UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0440

September Term, 2015

BALTIMORE CITY ENTERTAINMENT GROUP, LP

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

Meredith,
Arthur,
Leahy,

JJ.

Opinion by Arthur, J.

Filed: March 28, 2016

In 2010 Baltimore City Entertainment Group, LP ("BCEG"), filed suit for injunctive relief and damages because of Baltimore City's termination of agreements to sell and lease land for the development of a casino. On an interlocutory appeal in 2012, this Court affirmed the dismissal of BCEG's claims for injunctive relief. In an appeal in a related case in 2012, this Court affirmed an administrative agency's rejection of BCEG's application for a video lottery terminal license, which was the basis for the City's termination of the agreements.

Once this case returned to the circuit court in 2013, little occurred for more than two years, except for an inconclusive scheduling conference. After issuing a notice of contemplated dismissal under Md. Rule 2-507 and considering the parties' responses, the circuit court exercised its discretion to dismiss the case on April 1, 2015. BCEG took a timely appeal.

QUESTIONS PRESENTED

BCEG raises two related questions, which, for concision, we have rephrased as one: Did the circuit court abuse its discretion in dismissing BCEG's claims for want of prosecution under Rule 2-507(c)? Seeing no abuse of discretion, we affirm.[1]

[1] BCEG phrased its questions as follows:

1. Whether the Circuit Court erred in dismissing this case pursuant to Maryland Rule 2-507.

2. Whether the Circuit Court erred in dismissing this case pursuant to Maryland Rule 2-507 where BCEG had been vigorously litigating this case, where BCEG had made multiple requests for a scheduling hearing

(continued…)

FACTUAL AND PROCEDURAL BACKGROUND

On October 21, 2009, BCEG and Baltimore City entered into a Land Disposition Agreement and Lease. Both agreements anticipated the development of property as a casino.

As a condition precedent, the agreements required BCEG to obtain a license for video lottery terminals from the Maryland Video Lottery Commission. The City could terminate the agreements on June 22, 2010, if BCEG had not obtained the license by then.

On December 19, 2009, the Video Lottery Commission rejected BCEG's application for a license after BCEG missed several deadlines to submit the requisite license fee of $19.5 million. BCEG did not succeed in obtaining a license between December 19, 2009, and June 22, 2010. Consequently, the City terminated the agreements.

On July 15, 2010, BCEG filed a complaint to enjoin the termination of the agreements and for damages. After some initial sparring, the circuit court granted the City's motion for summary judgment as to the claims for injunctive relief, but denied it as to the claims for damages. BCEG took an interlocutory appeal, and this Court affirmed, stating that the City was "well within its contract rights" because "it was undisputed that

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and a hearing to resolve outstanding motions to compel discovery, where the Circuit Court previously ruled that the motions to compel had to be resolved for the case to proceed, and where BCEG had presented some of the foregoing issues to the Circuit Court on the record at a hearing held less than one year before the issuance of the Order to Show Cause.

BCEG never received a [video lottery terminal] license." *Baltimore City Entertainment Group, LP v. Mayor and City Council of Baltimore*, No. 48, Sept. Term. 2011 (Dec. 12, 2012), slip. Op. at 17.

Meanwhile, BCEG had brought an administrative challenge, in the Board of Contract Appeals, to the Video Lottery Commission's decision not to award it a license. The Board of Contract Appeals rejected BCEG's challenge, the Circuit Court for Baltimore City affirmed that decision on judicial review, and this Court affirmed the circuit court. *Baltimore City Entertainment Group, LP v. Maryland Video Lottery Facility Location Comm'n*, No. 814, Sept. Term 2011 (filed June 11, 2012). In reaching its decision, this Court reasoned that BCEG had not tendered the required licensing fee and that the agency had no discretion even to consider a proposal for a video operation license if the proposal was not accompanied by the requisite fee. *Id.*, slip op. at 12.

After an unsuccessful petition for a writ of certiorari, BCEG's case against the City returned to the circuit court sometime in the spring of 2013. In view of the appellate rulings, all that remained of the case was BCEG's contention that the City breached its contractual obligations by allegedly interfering with BCEG's ability to obtain a license between December 19, 2009, when the Video Lottery Commission rejected BCEG's application because of BCEG's failure to submit the requisite fee, and June 22, 2010, when the City terminated the agreements.

On June 26, 2013, the court conducted a scheduling conference. At the conference, BCEG requested a new scheduling order to govern discovery, while the City requested that the case be specially assigned to an individual judge. The court said that it

would "see about specially assigning the case" and would let the new judge "get in touch with you and create a scheduling order." For reasons that are not disclosed by the record, however, neither of those events occurred. Nor did either party take any steps to advance the case.

