NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1748

WAYNE BOYD

VERSUS

JOHN DOE, U.S. LAWNS, INC., XYZ INSURANCE COMPANY, REGIONS BANK AND ABC INSURANCE COMPANY

Judgment rendered SEP 1 8 2015

* * * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C590125
Honorable R. Michael Caldwell, Judge

* * * * * *

TIM L. FIELDS
NEW ORLEANS, LA

ATTORNEY FOR
PLAINTIFF-APPELLANT
WAYNE BOYD

PAUL D. PALERMO
CRAIG V. SWEENEY
METAIRIE, LA

ATTORNEYS FOR
DEFENDANT-APPELLEE
BNL ENTERPRISES, LLC

* * * * * *

BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.

PETTIGREW, J.

This is an appeal of a judgment dated August 28, 2014, which granted the defendant's motion to dismiss the plaintiff's suit for want of prosecution, based on the plaintiff's unpreparedness to proceed with trial as scheduled on May 20, 2014.[1]

FACTS AND PROCEDURAL HISTORY

This lawsuit for damages arises out of an incident that occurred on May 1, 2009. The plaintiff, Wayne Boyd, alleges that on that date, he was driving his vehicle "on Main Street at Regions Bank" in Zachary, Louisiana, when suddenly and without warning, a rock struck and broke the window of his vehicle, and also struck his face, resulting in personal injury and property damage. According to Mr. Boyd, the rock that struck him had been thrown from a lawnmower being operated on the Regions Bank property. Mr. Boyd filed a petition for damages on May 3, 2010[2], naming as defendants: John Doe, the alleged operator of the lawnmower; U.S. Lawns, Inc., the alleged employer of John Doe and the provider of the lawn service at Regions Bank; Regions Bank, which allegedly contracted with U.S. Lawns, Inc. to provide lawn service and maintenance at the Zachary branch identified; and XYZ Insurance Company and ABC Insurance Company, the alleged liability insurers for U.S. Lawns, Inc. and Regions Bank, respectively.

Regions Bank was dismissed from the lawsuit by judgment of the district court, dated August 2, 2010, sustaining its exception of no cause of action. U.S. Lawns, Inc. also was dismissed from the suit by judgment of the district court, dated March 16, 2011, granting its motion for summary judgment on the basis that its franchisee, BNL Enterprises, LLC (BNL) was the employer of John Doe and had complete operational control over the work being performed at Regions Bank. By amending and

---

[1] Although the judgment dismissed all of the plaintiff's claims against the defendant, the judgment also expressly states that it is certified and designated as final pursuant to La. C.C.P. 1915(B), which allows a partial judgment to be certified as final for purposes of appeal. The judgment dismissing all of the plaintiff's claims against BNL with prejudice appears to be a final appealable judgment. However, apparently the judgment's certification as final under La. C.C.P. 1915(B) was premised on the fact that BNL's insurer was still a named defendant in the action; and as such, the judgment was a partial judgment (dismissing the suit as to less than all the parties).

[2] The petition is stamped as having been fax filed on April 29, 2010, and the original was filed on May 3, 2010.

supplemental petition filed by Mr. Boyd on February 14, 2011, BNL, as John Doe's employer and franchisee of U.S. Lawns, Inc., and its alleged liability insurer, UVW Insurance Company, were added as the named defendants. BNL subsequently urged two separate exceptions raising the objection of prescription, which were both denied by the district court by judgments dated September 7, 2011 and October 13, 2011.[3]

On October 17, 2013, the district court issued an order specifying deadlines for discovery and pre-trial inserts, and also setting a pre-trial conference on March 18, 2014 conditioned on the timely submission by the parties of a pre-trial order. BNL filed an answer to Boyd's supplemental and amending petition on March 24, 2014, and sought a jury trial, which was granted in a jury order dated March 26, 2014. The parties submitted a joint pre-trial order, and a jury trial was set for May 20, 2014.

