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Civil Procedure - Dismissal and Nonsuit - Mandamus

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COMMENT

CIVIL PROCEDURE—DISMISSAL AND NONSUIT—MANDAMUS*—

Rule 41(e) of the New Mexico Rules of Civil Procedure requires the trial court to dismiss with prejudice, on motion by any party, any civil action when the plaintiff has failed to take "any action to bring the proceeding to a final determination" for at least two years after filing of the complaint.[1] The Supreme Court of New Mexico has held that the "any action" which the plaintiff is required to take must meet the standards developed, or to be developed, by the court in order to satisfy the statute.[2] It is generally accepted that the

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* Sender v. Montoya, 387 P.2d 860 (N.M. 1963).

1. N.M. Stat. Ann. § 21-1-1(41)(e)(1) (1953):

> In any . . . proceeding pending in any district court . . . that the plaintiff . . . *has failed to take any action to bring* . . . [the] *proceeding to its final determination for a period of at least two* (2) *years after . . . filing* . . . unless a written stipulation . . . has been filed suspending . . . final action . . . any party . . . may have the same dismissed with prejudice . . . by filing . . . a written motion moving the dismissal . . . . [Emphasis added.]

See also Robertson, *New Mexico Rules of Civil Procedure for the District Courts*, 16 F.R.D. 489, 492-93 (1955):

> New Mexico has adopted a curious modification of the rule relating to dismissal of actions. When it appears that the plaintiff has failed to take any action to bring the action to its final determination for a period of at least two years after the filing of the action, the defendant may have the action dismissed with prejudice by filing a written motion for such dismissal. The two year period may, however, be extended by written stipulation of the parties.

This is the only mention Robertson made of Rule 41(e). His article explains the purpose and effect of some of the rules and, speaking generally, he says:

> [T]he court said in Carrol v. Bunt, 1946, 50 N.M. 127, [130,] 172 P.2d 116, 118:
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> 'The general policy of the Rules requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of the litigants.' . . . [quoting from Victory v. Manning, 128 F.2d 415, 417 (3d Cir. 1942).]

Id. at 493.

2. Ringle Dev. Corp. v. Chavez, 51 N.M. 156, 159-60, 180 P.2d 790, 792 (1947):

> Construing Rules 41(b) and 41(e) together, we hold that except where the time is tolled by statute, such as the Soldiers' and Sailors' Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521, 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.

See also Western Timber Prods. Co. v. W. S. Ranch Co., 69 N.M. 108, 364 P.2d 361 (1961) (issues confused by informal agreements between counsel); Henriquez v.

power to dismiss for failure to exercise diligence in prosecution is an inherent right of the courts, not dependent on legislation, and that the determination of what constitutes "lack of diligence" is within the court's discretion.[3] It was settled by the court in *Morris v. Fitzgerald*[4] that discovery procedures are not "action" within the meaning of Rule 41(e).[5] The trial court must determine, on the defendant's motion to dismiss under Rule 41(e), whether or not the plaintiff has taken any action which meets the requirements of Rule 41(e) and the standards established by the supreme court.

Schall, 68 N.M. 86, 358 P.2d 1001 (1961) (*no* action taken in over two years); Featherstone v. Hanson, 65 N.M. 398, 338 P.2d 298 (1959) (*no* action taken in over thirty months). *But see* Vigil v. Johnson, 60 N.M. 273, 275, 291 P.2d 312, 313-14 (1955), where the court said:

> While the provision for dismissal is mandatory, it does not arbitrarily require the proceeding to be terminated in two years. The period may be extended by written stipulation of the parties and there are other exceptions to the rule. . . . The record itself denys [sic] its application here. The complaint was filed May 7, 1951. On May 28, 1951, appellants filed a motion to make definite and certain. Appellee's response thereto was filed *June 15, 1951.* Thereafter, on *June 8, 1953*, the motion for judgment on the pleadings or summary judgment was filed.
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> The response, filed June 15, 1951, was sufficient to defeat automatic dismissal. It was beyond the control of appellees to bring the case to a close until the response was filed; and it is clear that the two year period had not expired, by seven days.

