

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Rodney L. Archer et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 12AP-960
Berger Hospital et al.,	:	(C.P.C. No. 10 CV-303)
Defendants-Appellees.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on May 16, 2013

Colley Shroyer & Abraham Co., L.P.A., and Eleni A. Drakatos; Thomas D. Hunter, for appellants.

Reminger Co., L.P.A., Robert V. Kish and Melvin J. Davis, for appellee Berger Hospital.

Arnold Todaro & Welch Co., LPA, Karen L. Clouse, Maryellen Spirito and Gerald Todaro, for appellees Steven Haas, M.D. and Mid-Ohio Radiology.

APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} Plaintiffs-appellants, Rodney L. Archer, his wife Linda and sons Nathan and Brandon ("appellants"), appeal the judgment of the trial court dismissing plaintiff's case against all defendants-appellees for failure to prosecute. The trial court also overruled appellant's Civ.R. 60(B) motion. Appellees will be referred to separately as their situation is different in regard to disposition of the appeal. They will be referred to as "Berger Hospital, Mid-Ohio Radiology and Dr. Steven Haas, M.D."

{¶ 2} Appellants assert the following assignments of error:

[I.] THE TRIAL COURT ERRED IN DISMISSING THE ACTION FOR FAILURE TO PROSECUTE.

[II.] THE TRIAL COURT ERRED IN DENYING THE ARCHERS' MOTION FOR RELIEF FROM JUDGMENT.

{¶ 3} This case has a rather storied history part of which is applicable to the present appeal. The case was originally commenced in February 2007 by attorney John M. Mahota, now deceased, as a combined medical malpractice and product liability action. The product liability portion of the case against General Motors involved extensive discovery, the bankruptcy of the defendant corporation, and a dismissal of the medical malpractice action. The purpose for that dismissal was to facilitate the product liability portion of the case. However, it was a voluntary dismissal by appellants which calls into question what happens if there is a subsequent dismissal.

{¶ 4} The case was then taken over by another attorney and refiled in January 2010 as a medical malpractice case. That attorney ultimately moved to withdraw as counsel and the trial court granted his motion on November 16, 2011. Appellants briefly attempted to proceed pro se but ultimately engaged attorney Tom Hunter who entered an appearance on May 17, 2012. Voluminous discovery had already occurred by May 2012 according to the affidavit of Hunter. Appellants said the only task remaining to complete discovery was to depose expert witnesses. Hunter alleged that it took some time for him to get up to speed with the case. Beginning May 21, 2012, defense counsel began to request deposition dates.

{¶ 5} On September 19, 2012, Berger filed its motion to dismiss alleging that "[p]laintiffs have failed to do anything to advance their case in over a year." (R. 113.) Appellants assert that statement was untrue and that there were several status conferences at which appellants appeared including the naming of new counsel and the March 2012 filing of an amended scheduling order setting the trial for November 5, 2012 with a pretrial conference scheduled for October 22, 2012.

{¶ 6} The motion for dismissal for failure to prosecute was filed only by Berger Hospital and sought only that the court "dismiss Plaintiffs' claims" against Berger rather than that the court dismiss the entire case. Their brief in this court further asserts that they take no position as regarding an involuntary dismissal for failure to prosecute against

the remaining parties, Dr. Haas and Mid-Ohio Radiology. These defendants who were represented by other counsel did not join in the motion to dismiss.

{¶ 7} The motion to dismiss was filed on September 19, 2012 and, according to rule, plaintiffs were given 14 days to respond. The trial court did not render its decision until October 17, 2012 which was well in excess of the 14 days allowed. The only action that appellants took during that period of time was to file a motion for a continuance on October 16, 2012. There was no response to the allegations in the motion to dismiss which appellants now allege do not reflect the progress that was being made in the case. Importantly, appellants did not respond at all to the allegations of Berger which were stated in support of their motion to dismiss. Most of this progress, other than appearing at various meetings and asking for a continuance, were apparently outside the court record. Considering the neglect of appellants to oppose Berger's motion, the trial court did not act erroneously in considering those allegations to be true and thus to grant the motion to dismiss for failure to prosecute in favor of Berger Hospital.

{¶ 8} However, the trial court rendered the motion to dismiss for failure to prosecute, not only in favor of Berger, but also in favor of the two non-requesting parties Dr. Haas and Mid-Ohio Radiology.

