

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 17, 2014 Session

**KEVIN MAMON v. GEICO INSURANCE, ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 12C4564 Hamilton Gayden, Judge**

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**No. M2013-02114-COA-R3-CV - Filed September 22, 2014**

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Inmate filed suit *pro se* against Geico Indemnity Company, Master Muffler, and Sam Owens for breach of contract, negligence, fraud, and conversion related to the repairs of his automobile. The suit was initially dismissed for Plaintiff's failure to comply with T. C. A. §§ 41-21-805 and 41-21-807. Plaintiff filed a motion for relief, which the court granted. At the same time, Plaintiff moved to amend his complaint; he attached the amended complaint to the motion. Thereafter, one defendant filed a motion to dismiss for failure to prosecute, which the court granted. We reverse the judgment and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed;  
Case Remanded.**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., and W. NEAL MCBRAYER, J. joined.

Kevin J. Mamon, Pendleton, Indiana, Pro Se.

Joshua G. Offutt and J. Ross Hutchison, Nashville, Tennessee, for the appellee, Master Muffler.

## MEMORANDUM OPINION<sup>1</sup>

On November 18, 2012, Kevin Mamon (“Mr. Mamon”) filed suit *pro se* against Geico Indemnity Company, Master Muffler, and Sam Owens, alleging breach of contract, negligence, fraud, and conversion, all related to the repairs on Mr. Mamon’s automobile. At the time of the filing, Mr. Mamon was incarcerated; the complaint listed his address as 123 E. Main Street in Greenfield, Indiana.

On January 14, 2013, the court entered an order giving Mr. Mamon twenty days to comply with Tenn. Code Ann. §§ 41-21-805 and 41-21-807.<sup>2</sup> Pertinent to the issues in this case, the caption of the order listed Geico as the only defendant, and the certificate of service reflects that Mr. Mamon and Geico were the only parties served with the order; the service address for Mr. Mamon was 123 E. Main Street, Greenfield, Indiana. On January 28, Mr. Mamon filed what he styled a “Notice to File Writ of Attachment Against Defendants” in which he stated his intent to apply for a writ of attachment against “all assets owned by Sam Owens and in the custody of Master Muffler.” On the same day, Mr. Mamon filed a motion styled, “Motion to Amend and Request for Nunc Pro Tunc Entry,” intended to correct the spelling of his name. Additionally, he filed an affidavit styled “Affidavit in Support of Application and Paupers Oath Pursuant to T. C. A. [§] 41-21-805”; both filings listed Mr. Mamon’s address as 123 E. Main Street, Greenfield, Indiana.

On February 1, Master Muffler filed two motions: a Motion to Strike Plaintiff’s Claims of Personal Injury and Contractual Damages on the Pleadings, and a Motion to Strike Plaintiff’s Notice of Intent to File Writ of Attachment Against Defendant Master Muffler; the address for Mr. Mamon on the certificate of service was 123 E. Main Street, Greenfield, Indiana. On February 12, Mr. Mamon filed responses to both motions, to which Master Muffler replied. The record does not reflect that an order was entered on either of Master Muffler’s motions.

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<sup>1</sup> Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

<sup>2</sup> Tenn. Code Ann. § 41-21-805 requires that an inmate who files a claim with an affidavit of inability to pay costs also file an affidavit containing information relating to prior claims the inmate may have filed. Tenn. Code Ann. § 41-21-807 requires an inmate who files suit without prepayment of fees or security for fees to file a certified statement of the inmate’s trust fund account.

On February 26, the court entered an order on its own initiative dismissing Mr. Mamon's complaint for failure to comply with the January 14 order. The caption of the order identified Geico as the only defendant, and the certificate of service reflects that a copy was served on Geico in Nashville and on Mr. Mamon at 123 E. Main Street, Greenfield, Indiana.<sup>3</sup> On March 14, 2013, Mr. Mamon filed a Tenn. R. Civ. P. 60.02 Motion for Relief from Order of Dismissal and a Motion for Leave to File Amended Complaint pursuant to Rules 15.01 and 15.02, to which he attached the proposed amended complaint; Mr. Mamon listed his address as 705 Drexel Street, Nashville, Tennessee, on both motions and the amended complaint. Of significance to this case, the amended complaint bore the clerk's stamp "Filed" in the same manner as the motions.<sup>4</sup> On March 26, Master Muffler filed responses to the Rule 60 and Rule 15 motions; the address for Mr. Mamon on the certificate of service on the responses was 123 E. Main Street, Greenfield, Indiana.

On April 19, Mr. Mamon filed a notice stating he would not be able to attend a hearing which was set for April 19 because he was enrolled in college in Indiana; the address Mr. Mamon listed on the notice was 1009 Manck Drive, Fort Wayne, Indiana.<sup>5</sup> The court held a hearing on April 26 and on May 10 entered an order stating that "it is proper to set the dismissal aside" and that "the Court will allow the filing of the amended [c]omplaint once the dismissal is set aside."<sup>6</sup> Mr. Mamon's addresses on the certificate of service on the order were 705 Drexel St. 37203 and 1009 Manck Drive, Fort Wayne, Indiana.

