

Reverse and Remand; Opinion Filed January 9, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-01047-CV

ENEXCO, INC., Appellant

V.

**JAMES STALEY, II, AS TRUSTEE OF THE
CONNIE G. STALEY HERITAGE TRUST B, AND
JAMES STALEY, III, Appellees**

**On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-09177**

MEMORANDUM OPINION

Before Justices Myers, Evans, and Richter¹
Opinion by Justice Evans

This is an appeal from the trial court's order dismissing for want of prosecution Enexco Inc.'s breach of contract suit against James Staley, II, as trustee of the Connie G. Staley Heritage Trust B, and James Staley, III (collectively Staley). In two issues, Enexco generally complains that the trial court abused its discretion in dismissing its lawsuit and denying its motion to reinstate the case. For the reasons that follow, we reverse the trial court's dismissal order and remand the case for further proceedings consistent with this opinion.

¹ The Honorable Martin Richter, Justice, Assigned

BACKGROUND

Enexco sued Staley and nine others in October 2012 in Nacogdoches County alleging the defendants failed to pay operating expenses for an oil and gas well as required by certain joint operating agreements. In December 2012, Staley appeared and moved to transfer the case to Dallas County. Pursuant to an agreed order, the case was ultimately transferred to Dallas County on July 2, 2013. About one year after the case was first filed, on October 29, 2013, James Staley, II filed a plea in abatement asserting Enexco did not sue him in his proper capacity. Enexco agreed to amend its petition in accordance with a rule 11 agreement dated October 31, 2013. When Enexco failed to amend its petition in accordance with the agreement, however, the trial court granted a motion to enforce on January 9, 2014.

When the case was received in Dallas County on venue transfer, counsel for Enexco and Staley agreed to the trial court's uniform scheduling order by which the case was first set for a non-jury trial on August 11, 2014. On that trial date, however, the trial court signed an order granting an agreed motion for a continuance and modification of the existing discovery control plan. The trial court then reset the trial for April 27, 2015 by another uniform scheduling order again agreed to by counsel for Enexco and Staley.

About two months before the new trial date, on March 2, 2015, Staley moved to dismiss the case for want of prosecution under rule 165a of the Texas Rules of Civil Procedure and the trial court's inherent power. Staley asserted the case had been pending for twenty-eight months, more than double the time set forth by the Texas Supreme Court for disposition under its administrative rules. Staley also complained that Enexco failed to conduct any discovery. Counsel for Staley and Enexco each filed motions to withdraw. On April 14, 2015 the trial court signed an order vacating the April 27 trial date and resetting the hearing on Staley's motion to

dismiss and motions to withdraw for May 27, 2015.² Staley filed an amended motion to dismiss which, after the May 27 hearing, the trial court granted dismissing the case for want of prosecution.³ The trial court subsequently denied Enexco's motion to reinstate. The claims against Staley were then severed from the lawsuit. Enexco now appeals from the dismissal order, a final and appealable order pursuant to the severance.

ANALYSIS

In its first issue, Enexco contends the trial court abused its discretion in dismissing the case for want of prosecution. A trial court may dismiss for want of prosecution under rule 165a if a case remains pending beyond the time standards set out by the Texas Supreme Court. TEX. R. CIV. P. 165a(2); *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). The trial court may also dismiss a case for want of prosecution under its inherent power to control its docket if the case has not been prosecuted with diligence. *See WMC Mortgage Corp. v. Starkey*, 200 S.W.3d 749, 752 (Tex. App.—Dallas 2006, pet. denied). At the dismissal hearing, the trial court shall dismiss the case unless there is good cause to maintain the case on the docket. *See* TEX. R. CIV. P. 165a(1).

