Winter 1966

Civil Procedure—Dismissal and Nonsuit—Mandate Dismissal

Frances Freddle

Recommended Citation
Frances Freddle, Civil Procedure—Dismissal and Nonsuit—Mandate Dismissal, 6 Nat. Resources J. 159 (1966). Available at: https://digitalrepository.unm.edu/nrj/vol6/iss1/14

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CIVIL PROCEDURE—DISMISSAL AND NONSUIT—MANDATORY DISMISSAL.*—Recent New Mexico cases have had considerable impact on the meaning of the mandatory dismissal provision of Rule 41(e) of the New Mexico Rules of Civil Procedure. The rule, as amended, provides that when the plaintiff has failed to take any action to bring the litigation to a final determination for a period of three years after the filing of the original complaint, any party may have the case dismissed with prejudice upon the filing of a written motion, unless a written stipulation signed by all parties has been filed postponing the action. Rule 41(e) does not apply to those cases in which a jury trial has been demanded.1 Although this Comment is based upon decisions given when the rule specified a two-year time limit, the 1965 amendment extending the time limit to three years should not affect the future judicial interpretation of 41(e), except, of course, in cases in which a jury trial has been requested.

Generally the rule has been strictly construed, and its application has been mechanical. The New Mexico Supreme Court held the dismissal provision to be mandatory in Ringle Dev. Corp. v. Chavez.2 But the court in Ringle indicated that some rather unclear exceptions to a mandatory application of the rule might exist:

Except where the time is tolled by statute, such as the Soldiers' and Sailors' Relief Act . . . or unless process has not been served because of inability to execute it on account of the absence of the defendant from the state, or his concealment within the state, or unless from some other good reason, the plaintiff is unable, for causes beyond his control, to bring the case to trial, the provision for dismissal is mandatory.3

   In any civil action or proceeding pending in any district court in this state, when it shall be made to appear to the court that the plaintiff therein or any defendant filing a cross complaint therein has failed to take any action to bring such action or proceeding to its final determination for a period of at least three [3] years after the filing of said action or proceeding or of such cross complaint unless a written stipulation signed by all parties to said action or proceeding has been filed suspending or postponing final action beyond three [3] years, any party to such action or proceeding may have the same dismissed with prejudice to the prosecution of any other or further action or proceeding based on the same cause of action set up in the complaint or cross-complaint by filing in such pending action or proceeding a written motion moving the dismissal thereof with prejudice. This section does not apply to any action or proceeding wherein a jury trial has been demanded.
2. 51 N.M. 156, 180 P.2d 790 (1947).
3. Id. at 159, 180 P.2d at 792.
Beyond the indefinite exceptions established in *Ringle*, the supreme court has held that dismissal under 41(e) is not an occasion for the exercise of judicial discretion.\(^4\)

The supreme court has been reluctant to find exceptions that would avoid application of the rule. The court has held that the taking of depositions,\(^5\) the filing of a request for an admission of fact,\(^6\) motions made by the defendant during the two-year period,\(^7\) and the use of discovery procedures\(^8\) were not sufficient "actions" to toll the statute. Similarly, the absence of two material witnesses from the state was held an insufficient reason beyond a party's control for taking no steps to bring the case to a final determination.\(^9\)

The supreme court has further held that actions taken after expiration of the two-year period, but before a motion to dismiss was made by the defendant, did not prevent the defendant from meritoriously filing a motion to dismiss under 41(e). In *Featherstone v. Hanson*,\(^10\) the plaintiff hired new attorneys, entered settlement negotiations, and paid fees to his attorneys. Nevertheless, the supreme court affirmed dismissal with prejudice, saying that because the

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See also Foster v. Schwartzman, 4 N.M. Bar Bull. 233 (1965), decided by the supreme court on December 27th. In *Foster*, the plaintiff moved to have the trial court set trial on the day the two-year statutory period would expire. (*Foster* was decided under the two-year time limit of 41(e) prior to its amendment). The plaintiff's motion in *Foster* was made seven days before two-year anniversary date. If the trial court was unable to set trial, the plaintiff sought an alternative order to the effect that the motion to set for trial was, in any event, sufficient action under 41(e) to prevent dismissal. The trial court was unable to meet the trial date requested by the plaintiff and denied the plaintiff's alternative motion that sufficient action had been taken by the plaintiff in seeking a trial date to prevent dismissal under 41(e). Relying solely on 41(e), and expressly declining to exercise its inherent power to dismiss for lack of diligence, the trial court later dismissed the plaintiff's action with prejudice.

