

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

MARY PARKER, et al.,	:	O P I N I O N
Appellant,	:	
- vs -	:	CASE NO. 2012-L-054
LAKE METROPOLITAN HOUSING AUTHORITY,	:	
Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 11CV003058

Judgment: Reversed and remanded.

Neil R. Wilson, Neil R. Wilson Co., L.P.A., Firstmerit Bank Building, 56 Liberty Street, #205, Painesville, OH 44077 (For Appellant).

Richard A. Hennig, Baker, Hackenberg & Hennig Co., L.P.A., 77 North St. Clair, Suite 100, Painesville, OH 44077 (For Appellee).

DIANE V. GRENDELL, J.

{¶1} Appellant, Mary Parker, appeals from the judgments of the Lake County Court of Common Pleas, dismissing her administrative appeal from a decision of the Lake Metropolitan Housing Authority (LMHA), for failure to prosecute and finding Parker's Motion for R.C. 2506.03 Evidentiary Hearing to be moot. The issue to be determined in this case is whether a lower court may properly dismiss an administrative appeal for failure to prosecute when the appellant failed to timely file a brief and the trial court did not give notice of the impending dismissal to the appellant. For the following

reasons, we reverse the decision of the court below and remand for further proceedings consistent with this opinion.

{¶2} On November 15, 2011, Parker filed a notice of appeal in the Lake County Court of Common Pleas, appealing from the decision of the LMHA, terminating her housing subsidy benefits under the Housing Choice Voucher Program.

{¶3} Parker filed a Motion for Stay of Administrative Decision Pending Appeal on January 5, 2012. On the same date, Parker filed a Motion to Amend Notice of Appeal and a “Praeceptum to Administrative Agency for Transcript.”

{¶4} On January 6, 2012, Parker filed a Motion for R.C. 2506.03 Evidentiary Hearing, asserting that such a hearing was necessary since “no transcript exists of the administrative hearing from which the appeal was taken and no testimony was taken under oath at the hearing.”

{¶5} On January 25, 2012, the lower court issued a Judgment Entry granting Parker leave to file an amended notice of appeal.¹ A separate Judgment Entry was issued on the same date, ordering that LMHA “file the record within forty (40) days of receipt of the Amended Notice of Appeal.” It further ordered that “Appellant shall, within thirty (30) days from the filing of the record, file with the Clerk of Courts, a brief containing a statement of the questions presented, conclusions on the questions and authorities supporting the conclusions.” The Entry stated that once all briefs were filed, “the Court will consider the matter submitted for ruling.”

{¶6} The lower court granted the Motion for Stay of Administrative Decision Pending Appeal, in part, on January 25, 2012.

1. The record indicates that an amended notice of appeal was never filed.

{¶7} On February 17, 2012, a Notice of Filing of Transcript of Proceedings was filed by LMHA, which included an attached transcript of the proceedings. On March 1, 2012, a Notice of Filing of Supplemental Transcript of Proceedings was filed.

{¶8} On April 24, 2012, the trial court issued a Judgment Entry, sua sponte, dismissing Parker's administrative appeal for failure to prosecute. The court found that Parker failed to file a brief containing a statement of questions presented, conclusions on those questions, and supporting authorities within thirty days from the filing of the record by LMHA, as had been ordered in the court's January 25, 2012 Judgment Entry. On the same date, the trial court issued a Judgment Entry finding that the Motion for R.C. 2506.03 Evidentiary Hearing was moot, due to the dismissal of the appeal.

{¶9} Parker timely appeals and raises the following assignment of error:

{¶10} "The trial court erred in dismissing the case for failure to prosecute because the appellant failed to file a brief."

{¶11} "The decision to dismiss an action for failure to prosecute is within the trial court's discretion. A reviewing court is limited to determining whether the trial court abused its discretion." (Citation omitted.) *Genesis Outdoor Advertising, Inc. v. Troy Twp. Bd. of Zoning Appeals*, 11th Dist. No. 2001-G-2399, 2003-Ohio-3692, ¶ 18.

{¶12} Parker argues generally that the trial court erred by finding that her failure to file a brief was cause for dismissal of her administrative appeal and states that "there is no procedural mechanism under the circumstances of this case for the trial court to have dismissed the case." She also argues that since she requested a transcript which complied with R.C. 2506.03 and an evidentiary hearing, the trial court could not dismiss the action without holding a hearing.

{¶13} LMHA asserts that the argument regarding whether an evidentiary hearing was required was never reached by the trial court, since it properly dismissed the appeal based on Parker's failure to comply with the requirement to timely file her brief.

