UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 728

September Term, 2016

OORO OTIENO

v.

SEARS, ROEBUCK AND CO.

Meredith,
Reed,
Wallace, Sean D.
(Specially assigned),

JJ.

Opinion by Wallace, J.

Filed: June 1, 2017

According to Woody Allen, "showing up is eighty percent of success in life."* In litigation, it is closer to one-hundred percent, as this appeal demonstrates. It raises two questions, which we rephrase as follows:

1. Did the circuit court err in dismissing the case for failure to attend the pretrial conference?
2. Did the circuit court err in granting Appellee's motion for summary judgment?

We find no error in the dismissal but error in granting summary judgment, for the following reasons.

In May of 2015, Appellant Ooro Otieno filed suit against Appellee Sears, Roebuck and Company claiming products liability. It is undisputed that Appellant and his attorney failed to appear at a Pretrial Conference held on May 12, 2016. As a result, the circuit court dismissed the case with prejudice. Appellant filed a timely motion to reopen and, on June 14, 2016 the circuit court issued two orders: one denying the motion to reopen and the other granting appellee's unopposed motion for summary judgment. This appeal ensued.

A decision whether or not to dismiss a case for failure to prosecute rests within the sound discretion of the trial judge. Stanford v. District Title Ins. Co., 260 Md. 550, 555 (1971); Langrall, Muir & Noppinger v.Gladding, 282 Md. 397 (1978). We will not invade the trial judge's province on appeal except in extreme

* Actually, Mr. Allen is reported as having said two very similar things at different times. In 1977, the New York Times quoted his language to be "showing up is 80 percent of life." A dozen years later, he wrote "as I'm now trying to recall it, I did say that 80 percent of success is showing up."

cases of clear abuse. Id. Thus, we examine the dismissal here to determine whether the circuit court abused its discretion.

Appellant proffers that the failure to appear was inadvertent and that he was actively prosecuting his case. The record does not support this assertion. At the pretrial conference, Appellee's counsel pointed out that, in addition to failing to appear at the conference, Appellant had not filed a pretrial statement nor had he opposed the motion for summary judgment "which is long overdue." The judge asked if Appellee's attorney had any contact with Appellant's counsel and was told:

> I tried to reach out to him last week. I tried to reach out to him several times about the joint pretrial statement, which was due on Monday. He indicated he was in Florida last week for his daughter's graduation.
>
> But since then, I tried to reach out to him to get his authority to sign off on the joint pretrial statement, but I never heard from him. And that's why we ended up filing just a defense pretrial statement.

This was certainly a sufficient basis for the trial court to exercise its discretion and dismiss the case for failure to prosecute.

Moreover, the submissions related to the Motion to Reopen demonstrated further dilatory conduct by Appellant. It was pointed out that "[Appellant] was over three months late in providing his discovery responses to Defendant, which necessitated a court order compelling him to do so." This dilatory conduct by Appellant caused a rescheduling of the pretrial conference. Further, it was noted

that the summary judgment motion, which was unopposed, was based on Appellant's failure to designate a proximate causation expert as required for his product liability claim. (At oral argument the Appellant's counsel conceded that her predecessor's trial theory of *res ipsa loquitur* was misplaced, that an expert was needed for this products liability claim, and that plaintiff had no expert.) Finally, Appellant's trial counsel admitted to the court that

> counsel has searched his file, and could not see the order rescheduling the Pretrial Conference for May 12, 2016. In fact, there was nothing on the undersigned counsel's calendar for May 12, 2016; thus nothing could have prevented the undersigned counsel and the Plaintiff from attending the Pretrial Conference.

Given this record, we do not find that the circuit court abused its discretion in both dismissing the case and refusing to reopen it.

Appellant next argues that the trial court "misapplied the law where it granted the Appellee's Motion for Summary Judgment after dismissing the case with prejudice because the motion was moot." We agree with Appellant's argument, although this is no more than a Pyrrhic victory.

Once the trial court dismissed the claim, all other pending motions (including the motion for summary judgment) became moot. Although the court did retain revisory power over the judgment, see Md. Cts. & Jud. Proc. Code § 6-408 and Rule 2-535, that power extended solely to reopening the dismissal in this case. If the court had vacated the dismissal and reopened the case, that would have revived the summary judgment motion and made it ripe for ruling. However,

since the trial court denied the motion to reopen (and without error, as we note above), it had no authority to rule on the summary judgment motion.

Accordingly, we vacate the trial court's order granting summary judgment. Nonetheless, the dismissal is affirmed so that ultimate result is the same.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND REVERSED IN PART. REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.