On July 26, Master Muffler filed a Motion to Dismiss for Failure to Prosecute, asserting that Mr. Mamon had not filed a pleading since the May 10 order; Mr. Mamon's address on the certificate of service was 1009 Manck Drive, Fort Wayne, Indiana. The motion contained a notice setting it for hearing on August 9, at 9:15 a.m. On August 9, at 8:47 a.m. Mr. Mamon filed a Motion to Compel Defendants to Respond to Amended Complaint, reciting, *inter alia*:

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<sup>3</sup> For reasons not apparent from the record, on March 18 the court entered an identical order, prepared by counsel for Master Muffler, the caption of which named Geico, Master Muffler, and Sam Owens as defendants.

<sup>4</sup> It appears from the copies of the pleadings in the record that both motions were filed at 10:40 a.m. while the Amended Complaint was filed at 2:45 p.m.

<sup>5</sup> While the record does not show the purpose of the April 19 hearing, we presume it was to hear the motions Mr. Mamon filed on March 14.

<sup>6</sup> In the Motion to Compel Defendants to Respond to Amended Complaint, filed August 9, 2013, Mr. Mamon states that "all parties were present" at the April 26 hearing.

A. Plaintiff filed the amended complaint along with exhibits attached thereto on March 14, 2013.

B. Attached to this amended complaint is a certification of service on the named Defendants.

C. Notwithstanding the aforesaid, a hearing was held on April 26, 2013, regarding Plaintiff's motion for leave to file amended complaint. All parties were present at said hearing

D. Defendants were placed on adequate notice that Plaintiff filed amended complaint with the Court and that said complaint became operative on May 10, 2013.

The signature and address for Mr. Mamon listed on the motion were: Kevin J. Mamon #190764, 5124 West Reformatory Road, Pendleton, Indiana.<sup>7</sup> The record does not show that an order was entered on this motion.

On August 12, Mr. Mamon filed a pleading styled "Motion for Nunc Pro Tunc Entry" in which he stated:

Plaintiff filed an amended complaint, in this action, on March 14, 2013. The court granted appellant leave to proceed with the filing of said amended complaint on May 10, 2013. The current established record does not reflect that the amended complaint is operative, although the Court's order of May 10, 2013 made it so.

The amended complaint is styled *Kevin Mamon v. GEICO Insurance and Master Muffler*. The current record still reflects the parties listed in the original complaint as *Kedin Mamon v. GEICO Auto Insurance, Master Muffler and Sam Owens*. The spelling of Plaintiff's first name was corrected in the amended complaint, from Kedin to Kevin; as well as Defendant Sam Owens was not named as a party and GEICO Insurance replaced GEICO Auto Insurance as a Defendant.

Defendant Master Muffler requested that this action be dismissed for Plaintiff's failure to prosecute, however, Plaintiff was not properly notified of the Court's May 10, 2013, order allowing him to proceed with the filing of the amended complaint; he was not properly served with Defendant Master Muffler's motion to dismiss for failure to prosecute – filed on July 26, 2013,

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<sup>7</sup> The certificate of service reflects that copy of the motion was mailed to counsel for Master Muffler on August 6.

or notified of the August 9, 2013, hearing regarding Defendant Master Muffler's motion to dismiss for failure to prosecute. Plaintiff only learned of the foregoing through correspondence with the Clerk of Davidson County made August 2, 2013. Therefore, any reason that Master Muffler gives for dismissing this action is without merit.

Plaintiff requests that an order be made reflecting that the amended complaint was deemed filed on March 14, 2013 and that the plaintiff is: (1) Kevin Mamon, and the Defendants are: (1) GEICO Insurance, and (2) Master Muffler. Furthermore, Plaintiff requests that Defendant Master Muffler's motion to dismiss for failure to prosecute be denied.

The signature and address for Mr. Mamon listed on this motion were: Kevin J. Mamon #190764, 5124 West Reformatory Road, Pendleton, Indiana

On August 20, the court entered an order granting Master Muffler's motion to dismiss for failure to prosecute; the court did not rule on either of the motions Mr. Mamon filed on August 9 and August 12. It appears that counsel for Master Muffler prepared the order; the certificate of service lists Mr. Mamon's address as 1009 Manck Drive, Fort Wayne, Indiana.<sup>8</sup>

On September 9, Mr. Mamon filed a Tenn. R. Civ. P. 60 Motion for Relief from Order of Dismissal. Similar to the motion to compel he filed on August 9, the Rule 60 motion asserted, *inter alia*, that he filed and served an amended complaint on March 14; that the court "ordered him to proceed with the filing of the amended complaint" on May 10; and that "Defendants did not respond to the amended complaint within the time allotted by the Rules of Civil Procedure." Master Muffler responded to the motion on September 16, and an order was entered denying the motion on November 26. Mr. Mamon appeals the dismissal of his complaint.

