[Cite as *Huntington Natl. Bank v. Molinari*, 2012-Ohio-4993.]

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

The Huntington National Bank	Court of Appeals No. L-11-1223
Appellee	Trial Court No. CI0200908758
v.	
Prudence Molinari, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: October 26, 2012

* * * * *

Kurt J. Lindower and John J. Hunter, Jr., for appellee.

Dennis A. Lyle, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Defendant-appellant, Prudence Molinari, appeals from a judgment of the Lucas County Court of Common Pleas dismissing for lack of jurisdiction her motion to enforce a settlement agreement, and denying her Civ.R. 60(B) motion to vacate an order

that dismissed plaintiff-appellee, Huntington National Bank's ("Huntington"), foreclosure action against her. We affirm.

A. Facts and Procedural Background

{¶ 2} The interesting procedural history of this case began on December 10, 2009, when Huntington filed a complaint for foreclosure against Molinari. The complaint alleged that Molinari defaulted on two notes that were secured by mortgages on certain rental property. Subsequently, at a July 6, 2010 hearing, the parties represented that they had reached a settlement agreement, and the terms of that agreement were read into the record.

{¶ 3} However, a dispute arose over whether the settlement agreement drafted by Huntington accurately reflected the agreement made on July 6, 2010. Consequently, Molinari refused to sign the settlement agreement, prompting Huntington to file a motion to enforce the settlement. Molinari responded, and filed her own motion for sanctions and fees. A second hearing was held on September 9, 2010, at which the parties again indicated they had reached a resolution. The terms of that resolution were read into the record, and the parties withdrew their respective motions. On September 15, 2010, the parties signed a "Change in Terms and Forbearance Agreement" that memorialized the settlement agreement. Notably, one of the terms provided,

> [Molinari] and [Huntington] agree that, subsequent to the execution of this Agreement and related documents, the Litigation shall be dismissed

without prejudice at the expense of [Molinari], and the repayment of the Loans represented by the New Note will be as set forth herein.

{¶ 4} Pursuant to that agreement, on October 6, 2010, Huntington moved for an order dismissing its complaint. Molinari's counsel admitted to being served with a copy of this motion, however, he denies receiving the proposed order that was attached to it. Counsel for Huntington acknowledged that the proposed order was not served on Molinari's counsel. Molinari has never filed an opposition to the motion to dismiss. On October 12, 2010, the trial court, apparently using the proposed order from Huntington, granted the motion. The order read,

> This day this cause came on for the Court's consideration of Plaintiff [Huntington's] Motion to Dismiss the within cause without prejudice. The Court, being fully advised in the premises, finds said motion well taken and hereby grants the same.
>
> It is therefore ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff [Huntington] should be and hereby is dismissed without prejudice.
>
> It is further ORDERED, ADJUDGED AND DECREED that the costs in this matter should be taxed to deposit and the balance due thereafter if any, to the Defendant [Molinari].

{¶ 5} Molinari's counsel stated that he did not receive notice of the October 12, 2010 judgment entry until around March 2011, when he discovered it while looking into

whether it would be appropriate to file a contempt motion. Evidently, during the months between October 2010 and March 2011, the parties continued to have disputes over the enforcement of the settlement agreement, the subjects of which are not pertinent to the present appeal. On April 11, 2011, believing that Huntington breached the settlement agreement in several respects, and unable to resolve the matter on her own, Molinari filed a motion in which she sought enforcement of the settlement agreement and sanctions. Alternatively, in the event the trial court determined it did not have jurisdiction over the motion on account of its October 12, 2010 dismissal of the complaint, Molinari sought to vacate the October 12, 2010 order pursuant to Civ.R. 60(B). Huntington responded, but did not address the potential jurisdiction issue, instead focusing on the merits of whether it breached the settlement agreement. Molinari replied.

{¶ 6} Following the briefing, the trial court held a hearing for additional argument relating to whether it had jurisdiction to rule on Molinari's April 11, 2011 motion. Subsequently, the trial court issued its judgment on August 18, 2011, in which it found that its October 12, 2010 order dismissing the complaint was unconditional, thereby divesting it of jurisdiction to rule on Molinari's motion to enforce the settlement agreement. In addition, the trial court denied Molinari's Civ.R. 60(B) motion to vacate the October 12, 2010 order because that order was not an adjudication on the merits, and, therefore, was not a final judgment, order, or proceeding within the meaning of Civ.R. 60(B).

B. Assignments of Error

{¶ 7} Molinari has timely appealed from the August 18, 2011 judgment, raising three assignments of error:

> I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ISSUED AN ORDER DISMISSING THE CASE WITHOUT PREJUDICE *BEFORE* THE TIME HAD EXPIRED TO RUN FOR THE APPELLANT TO OPPOSE THE MOTION. (Emphasis sic.)
>
> II. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE DISMISSAL WITHOUT PREJUDICE DIVESTED THE COURT OF JURISDICTION TO HEAR APPELLANT'S MOTION TO SHOW CAUSE.
>
> III. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT A RULE 41(A)(2) ORDER DISMISSING THE CASE WITHOUT PREJUDICE WAS NOT A FINAL ORDER FOR PURPOSES OF ADDRESSING A RULE 60(B) MOTION.

