

IN THE COURT OF APPEALS 7/2/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00582 COA

UNION PONTOTOC PAVING CO., INC.

APPELLANT

v.

UNION COUNTY, MISSISSIPPI, A POLITICAL SUBDIVISION OF THE STATE OF MISSISSIPPI, NICKY MOORE, DANNY JORDAN, NORMAN TREADAWAY, BRUCE SANFORD AND E.H. BLYTHE, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS THE BOARD OF SUPERVISORS OF UNION COUNTY, MISSISSIPPI

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HENRY LAFAYETTE LACKEY

COURT FROM WHICH APPEALED: UNION COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHARLES R. WILBANKS, SR.

ATTORNEY FOR APPELLEES:

LESTER F. SUMNERS

NATURE OF THE CASE: PROCEDURAL: DISMISSAL OF CIVIL ACTION FOR FAILURE TO PROSECUTE

TRIAL COURT DISPOSITION: MOTION TO REINSTATE AFTER DISMISSAL FOR FAILURE TO PROSECUTE DENIED

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

The sole question we are asked to decide by this appeal is whether the Circuit Court of Union County erred when it denied Union Pontotoc's motion to reinstate an action, which had been dismissed for failure to prosecute.

FACTS

On February 5, 1991, Union Pontotoc filed a complaint against Union County and the Union County Board of Supervisors in their individual and representative capacities. The complaint alleged

that the county and board of supervisors had been negligent in failing to require the posting of a payment bond from one of its contractors, Cook Construction Company, and as a result of the county and board of supervisors' negligence, Union Pontotoc was damaged in the amount of \$135,541.73.

After the filing of the complaint, the clerk's records indicate that activity prosecuting the case was sporadic. On August 22, 1992, Union Pontotoc filed a set of discovery requests to the Defendants, and the Defendants filed responses to the discovery requests on September 16, 1992. No further activity evidencing prosecution of the case appears in the record after the filing of the Defendant's discovery responses.

Then, on September 13, 1994, the court ordered dismissal of the action, pursuant to Rule 2.02 of the Uniform Rules of the Circuit Court and Rule 41 of the Mississippi Rules of Civil Procedure, within thirty days of the date of the clerk's certificate indicating service of the order upon the parties' counsel, unless the action was reinstated upon proper motion. The clerk's certificate of service was dated July 25, 1994. Obviously, if the court did not order the dismissal until September 13, 1994, the clerk could not have served the parties' attorney with a copy of the order on July 25, 1994.

The exact date that the clerk served the order upon the parties' attorneys is unknown. However, we can assume that the clerk served the order upon the attorneys prior to October 25, 1994, because on that date, Union Pontotoc's attorney mailed a letter to Harold Little, Union Pontotoc's president at L & L Construction in Corinth, Mississippi. In the letter, the attorney advised Little that Union Pontotoc's action against the county and board of supervisors had been dismissed as a stale case, and for legal reasons, the attorney recommended that Union Pontotoc forego requesting reinstatement of the case.

Four months later, on February 15, 1995, Union Pontotoc filed a motion requesting reinstatement of the action. The motion was later amended to include the affidavit of Little. In the affidavit, Little stated that he was not advised of the dismissal until October 26, 1994, when he was advised by counsel that the case could not succeed.

On May 5, 1995, the court denied Union Pontotoc's motion requesting reinstatement of the action, and Union Pontotoc appealed.

DISCUSSION OF THE LAW

Union Pontotoc argues that the court's judgment dismissing the cause was "tainted by mistake"; therefore, the trial court abused its discretion when it denied the motion requesting reinstatement of the case. Specifically, Union Pontotoc states that the court and clerk did not comply with the notice requirements of Rule 41(d) of the Mississippi Rules of Civil Procedure. The notice provisions of Rule 41(d) require the clerk of the court to mail notice to the attorneys of record that a case will be dismissed for want of prosecution unless within thirty days following the mailing of the notice, action of record is taken or an application in writing is made to the court and good cause is shown for allowing the case to continue as pending. M.R.C.P. 41(d).

In error, Union Pontotoc assumes that the notice provisions of Rule 41(d) were not complied with because the judge signed the order of dismissal on September 13, 1994, and it did not receive notice until October 25, 1994. Union Pontotoc's supposition ignores the contingent phrasing of the order of dismissal. The order of dismissal would not become effective if a proper motion was filed and granted within thirty days of the clerk's certificate of service. Although the clerk's certificate of service was incorrectly dated for July 25, 1994, the facts support a conclusion that the clerk mailed a copy of the notice and order of dismissal to Union Pontotoc's counsel on or about October 24, 1994. The clerk's delay in mailing the notice and order of dismissal did not render the notice and order void. It merely tolled the effective date of the order of dismissal. Assuming the clerk mailed a copy of the notice and order of dismissal to Union Pontotoc's counsel on October 24, 1994, the effective date of the dismissal would have been November 23, 1994.

Because the order of dismissal was conditioned upon the filing and granting of a proper motion within thirty days of the clerk's certificate of service, we find that the court and clerk complied with the notice provisions of Rule 41(d). Consequently, because Union Pontotoc was dilatory in requesting reinstatement of the case, we cannot say that the trial court abused its discretion when it denied the motion to reinstate. Therefore, we affirm the court's judgment dismissing the cause for want of prosecution.

**THE JUDGMENT OF THE CIRCUIT COURT OF UNION COUNTY IS AFFIRMED.
COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, PAYNE,
AND SOUTHWICK, JJ., CONCUR.**

MCMILLIN, J., NOT PARTICIPATING.