



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 2-01-219-CV

EVANNA L. JOHNSON-SNODGRASS

APPELLANT

V.

KTAO, INC. AND KTAO PARTNERS, LTD.
D/B/A ARLINGTON OAKS OFFICE PARK

APPELLEES

FROM COUNTY COURT AT LAW NO. 2 OF TARRANT COUNTY

OPINION

I. INTRODUCTION.

Appellant Evanna L. Johnson-Snodgrass ("Snodgrass") raises four issues on appeal challenging the trial court's dismissal of her lawsuit against appellees KTAO, Inc. and KTAO Partners, Ltd. d/b/a Arlington Oaks Office Park. We will reverse.

II. BACKGROUND FACTS.

Snodgrass brought suit against appellees on January 28, 2000. Appellees answered on February 17, 2000. On May 10, 2000, and on July 12, 2000, Snodgrass responded to requests for production, interrogatories, and requests for disclosure.

On January 26, 2001, the trial court issued a notice of dismissal. Snodgrass filed a motion to retain the case, and the trial court conducted a hearing on April 6, 2001. The trial court denied Snodgrass's motion to retain and dismissed her lawsuit on April 6, 2001.

Snodgrass timely filed a verified motion to reinstate. Following a hearing, the trial court denied Snodgrass's motion to reinstate. Snodgrass then perfected an appeal to this court.

III. ISSUES PRESENTED ON APPEAL.

In her first three issues, Snodgrass complains that the trial court erred in dismissing her lawsuit. She claims: (1) dismissal was not authorized under rule 165a because she did not fail to appear at a hearing or trial and the case was still within the supreme court's disposition time standards; (2) dismissal was not authorized under the trial court's inherent authority because the notice of dismissal did not identify the trial court's inherent authority as a basis for dismissal; and (3) dismissal was not authorized under the trial court's inherent

authority because the case was still within the supreme court's disposition guidelines and she indicated her intent and desire to continue to prosecute her case. In her fourth issue, Snodgrass asserts that the trial court erred in failing to reinstate her lawsuit.

IV. STANDARD OF REVIEW.

A trial court's authority to dismiss a case for want of prosecution derives from two sources: rule 165a of the rules of civil procedure and the court's inherent power. TEX. R. CIV. P. 165a(1); *Lopez v. Harding*, No. 05-99-02101-CV, slip op. at 3, 2001 WL 576648, at *2 (Tex. App.—Dallas May 30, 2001, no pet.). We review a trial court's order of dismissal under either source for an abuse of discretion. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997). A trial judge abuses his discretion when he acts arbitrarily or unreasonably, or without reference to guiding rules and principles. *See Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 298 (Tex. 1986) (op. on reh'g).

V. ABUSE OF DISCRETION TO DISMISS UNDER RULE 165a.

Rule 165a(1) gives a court power to dismiss for want of prosecution when a party or its counsel fails to appear at a hearing or trial. TEX. R. CIV. P. 165a(1); *Maida v. Fire Ins. Exch.*, 990 S.W.2d 836, 841 (Tex. App.—Fort Worth 1999, no pet.). Neither Snodgrass nor her counsel failed to appear at a

hearing or trial. Thus, dismissal based on rule 165a(1) would constitute an abuse of discretion.

Rule 165a(2) authorizes the trial court to dismiss a case for want of prosecution when it is not disposed of in accordance with the time standards prescribed by the supreme court. TEX. R. CIV. P. 165a(2); *Maida*, 990 S.W.2d at 841. The time standard governing civil jury cases, other than family law cases, encourages final disposition of the case within eighteen months from appearance date. TEX. R. JUD. ADMIN. 6, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. F app. (Vernon 1998). Here, Snodgrass filed a written demand for a jury and paid a jury fee; thus, the eighteen-month supreme court time standard applies to her case. The dismissal order was signed thirteen months after appellees' appearance date. Because the trial court dismissed Snodgrass's lawsuit before the eighteen-month supreme court time standard had run, dismissal based on rule 165a(2) would constitute an abuse of discretion. See *Maida*, 990 S.W.2d at 842.

We sustain Snodgrass's first issue and hold that any dismissal of her suit under rule 165a constituted an abuse of discretion.

