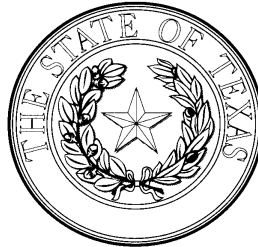


Opinion issued July 2, 2020



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-19-00172-CV

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**QUINCY DESHAN BUTLER, Appellant**  
V.  
**BANK OF AMERICA, Appellee**

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**On Appeal from the 55th District Court**  
**Harris County, Texas**  
**Trial Court Case No. 2018-40373**

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**MEMORANDUM OPINION**

Appellant, Quincy Deshan Butler, an inmate proceeding pro se, challenges the trial court's order dismissing his suit against appellee, Bank of America, to recover proceeds from an insurance claim. In his sole issue, Butler contends that the trial court erred in dismissing his suit for want of prosecution. We affirm.

## **Background**

On June 18, 2018, Butler filed a petition alleging that he was injured in an auto collision. He alleged that his attorney subsequently settled the matter with Butler's insurer but did not notify Butler of the settlement. Butler asserted that he was unaware of the settlement because he was incarcerated at the time. He learned about it when he inquired with his insurer about the status of the claim. He asserted that his attorney, who is now deceased, forged Butler's signature and deposited the settlement funds into the attorney's personal account at Bank of America. Butler sought to compel Bank of America to restore \$7,659.00 in settlement funds.

The record reflects that the Harris County District Clerk sent Butler an "Official Bill," containing a handwritten note as follows: "Mr. Butler, Your lawsuit has been filed containing the cause and court number above. At the time of filing no citations have been requested. No addresses for any defendants were provided. If you would like citations issue, please send names and addresses. Thanks."

On January 9, 2019, the trial court sent Butler a "Notice of Intent to Dismiss—No Answer Filed." In the notice, the trial court stated that its records showed that this case was eligible for dismissal because no answer had been filed. The trial court stated that the case would be dismissed for want of prosecution unless, by February 15, 2019, an answer was filed or a motion for default judgment was filed and heard. And, if neither occurred, Butler was required to file a verified motion to retain the

case, showing good cause or diligence in prosecution, and to appear for a hearing at 9:00 a.m. on February 15, 2019. The notice advised that any failure to appear would result in the case being dismissed for want of prosecution.

On January 28, 2019, Butler filed a response, stating that, on January 16, 2019, he received the trial court's notice of intent to dismiss his case. In his response, he reiterated the facts of his case. He did not address his failure to serve a defendant.

On February 19, 2019, the trial court issued an order dismissing the case for want of prosecution.

### **Dismissal**

In his sole issue, Butler argues that the trial court erred in dismissing his claim without addressing the merits because he had a "right to a trial."

#### **A. *Standard of Review and Legal Principles***

A trial court "has a duty to schedule its cases in such a manner as to expeditiously dispose of them." *Clanton v. Clark*, 639 S.W.2d 929, 931 (Tex. 1982). For this reason, the trial court is given "wide discretion in managing its docket, and we will not interfere with the exercise of that discretion absent a showing of clear abuse." *Id.* A trial court abuses its discretion when it acts without reference to any guiding rules or principles or in an arbitrary and unreasonable manner. *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 757 (Tex. 2003).

A trial court's authority to dismiss a suit for want of prosecution arises from: (1) Texas Rule of Civil Procedure 165a and (2) the trial court's inherent authority to control its own docket. TEX. R. CIV. P. 165a; *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). A trial court may dismiss a suit under Rule 165a if (1) a party seeking affirmative relief fails to appear for any hearing or trial of which the party had notice or (2) the case is not disposed of within the time standards promulgated by the Texas Supreme Court under its administrative rules. TEX. R. CIV. P. 165a; *see also* TEX. R. JUD. ADMIN. 6.1(a), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. F app.

“In addition, the common law vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence.” *Villarreal*, 994 S.W.2d at 630. A trial court may consider: (1) the length of time a case has been on file; (2) the extent of activity in the case; (3) whether trial settings have been requested; and (4) the existence of reasonable excuses for delay. *Dobroslavic v. Bexar Appraisal Dist.*, 397 S.W.3d 725, 729 (Tex. App.—San Antonio 2012, pet. denied).

“It has long been the case that a delay of an unreasonable duration . . . , if not sufficiently explained, will raise a conclusive presumption of abandonment of the plaintiff's suit.” *In re Conner*, 458 S.W.3d 532, 534 (Tex. 2015) (internal quotations omitted). This presumption justifies the dismissal of a suit under either Rule 165a

or the court's inherent authority. *Id.* When, as here, the trial court's order does not specify the ground for dismissal, we affirm on the basis of any legal theory supported by the record. *City of Hous. v. Thomas*, 838 S.W.2d 296, 297 (Tex. App.—Houston [1st Dist.] 1992, no writ).

**B. *Analysis***

A plaintiff “must exercise due diligence in the issuance and service of citation.” *Taylor v. Thompson*, 4 S.W.3d 63, 65 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Once a plaintiff initiates a lawsuit by filing an original petition, citation must be served, along with the original petition, on all named defendants. *See* TEX. R. CIV. P. 21(a). “Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party.” TEX. R. CIV. P. 99(a). “The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition.” *Id.*

Thus, here, upon the filing of his petition, Butler was responsible for obtaining service of citation and a copy of the petition on the defendant. *See id.*; *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994). In his petition, Butler did not request service of citation on any defendant. Further, the record does not show that Butler requested service on any defendant during the eight months that his lawsuit was on the trial court's docket.

After his lawsuit was on the trial court's docket for seven months, the trial court sent notice to Butler that if he did not move the case forward, it would be dismissed. *See In re Marriage of Buster*, 115 S.W.3d 141, 143–45 (Tex. App.—Texarkana 2003, no pet.) (noting, in context of inmate litigation, that trial court may dismiss civil suit for want of prosecution when plaintiff has failed to use reasonable diligence to advance case on docket and move it to trial). In his response, Butler noted that he received the trial court's notice of intent to dismiss his case. However, he did not address his failure to effectuate service of process on any defendant. Accordingly, the unexplained delay supports the trial court's implied finding that Butler did not diligently prosecute his lawsuit. *See In re Conner*, 458 S.W.3d at 534–35; *see also Ashley v. Hawkins*, 293 S.W.3d 175, 180–81 (Tex. 2009) (holding that plaintiff's unexplained eight-month delay in service efforts demonstrated lack of diligence as matter of law); *De La Cerda v. Jaramillo*, No. 01-17-00595-CV, 2018 WL 1189065, at \*6 (Tex. App.—Houston [1st Dist.] Mar. 8, 2018, no pet.) (mem. op.) (affirming, in context of inmate litigation, trial court's dismissal of suit after six months on docket for unexplained failure to diligently effect service).

Further, we note that Butler did not move for reinstatement. *See TEX. R. CIV. P. 165a(3)*. “This Court has held that when an appellant has the opportunity to move for reinstatement, he waives any due process rights if he fails to move to reinstate.” *De La Cerda*, 2018 WL 1189065, at \*6 (internal quotations omitted).

We hold that Butler has not shown that the trial court abused its discretion in dismissing his suit for want of prosecution.

Accordingly, we overrule Butler's sole issue.

### **Conclusion**

We affirm the trial court's order of dismissal.

Sherry Radack  
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.