3. See, *e.g.*, City of Roswell v. Holmes, 44 N.M. 1, 2-3, 96 P.2d 701, 701-02 (1939):

> In the first place, it is an inherent right of the courts and therefore one existing independently of any statute to dismiss a suit for failure to prosecute it with diligence. . . . Doubtless ordinarily the determination of what amounted to diligence was to be determined by the court in the exercise of a judicial discretion. . . . Prior to the enactment of the statute here involved, dismissing with prejudice has not been the procedure in New Mexico, or elsewhere, so far as we know, in the absence of controlling statute or rule of court.

4. 385 P.2d 574 (N.M. 1963).

5. Morris v. Fitzgerald, 385 P.2d 574, 577 (N.M. 1963):

> Beyond what has been considered above, the record discloses nothing that was done to bring the case to its conclusion except to take a number of depositions. Does this serve to toll the statute?
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> It was the duty of the plaintiff to take some action to *bring the case to its final determination within two years of its filing.* We do not consider the taking of depositions as being action to accomplish this end so as to toll the statute. All discovery procedures are available to be used or not, as a litigant sees fit, and none are required prerequisites to trial. Accordingly, in our view, they are not 'actions' to bring a proceeding to its final determination so as to toll the statute. [Emphasis added.]

The italicized part of the paraphrased rule may be illuminating. As stated, this wording may require bringing the case *to trial within two years.* A literal reading of Rule 41(e) would seem to indicate that action is required within two years—the action to be such as will cause the case to *move toward trial.*

Mandamus may be sought to force the trial court to *act*, but it is not available to control the exercise of its *discretion*.[6]

In *Sender v. Montoya*,[7] an original action in mandamus, the petitioner sought to compel the respondent to dismiss a case under Rule 41(e).[8] On *February 21, 1961*, the State Records Administrator of New Mexico commenced an action in replevin to recover some ancient documents, alleged to be public records belonging to New Mexico, from the petitioner. On *April 30, 1963*, the petitioner filed a motion to dismiss for want of prosecution under Rule 41(e). The respondent denied the motion to dismiss on the theory that the plaintiff's request for admissions of fact filed on *September 18, 1962*, constituted "action by the plaintiff to bring the proceeding to its final determination within the meaning of Rule 41(e)."[9] On *June*

6. In Kiddy v. Board of County Comm'rs, 57 N.M. 145, 149, 255 P.2d 678, 680-81 (1953), the court said:

> Mandamus traditionally lies to direct performance of nondiscretionary tasks and by statute the remedy may be extended to discretionary tasks, but ordinarily only to the *doing* of them and not to the manner in which the discretionary task shall be performed.

The purpose of this comment is not to discuss when the remedy of mandamus is properly available. Mandamus in New Mexico is provided for by N.M. Const. art. 6, § 3, which gives this power to the supreme court, and by N.M. Stat. Ann. § 22-12-4 (1953), which provides:

> It [mandamus] may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion.

N.M. Stat. Ann. § 22-12-5 (1953), so far as pertinent, provides: "The [mandamus] writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law."

7. 387 P.2d 860 (N.M. 1963).

8. N.M. Stat. Ann. § 21-1-1(41)(e) (1953), quoted in note 1 *supra*.

9. Sender v. Montoya, 387 P.2d 860, 861 (N.M. 1963). In addition to the request for admissions, other actions were taken. The chronology is as follows:

1961:

Feb. 21, action commenced.

Feb. 22, defendant-petitioner served.

Feb. 23, amended complaint filed.

March 22, defendant-petitioner filed a motion to quash service on the ground that the plaintiff had failed to furnish a replevin bond.

April 26, motion to quash service denied by respondent.

May 16, defendant-petitioner filed his answer.

June 1, plaintiff moved for, was granted leave to, and filed a second amended complaint.