It appears that at some point during the week of March 10, 2014, the court prompted the parties to engage in discussions about mutually agreeable trial dates on or before October 10, 2014. In a letter to the court on March 20, 2014, counsel for the City proposed a dispositive motion deadline in June, a pretrial conference date in September, and dates for a two-day trial in October. On that same day, counsel for BCEG responded that he "had been unable to contact [his] client to clear trial dates for company employees," that he could not clear those dates until "early next week," and that he would "provide dates when counsel and [the] company witnesses can be available" for the trial, which he understood would occur on or before October 9, 2014. In addition, counsel for BCEG asserted that "[d]iscovery in this case is not closed" and that the trial would take a week or more.

Six days later, on March 26, 2014, counsel for BCEG again wrote to the court. Despite his representation that BCEG would by then have "clear[ed] trial dates for company employees," counsel for BCEG did not propose any trial dates. Instead, counsel requested a scheduling conference, repeated that "discovery is not closed," and expressed doubt about whether an October trial date would allow sufficient time for discovery. For reasons that again are not disclosed by the record, the court did not set a

trial date, issue a scheduling order, or convene another scheduling conference. Nor did either party take any steps to advance the case.

On June 19, 2014, the clerk issued a notice of contemplated dismissal under Rule 2-507. The notice stated that the proceeding would be dismissed, without prejudice, for lack of prosecution unless BCEG filed a written notice, within 30 days, showing good cause to defer the entry of the order of dismissal.

Twenty-nine days later, on July 18, 2014, BCEG attempted to file what it called "Plaintiff's Response to the Show Cause Order of June 19, 2014." The three-page, seven-paragraph response, asserted that since the conclusion of the appeals the case had "ended up in limbo" because of the absence of a scheduling order to govern the unspecified areas of discovery that BCEG claimed to need. Unfortunately, because BCEG put the wrong case caption on the document, it did not find its way into the court file for this case.[2]

On July 31, 2014, the City filed a comprehensive response to BCEG's misplaced filing. Among other things, the City's response attached the two appellate decisions and argued that BCEG no longer had a viable case.

On August 1, 2014, the clerk dismissed BCEG's case under Rule 2-507. Because the clerk must dismiss a case for want of prosecution under Rule 2-507(f) when more

[2] BCEG had made the same mistake on an earlier occasion: in 2010, before the entry of partial summary judgment on its equitable claims, BCEG had filed a motion to compel deposition testimony from the City's representative, but put the wrong caption on the motion. BCEG's response to the order of contemplated dismissal referred to that motion to compel, which, like the response itself, did not appear in the court file for this case.

than 30 days pass without a response to an order for contemplated dismissal, we surmise that the clerk was unaware of BCEG's misfiled response.

BCEG learned of the dismissal of its case and, on August 11, 2014, filed a motion to alter or amend the judgment. The motion, which someone had manually corrected to insert the accurate case number, attached the March 2014 correspondence with the court and the appellate ruling in this case, and it reiterated BCEG's argument that the delay was attributable to the court's failure to specially assign the case, to issue a scheduling order, and to rule on a (misfiled) motion to compel. *See supra* note 2. On August 21, 2014, the court reopened the case because it had been closed in error – the error presumably being that the clerk had acted without realizing that BCEG had responded to the order of contemplated dismissal, albeit with a document bearing the wrong case number.

On September 3, 2014, BCEG filed a request for a hearing on its motion to compel, but again employed the wrong case number. In any event, the court was not required to conduct a hearing on that discovery motion. *See* Md. Rule 2-311(f).

Thereafter, the case languished for another seven months, until April 1, 2014, when the administrative judge dismissed it without prejudice for want of prosecution. In his order, the judge wrote that, having read and considered BCEG's response to the order of contemplated dismissal, as well as the City's response to BCEG, he had concluded that BCEG had failed to demonstrate good cause to defer the entry of the order of dismissal.

On April 29, 2015, BCEG filed this timely appeal.

STANDARD OF REVIEW

Under Rule 2-507, "the decision to grant or deny the dismissal is committed to the sound discretion of the trial court." *Reed v. Cagan*, 128 Md. App. 641, 646 (1999) (citing *Powell v. Gutierrez,* 310 Md. 302, 309-10 (1987)); *accord Spencer v. Estate of Newton*, ___ Md. App. ___, 2016 WL 756533, at *4 (Feb. 25, 2016). "The trial court's decision will be overturned on appeal only 'in extreme cases of clear abuse.'" *Reed*, 128 Md. App. at 646 (quoting *Stanford v. District Title Ins. Co*., 260 Md. 550, 555 (1971)). An abuse of discretion occurs "'where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles.'" *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13 (1994) (internal citations and quotation marks omitted)).

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION

A. The Governing Principles Under Rule 2-507

The purpose of Rule 2-507 is to "'prune the docket of dead cases' – cases in which 'neither party demonstrates an interest in having the issue resolved.'" *Spencer v. Estate of Newton*, 2016 WL 756533, at *3 (quoting *Powell v. Gutierrez*, 310 Md. at 308). The purpose is not "'to penalize plaintiffs for having lax attorneys.'" *Id.* (quoting *Powell v. Gutierrez*, 310 Md. at 308).