VI. ABUSE OF DISCRETION TO DISMISS UNDER TRIAL COURT'S INHERENT AUTHORITY.

Snodgrass argues in her second issue that the trial court could not exercise its inherent authority to dismiss her suit because the dismissal notice indicated only that the case was subject to dismissal for noncompliance with the supreme court time standards. Appellees, on the other hand, argue that the dismissal notice was not limited to dismissal for noncompliance with the supreme court time standards, but also encompassed dismissal under the trial court's inherent authority. The dismissal notice, in its entirety, provides:

NOTICE OF DISMISSAL

This case has been on the docket of this court for more than 10 months. This court desires to comply with the supreme court order of February 4, 1987, on time standards for disposition of cases. Therefore, unless the court signs an order of retention, or some final disposition [sic] is made on this case within thirty days, it will be dismissed for want of prosecution. (Rule 165a, Texas Rules of Civil Procedure).

A trial court has the inherent authority to dismiss a case that has not been diligently prosecuted. *Maida*, 990 S.W.2d at 842. However, a party must be provided with adequate notice of the trial court's intent to dismiss for want of prosecution, i.e., for failure to diligently prosecute the case, instead of for a violation of rule 165a(1) or (2). *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999); *Lopez*, slip op. at 3, 2001 WL 576648, at *2.

Notice that a case may be dismissed for failure to appear at a hearing, as authorized by rule 165a, does not constitute adequate notice that the trial court may exercise its inherent authority to dismiss a case for want of prosecution. *Villarreal*, 994 S.W.2d at 630; *Lopez*, slip op. at 3, 2001 WL 576648, at *2; *Clark v. Yarbrough*, 900 S.W.2d 406, 409 (Tex. App.—Texarkana 1995, writ denied); *Goff v. Branch*, 821 S.W.2d 732, 736 (Tex. App.—San Antonio 1991, writ denied).

Nothing in the notice of dismissal before us provided Snodgrass with notice that the trial court was contemplating dismissing her lawsuit under its inherent authority for want of prosecution. The notice indicates that the trial court desires to comply with the supreme court time standards, indicating the notice of dismissal is pursuant to rule 165a(2). The notice indicates that because the trial court desires to comply with the supreme court time standards, "therefore," unless the court signs an order of retention or there is a final disposition the case will be dismissed for want of prosecution. Use of the word "therefore" again ties possible dismissal to rule 165a(2). Finally, the last sentence of the notice of dismissal cites rule 165a. We hold that this notice of dismissal was not adequate to apprise Snodgrass that her lawsuit could be dismissed even if the supreme court time standards had not been violated. We sustain Snodgrass's second issue.

VII. VIOLATION OF SNODGRASS'S DUE PROCESS RIGHTS.

Appellees argue alternatively that, even if the notice of dismissal did not inform Snodgrass the trial court was contemplating dismissing her lawsuit for want of prosecution under its inherent authority, Snodgrass suffered no due process violation because she was made aware at the hearing on her motion to retain that the trial court might invoke its inherent authority to dismiss her case and because the trial court conducted a subsequent hearing on her motion to reinstate. A trial court ordinarily is required to provide notice of a hearing and to conduct an oral hearing prior to dismissal. *See Villarreal*, 994 S.W.2d at 630; *Brown v. Brookshires Grocery Store*, 10 S.W.3d 351, 354-55 (Tex. App.—Dallas 1999, pet. denied). The requirements of notice and a hearing are necessary to ensure the dismissed claimant has received due process. *See Hubert v. Ill. State Assistance Comm'n*, 867 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.] 1993, no writ). Due process requires that adequate notice be given before entry of an order dismissing a suit for want of prosecution. *See Jimenez v. Transwestern Prop. Co.*, 999 S.W.2d 125, 128 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Because a failure to give such notice deprives the party of its right to be heard by the court, the omission of such notice is a denial of due process under the Fourteenth Amendment. *Id.*

At the hearing on Snodgrass's motion to retain, the trial court verbally expressed consternation regarding the filing of Snodgrass's suit on the eve of limitations and indicated it did not feel Snodgrass had diligently pursued her lawsuit. Yet, the actual dismissal order subsequently signed by the trial court simply states that, "CAME ON TO BE HEARD on April 6, 2001 Plaintiff's Motion to Retain this case on the Court's Docket after receiving the Court's January 26, 2001 Notice of Intent to Dismiss Plaintiff's Case." The order then decrees that plaintiff's motion to retain is denied and that the case is ordered dismissed for want of prosecution.