June 6, defendant-petitioner filed answer to second amended complaint.

June 28, plaintiff's motion to strike certain defenses granted.

1962:

Sept. 18, plaintiff served interrogatories and a request for admissions of fact

27, 1963, the petitioner filed an original petition with the New Mexico Supreme Court for a writ of mandamus to compel dismissal. *Held* (one Justice dissenting), peremptory writ of mandamus issued.[10] A request for admissions of fact under Rule 36[11] is not "any action to bring the proceeding to a final determination" as required under Rule 41(e).[12]

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on defendant-petitioner.

Oct. 1, defendant-petitioner filed a response to the plaintiff's request for admissions of fact.

Oct. 30, defendant-petitioner filed answers to the interrogatories.

1963:

April 30, defendant-petitioner filed a motion to dismiss under Rule 41(e) of the Rules of Civil Procedure.

May 23, plaintiff filed a motion requesting a pre-trial conference and that the case be set for trial.

June 14, defendant-petitioner's motion to dismiss under Rule 41(e) denied by respondent on the ground that plaintiff's request for admissions of fact filed on September 18, 1962, constituted "action by plaintiff to bring the proceeding to its final determination" within the meaning of the rule.

June 27, defendant-petitioner filed his petition for alternative writ of mandamus and the alternative writ issued.

July 3, respondent's answer filed.

July 23, defendant-petitioner's brief-in-chief filed.

Aug. 13, respondent's answer brief filed.

Aug. 28, defendant-petitioner's reply brief filed.

Dec. 23, peremptory writ of mandamus issued.

10. 387 P.2d at 864.

11. N.M. Stat. Ann. § 21-1-1(36) (1953).

12. In Sender v. Montoya, 387 P.2d 860, 861-62 (N.M. 1963), the court said:

> We are of the opinion that the request for admissions of fact is one of the discovery procedures . . . . This is so, even though 2A Barron & Holtzoff, Federal Practice & Procedure, § 831, states that 'Strictly speaking Rule 36 is not a discovery procedure at all * * * ' However, this same authority (§ 641) includes rule 36 as a part of the 'discovery mechanism' and cites no less authority than the Supreme Court of the United States in the case of Hickman v. Taylor, 1947, . . . 329 U.S. 495 . . . . [T]he Federal Rules of Civil Procedure are subdivided under ten separate headings, identified by Roman numerals and generally describing the type of the rules thereunder. When this court adopted the Federal Rules, with minor changes, we also adopted the same subdivisions. Subdivision V, 'Depositions and Discovery,' includes rules 26 to 37, both inclusive. Thus, inasmuch as rule 36, dealing with requests for admissions of fact, is classified as a part of the discovery process, we know of no reason why it should be considered otherwise. . . . It follows, therefore, that the motion to dismiss under Rule 41(e) should have been sustained.

But see Note, *The Dilemma of Federal Rule 36*, 56 Nw. U.L. Rev. 679, 681 (1961), where it is noted that Rule 36 could well be used with Rule 16 for pre-trial procedure to avoid many complicated problems of proof and thereby save time of the trial court. Further, if Rule 36 operated in the same manner as true discovery procedures used to obtain information of evidence, or which may be used as evidence, it would be redundant. The Note concludes:

> Rule 36 is a valuable timesaving tool when properly used, but the rule,

By the *Sender* decision, the supreme court has further extended the construction and interpretation of Rule 41(e).[13] In so doing, it relied heavily on the interpretation of a California statute[14] which is quite dissimilar to that of New Mexico.[15]

Prior New Mexico decisions, with few exceptions, have dealt entirely with circumstances which excuse inaction and "toll the running of the statute"[16] (Rule 41(e)). *Morris* held that discovery proceedings "are not 'actions' to bring a proceeding to its final determination so as to toll the statute."[17] *Sender* holds that since requests for admissions are discovery proceedings, they are not "action" under Rule 41(e).[18] The decisions thus far have been negative; no case has yet indicated what action will qualify as an "action to bring a proceeding to its final determination."[19]

