

COURT OF APPEALS  
COSHOCTON COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

THE HOME LOAN SAVINGS BANK, et al.	:	JUDGES:
	:	
Plaintiff-Appellees	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 10-CA-05 & 10-CA-08
BRANDON A. RUSSELL, et al.	:	
	:	
	:	
Defendants-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Coshocton County Court of Common Pleas Case No. 08CI0475

JUDGMENT: REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY: December 13, 2010

APPEARANCES:

For Appellee Home Savings Bank:

STEPHEN WRIGHT  
309 Main Street  
Coshocton, Ohio 43812  
and  
MATTHEW MULLEN  
158 North Broadway Street  
New Philadelphia, Ohio 44663

For Appellant:

SHAWN P. LINDSAY  
201 North Main Street, P.O. Box 272  
Uhrichsville, Ohio 44683  
  
COSHOCTON COUNTY  
TREASURER  
349 Main Street  
Coshocton, Ohio 43812

For Appellees Motorists Mutual  
Insurance Company & Michael  
Leach, DBA Kimberly Ins.:

MERLE D. EVANS, III  
200 Market Avenue, North Suite 300  
Canton, Ohio 44701

*Delaney, J.*

{¶1} Appellant Brandon A. Russell<sup>1</sup> appeals the judgments of the trial court dismissing with prejudice his counterclaim against Appellee Home Loan Savings Bank and third-party complaint against Appellees Motorist Mutual Insurance Company and Michael L. Leach, dba Kimberly Insurance. Appellant also appeals the granting of foreclosure in favor of Home Loan Savings Bank.

{¶2} Home Loan Savings Bank initiated a foreclosure action against Appellant on July 17, 2008, involving property located at 22440 County Road 124, West Lafayette, Ohio. Home Loan Savings was the holder of both the primary and secondary mortgages on the property. The mortgages were executed by Appellant on June 13, 2003 and February 18, 2004, respectively.

{¶3} On October 3, 2008, Appellant, through attorney Dimitrios Pousoulides, filed an answer that included a counterclaim against Home Loan Savings Bank, and a third-party complaint against Motorist Mutual Insurance Company and Michael L. Leach, dba Kimberly Insurance Agency. The basis of the counterclaim and third-party complaint was that these parties failed to provide homeowners insurance on Appellant's residence which was the subject of the foreclosure action. The home sustained fire damage in March 26, 2008, rendering the home uninhabitable.

{¶4} On October 9, 2008, Home Loan Savings Bank filed a motion for summary judgment on its foreclosure complaint.

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<sup>1</sup> Throughout the trial court record, Appellant's name is identified as Branden A. Russell.

{¶5} On November 28, 2008, Motorists and Leach filed their answers to the third-party complaint. Home Loan Savings Bank filed its answer to the counterclaim on February 26, 2009. Thereafter, discovery ensued between the litigants.

{¶6} On April 7, 2009, Home Loan Savings Bank filed a supplemental memorandum in support of summary judgment.

{¶7} On July 9, 2009, the trial court denied Home Loan Savings Bank's motion for summary judgment and scheduled the matter for a case management conference on August 31, 2009.

{¶8} All of the parties filed detailed pretrial statements setting forth the facts and legal issues involved in the case. From these statements, it can be gleaned that Appellant owned and lived at the residence in West Lafayette which was subject of the mortgages held by Home Loan Savings Bank. Beginning in June, 2003, the home was insured by Motorists Mutual Insurance and Appellant's premium was added to his mortgage payment. However, Motorists claims it cancelled the policy effective July, 2007 and sent notices to Appellant and Home Loan Savings Bank. Motorists claimed it issued a premium refund check to Home Loan Savings Bank with a notice of cancellation. According to Motorists, Home Loan Savings Bank cashed the check. Neither Appellant nor Home Loan Savings Bank claims to have received the cancellation notice; however Appellant continued to make the insurance payments to Home Loan Savings Bank. When the fire occurred, Appellant sought and was denied coverage by Motorists. He alleges he could not pay his mortgage payments because of the coverage denial as he was forced to pay rent for suitable housing. It is the position of Home Loan Savings Bank that regardless of whether or not Appellant has a claim

against Motorists and/or their agent Leach or even a claim against the Bank, it does not affect the Bank's right to foreclose on the property.

