Affirmed as Modified and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01169-CV

CASH BUYERS, INC., Appellant

V.

TOM SASH, CAPITAL SOUTH MORTGAGE INVESTMENTS, INC. D/B/A CAPITAL SOUTH MORTGAGE, HAMM-BELT, LTD., AND FIRST COMMONWEALTH MORTGAGE TRUST, Appellees

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On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 98-30487

O P I N I O N

Appellant, Cash Buyers, Inc., appeals the trial court's denial of its motion to set aside a take nothing judgment and for new trial. We affirm.

I. Factual Background and Procedural History

This lawsuit was filed in June 1998. At a pre-trial conference in April 1999, both sides agreed to a September 13, 1999 trial setting. At an August 20, 1999 pre-trial conference, both sides announced "ready" for trial. Ten days later, on August 30, 1999,

Cash Buyers' attorney, Samuel Milledge, filed an Attorney Registration Information Form with the District Clerk's office notifying the clerk's office of his new address and telephone number. He did not provide this document to the court. On September 8, 1999, the trial coordinator, evidently unaware of Milledge's change of address, attempted to send him a reminder of the upcoming trial date by facsimile, but the transmittal indicates she received no response.[1] On September 13, 1999, at 9:00 a.m., the trial court called to trial Cash Buyers' case against appellees, Tom Sash, Capital South Mortgage Investments, Inc. d/b/a Capital South Mortgage, Hamm-Belt, Ltd.,[2] and First Commonwealth Mortgage Trust. Cash Buyers' attorney did not appear, but the company's representative did.[3] The court instructed the representative to ensure the attorney was in the courtroom by 10:00 a.m., or Cash Buyers' case would be dismissed. When no one for Cash Buyers appeared by ten minutes after 10 o'clock, the judge dismissed the case.

II. Discussion

On appeal, we review the trial court's dismissal and subsequent ruling on the motion to reinstate under an abuse of discretion standard. *Seigle v. Hollech*, 892 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Goff v. Branch*, 821 S.W.2d 732, 733 (Tex. App.—San Antonio 1991, writ denied). An abuse of discretion occurs if the trial court acts without reference to guiding rules or principles. *Seigle*, 892 S.W.2d at 203.

A trial court's authority to dismiss a case stems from two sources. Under Rule 165a of the Texas Rules of Civil Procedure, a trial court may dismiss upon the "failure of any

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[1] Additionally, the comments on the transmittal indicate the court had been "attempting to contact [Milledge] for 2 days regarding trial assignment [but] your telephone . . . does not answer nor is there any way to leave a message." The transmittal also indicates it was mailed to Milledge's office the same day.

[2] Hamm-Belt, Ltd. was previously granted summary judgment, the propriety of which Cash Buyers does not address by this appeal.

[3] Cash Buyers' contends that the representative informed the court that Milledge was before another Harris County court that morning on a non-trial matter, but at the hearing on Cash Buyers' motion to set aside, the court found that the representative told the court only that Milledge "was on the way"—a statement verified at the hearing by the trial coordinator and the attorney for Capital South Mortgage.

party seeking affirmative relief to appear for any hearing or trial of which the party had notice." TEX. R. CIV. P. 165a(1). A trial court also has inherent authority to dismiss. *Veterans' Land Bd. v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976) (per curiam); *Davis v. Zoning Bd. of Adjustment*, 853 S.W.2d 650, 652 (Tex. App.—Houston [14th Dist.] 1993), *rev'd on other grounds*, 865 S.W.2d 941 (Tex. 1993).

"With no statement of facts or findings of fact before us, we must presume the trial court had before it and passed on all facts necessary to support the judgment." *Knight v. Trent*, 739 S.W.2d 116, 119 (Tex. App.—San Antonio 1987, no writ) (citing *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978)). The record on appeal contains a statement of facts of the hearing on the motion to set aside, but not a statement of facts or findings of fact from the dismissal hearing. Accordingly, the presumptions in favor of the dismissal order prevail, and Cash Buyers' complaint as to the dismissal order is rejected. *See Goff*, 821 S.W.2d at 733. However, because we have a statement of facts as to the reinstatement hearing, the dispositive issue is whether the trial court abused its discretion in refusing to reinstate the dismissed cause. *See id.*

Under Rule 165a, a court may dismiss a case for want of prosecution if the party seeking affirmative relief fails to appear for any hearing or trial of which the party had notice. TEX. R. CIV. P. 165a(1); *see also Cabrera v. Cedarapids Inc.*, 834 S.W.2d 615, 618 (Tex. App.—Houston [14th Dist.] 1992, writ denied). The reinstatement provisions of Texas Rule of Civil Procedure 165a(3) apply to dismissals for failure to appear at trial. *Ozuna v. Southwest Bio-Clinical Lab.*, 766 S.W.2d 900, 901–03 (Tex. App.—San Antonio 1989, writ denied). Under 165a(3), "[t]he court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney [to appear] 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).