{¶ 9} Civ.R. 41(B)(1) provides as follows:

Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

{¶ 10} Under this rule, notice is a prerequisite to dismissal for failure to prosecute. *Logston v. Nichols*, 72 Ohio St.3d 124, 128 (1995). The notice requirement allows a party in default the opportunity to explain or correct any default before a trial court may dismiss a case sua sponte for failure to prosecute. A court must provide notice of this intent to do so to plaintiffs' counsel. *Perotti v. Ferguson*, 7 Ohio St.3d 1, 3 (1983).

{¶ 11} This case was dismissed, insofar as Dr. Haas and Mid-Ohio Radiology was concerned, sua sponte by the court who admittedly gave no specific notice to appellants' counsel that their claim against defendants Dr. Haas and Mid-Ohio Radiology might be dismissed. The court's reasoning that "they should have known" assumed that appellants were equally deficient against the non-moving Dr. Haas and Mid-Ohio Radiology. On the

day before the ruling, October 16, 2012, appellants, who added co-counsel, requested a continuance to get the case back on track for trial on the merits. As previously stated, under the *Logston* case, notice is a prerequisite to dismissal for failure to prosecute. The supplemental authority submitted by appellants' counsel provides authoritative support for the ruling herein. In *Smart v. Russell*, 1st Dist. No. C-120211, 2013-Ohio-1570, plaintiff did not appear for trial and the magistrate recommended that the case be dismissed for failure to prosecute. Plaintiff filed an objection to the magistrate's decision contending that counsel had not received notice of the trial date which was bolstered by counsel's affidavit in support of the objection. The trial court overruled the objection and dismissed the action. In a single assignment of error, plaintiff contended that the trial court erred by dismissing her complaint for failure to prosecute without giving her the notice required by Civ.R. 41(B)(1). The first appellate district reversed the dismissal because the trial court did not comply with the notice provisions of Civ.R. 41(B)(1) and remanded the cause to the trial court for further proceedings in accordance with law.

{¶ 12} That same ruling applies to the court's sua sponte dismissal for failure to prosecute in favor of Dr. Haas and Mid-Ohio Radiology. The sua sponte dismissal required a specific notice to appellants of the court's intent to consider applying the dismissal to the remaining two defendants, but before doing so, would allow appellants the opportunity to explain or correct a default.

{¶ 13} The ruling of the trial court also added additional consequences for appellants' actions against Dr. Haas and Mid-Ohio Radiology. Since appellants had previously voluntarily dismissed their claims against appellees, they were deprived of the right to voluntarily dismiss the claims again without prejudice. In Civ.R. 41(A)(1)(b), the following language appears:

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, *except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.*

(Emphasis added.)

{¶ 14} Therefore, the sua sponte dismissal by the court is a particularly harsh sanction because of this "double dismissal" rule.

{¶ 15} Appellants' first assignment of error is overruled in regard to Berger Hospital and sustained in regard to defendants' Dr. Haas and Mid-Ohio Radiology.

{¶ 16} Appellants immediately filed a motion for relief from the judgment under Civ.R. 60(B), pointing particularly to Civ.R. 60(B)(5), arguing that the court, by denying appellants' notice and a hearing, acted arbitrarily, unreasonably, and unconscionably. Appellants wanted an opportunity to explain to the court exactly what had taken place in the case and what additional things needed to be done so that the case could get back on track and decided on the merits of the case. Given the circumstances of the case as previously explained, the trial court did not err in overruling the motion as far as Berger Hospital is concerned. Appellants were given notice by Berger Hospital that it sought an involuntary dismissal for failure to prosecute. They did not seek a hearing or even submit a memo contra to Berger Hospital's allegations. Thus, appellants had exhausted their chances as far as Berger Hospital is concerned. There was no abuse of discretion in handling of the verdict for Berger Hospital.

{¶ 17} As far as Dr. Haas and Mid-Ohio Radiology are concerned, appellants immediately responded to the trial court's erroneous sua sponte dismissal without notice by their Civ.R. 60(B) motion. Further consideration of the Civ.R. 60(B) motion is moot as the error has been corrected so far as the dismissal in favor of Dr. Haas and Mid-Ohio Radiology are concerned. There was an abuse of discretion in failing to provide a notice and hearing as required by law.

{¶ 18} Appellants' second assignment of error is overruled on the merits in favor of Berger Hospital and rendered moot in regard to appellants' claims against Dr. Haas and Mid-Ohio Radiology.

{¶ 19} The judgment of the trial court is reversed and the case is remanded to the Franklin County Court of Common Pleas for further proceedings in accordance with this decision.

*Judgment affirmed in part, reversed
in part and case remanded for further proceedings.*

TYACK and DORRIAN, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).