In an opinion written by Justice Chavez, the supreme court reversed. Language by the court in *Foster* raises additional doubts regarding the future status of rule 41(e):

> [W]e believe that, as a matter of law, [41(e)] is merely a standard as to lack of diligence. It does not infer that inaction for a shorter period of time may not also show a lack of diligence. The courts of this jurisdiction have inherent power to dismiss actions for lack of diligent prosecution [Citations omitted.]

4 N.M. Bar Bull. at 234.


plaintiff's actions were outside the court record they could not be considered to deny a 41(e) motion. The plaintiff's action must be part of the court record before the supreme court will consider the plaintiff's argument to resist dismissal. The fact that the defendant had participated in the negotiations could not be considered because the negotiations were not part of the record. The holding in Featherstone, that the plaintiff's actions must be part of the court record, has been reaffirmed in subsequent cases. Thus, rule 41(e) has had the effect of a statute of limitations.

The foregoing discussion outlines two problems arising in the application of rule 41(e): (1) Is dismissal always mandatory after a lapse of two years (now three years) from the date the complaint is filed? (2) What action or excuse is sufficient to avoid application of rule?

The New Mexico Supreme Court answered the first question in Martin v. Leonard Motor-El Paso, decided in 1965. In Martin, the plaintiff-appellant appealed from a judgment dismissing his complaint pursuant to rule 41(e). The complaint was filed June 7, 1961, and dismissed without prejudice on the trial court’s own motion on August 21, 1963. The complaint was reinstated on the docket by order of the district court on November 5, 1963, the date on which the plaintiff filed a written motion requesting that the case be set for trial. The motion for a trial setting was filed more than two years after the original complaint was filed, but it was filed before the defendant moved to dismiss under 41(e) on January 17, 1964. The trial court granted the motion to dismiss. The New Mexico Supreme Court, held, Reversed and remanded, stating that the defendant was required to invoke his right to dismiss before the plaintiff took the requisite action to bring the case to a final determination. The court said:

The defendant slumbered while the plaintiff satisfied the requirements of Rule 41(e) and, therefore, his subsequent motion for dismissal came too late.


12. Eager v. Belmore, 53 N.M. 299, 207 P.2d 519 (1949); City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1949) (construing predecessor to present 41(e)).


14. Id. at 957.
The *Martin* decision means that dismissal is not mandatory if the plaintiff takes sufficient action to bring the case to a final determination before the defendant moves under 41(e), even though the two-year period has passed. Although *Martin* seems to conflict with *Featherstone*, the two cases can be reconciled. In *Featherstone*, the plaintiff's actions to bring the case to trial were not part of the court record; in *Martin*, they were. The plaintiff's action, if it is part of the record and precedes the defendant's motion under 41(e), will prevent dismissal.

*Martin* is not inconsistent with the holding in the *Ringle* case, which set forth the unclear exceptions to the application of 41(e); *Martin* defines one of the exceptions of that holding. Mandatory dismissal, previously undefined in a fact situation like *Martin*, will result only if the defendant, at the expiration of the two-year period, files his motion before the plaintiff takes sufficient action to bring the case to final determination. In *Martin*, the plaintiff's action was taken prior to the defendant's motion to dismiss, and the plaintiff's action was in the court record. A combination of these two circumstances had never before been presented to the supreme court in a 41(e) case. Although *Martin* appears to conflict with earlier decisions, it does not. Rule 41(e) can still be a statute of limitations in its effect, but this is true only if the defendant moves for dismissal before the plaintiff takes sufficient action to satisfy the rule.

The *Martin* holding was reaffirmed in *Beyer v. Montoya*, decided a week after *Martin*. In *Beyer*, the plaintiff obtained a trial setting after expiration of the two-year period but before the defendant moved for a dismissal under 41(e). The New Mexico Supreme Court, held, Reversed and remanded:

> Dismissal is mandatory only when a written motion under Rule 41(e) is filed before plaintiff takes action toward final disposition, even if that action is taken after the two-year period has expired... [citing *Martin*].

