[Cite as *Hanko v. Nestor*, 2012-Ohio-4488.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michael Hanko

Appellant

v.

Michael Nestor, et al.

Appellees

v.

Robert Hanko

Appellant

Court of Appeals No. E-11-055

Trial Court No. 2001-CV-304

DECISION AND JUDGMENT

Decided: September 28, 2012

* * * * *

Brent L. English, for appellants.

Christian M. Bates, for appellees.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas granting appellees' motion to dismiss appellant's complaint for failure to prosecute. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} In the early 1990s, appellee Michael Nestor and appellant Michael Hanko established H&N Construction, Inc. Shares of H&N were owned equally by Nestor and Hanko and the two men were the sole directors of the corporation. In the summer of 1999, Hanko told Nestor that he wanted to end their business relationship and suggested that Nestor consider buying his shares in H&N. From that point on, the business relationship deteriorated. Nestor claimed that Hanko had resigned as an officer and director of H&N, while Hanko alleged that Nestor removed him from the company's bank accounts and then closed the company's accounts, opening new ones to which Hanko had no access. Hanko asserted that Nestor generally operated H&N as his "personal fiefdom."

{¶ 3} Litigation between the two business partners originated in November 1999, when Hanko filed suit against Nestor, alleging that Nestor had, among other things, breached fiduciary duties to Hanko and "usurped corporate opportunities." Nestor filed a counterclaim against Hanko alleging similar causes of action. While the 1999 case is not a part of the record, the instant complaint reveals that in April 2001, the case was voluntarily dismissed without prejudice. The complaint was re-filed on June 19, 2001. Nestor again brought counterclaims against Hanko. The first case and the instant action were identical other than the addition of Robert Hanko and Hanko Farms, Inc. as parties to a third-party complaint filed by the Nestors. Thus began a nearly ten-year stream of filings and proceedings which included discovery, motions to compel and enlarge discovery, a motion for partial summary judgment, motions for restraining orders,

motions to continue trial dates, other various motions, pretrials and rescheduled trial dates—most of which are not relevant to the issues raised on appeal.

{¶ 4} On January 8, 2003, Hanko filed a motion to compel discovery, which the trial court granted nearly one year later. After the motion to compel was granted, Hanko did not pursue discovery; he did, however, file four motions for continuance, which included two motions to continue trial dates, without raising the alleged outstanding discovery as the basis for needing additional time.

{¶ 5} On April 4, 2008, a "final pretrial" was held. At that time, trial was set for May 12, 2008. Three days later, the trial court filed a journal entry indicating that discovery was still not complete and ordered that the depositions of the parties take place forthwith. Discovery was ordered to be completed immediately. On May 7, 2008, the parties filed a joint motion to continue trial, which the trial court granted.

{¶ 6} Eventually, the trial court set a discovery cutoff date of December 1, 2008, which came and went without Hanko requesting any discovery. Hanko then filed a motion on December 12, 2008, requesting a 60-day enlargement of time to complete discovery. In response, on January 13, 2009, Nestor filed a memorandum in opposition and a motion to dismiss Hanko's claims for failure to prosecute.

{¶ 7} On February 19, 2009, the trial court denied Hanko's motion for enlargement of time to complete discovery. In so doing, the trial court noted that "at the most recent final pretrial [Hanko's] counsel was unprepared to discuss settlement as discovery was reported to be incomplete." The trial court further stated that discovery

had not been completed by December 1, 2008, adding "nor does this Court believe it will ever be completed." The trial court withheld its ruling on Nestor's motion to dismiss pending further review.

{¶ 8} On July 1, 2009, Nestor filed another motion to dismiss Hanko's complaint for lack of prosecution. On July 2, 2009, the trial court dismissed Hanko's complaint with prejudice for failure to prosecute pursuant to Civ.R. 41(B)(1).

{¶ 9} The case proceeded on the counterclaim and third-party claim until April 2011, when the parties appeared before the trial court for yet another pretrial. At that time, Hanko orally moved the court to reconsider its July 2, 2009 order dismissing his case. The trial court denied the oral motion. Several weeks later—three days before trial—Hanko filed a written motion for reconsideration of the order. The trial court denied the motion and this appeal followed.