### STANDARD OF REVIEW

Tenn. R. App. P. 41.02(1) governs dismissal of an action for failure to prosecute.<sup>9</sup> A decision to dismiss a case for failure to prosecute is within the trial court's sound discretion,

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<sup>8</sup> On August 21, Master Muffler filed a response to Mr. Mamon's Nunc Pro Tunc Entry and listed Mr. Mamon's service address as 5124 West Reformatory Road, Pendleton, IN.

<sup>9</sup> Tenn. R. Civ. P. 41.02(1) states:

For failure of the plaintiff to prosecute or comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

and will not be reversed unless there is abuse of that discretion. *Osagie v. Peakload Temp. Servs.*, 91 S.W.3d 326, 329 (Tenn. Ct. App. 2002) (internal citations omitted). The standard was discussed at length in *Lee Med., Inc. v. Beecher*:

The abuse of discretion standard of review envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal. It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. Thus, it does not permit reviewing courts to second-guess the court below or to substitute their discretion for the lower court's. The abuse of discretion standard of review does not, however, immunize a lower court's decision from any meaningful appellate scrutiny.

Discretionary decisions must take the applicable law and the relevant facts into account. An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.

312 S.W.3d 515, 524 (Tenn. 2010) (internal citations omitted).

## ANALYSIS

Master Muffler contends that, despite being “allow[ed] three months” to file an amended complaint, Mr. Mamon never filed an “appropriate [c]omplaint,” and that awarding the dismissal pursuant to Rule 41.02(1) was proper. Upon the record presented, we respectfully disagree.

Tenn. 20th J. Dist. R. § 26.04(c) requires that a party moving to amend a pleading attach the proposed pleading to the motion. The record shows that the proposed amended complaint was filed on March 14, shortly after the motion; both were marked “Filed” by the clerk. The court, in its May 10 order, set aside the prior dismissal and “allow[ed] the filing of the amended [c]omplaint.” Thereafter, Mr. Mamon continued to prosecute the action by filing numerous motions, including a Motion to Compel Defendants to Respond to Amended Complaint, and by responding to pleadings filed by Master Muffler.

In the motion to compel, Mr. Mamon stated that the amended complaint became “operative on May 10,” and that he was entitled to a response from the defendants. Master Muffler did not respond to the motion, or otherwise rebut Mr. Mamon’s assertion that the amended complaint became operative on May 10; it does not appear from the record that the court acted on Mr. Mamon’s motion to compel.

As we consider the application of Rule 41.02 to the facts presented, we are mindful of the following instruction from *Hessmer v. Hessmer*:

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

The courts give pro se litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs. Accordingly, we measure the papers prepared by pro se litigants using standards that are less stringent than those applied to papers prepared by lawyers.

Pro se litigants should not be permitted to shift the burden of the litigation to the courts or to their adversaries. They are, however, entitled to at least the same liberality of construction of their pleadings that Tenn. R. Civ. P. 7, 8.05, and 8.06 provide to other litigants. Even though the courts cannot create claims or defenses for pro se litigants where none exist, they should give effect to the substance, rather than the form or terminology, of a pro se litigant's papers.

138 S.W.3d 901, 903-04 (Tenn. Ct. App. 2003)(internal citations omitted).

Mr. Mamon represented himself in this matter and was periodically incarcerated. Despite the lack of counsel, Mr. Mamon complied with the pertinent state and local rules in filing the motion to amend the complaint and the proposed amended complaint. Master Muffler’s insistence that the failure to complete the essentially ministerial task of refileing the amended complaint after May 10 meant that an “appropriate complaint” was never filed is

not well taken. Numerous motions, including ones in which Mr. Mamon clearly set forth his belief that the amended complaint was properly filed, were not acted upon by the court.<sup>10</sup>

The record shows that Mr. Mamon prosecuted this case with alacrity and complied with the orders of the court; dismissal under Tenn. R. Civ. P. 41.02(1) was not appropriate under the facts presented.<sup>11</sup>

### CONCLUSION

For the foregoing reasons, we reverse the judgment dismissing this action and remand the case for further proceedings in accordance with this opinion.

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RICHARD H. DINKINS, JUDGE

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<sup>10</sup> Indeed, Mr. Mamon's Motion to Compel Defendants To Respond To the Amended Complaint could have been construed as a motion for default judgment and, on the record presented, would have entitled him to a judgment against Geico and Sam Owens.

<sup>11</sup> Moreover, pursuant to Tenn. R. Civ. P. 41.02(3) dismissals under the rule are with prejudice unless the court otherwise specifies. We see no basis on this record for the dismissal of Mr. Mamon's action with prejudice.