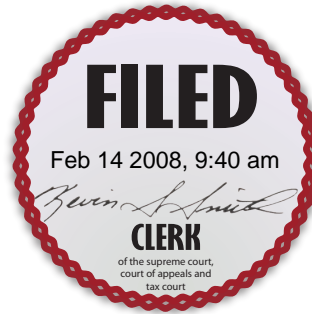


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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GABRIEL WITT,

Appellant-Plaintiff,

vs.

ROBERT CURRY,

Appellee-Defendant.

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No. 10A05-0708-CV-452

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APPEAL FROM THE CLARK SUPERIOR COURT  
The Honorable Vicki L. Carmichael, Judge  
Cause No. 10D01-0508-CT-126

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**February 14, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SHARPBACK, Judge**

Gabriel Witt appeals the trial court's dismissal of his complaint against Robert Curry. Witt raises one issue, which we revise and restate as whether the trial court abused its discretion when it dismissed his complaint. We affirm.

The relevant facts follow. In August 2005, Witt filed a complaint for damages against Curry. Curry responded with an answer and a counterclaim. Later that year, Curry filed a motion for default judgment on the counterclaim. Witt filed a response to the motion for default judgment, and the trial court allowed Witt extra time to file his answer to the counterclaim. Witt then filed his answer and a motion to amend complaint, which the trial court granted. In January 2006, Witt filed his amended complaint. In October 2006, Witt's attorney moved to withdraw as Witt's counsel, informing him that if he intended to "move forward with these proceedings," he should "retain new counsel as soon as possible." Transcript at 17. Witt's attorney had taken no depositions and made no discovery requests.

On March 22, 2007, Curry filed a motion to dismiss pursuant to Ind. Trial Rule 41(E) on the grounds that no action had been taken in the case for a period of sixty days or more. The next day, an attorney agreed to represent Witt. On May 2, 2007, Witt failed to appear at the hearing on the motion to dismiss, and the trial court granted the motion. In June 2007, Witt filed a motion to correct error, asking the trial court to set aside the dismissal of his case because: (1) he was unable to be present at the hearing on May 2 because he was "shadowing" his mother at a real estate transaction; (2) his attorney withdrew from the case in October 2006; and (3) he had been incarcerated during February of 2007. *Id.* at 6. His mother also testified that, from October 2006 to

March 2007, she and Witt had spoken to two attorneys, both of whom had declined to take his case. The trial court denied the motion to correct error based “not only on the five month [sic] between October and March when new counsel was obtained but the nearly one year . . . prior to that when absolutely nothing was done on this case . . . .” Id. at 22.

The issue is whether the trial court erred when it dismissed Witt’s complaint. We will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the decision of the trial court is against the logic and effect of the facts and circumstances before it. Belcaster v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003) (citing Metcalf v. Estate of Hastings, 726 N.E.2d 372, 373-74 (Ind. Ct. App. 2000), trans. denied; Hill v. Duckworth, 679 N.E.2d 938, 939 (Ind. Ct. App. 1997)), trans. denied. We will affirm if there is any evidence that supports the decision of the trial court. Id.

Ind. Trial Rule 41(E) provides in pertinent part:

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff’s costs if the plaintiff shall not show sufficient cause at or before such hearing.

Thus, a complaint may be dismissed under Ind. Trial Rule 41(E) for failure to prosecute for sixty days or for a failure to comply with the rules.

The purpose of this rule is “to ensure that plaintiffs will diligently pursue their claims. The rule provides an enforcement mechanism whereby a defendant, or the court,

can force a recalcitrant plaintiff to push his case to resolution.” Belcaster, 785 N.E.2d at 1167 (quoting Benton v. Moore, 622 N.E.2d 1002, 1006 (Ind. Ct. App. 1993), reh’g denied). “The burden of moving the litigation is upon the plaintiff, not the court. It is not the duty of the trial court to contact counsel and urge or require him to go to trial, even though it would be within the court’s power to do so.” Id. “Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered. He should not be left with a lawsuit hanging over his head indefinitely.” Id.

Courts of review generally balance several factors when determining whether a trial court abused its discretion by dismissing a case for failure to prosecute. Id. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff’s part. Id. (citing Lee v. Friedman, 637 N.E.2d 1318, 1320 (Ind. Ct. App. 1994)). “The weight any particular factor has in a particular case appears to depend upon the facts of that case.” Id. However, a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay. Id.

Here, several of the factors support the trial court's dismissal of the complaint, including the length of the delay, the reason for the delay, the degree of Witt's personal responsibility, and the extent to which Witt was stirred to action by the threat of dismissal. There was no activity in this case from January 2006 through October 2006, when Witt's attorney withdrew from the case. After Witt's counsel withdrew, there was no activity until five months later, when Curry filed a motion to dismiss pursuant to Ind. Trial Rule 41(E). The day after Curry filed the motion to dismiss, another attorney agreed to represent Witt, but Witt subsequently failed to appear at the hearing on Curry's motion. At the hearing on Witt's motion to correct error, when asked whether he could have made arrangements to attend the earlier hearing, rather than a real estate transaction, Witt responded, "Well it was really important for me to get the job experience . . . ." Transcript at 9. Witt had made no attempt to reschedule the hearing, and his attorney was unable to present evidence explaining Witt's failure to prosecute the case.

Dismissal under Trial Rule 41(E) requires only a sixty-day period of inaction. Witt failed to take action in this case for over a year. Accordingly, we cannot say that the trial court abused its discretion when it dismissed Witt's complaint. See Smith v. Harris, 861 N.E.2d 384, 387 (Ind. Ct. App. 2007) (holding that the trial court did not abuse its discretion by dismissing plaintiff's case under Trial Rule 41(E) where plaintiff offered no good reason for his failure to prosecute his case diligently, bore the responsibility for the inactivity, and was prompted to act again only because of the threat of dismissal of his lawsuit), trans. denied.

For the foregoing reasons, we affirm the trial court's dismissal of Witt's complaint.

Affirmed.

BARNES, J. and VAIDIK, J. concur