{¶9} At the case management conference, the case also was set for a pretrial on February 22, 2010, and for jury trial on April 6, 2010.

{¶10} On September 30, 2009, Home Loan Savings Bank filed a motion for reconsideration as to the denial of its motion for summary judgment. Appellant opposed the motion and the trial court denied the same on December 18, 2009. In that same entry, the trial court confirmed the pretrial date of February 22, 2010, and trial date of April 6, 2010.

{¶11} On January 20, 2010, Attorney Pousoulides filed a motion to withdraw as counsel for Appellant, stating that "[p]rofessional considerations require termination of the legal representation". Appellant was served with a copy of the motion by certified mail at the West Lafayette address on January 22, 2010.

{¶12} The trial court granted the motion to withdraw on February 9, 2010, and indicated in the Entry that "Branden A. Russell shall notify the Court immediately of his new attorney. Trial by jury remains scheduled for Tuesday, April 6, 2010 at 9:00 a.m."

{¶13} On February 22, 2010, Attorney Pousoulides filed a notice of service upon Appellant of the trial court's order authorizing withdrawal. The notice reflects that certified mail service was attempted at the 22440 County Road 124, West Lafayette address on February 16, 2010, but the record does not demonstrate confirmed delivery to Appellant.

{¶14} On February 25, 2010, Home Loan Savings Bank filed a motion to dismiss Appellant's claims, with prejudice, for failure to prosecute pursuant to Civ.R. 41(B)(1).

The motion was based upon Appellant's failure to appear for the pretrial conference on February 22, 2010, and the fact that he did not request a continuance of the pretrial or notify the court he would not be appearing. The motion was served upon Appellant by ordinary mail at the 22440 County Road 124, West Lafayette and a second West Lafayette address that Appellant had provided in response to interrogatories in the case.

{¶15} On February 26, 2010, Motorists Mutual and Leach filed a similar motion to dismiss, also based upon Appellant's failure to appear at the final pretrial. This motion was served by ordinary mail upon Appellant at the 22440 County Road 124, West Lafayette address. On March 17, 2010, the trial court granted both motions and dismissed with prejudice Appellant's counterclaims and third-party complaint by separate judgment entries.

{¶16} On April 16, 2010, Appellant filed a notice of appeal of the March 17, 2010, dismissal entries, which was assigned case number 2010-CA-0005.

{¶17} On May 19, 2010, Appellant filed a notice of appeal of a judgment entry of foreclosure subsequently entered on May 7, 2010, by the trial court in favor of Home Loan Savings Bank. This notice was assigned case number 2010-CA-0008.

{¶18} The trial court stayed the matters pending appeal.

{¶19} Pursuant to Loc. App.R.12, this Court consolidated the cases for review.

{¶20} Appellant raises one Assignment of Error:

{¶21} "I. THE TRIAL COURT ERRED WHEN IT DISMISSED, WITH PREJUDICE, APPELLANT'S COUNTERCLAIMS AND THIRD-PARTY COMPLAINT."

## I.

{¶22} Appellant contends the trial court's dismissal of his claims was too harsh and a less drastic alternative should have been employed under the circumstances, as Appellant's failure to appear at the pretrial was not so negligent, irresponsible, contumacious or dilatory so as to warrant dismissal and leave Appellant without any remedy at law. In addition, Appellant argues the granting of foreclosure was in error without hearing evidence as to the counterclaim and third-party complaint.

{¶23} Under Ohio law, a court possesses discretionary power to dismiss actions as a sanction for disregarding orders or failing to prosecute. Civ.R. 41(B)(1); *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371, 678 N.E.2d 530. A dismissal for failure to prosecute "operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." Civ.R. 41(B)(3).

