997 and that when Daley subsequently tried to contact Powerscreen to reschedule the trial date, Powerscreen responded with a motion to dismiss. Adams states that the intervening delay since April of 1996 had not been intentional.

As a matter of procedure, we believe that a motion to reinstate may be verified by affidavit as well as by a verification paragraph in the motion because each serves only to verify that facts stated in the motion are within the personal knowledge of the affiant and are true and correct. This, in turn, signifies that there are witnesses who can provide sworn testimony to warrant holding an evidentiary hearing.

Although all of the assertions made in the four affidavits are discussed in Daley's motion to reinstate, many statements in the motion are not supported by the affidavits.[3] However, once a motion to

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[3] As examples, the motion: (1) refers to the clerk's entry log as reflecting extensive discovery being done in this case and that the case is ready for trial; (2) distinguishes caselaw used by Powerscreen in its motion to dismiss; (3) alleges that nothing had changed in the posture of this case from April of 1996 to the present except for the period of inactivity; (4) asserts that the chronology of events in

reinstate meets the threshold requirements of being timely filed and verified, a hearing must be held on it regardless whether the motion states meritorious grounds or whether the facts verified in the motion are sufficient to sustain the movant's burden of proof to warrant reinstatement. *See Thordson*, 815 S.W.2d at 550.[4] Thus, even if Daley's motion had contained only the facts verified by the affidavits and none of the unverified assertions, a hearing would still have been required. Therefore, the fact that the motion was only partly verified did not overcome the hearing requirement. Because Daley filed a timely, verified motion to reinstate in this case, the trial court erred in failing to hold an oral hearing on it. Accordingly, we reverse the judgment of the trial court and remand the case for an oral hearing on Daley's motion to reinstate.[5]

Richard H. Edelman
Justice

Powerscreen's motion to dismiss was inaccurate; (5) sets forth numerous factual assertions detailing what actually occurred; and (6) details legal fees, expenses, and the amount of time Daley's attorneys expended in the prosecution of this case.

[4] This case is distinguishable from those in which the complaint was for denial of due process for lack of adequate notice of the trial court's intent to dismiss, rather than, as here, for denial of a hearing on a properly filed motion to reinstate under Rule 165a. *Compare Villarreal v. San Antonio Truck & Equipment, Inc.*, 994 S.W.2d 628, 632-33 (Tex. 1999) (holding that due process was denied where notice of intent to dismiss was defective and plaintiff did not file motion to reinstate); *with State v. Rotello*, 671 S.W.2d 507, 508 (Tex. 1984) (holding that due process was not denied by trial court's failure to give notice of intent to dismiss where notice of the order of dismissal was adequate and a full hearing was held on the motion to reinstate).

[5] The concurring opinion would instead reverse for failing to also dismiss the defendant's counterclaims even though: (1) no authority requires doing so.; (2) the trial court was not asked to dismiss the counterclaims; and (3) error was not assigned on appeal to the failure to dismiss the counterclaims.

Judgment rendered and Opinion filed September 30, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).

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C O N C U R R I N G O P I N I O N

This Rip Van Winkle case was seasonable dismissed by the trial judge, as most trial courts would. The case languished for years with no active prosecution by the plaintiff, whose lawyer eventually passed away. (And may he rest in peace.) The longer a case languishes, the more likely some untoward event will occur.

I disagree with the majority that the trial judge was required to hold a meaningless hearing, post dismissal, for three reasons. First, the court already heard the very matter complained of and appellant put on no or little evidence. Second, the rule requires a verified motion to reinstate. *See Christopher v Fuerst*, 709 S.W. 2d 266, 268 (Tex. App.–Houston [14th Dist.] 1986 writ ref'd n. r. e.). Appellant was dilatory in this matter just as he was in the prosecution of the case. Third, many courts have what are called "submission dockets" specifically approved by the Supreme Court. In a submission docket the trial court "sets a hearing" on the pleadings, affidavits et cetera, without oral argument, much as the court of appeals does.

Still, I do not agree with the practice of dismissing even an ancient relic of a case such as this while at the same time leaving the reluctant plaintiff to still defend a counter-claim. One party is stripped of their best defense, their offensive pleadings. No judicial economy is accomplished, and the matter lingers even longer on the particularly crowded dockets of our circuit district courts. Thus I would hold pursuant to Rule 1, TEX. R. CIV. P., that dismissing only half a case is not to the end objective of great expedition, dispatch and the least expense to the litigants and the state. Accordingly, I concur in the result, only.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed September 30, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).