On the scheduled date for trial, Mr. Boyd and his counsel, Mr. John Sileo[4], as well as the defendant and its counsel appeared before the district court. The transcript for that date reveals that immediately after the case was called, counsel for Mr. Boyd stated that Mr. Boyd had asked him to seek a continuance of the trial, asserting that he needed "some time to think the problem through and discuss it with some family members." Counsel represented that Mr. Boyd, who was present but outside of the courtroom, was nervous, unable to communicate with the court, and at that time, was "a tad bit unstable." However, counsel for Mr. Boyd also revealed that he "came into the case a week ago" and had just received the client file the night before trial. He also stated that he did not have "certified copies of records," indicating he was not in a posture to proceed with trial that day.

Counsel for BNL opposed the continuance, noting that the date for trial had been set for two months; that the defendant was present in the courtroom, with all exhibits

---

[3] The record also reveals that BNL filed applications for supervisory writs with this court: the first was not considered by action dated March 28, 2011, based on rule violations; and the other was denied, by action dated August 13, 2012, on which this court declined to exercise its supervisory jurisdiction. Additionally, an application for supervisory writs filed by BNL with the supreme court was denied on December 14, 2012.

[4] The record reveals that Mr. Sileo is the litigation assistant of Mr. Boyd's primary counsel, Mr. Tim Fields.

and witnesses as listed in the joint pre-trial order; and that they were ready to proceed with the trial as scheduled.

The district court noted that the suit had been filed in 2010, and had "been around now for four years." The district court acknowledged that Mr. Sileo became involved in the case "very recently" and that "through no fault of his own," the matter was not in a posture to proceed to trial. The district court further stated that "if called upon to do so, the court would be inclined to dismiss this case for failure to prosecute." However, the district court also noted that Mr. Boyd was perhaps suffering from "some preexisting mental problems that make it difficult for him to make a decision on his own at this time." The district court observed, however, that BNL had done everything it could do and was present and ready for trial, and then orally issued the following ruling:

> I am going to deny the motion to continue, but I will not entertain a motion to dismiss for at least 10 days from this date. And if, by that time, nothing has been resolved, Mr. Palermo [counsel for BNL], you may submit a motion to dismiss for failure to prosecute....

On July 9, 2014, BNL filed a motion to enforce settlement, asserting that on June 2, 2014, Mr. Boyd and BNL had reached a settlement agreement, and the parties had mutually agreed to meet on June 17, 2014, at Mr. Boyd's counsel's office to have Mr. Boyd execute the necessary release documents and receive his settlement payment. However, on the morning of that meeting, counsel for BNL received an email from Mr. Boyd's counsel, stating that Mr. Boyd was ill and the meeting would have to be rescheduled. In support of these assertions, BNL attached to its motion an email from Mr. Boyd's counsel's assistant, to BNL's counsel, stating "[p]er Mr. Fields, Mr. Boyd has accepted the [amount of settlement (blacked out)]. Please see W-9 attached."

BNL further asserted that notwithstanding the notification that Mr. Boyd was ill and could not attend the meeting, counsel for BNL received a telephone call that same afternoon from an attorney in Jefferson Parish, who was not enrolled and had no previous involvement in the matter. The attorney advised counsel for BNL that he had met with Mr. Boyd that morning and that he wished to discuss the settlement in the matter. Finally, BNL asserted that in addition to counsel for BNL's attempts to meet with Mr. Boyd

and his counsel on that same afternoon, and again, on July 1, 2014 (as reflected in emails attached to the motion), he made additional attempts to have the settlement documents executed, but that he had received no response from Mr. Boyd or his counsel.

On August 4, 2014, BNL's motion to enforce settlement was heard by the district court. Counsel for BNL set forth the procedural posture of the matter subsequent to the May 20, 2014 trial date when the district court gave Mr. Boyd ten days to resolve the matter, otherwise, it would grant a motion to dismiss. BNL sought an order from the court that the settlement documents be executed by Mr. Boyd within seven days and alternatively, if that was not done, that the court dismiss the case. Mr. Fields, counsel for Mr. Boyd, responded candidly that he was "sort of between a rock and a hard place" because, despite that Mr. Sileo told him that Mr. Boyd had represented to him he wanted to accept the settlement offer on June 2, 2014, Mr. Boyd was now telling him (Mr. Fields) that he never agreed to that. Mr. Boyd was present in court, and the district court specifically addressed him as follows:

> And I will tell you, Mr. Boyd, I allowed those 10 days to give you an opportunity to settle the case; otherwise, your suit was going to be dismissed. And if there is no settlement, then the suit is going to be dismissed. So you need to speak with your attorney. I just don't know, Mr. Palermo (BNL's counsel), that that one e-mail from [Mr. Boyd's counsel's assistant] is enough to give you a written settlement agreement. So the motion to enforce settlement is denied, but I will entertain a motion to dismiss.