In determining whether a case should be dismissed, the trial court may consider the entire history of the case, including the length of time the case was on file, the amount of activity in the case, the request for a trial setting and the existence of reasonable excuses for delay. *WMC Mortgage Corp.*, 200 S.W.3d at 752. An appellate court may reverse the trial court's dismissal

² The April 14 order indicated that the trial court commenced hearing Staley's motion to dismiss on March 26, 2015. At the May 27 hearing on Staley's amended motion to dismiss, the trial court stated that no one appeared on Enexco's behalf at the March 26 hearing. The clerk's record does not contain any indication that Enexco was notified of the March 26 hearing setting and we do not have a reporter's record of that hearing. Neither the trial court in its statements at the May 27 hearing or Staley in its amended motion to dismiss or argument at the May 27 hearing made Enexco's failure to appear at the March 26 hearing a basis for dismissal. Staley does not argue in its appellate brief that Enexco's failure to appear is a basis for dismissal.

³ After the trial setting, a different lawyer at the same firm represented Enexco at the hearings on the motion to dismiss and motion to reinstate.

only upon a showing that the trial court clearly abused its discretion. *See State v. Rotello*, 671 S.W.2d 507, 508–09 (Tex. 1984).

As relevant here, the rules of judicial administration provide that civil non-jury cases should be brought to trial or final disposition within twelve months from the defendant's appearance date. *See* TEX. R. JUD. ADMIN. 6.1(b)(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. F app. (West 2013). The administrative rules expressly recognize, however, that in complex cases or special circumstances "it may not be possible to adhere to these standards." TEX. R. JUD. ADMIN. 6.1(e).

Staley first appeared in this case in December 2012 and filed its motion to transfer venue. After the case was transferred to Dallas County in July 2013, Enexco and Staley agreed to, and the Court entered, the court's uniform scheduling order scheduling the case for trial on August 11, 2014 and setting orderly pretrial proceedings. Staley then filed a plea in abatement to require Enexco to correct the capacity in which Staley II was sued. Although the case had been pending in Dallas County for about twelve months, an agreed motion for continuance was filed on July 11, 2014.⁴ The trial court then reset the case for April 27, 2015 pursuant to the same form of uniform scheduling to which Enexco and Staley again agreed. Staley filed its motion to dismiss on March 2, 2015, about two months *before* the new trial date, arguing the case had been pending for twenty-eight months and Enexco had not conducted any discovery. According to the April 14 order, the trial court postponed the April 27 trial date and reset the motion to dismiss

⁴ Staley asserts that we cannot consider the continuance motion because it does not appear in the appellate record. We note, however, that Staley does not dispute that it filed the agreed motion with the court. Moreover, the order granting the agreed motion is contained in the appellate record.

with the motions to withdraw for May 27.⁵ The dismissal motion was heard and granted on May 27.

Our review of the record reveals that contrary to Staley's contentions of Enexco's inactivity in the lawsuit, at all relevant times in the trial court Enexco had the case set for trial with the agreement of Staley and order of the trial court. The case progressed to two trial dates the first of which was continued by agreement of Staley and Enexco. Enexco did not seek continuance of second trial setting; rather it was vacated by the trial court after the motion to dismiss was filed. Moreover, for more than twelve months after the case was first filed, procedural matters including a change of venue and a plea in abatement were addressed. Allowing for the resolution of these procedural issues, the case was pending for about eight months when the first trial date of August 11, 2014 was set. It was only after the case was reset for April 27, 2015 that Staley filed its motion to dismiss. Rather than try the case on April 27, however, the trial court vacated the trial date to allow consideration of Staley's motion to dismiss and the motions to withdraw one month later, on May 27.

In the trial court and its appellate brief, Staley relies on the fact that Enexco did not conduct discovery to justify dismissal of the case for want of prosecution. It is undisputed that Enexco did not conduct discovery on the case. But Staley has not cited any authority which requires a plaintiff to conduct discovery as a requirement for its case not to be dismissed and we are not aware of such a requirement.⁶ Such a requirement would be tantamount to a rule of

⁵ Discussion at the May 27 hearing indicates the trial court postponed the trial to allow time for counsel to correct aspects of the motions to withdraw that the trial court considered deficient.