After *Martin* and *Beyer*, the defendant cannot rely merely upon the expiration of the time limit given in 41(e); the defendant must move to dismiss before the plaintiff takes sufficient action to bring the case to final determination.

The second question remains: What activity by the plaintiff constitutes sufficient action or excuse to avoid dismissal? *Martin* and

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15. 402 P.2d 960 (N.M. 1965).
16. Id. at 962-63.
answer this question only to the extent that a request by the plaintiff to set a trial date is sufficient action to avoid dismissal.

A third case, decided after Martin and Beyer, gives an example of an action that will not be considered sufficient. In *State ex rel. City of Las Cruces v. McManus*, the plaintiff, Seaborn Collins, filed his original complaint on January 12, 1961. On February 9, 1961, the defendant filed a motion to dismiss the complaint for failure to state a cause of action. According to the record, this motion was never ruled upon, partly because of difficulty encountered in securing a presiding judge. Judge McManus was finally designated to preside on May 22, 1962. In the interim, two judges had been disqualified, and two other judges had declined to preside. Judge McManus took the defendant's motion to dismiss for failure to state a cause of action under advisement but did not rule on it until July 27, 1964, when he advised counsel by letter of his decision to deny the motion. No order was entered in the record.

The defendant filed a motion to dismiss under rule 41(e) on August 5, 1964. The motion was denied. The defendant sought mandamus to compel Judge McManus to dismiss the action. The New Mexico Supreme Court, relying on Featherstone, ordered dismissal of the plaintiff's suit:

> [W]e are impressed that we must hold preliminary motions filed but not ruled upon by the court will not prevent the running of the statute, at least where, . . . the record does not disclose that the court has been timely advised of the urgency of ruling on the pending motion with a request for a ruling and a setting for final disposition prior to a motion to dismiss under Rule 41(e).

The decision in *City of Las Cruces* shows that the court will continue to determine the adequacy of the plaintiff's action in the first instance by requiring that it appear in the court record. If the plaintiff's action is not part of the record, *City of Las Cruces* seems to indicate the supreme court's reluctance to consider the nature of the plaintiff's action under the uncertain standards of *Ringle* to determine if the action is sufficient to avoid dismissal. The New Mexico Supreme Court said in *Beyer* that it was not receding from the standards established in *Ringle*. Because the standards in

17. 404 P.2d 106 (N.M. 1965).
18. *Id.* at 106.
19. *Id.* at 107-08.
Ringle are unclear, it seems that the court will, as it said in Martin, determine each case upon its own particular facts and circumstances.

Suits in which a jury trial is demanded have been removed from the mandatory dismissal provisions of rule 41(e) by the 1965 amendment: "This section does not apply to any action or proceeding wherein a jury trial has been demanded." According to Senator A. T. Montoya, who introduced the amendment in the New Mexico legislature, juries are not regularly impaneled in many

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21. See note 3 supra and accompanying text.
23. Rule 41(e), as amended in 1965, is set forth in full at note 1 supra.
New Mexico counties because these counties lack funds to pay them. Thus, according to Senator Montoya, the plaintiff's attorney loses control of the case when a jury trial has been requested because the case cannot be tried until a jury is impaneled, the attorney cannot compel the court to impanel a jury, and the time limit of rule 41(e) might run before a jury is impaneled. The reasoning underlying the amendment seems to overlook the fact that under the former language of rule 41(e) a request by the plaintiff's attorney to set a trial date, if made a part of the record and submitted before the defendant moved to dismiss, would avoid dismissal of the suit because the plaintiff had done all that could be done to bring the case to a final determination, regardless of the time at which a jury might eventually be impaneled to hear the case.