Subsequently, on August 27, 2014, after the additional ten days the district court gave Mr. Boyd to reach a settlement had lapsed, BNL filed a motion to dismiss, on the basis that during the additional ten days he was given, Mr. Boyd made no attempt to schedule a meeting or otherwise to confect a settlement. On August 28, 2014, the district court signed a judgment, certified as final, granting BNL's motion to dismiss pursuant to the reasons assigned in open court on May 20, 2014 and on August 4, 2014, dismissing all claims by Mr. Boyd against BNL, with each party to bear its own cost. It is that judgment that Mr. Boyd appeals.

ASSIGNMENT OF ERROR

In his sole assignment of error, Mr. Boyd argues the district court erred in denying his motion for continuance, and, as a result, ordering dismissal with prejudice for failure to prosecute.

APPLICABLE LAW

Continuance

A continuance rests within the sound discretion of the trial court, and may be granted under La. C.C.P. art. 1601 "if there is good ground therefor." **Denton v. Vidrine**, 2006-0141 (La. App. 1 Cir. 12/28/06), 951 So.2d 274, 284, writ denied, 2007-0172 (La. 5/18/07), 957 So.2d 152. The trial court must consider the particular facts of a case when deciding whether to grant or deny a continuance. The trial court should consider the diligence and good faith of the party seeking the continuance and other reasonable grounds, and may also weigh the condition of the court docket, fairness to the parties and other litigants before the court, and the need for orderly and prompt administration of justice. *Id.*

Weighed against the possibility of injustice, unfairness, and inequity, which might result from a premature trial, is the effect that a continuance might have on the administration of justice, including congested court dockets, and just as important, the opposing party's corollary right to have his case heard as soon as practicable. **Rainone v. Exxon Corporation**, 93-2008 (La. App. 1 Cir. 1/13/95), 654 So.2d 707, 710, writ denied, 95-0337 (La. 3/24/95), 655 So.2d 1340. Absent a clear abuse of discretion in granting or denying a continuance, the ruling of the trial court should not be disturbed on appeal. **Newsome v. Homer Memorial Medical Center**, 2010-0564 (La. 4/9/10), 32 So.3d 800, 802 (per curiam); **Denton**, *supra.* As this court observed in **Malter v. McKinney**, 310 So.2d 696, 698 (La. App. 1 Cir. 1975):

> The trial judge is much more familiar with the conditions and requirements of his trial docket than are we. ... The trial courts are under a duty to schedule their trial work and dispose of same expeditiously to alleviate the continuous problem of crowded dockets. [Internal citations omitted.]

Thus, appellate courts interfere in matters such as control of trial court's docket, case management, and determining whether motion for continuance should be granted only with reluctance and in extreme cases. **Willey v. Roberts**, 95-1037 (La. App. 1 Cir. 12/15/95), 664 So.2d 1371, 1374, writ denied 96-0164 (La. 3/15/96), 669 So.2d 422.

Dismissal

The district court is mandated to dismiss an action, upon application of any party, "when the plaintiff fails to appear on the day set for trial." La. C.C.P. art. 1672.A.(1). That same provision of article 1672 grants the district court discretion to determine whether the judgment of dismissal is rendered with or without prejudice. However, a dismissal for failure to prosecute is a harsh remedy. **England v. Baird**, 99-2093 (La. App. 1 Cir. 11/3/00), 772 So.2d 905, 908. An important consideration before dismissal of a claim is "whether the misconduct was by the attorney or the client, or both." **Zavala v. St. Joe Brick Works, Inc.**, 2004-0065 (La. App. 1 Cir. 12/17/04), 897 So.2d 703, 705, quoting **Benware v. Means**, 99-1410 (La. 1/19/00), 752 So.2d 841, 847. A court must also consider a broad range of less severe alternatives prior to deciding on dismissal. **Zavala**, 897 So.2d at 705. A dismissal for failure to appear or comply with a court's order is reviewed for abuse of discretion. ***Id.***, See **Benware**, 752 So.2d at 847.