{¶14} This court has found, in cases involving administrative appeals, that the dismissal of an action for failure to prosecute is governed by Civ.R. 41(B)(1). *Genesis*, 2003-Ohio-3692, at ¶ 20. Civ.R. 41(B)(1) states the following: "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."

{¶15} This court has held that, pursuant to Civ.R. 41(B)(1), notice is required to the appellant in order for the lower court to properly dismiss an administrative appeal for failure to prosecute. In *Leonardi v. LaBrae Bd. of Edn.*, 11th Dist. No. 94-T-5073, 1994 Ohio App. LEXIS 5823 (Dec. 23, 1994), this court held that the lower court abused its discretion by dismissing an appellant's administrative appeal when there was "nothing in the record to indicate that appellant or appellant's counsel were ever notified of the court's intention to dismiss appellant's action for failure to prosecute." *Id.* at *5. In *Genesis*, this court noted that "[c]ourts have held that Civ.R. 41(B)(1) requires that the trial court give the plaintiff notice of its intention to dismiss an action prior to a sua sponte dismissal," but also found that when a dismissal is based on a motion to dismiss filed by the appellee, this is sufficient to constitute notice. *Id.* at ¶ 20.

{¶16} Several other districts have reached similar holdings in administrative appeals. *Durell v. Spring Valley Twp. Bd. of Zoning Appeals*, 2nd Dist. 2009-CA-69, 2010-Ohio-3241, ¶ 21 ("before a trial court may carry out its intention to dismiss an

action for failure to prosecute, * * * the trial court must afford the party adversely affected by the dismissal with notice”); *Feiertag v. Dept. of Liquor Control*, 12th Dist. No. 53, 1982 Ohio App. LEXIS 14341, *4 (Dec. 22, 1982) (the trial court erred by failing to give notice to counsel prior to dismissing an administrative appeal for failure to prosecute); *Davis v. Cleveland*, 8th Dist. No. 92336, 2009-Ohio-4717, ¶ 21.

{¶17} In the present matter, Parker did not file her brief containing the questions presented, conclusions on the questions, and supporting authorities. However, the record indicates that the lower court did not give notice to Parker or her counsel of its intent to dismiss the appeal due to her failure to prosecute. LMHA did not file a motion to dismiss. Since Parker did not have notice, from either the opposing party or the court, it was an abuse of discretion for the trial court to dismiss the appeal based on Parker’s failure to prosecute.

{¶18} LMHA notes that the lower court was permitted to dismiss the appeal due to Parker’s failure to submit a brief because there was a requirement to file a timely brief in the lower court’s January 25, 2012 Judgment Entry and in the court’s local rules. Lake County Local Rule III(E)(1)(b), which sets forth the procedure to be followed in administrative appeals, states that “[c]ounsel for appellant, within thirty days after filing a notice of appeal, or filing the transcript of proceedings, if required, whichever is later, shall file with the clerk of court a brief containing a statement of the facts, issues presented for review, arguments in support of position and legal authorities in support of said arguments.”

{¶19} While both this rule and the Judgment Entry set forth the time requirement for filing a brief, they do not negate the obligation that notice must be provided to

dismiss an appeal for failure to prosecute. Neither stated that the appeal would be dismissed as a consequence of the appellant's failure to submit a timely brief. Moreover, where a local rule exists dictating the time during which a brief must be filed, the rule itself has not been considered a proper notice of a court's intent to dismiss. See *Durell*, 2010-Ohio-3241, at ¶ 21 (even where a local rule stated that an appeal "may be dismissed" due to failure to file a brief, the appellate court found that such rules "cannot be taken to express the trial court's intention, in a particular case, to dismiss an administrative appeal" and that notice of dismissal was still required).

{¶20} Regarding whether the lower court should have held an evidentiary hearing prior to dismissing the appeal, we note that the court below did not reach the merits of the case or even consider whether an evidentiary hearing should be held. Instead, it found that Parker's Motion for R.C. 2506.03 Evidentiary Hearing was moot due to the dismissal of the appeal for failure to prosecute. Since we find that the lower court abused its discretion by dismissing the appeal due to its failure to provide Parker with notice, it is unnecessary to consider whether an evidentiary hearing was required prior to the dismissal. However, since the lower court's dismissal of the action is reversed, its finding that the Motion for R.C. 2506.03 Evidentiary Hearing is moot is also reversed.

{¶21} The sole assignment of error is with merit.

{¶22} For the foregoing reasons, the judgments of the Lake County Court of Common Pleas, dismissing Parker's appeal from LMHA's decision for failure to prosecute and finding Parker's Motion for R.C. 2506.03 Evidentiary Hearing to be moot, are reversed and the matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.