⁶ We reject Staley's reliance on *Phillips v. Welch*, 749 S.W.2d 286 (Tex. App.—San Antonio 1988, no writ) and *Kilpatrick v. Norby*, 302 S.W.2d 492, 493 (Tex. Civ. App.—San Antonio 1957, no writ) to support its position that Enexco's failure to conduct discovery compels us to affirm the trial court's dismissal. Although the plaintiffs in those cases failed to conduct discovery, there is no indication that either case had a scheduled trial date, that the trial court postponed an existing trial date to dispose of a motion to dismiss, or other circumstances that are present in the case before us. Staley also cites us to *Thomas v. Watson Elec. Supply*, No. 05-92-01266-CV, 1994 WL 60621 (Tex. App.—Dallas Feb. 25, 1994, writ denied) (not designated for publication) in support of its position. We note that

procedure mandating that a plaintiff conduct discovery which does not exist. Rather, as Enexco argues, it could have and should have been allowed to proceed to try the case on April 27 based on evidence in its possession. At the dismissal hearing on May 27, Enexco argued the lawsuit was a breach of contract case involving a joint operating agreement and invoices that Enexco had sent Staley and Staley had failed to pay.⁷ Enexco indicated it had been ready to try the case in April.

We conclude the trial court clearly abused its discretion in ordering the case dismissed. The record before us demonstrates that at all relevant times Enexco had been able to obtain trial settings and docket control orders with the agreement of Staley. Enexco did not seek any relief from the docket control order that set the April 27 trial nor did Enexco seek to postpone the trial. Special circumstances existed in the nature of the venue challenge and plea in abatement that made it unlikely, if not impossible, for the case to be disposed of within the twelve-month time frame in the administrative rules. Moreover, after considering the entire history of the case as outlined above, we conclude the trial court abused its discretion in finding that that Enexco failed to diligently prosecute its claims against Staley. The only basis for this finding is Enexco's

unpublished opinions before January 1, 2003 have no precedential value although they may be cited. *See* TEX. R. APP. P. 47.7(b). *Thomas* is completely inapposite to Enexco's case because *Thomas* involved a dismissal of a products liability case for the failure of the plaintiff to identify the supplier of the allegedly defective product that allegedly caused plaintiff's injury. In fact, the trial court reinstated the case once resetting the deadline twice more for the plaintiff to identify the supplier before dismissing the case again for the plaintiff's failure to identify the supplier of the defective product—almost six and one-half years after the case had been filed. So the court's decision in *Thomas* did not pertain to the plaintiff's failure to conduct discovery but the plaintiff's failure to respond to discovery. Here, the record does not reflect that Staley conducted any discovery and neither in the trial court or its appellate brief does Staley complain about Enexco not responding to discovery.

⁷ Enexco argued:

I don't know that we've not diligently pursued the case. We have the evidence that we think we need to prove the case. So once the case was set for trial in September by the Court's order, there's lots of reasons why a case -- why discovery might not be sent, you know. This man that owns Enexco -- there was a joint operating agreement. These defendants filed a motion by that joint operating agreement, by the invoices that we intend to present at trial, owe Enexco, Inc. over \$71,000. So they're already out \$71,000. So it's not out of the question for an attorney or his firm to say let's minimize expenses, let's wait this out, get the trial setting, once we get the trial setting let's go try this case. I don't think that's -- I don't think that's lack of due diligence. What that is, is doing what's good for your client and not running up fees.

failure to conduct discovery which we have already concluded does not exist in the circumstance presented here. We resolve Enexco's first issue in its favor.

Having concluded that the trial court abused its discretion in dismissing the case, we need not address Enexco's second issue. We reverse the trial court's order of dismissal and remand the cause to the trial court for further proceedings consistent with this opinion.

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/David W. Evans/

DAVID EVANS
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ENEXCO, INC., Appellant

No. 05-15-01047-CV V.

JAMES STALEY, II, AS TRUSTEE OF
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Trial Court Cause No. DC-15-09177
Opinion delivered by Justice Evans, Justices
Myers and Richter participating.

In accordance with this Court's opinion of this date, the order of the trial court dismissing this case for want of prosecution is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings.

It is **ORDERED** that appellant Enexco, Inc. recover its costs of this appeal from appellees James Staley, II, as Trustee of the Connie G. Staley Heritage Trust B, and James Staley, III.

Judgment entered this 9th day of January, 2017.