ARGUMENTS ON APPEAL

Mr. Boyd asserts that he had reasonable grounds for the continuance request on May 20, 2014, *to wit*, "[his] emotional problems." Thus, he maintains the district court's reason for denying the continuance was unjustified. He noted that the dismissal of his claims by the district court was the harshest remedy, and unjustly deprived him of his day in court. Mr. Boyd asserts that he had acted diligently and in good faith, and that this was his first request for continuance.

Further, Mr. Boyd notes that although, as stated by the district court, this case had been pending for years, the delay was not due to his failure to prosecute, but rather by identifying and adding the proper parties and by BNL's two exceptions raising the objection of prescription, and the subsequent writ applications thereon. He states that after the supreme court denied writs on that issue, the matter proceeded in accordance

with the schedule ordered by the district court through May 20, 2014, the scheduled trial date. Although Mr. Boyd appeared in court on the trial date, he asserts he was forced to request a continuance due to his inability to proceed with the trial as a result of "emotional problems."

Finally, regarding the district court's ruling (in open court, at the hearing on BNL's motion to enforce settlement) on August 4, 2014 -- giving Mr. Boyd ten days to resolve the matter or it would entertain a motion to dismiss for failure to prosecute -- Mr. Boyd contends that the court, in effect, ordered him to settle the case or suffer the extreme remedy of dismissal of his claims. He claims that the district court had no authority to render such an order, and that the denial of his request for a continuance was an abuse of the court's discretion.

BNL contests Mr. Boyd's claim that he was diligent in his efforts to prepare for trial. BNL notes that the pre-trial conference (at which the trial date was set) took place on March 27, 2014, almost two months prior to the May 20, 2014 trial date. Yet, BNL argues, the plaintiff made no efforts to secure medical records, depose witnesses, or issue trial subpoenas in all of the time the case had been pending. BNL further asserts that on the date of trial, Mr. Boyd had no witnesses present, and no one for the plaintiff was ready to proceed with trial. Thus, notwithstanding Mr. Boyd's claim of "emotional problems" and instability on the morning of trial, BNL urges that the plaintiff's lack of diligence in preparing for trial during the pendency of the case and the plaintiff's total lack of preparedness to proceed on the date of trial support the district court's granting of its motion to dismiss for failure to prosecute.

DISCUSSION/ANALYSIS

Denial of Motion to Continue

The factors weighing in support of a continuance are the plaintiff's emotional instability on the morning of the trial and the fact that this was the first trial date set in this matter, as well as the first request for a continuance. However, the factor weighing against a continuance is the plaintiff's lack of due diligence in utilizing the two months during which he had notice of the trial date to prepare for trial.

The record reflects that the plaintiff had no witnesses in court ready to testify on the scheduled trial date, nor did he have any documentary evidence, such as medical records or records to substantiate his claim for property damages. Notwithstanding the claims that the plaintiff was suffering from emotional problems on the date of trial, there was no explanation given as to why, given that he had two months notice of the trial date, neither plaintiff nor his counsel had made any efforts to prepare for and be ready to proceed with the case as scheduled.

Moreover, there was no expert medical explanation or evidence to support Mr. Boyd's claim of emotional instability, to detail the duration of his condition, or the impact it had on his ability to testify or make decisions concerning this matter. Although Mr. Boyd was at the court on the date of the trial, he did not come into the courtroom, and his counsel made the oral motion for continuance on his behalf. The district court did not personally observe Mr. Boyd, and had to determine the propriety of granting a continuance based only on counsel's representations that Mr. Boyd was unstable.

In addition to noting the plaintiff's complete lack of preparation to proceed with the trial, the district court also considered the facts pertinent to the orderly and fair administration of justice as well as the corollary rights of the opposing party. It noted that the matter had been pending for four years, and that the opposing party, BNL, was present in court, with witnesses and evidence, ready to proceed with trial as scheduled.