Whether the party's conduct was intentional or the result of conscious indifference is a question of fact to be determined by the trial court in the exercise of its discretion.

Price v. Firestone Tire & Rubber Co., 700 S.W.2d 730, 733 (Tex. App.—Dallas 1985, no writ). "Some excuse, not necessarily a good one, is sufficient." *Mayad v. Rizk*, 554 S.W.2d 835, 838 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). If the trial court finds that a party's failure to appear was not intentional or the result of conscious indifference, then reinstatement is mandatory. TEX. R. CIV. P. 165a(3); *Clark v. Yarborough*, 900 S.W.2d 406, 408 (Tex. App.—Texarkana 1995, writ denied). The burden is on the party seeking relief to show accident or mistake. *See Landry v. Ringer*, 44 S.W.3d 271, 275 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.) (citing *Roberts v. Medical City Dallas Hosp.*, Inc., 988 S.W.2d 398, 403 (Tex. App.—Texarkana 1999, pet. denied).

This case is factually similar to *Smock v. Fischel*. 146 Tex. 397, 207 S.W.2d 891 (1948). In that case, Fischel sued Smock and Smock filed a cross-action against Fischel. *Id.* at 891. Smock and his attorney were given three days' notice of a trial setting. When neither appeared, the trial court ordered Smock take nothing on his cross-action.[4] *Id.* On appeal, the court held that the trial court erred in rendering judgment on Smock's cross-action, finding instead that it should have dismissed his case. *Id.* at 892. Here, the parties were given more than four months' notice of the trial setting. They had a pre-trial hearing more than three weeks before the agreed trial setting, and each party announced "ready." That Cash Buyers' attorney changed offices subsequent to these dates bears no weight on whether he had notice of the original trial setting. In addition, regardless of whose version of events is correct, Milledge consciously decided to go to another court on the date of Cash Buyers' trial setting. *Cf. Pfeiffer v. Jacobs*, 29 S.W.3d 193, 198 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that expert's need for more time to prepare report did not preclude finding that failure to file report within time strictures of 4590i was intentional).[5] The fact that Milledge sent the company's representative to the court

[4] Fischel proceeded to try his case against Smock. *Id*. at 891.

[5] "Intentional conduct" in the context of a dismissal of an action is defined the same regardless of whether the claim was dismissed for intentionally failing to file an expert report under 4590i or a party intentionally failed to appear for a scheduled hearing or trial under 165a(1) of the Texas Rules of Civil Procedure. *See, e.g., Martinez v. Battelle Mem'l Inst.*, 41 S.W.3d 685, 690 n.6 (Tex. App.—Amarillo 2001, no pet.) (citing cases).

on the day of trial evinced knowledge of the trial setting on that day. Were it not for the trial setting, there was no reason for the representative to be in court to tell the judge whatever he did. Accordingly, under Rule 165, it was not error for the trial court to dismiss Cash Buyers' case. *See Smock*, 207 S.W.2d at 892.

However, rather than dismissing the case, the court here entered a take nothing judgment. Texas Rule of Civil Procedure 165a "authorizes a trial judge to dismiss a suit for want of prosecution, *and no more*." *Alvarado v. Magic Valley Elec. Co-op*, 784 S.W.2d 729, 733 (Tex. App.—San Antonio 1990, writ denied) (emphasis in original) (stating court must not render judgment on merits in dismissing plaintiff's case). A dismissal is not intended to be an adjudication on the merits of the case or the rights of the parties; it merely returns the parties to the position they occupied before suit was filed. *Crofts v. Court of Civil Appeals*, 362 S.W.2d 101, 104 (Tex. 1962). A take-nothing judgment, however, is a dismissal on the merits. *De La Garza v. Express-News Corp.*, 722 S.W.2d 251, 253 (Tex. App.—San Antonio 1986, no writ). The trial court, therefore, erred to the extent the Final Judgment reflects appellees "take nothing by its suit." Accordingly, we order the judgment be reformed to restate Cash Buyers' cause of action is dismissed. *See De La Garza*, 722 S.W.2d at 253.

The judgment is affirmed as modified.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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