The fact that no jury has been impaneled might cause the plaintiff's attorney to believe that the time limit of rule 41(e), prior to amendment, would be tolled until a jury was impaneled. This argument was advanced by the plaintiff to save his case from dismissal under the former language of 41(e) in Western Timber Prods. Co. v. W. S. Ranch Co., decided in 1961. In Western Timber, the case was dismissed under 41(e) even though no jury was impaneled from the time a presiding judge was obtained until the time the two-year time limit passed. The New Mexico Supreme Court rejected this argument and said that the plaintiff's failure to answer interrogatories would have prevented the trial of the case even if a jury had been impaneled. Similar reasoning could be used to justify dismissal when a jury has been impaneled, but when the plaintiff has failed to request that trial be set. Because the 1965 amendment removes jury cases from the mandatory dismissal provisions of rule 41(e), the relationship between the time at which a jury is impaneled and mandatory dismissal under the former language of the rule is no longer important.

Exemption of jury cases from the mandatory dismissal provisions of rule 41(e) might persuade plaintiffs to demand a jury trial, when permitted by law, to circumvent the time limit of 41(e), now applicable only to non-jury cases. However, this result seems unlikely for two reasons. First, a fee is required when a jury trial is demanded. Second, most plaintiffs are sincere in their desire to prosecute and want to do so immediately. The distinction drawn by the

25. This procedure has been followed in Bernalillo County. Telephone Interview With Mrs. Eloise Young, Clerk, Bernalillo County District Court, Nov. 30, 1965.
amended rule between jury and non-jury cases creates an anomalous situation in the law. Presumably, jury cases are now subject to dismissal in the court's discretion, but non-jury cases remain within the mandatory dismissal provisions of rule 41(e).

The reasons motivating adoption of rule 41(e) in New Mexico, and the federal rule from which it was adapted, were to relieve clogged dockets, eliminate stale cases, and, generally, to force plaintiffs' attorneys to prosecute with diligence. These are salutary objectives. There are, however, persuasive countervailing considerations to be balanced against the rule's objectives: the desirability of giving the plaintiff his day in court and the general desirability of adjudication on the merits.

The legislature has decided, perhaps inadvertently, to give more weight to the plaintiff's right to his day in court and adjudication on the merits by extending the time in which the plaintiff can take action to three years, and by making the rule inapplicable to jury trial cases. The supreme court seems to have adopted a similar approach. The Martin and Beyer cases indicate a decided shift in emphasis from a mechanical application of rule 41(e) when the specified time has lapsed to a closer scrutiny of the circumstances of the particular case. The court has recognized that a strict application of the rule is harsh under the circumstances confronting a litigant in the courts today. It is not easy for a plaintiff to take sufficient action to satisfy the rule. He must deal with busy lawyers and rely on their attentiveness to his case. To apply a two-year statute of limitations without considering efforts he and his attorney may have made after the two years had lapsed but before the defendant moved to dismiss, is too harsh. While Martin and Beyer do not go very far in mitigating this harshness, they do represent a step in that direction. At least the court is now considering the record before deciding whether to affirm or reverse dismissal. It is hoped that this represents a discernible trend toward a more permissive construction of rule 41(e). Hopefully, this trend will be continued even though the time limit has now been extended to three years. It seems doubtful that the one additional year allowed the plaintiff by the 1965 amendment will make application of the rule at the end of three years less difficult than at the end of two years.

The best solution to the problem surrounding rule 41(e) is to abandon the rule. The New Mexico courts have the inherent power

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to dismiss for lack of diligence in the prosecution of a case. Why not leave with the courts the power to examine all circumstances of a case to see if diligence is shown? Surely no court would have used its inherent power to dismiss in Featherstone, in which the plaintiff made a substantial attempt to move the case forward when it became apparent that he could not rely on his original attorneys. Why should the plaintiff have been punished, as he was, by his original attorney’s lack of diligence? Surely no court would have used its inherent power to dismiss in Western Timber, in which neither the plaintiff nor his attorney believed that the case could move forward until a jury was impaneled. Rule 41(e) is aimed at attorneys, but often the effect of its application is to unfairly punish plaintiffs.

Despite the often unfair effects of the application of rule 41(e), it is part of the New Mexico procedural rules. However, it is hoped that the supreme court will abandon its “on the record” standard and liberalize the concept of those “actions” sufficient to avoid mandatory dismissal. The plaintiff’s right to a hearing and an adjudication on the merits should be paramount. Only under circumstances showing complete indifference to the prosecution of his own case should a plaintiff’s case be dismissed under 41(e).

FRANCES FREEDLE