In determining whether the district court abused its discretion in denying the motion to continue in this case, we are guided by a similar prior opinion from this court, **Willey v. Roberts**, *supra.* In that case, plaintiff filed a motion for continuance four days prior to a hearing to show cause why her suit should not be dismissed due to abandonment, stating she was unable to attend the hearing on the date scheduled for "health and family reasons" and because "travel arrangement will be burdensome and difficult." ***Id.***, 664 So.2d at 1374. Because the district court in **Willey** did not rule on the motion to continue until the morning of the scheduled hearing, this court found that plaintiff should have been prepared to present evidence at that hearing on the issue of abandonment. ***Id.***

We find the same is applicable herein, where the continuance was not sought until the morning of the trial, yet Mr. Boyd and his counsel were not prepared with evidence for trial. Therefore, we conclude (as we did in **Willey)** that because the motion to continue trial did not provide specific and compelling reasons regarding the plaintiff's inability to proceed with the trial, and the fact that counsel failed to present any evidence to substantiate those allegations -- *to wit*, Mr. Boyd's being "a tad bit unstable," nervous, and unable to communicate with the court -- that there was no abuse in the district court's discretion in denying the motion. The defendant's interest in having this litigation judicially resolved within a reasonable time and the district court's interest in controlling the docket far outweigh any possibilities of prejudice that may have resulted from the denial of the continuance. **Willey**, 664 So.2d at 1374-75.

We do not believe these facts present the type of extreme situation that would justify our interference with the district court's decision. ***Id.***, 664 So.2d at 1374-75. See also, **McMahan v. Everyday Plumbing Company**, 368 So.2d 1227, 1228 (La. App. 4 Cir. 1979) (wherein the court found that the district court's refusal to grant a motion for continuance and dismissal of plaintiff's motion without prejudice was justified in light of plaintiff's attorney's mere statement that "he thought the plaintiff was sick," but attorney could not tell the court from his own knowledge why plaintiff did not appear); **Gautier v. Gautier**, 385 So.2d 583, 583-84 (La. App. 4 Cir. 1980) (finding the district court did not abuse its discretion in refusing to grant a fourth continuance when, after the third continuance, the defendant was voluntarily committed for psychiatric treatment, and on the morning of trial, counsel for defendant sought a continuance stating that he had instructed his client not to appear for trial if "he was not in better condition than he had been on the previous day" when counsel had found him to be in an "irrational state").

Dismissal

In light of the fact that we find no abuse of the district court's discretion in denying plaintiff a continuance on the morning that the case was called for trial, together with the fact that counsel represented that plaintiff was unprepared to proceed with trial -- that no certified records were ready and no witnesses on his behalf were present in court -- we

also conclude that the district court's dismissal of plaintiff's claims on the basis of failure to prosecute was not an abuse of discretion. Implicit in the requirement stated in La. C.C.P. art. 1672, that plaintiff appear for trial, is that plaintiff be prepared and able to proceed with his case. Thus, the mere appearance of plaintiff's counsel without witnesses and obviously unable to proceed in the event of denial of the request for continuance did not preclude dismissal of plaintiff's action. See **Hebert v. C.F. Bean Corporation**, 2000-1029 (La. App. 4 Cir. 4/25/01), 785 So.2d 1029, 1031; **Brower v. Quick Service Body Shop**, 377 So.2d 878, 879 (La. App. 4 Cir. 1979).

We specifically find no merit to the plaintiff's argument that the district court's ruling (giving him ten days to resolve the matter before the court would entertain a motion to dismiss) "in effect, ordered [him] to settle the case or suffer dismissal." There is simply nothing in the record to support the plaintiff's erroneous implication that the district court's dismissal of his claims was a result of his refusal to settle the case. In fact, as noted above, after denying the motion to continue, the district court had the authority to dismiss the plaintiff's claims outright for failure to prosecute. By gratuitously giving the plaintiff an *additional* ten days in which to resolve the matter, it appears the district court was comporting with the jurisprudence that a court consider less severe alternatives to the harsh result of dismissal. Moreover, BNL's motion to enforce settlement revealed that the plaintiff had previously agreed, and had been given ample opportunity even after the denial of the motion to continue, to settle the matter, but he refused to do so. Under these circumstances, plaintiff's assignment of error has no merit.

CONCLUSION

For all of the foregoing reasons, we find the district court acted with authority and did not abuse its discretion in denying Mr. Wayne Boyd's motion for continuance and subsequently granting the motion to dismiss his claims filed by BNL Enterprises, LLC. All costs of this appeal are assessed to Mr. Wayne Boyd.

AFFIRMED.