{¶24} An appellate court's review of a dismissal for failure to prosecute is ordinarily limited to whether the trial court abused its discretion. The term "abuse of discretion" as it applies to a dismissal with prejudice for lack of prosecution "implies an unreasonable, arbitrary or unconscionable attitude on the part of the court in granting such motion. *Jones*, 78 Ohio St. at 371, 678 N.E.2d 530.

{¶25} Although reviewing courts employ an ordinary abuse of discretion standard of review for dismissals with prejudice, that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits. *Id.* Due process also requires that notice be given to a party who is in jeopardy of having his claim dismissed one last chance to comply with the order or to explain the default.

Civ.R. 41(B)(1); *Sazima v. Chalko*, 86 Ohio St.3d 151, 155, 712 N.E.2d 729, 1999-Ohio-92.

{¶26} In considering dismissals under Civ.R. 41(B)(1), a trial court may properly take into account the entire history of the litigation, however “[t]he extremely harsh sanction of dismissal should be reserved for cases when \* \* \* conduct falls substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party.” *Id.* at 158, quoting *Moore v. Emmanuel Family Training Ctr., Inc.* (1985) 18 Ohio St.3d 64, 70, 479 N.E.2d 879.

{¶27} In other words, dismissal is reserved for those cases in which “the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for failure to prosecute or obey a court order.” *Id.* citing *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 684 N.E.2d 319.

{¶28} Turning to the facts of this case, we find Appellant was on notice that the action could be dismissed based upon the motions to dismiss filed by Appellees, which requested the trial court to dismiss Appellant’s claims with prejudice. See, *Quonset Hut*, 80 Ohio St.3d at 49 (“counsel has notice of an impending dismissal with prejudice for failure to comply with a discovery order when counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal”).

{¶29} We then look to the issue of whether the trial court abused its discretion in dismissing Appellant’s claims with prejudice. It is a “basic tenet of Ohio jurisprudence that cases should be decided on their merits.” *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3, 454 N.E.2d 951.



{¶30} Here, the record reflects that Appellant, when represented by counsel, diligently prosecuted his claims for well over a year, including conducting discovery and responding successfully to dispositive motions. Appellant then lost his attorney and the record fails to demonstrate that Appellant was actually served with the trial court's order granting the withdrawal of counsel. Appellant's claims were then forever dismissed one month later for failing to appear at the final pre-trial and respond to the motions of dismissal.

{¶31} Considering Appellant's recent pro se status and the lack of any prior continuances, we find a dismissal with prejudice was not warranted. See also, *Willis v. RCA Corp.* (1983) 12 Ohio App.3d 1, 2, 465 N.E.2d 924 (dismissal with prejudice for nonappearance at a pretrial conference should be used sparingly and only in extreme situations). While opposing counsel and the trial court were no doubt inconvenienced by Appellant's failure to appear at the final pre-trial, there is no indication in the record that Appellant proceeded in a dilatory fashion in this case. Appellant's failure to respond the motions to dismiss, when proceeding without legal counsel, can arguably be negligent, but not so flagrant as to warrant the harsh sanction of dismissal. Combined with the recent withdrawal of legal representation, the record demonstrates unreasonableness on the trial court's part in dismissing the claims with prejudice without first resorting to the imposition of lesser sanctions, such as a dismissal without prejudice.

{¶32} Accordingly, we hold that the trial court abused its discretion in dismissing Appellant's claims with prejudice.

{¶33} Appellant's assignment of error is sustained. The judgments of the trial court are reversed and we remand this matter to the common pleas court for further proceedings.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

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HON. PATRICIA A. DELANEY

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE

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For the reasons stated in our accompanying Memorandum-Opinion on file, the judgments of the Coshocton County Court of Common Pleas are reversed and these matters are remanded for further proceedings. Costs assessed to Appellees.

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