It is not clear whether any action other than actually bringing the case to trial will qualify as "action to bring a proceeding to its final determination." Perhaps a request for a pre-trial conference under Rule 16[20] would suffice. *Marley v. City of Truth or Con-*

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due to vagaries of interpretation, is not always effectively applied. Perhaps this difficulty is due to the court's tendency to treat the rule as a discovery procedure—a misconception perhaps resulting from its placement in the discovery section of the Rules. . . . The rule is more closely allied to Rule 16, which provides for stipulations. It is not so much a finding of facts, but rather an agreement as to what the facts are.

Id. at 686.

13. N.M. Stat. Ann. § 21-1-1(41)(e) (1953), quoted in note 1 *supra.*

14. Cal. Civ. Proc. Code § 583:

The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff *has failed for two years after action is filed to bring such action to trial* . . . . Any action . . . *shall be dismissed by the court* . . . on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, *unless such action is brought to trial within five years* after the plaintiff has filed his action . . . . [Emphasis added.]

This statute was construed in, *e.g.*, J. C. Penney Co. v. Superior Ct., 52 Cal. 2d 777, 343 P.2d 919 (1959); Andersen v. Superior Ct., 187 Cal. 95, 200 Pac. 963 (1921), and cited in Sender v. Montoya, 387 P.2d 860, 862 (N.M. 1963).

15. N.M. Stat. Ann. § 21-1-1(41)(e) (1953); see note 1 *supra.*

16. See cases cited in note 2 *supra.*

17. Morris v. Fitzgerald, 385 P.2d 574, 577 (N.M. 1963).

18. Sender v. Montoya, 387 P.2d 860, 861-62 (N.M. 1963); see note 12 *supra.*

19. Except perhaps Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955); see note 2 *supra.*

20. N.M. Stat. Ann. § 21-1-1(16) (1955):

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and documents which

sequences, a case decided subsequent to *Sender*, indicates that a "motion or other action sought of the court and disclosed in the record" may qualify.[21] In *Sender*, however, the court reiterated that:

> '. . . . The basic difference, however, between the California statute and our rule is the difference in time limit, for otherwise both statutes have been construed to be mandatory.'[22]

The conclusion is clear. The phrase "any action to bring the proceeding to a final determination for at least two years" is ambiguous. What is meant by "action" has not been defined, nor is

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will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference . . . which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action . . . .

21. Marley v. City of Truth or Consequences, 389 P.2d 603, 605 (N.M. 1964):

There is no evidence of record to support appellants' requested finding of fact, that they orally requested the trial court to set the case for trial. The 'Judge's Docket' shows the following, among other things:

'1960

'Apr. 18 To be set late summer.

'Oct. 17 Try after 1st of year.'

However, the 'Judge's Docket' was not introduced or received in evidence, and possibly appears in the record because appellants, in their praecipe, requested that said document be included in the transcript. There is no evidence as to who made the notation on the 'Judge's Docket' set out above, this proves only what is set out therein, and does not prove that appellants requested that the case be set for trial.

* * * *

There is no proof here of the written stipulation nor exceptions . . . so that absent a showing of diligence reflected in the court file itself, the record fails to show such action as is required to prevent dismissal under the rule. . . .

* * * *

We do not believe, under the facts as disclosed by the record in this case, that appellants have shown the required diligence on their part to bring their action to a final determination, *by motion or other action sought of the court and disclosed in the record.* Further, there is no showing upon which appellants relied which would estop appellees from meritoriously filing a motion to dismiss, after two years from the date of the filing of the action. [Emphasis added.]

22. Sender v. Montoya, 387 P.2d 860, 862 (N.M. 1963), quoting from Featherstone v. Hanson, 65 N.M. 398, 403, 338 P.2d 298, 301 (1958).

it clear whether the period of two years applies to "action" or is to be a period within which a final determination must be made. If the phrase means "bring the case to trial within two years," decision or legislation to that effect seems highly desirable.

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