{¶ 10} Appellant Hanko sets forth the following assignments of error:

1. The trial court erred and abused its discretion by granting appellees' motion to dismiss for want of prosecution.

2. The trial court failed to provide Hanko with adequate notice that his complaint could be dismissed.

3. The trial court erred by failing to provide findings of fact and conclusions of law.

{¶ 11} Appellant's first and second assignments of error will be considered together (in reverse order) as they are interrelated.

{¶ 12} Civ.R. 41(B)(1) provides that, "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 may, after notice to the plaintiff's counsel, dismiss an action or claim."

{¶ 13} Ohio courts have held that "[t]he power to dismiss for failure to prosecute is within the sound discretion of the trial court, and appellate review is confined solely to whether the trial court abused its discretion." *Kendall v. Kendall*, 6th Dist. No. OT-08-054, 2009-Ohio-4067, citing *Williams v. RPA Development Corp*., 10th Dist. No. 07AP-881, 2008-Ohio-2695, ¶ 6. (Other citations omitted.) An abuse of discretion connotes more than a mere error of judgment or of law; it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 14} Before upholding the trial court's decision to dismiss a case for failure to prosecute, an appellate court must determine if the plaintiff had sufficient notice prior to the dismissal and, if notice was provided, whether the trial court abused its discretion. *Kendall, supra*. Application of this standard of review will allow us to resolve Hanko's first and second assignments of error.

{¶ 15} In support of his second assignment of error, appellant infers that the trial court was required to give him "advance notice" before ruling on the motion to dismiss. Appellant believes his due process rights were denied because he did not have adequate notice or an opportunity to explain any of the "speculation" in Nestor's January 13, 2009 motion. Appellant further argues that if the trial court believed that Nestor's motion

suggested a failure to prosecute, "it was obligated to so advise Hanko and [give] him time to explain why this perception was wrong." A review of the record shows that Hanko was served with a copy of Nestor's motion to dismiss and in fact responded to the motion on February 4, 2009. Hanko faults the trial court for failing to "give [him] any notice that it intended to dismiss his Complaint for want of prosecution * * *." This argument is wholly without merit.

{¶ 16} In support of his first assignment of error, appellant asserts that the dismissal was ordered after eight years of litigation in which he played a very active part and that there was no evidence of "contumacious or dilatory conduct." The record reflects that at the "final" pretrial in April 2008, the trial court granted Hanko eight additional months to request certain outstanding documents Hanko desired, to depose Nestor, and to otherwise complete discovery. Hanko did not comply with the court's order and otherwise failed to complete discovery as ordered by December 1, 2008. Then, in its February 19, 2009 judgment entry, the trial court addressed Hanko's latest motion to enlarge discovery an *additional* 60 days. The trial court noted that, at what was intended to be the "final" pretrial in April 2008, Hanko had not been prepared to discuss settlement and trial procedure as discovery was alleged to be incomplete. The court commented that discovery was still not complete and that it did not believe it would ever be completed. The court stated that it would not grant any requests for additional time. Our review of the record in this case shows that, since the time this action was refiled in 2001, Hanko filed 13 motions for continuances or extensions of time.

{¶ 17} Based on the foregoing, we find that Hanko had sufficient notice prior to the dismissal of the complaint and that the trial court's decision to grant the motion to dismiss did not constitute an abuse of discretion. Accordingly, appellant's first and second assignments of error are not well-taken.

{¶ 18} In support of his third assignment of error, appellant asserts that this matter should be remanded to the trial court to issue findings of fact and conclusions of law, which Hanko requested 11 days after the trial court's July 2, 2009 order. While a party may request findings of fact and conclusions of law pursuant to Civ.R. 52 when questions of fact are tried by the court without a jury, there is no requirement under Ohio law that a trial court issue findings of fact and conclusions of law upon dismissing a case for failure to prosecute pursuant to Civ.R. 41(B). *See, e.g., City of Columbus v. Triplett*, 10th Dist. No. 00AP-39, 2000 WL 1715835 (Nov. 16, 2000). Accordingly, appellant's third assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.
CONCUR.

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JUDGE