Hence, regardless of the trial court's verbal comments at the hearing on the motion to retain, the actual order of dismissal references the January 26, 2001 notice of dismissal and orders dismissal based on that notice, a rule 165a notice, not based on the trial court's inherent authority. Accordingly, Snodgrass's case was dismissed, by the terms of the dismissal order, pursuant to rule 165a. In light of the trial court's subsequent dismissal order, we disagree with appellees' contention that the trial court's verbal comments at the hearing notified Snodgrass that her case was subject to dismissal under the trial court's inherent authority. The trial court's comments, in light of the subsequent dismissal order, did not provide Snodgrass with adequate notice that at the motion to reinstate hearing she would be required to establish

diligent prosecution rather than compliance with the supreme court's time standards. Thus, Snodgrass's due process rights were violated.

Appellees also argue that the trial court's hearing on Snodgrass's motion to reinstate substitutes for or nullifies any due process deprivations she suffered as a result of the notice of dismissal informing her of possible dismissal only under rule 165a. Appellees cite *Franklin v. Sherman Independent School District*, 53 S.W.3d 398, 402-03 (Tex. App.—Dallas 2001, pet. denied); *Montgomery Ward & Co. v. Denton County Appraisal District*, 13 S.W.3d 828, 830-31 (Tex. App.—Fort Worth 2000, pet. denied); *Jimenez*, 999 S.W.2d at 128-29; and *Clark*, 900 S.W.2d at 409.

We have reviewed each of the cases cited by appellees and they do not control the present case. The plaintiffs in the cases cited by appellee received notice of the basis for the dismissal of their suit and were provided either a pre- or post-dismissal hearing to refute the stated basis for dismissal. Compare *Franklin*, 53 S.W.3d at 404 (holding that a post-dismissal oral hearing on motion to reinstate renders harmless the trial court's error in failing to hold hearing prior to dismissal under rule 165a(2) for noncompliance with the time standards promulgated by the supreme court); *Montgomery Ward & Co.*, 13 S.W.3d at 831 (holding that a litigant's receipt of an order dismissing a case under rule 165a within the time prescribed by rule 165a(3) to file a verified motion to

reinstate provides due process concerning the dismissal). The distinguishing feature between those cases and the present case is that here Snodgrass was never provided adequate notice of the basis for the proposed dismissal of her lawsuit: exercise of the trial court's inherent authority to dismiss her suit for want of diligent prosecution. Because Snodgrass was never notified that the trial court was considering exercising its inherent authority to dismiss her lawsuit but was instead told in the notice of dismissal and in the dismissal order that the dismissal was initiated pursuant to rule 165a, she was deprived of the opportunity to intelligently refute or respond to the proposed dismissal executed under the trial court's inherent authority. *See Villarreal*, 994 S.W.2d at 629-33 (holding notice of dismissal providing only that plaintiff's case was set for dismissal on a certain date and time and that failure to be present then would result in dismissal did not provide plaintiff of adequate notice of possible dismissal under the trial court's inherent authority). Thus, Snodgrass's due process rights were violated, and we cannot agree with appellees' contention to the contrary.

VIII. CONCLUSION.

Having sustained Snodgrass's first and second issues, holding that the trial court abused its discretion in dismissing her lawsuit under either rule 165a or under its inherent authority, we need not address her third issue raising an

additional challenge to the trial court's inherent authority to dismiss her case or her fourth issue challenging the trial court's failure to reinstate her case. We reverse the trial court's judgment, remand this cause to the trial court, and order Snodgrass's lawsuit reinstated.

SUE WALKER
JUSTICE

PANEL A: HOLMAN and WALKER, JJ.; and DAVID L. RICHARDS, J. (Sitting by Assignment).

PUBLISH

[Delivered February 7, 2002]