Under Rule 2-507, a case becomes subject to dismissal for lack of prosecution one year after the last docket entry, but "lack of prosecution alone does not require automatic dismissal." *Id.* Instead, "[t]he test under the Rule is whether there is 'good cause' to defer dismissal." *Id.* In applying that test, "a court must weigh, consider, and balance"

two factors pertaining to the plaintiff: "(1) is the plaintiff currently ready, willing, able, and desirous of proceeding with prosecution of the case, and (2) was there any justification for the delay[.]" *Id.*

In addition to the two factors pertaining to the plaintiff, "the court must consider whether the defendant 'has suffered serious prejudice because of the delay, so as to impede substantially his [, her, or its] ability to defend the suit.'" *Id.* (quoting *Powell v. Gutierrez*, 310 Md. at 308). "Where appropriate, the court must take into account that the defendant also has a responsibility 'to promote the orderly resolution of litigation' and may not 'sit back and allow the prescribed period under the Rule to pass in the hope that the court will dismiss the case irrespective of the vitality of the litigation.'" *Id.* (quoting (*Powell v. Gutierrez*, 310 Md. at 309).

"In the end, although the court must consider, weigh, and balance these factors, the ultimate decision whether to defer dismissal is within the trial court's discretion, and the appellate court must give deference to the exercise of that discretion." *Id.* at *4.

B. <u>The Circuit Court Did Not Abuse Its Discretion</u>

This is not an extreme case involving a clear abuse of discretion. When the circuit court dismissed the case on April 1, 2015, nothing of substance had occurred for almost two years, since the case had returned from the appellate courts. During that time, BCEG had demonstrated little interest in pursuing the case – it did not follow through with its promise, in March 2014, to propose trial dates; and despite the assertion that it required additional discovery, it made no effort to pursue any discovery, except to file a

miscaptioned request for a hearing (on a motion on which it had no entitlement to a hearing) after the order of contemplated dismissal.

It is no answer that the court had not issued a scheduling order. Not only did BCEG need no new scheduling order to propound interrogatories, serve document requests, and note depositions, but the absence of an order may well have been attributable to BCEG's failure to propose trial dates. It was not unreasonable, in these circumstances, for the circuit court to conclude that BCEG had no justification for the delay.

Nor was it unreasonable for the circuit court to conclude that BCEG was not ready, willing, or able to proceed with prosecution of the case. In fact, in light of the appellate rulings that the City attached to its opposition to BCEG's response to the order of contemplated dismissal, it appears that nothing of substance remained of the case. The earlier appellate decision in this case knocked out BCEG's claims for injunctive relief. The appellate decision in the related *Maryland Video Lottery* case had the effect of knocking out BCEG's remaining damages claims, because the City could not have breached an obligation to assist BCEG in obtaining a license that the Commission had no discretion to issue. It was not unreasonable for the circuit court to conclude that BCEG had not pursued its case because BCEG believed that it no longer had a viable case to pursue.

BCEG argues that the circuit court erred in dismissing the case because the clerk issued the order of contemplated dismissal on June 19, 2014, just less than a year after the fruitless scheduling conference on June 26, 2013. In the circuit court and on appeal,

BCEG argued that the scheduling conference was a "proceeding of record," which took place during the year before the order of contemplated dismissal, and which made the order of contemplated dismissal premature. The short answer to BCEG's contention is that, unlike its predecessor (Rule 530), Rule 2-507(c) speaks of a "docket entry," not a "proceeding of record." *Compare Cooney v. Board of County Comm'rs of Carroll County*, 21 Md. App. 57, 58 (1974) ("Md. Rule 530 prescribes that a pending action in which proceedings of record have not taken place within an eighteen month period shall be dismissed, unless, for good cause shown, the court suspends the operation of the rule"). Under Rule 2-507, a "proceeding of record" is irrelevant unless it results in a "docket entry."

On appeal, BCEG points out that the scheduling conference of June 26, 2013, did result in a kind of entry on the computerized docket – albeit an entry in the "Calendar Events" section, and not in the "Document Tracking" section in which the clerk records court filings. In this era of computerized dockets, where docket books and ledgers have become a thing of the past, it is unclear whether the term "docket entry" is confined to an entry that records the filing of pleadings, motions, and orders, or whether the term includes entries that reflect the scheduling and completion of hearings, scheduling conferences, pretrial conferences, trials, etc. We need not resolve this issue, however, because BCEG failed to preserve it for appeal by failing to raise it in its response to the order of contemplated dismissal. *See* Md. Rule 8-131(a) (except for the issue of jurisdiction, an appellate court ordinarily "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"). We cannot

fault the circuit court for not agreeing with BCEG's arguments on an issue that it did not raise.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY ALL COSTS.