II. Analysis

A. Molinari's Opportunity to Respond to the Motion to Dismiss

{¶ 8} In her first assignment of error, Molinari protests the trial court's order granting Huntington's motion to dismiss its foreclosure complaint without prejudice for the reason that she did not have an opportunity to oppose that motion. In support, Molinari identifies two sources of authority that she argues confer upon her a right to

have an opportunity to respond to Huntington's motion for voluntary dismissal pursuant to Civ.R. 41(A)(2).[1]

{¶ 9} As one source, Molinari cites to several cases which hold that a party must receive notice and a reasonable time to defend against an involuntary, Civ.R. 41(B) dismissal. For example, in *Hillabrand v. Drypers Corp.*, 87 Ohio St.3d 517, 721 N.E.2d 1029 (2000), the plaintiff's action was involuntarily dismissed by the trial court two days after the defendant filed a motion for sanctions, including dismissal, because the plaintiff failed to respond to discovery requests. The Ohio Supreme Court reversed, holding that the plaintiff did not have a "reasonable opportunity to defend against dismissal," which contemplated at least the time frame to respond allowed by the procedural rules of the court. *Id.* at 519-520. Similarly, in *Zils v. Hinton*, 5th Dist. No. 2000CA00095, 2000 WL 1015874 (July 17, 2000), the plaintiff's action was involuntarily dismissed by the trial court on the same day that the plaintiff failed to appear at a pre-trial conference. The Fifth District reversed, holding that the trial court abused its discretion by not affording plaintiff a reasonable opportunity to defend against dismissal. *Id.*

{¶ 10} In the same way, Molinari argues that she should have been provided at least the time for response allowed by rule to contest the dismissal. However, we are not

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[1] Civ.R. 41(A)(2) provides,

> (A) Voluntary dismissal: effect thereof * * **(2) By order of court.* Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. * * * Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

persuaded that the "reasonable opportunity to defend against dismissal" that is required when a party's action is being involuntarily dismissed as a punitive measure is equally afforded to the defendant of an action that is being voluntarily dismissed by the plaintiff pursuant to a settlement agreement.

{¶ 11} As the other source of authority, Molinari relies on Loc.R. 5.04(D) of the Court of Common Pleas of Lucas County, General Division, which provides, "An opposing party may serve and file a memorandum in opposition to any motion. The filing shall be made within 14 days after service." Molinari points out that Huntington filed its motion to dismiss on October 6, 2010, and that the trial court entered its order on October 12, 2010. As a result, Molinari argues that she was deprived of the full 14 days she had to respond. While we find some support for Molinari's argument under this rule, we fail to see how she was prejudiced under the circumstances of this case. Molinari was served with a copy of Huntington's motion to dismiss on October 6, 2010. By rule, she had until the end of the day on October 25, 2010, to file her response.[2] Although the trial court granted the motion six days later on October 12, 2010, Molinari asserted that she never received a copy of that order, and consequently had no knowledge that it was entered. Thus, her argument that the trial court abused its discretion by granting the motion to dismiss before she had time to respond may have been tenable if she had

[2] Lucas County Court of Common Pleas, General Division Loc.R. 5.04(D) allows for 14 days to respond, making the deadline October 20, 2010. Further, since service of the motion was by mail, Civ.R. 6(D) adds an additional three days, making the deadline October 23, 2010. Because October 23, 2010, was a Saturday, Molinari had until the following Monday, October 25, 2010, to respond pursuant to Civ.R. 6(A).

subsequently filed a response within the prescribed period, but instead, she asks us to impute reversible error to the trial court for failing to wait for a response that never came. We decline to do so.

{¶ 12} Accordingly, Molinari's first assignment of error is not well-taken.

B. Jurisdiction over the Motion to Enforce the Settlement Agreement

{¶ 13} For her second assignment, Molinari argues the trial court erred when it determined its October 12, 2010 dismissal of the action divested it of jurisdiction to rule on her motion to enforce the settlement agreement. We disagree.

{¶ 14} We start by noting that a trial court possesses authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit because such an agreement constitutes a binding contract. *Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34, 36, 470 N.E.2d 902 (1984). We also note that a trial court will lose jurisdiction to proceed in a matter when the court has unconditionally dismissed the action. *State ex rel. Rice v. McGrath*, 62 Ohio St.3d 70, 71, 577 N.E.2d 1100 (1991). "The determination of whether a dismissal is unconditional, thus depriving a court of jurisdiction to entertain a motion to enforce a settlement agreement, is dependent upon the terms of the dismissal order." *Le-Air Molded Plastics, Inc. v. Goforth*, 8th Dist. No. 74543, 2000 WL 218385 (Feb. 24, 2000), *citing Showcase Homes, Inc. v. Ravenna Sav. Bank*, 126 Ohio App.3d 328, 331, 710 N.E.2d 347 (3d Dist.1998).

{¶ 15} Here, Molinari argues that the order in this case was a conditional dismissal, and thus the trial court retained jurisdiction to enforce the settlement

agreement. As support, she cites to *Estate of Berger v. Riddle*, 8th Dist. Nos. 66195, 66200, 1994 WL 449397 (Aug. 18, 1994), in which the Eighth District stated, "When an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the court retains the authority to enforce such an agreement in the event the condition does not occur."

{¶ 16} The Eighth District, on several occasions, has held that an order dismissing an action in light of a settlement is a conditional order, and therefore the trial court retains jurisdiction to entertain a motion to enforce the settlement agreement. For example, in *Berger*, the court of appeals held that the trial court's entry stating, "All claims and counterclaims in the above numbered cases settled and dismissed with prejudice at defendants' costs," was "clearly a conditional dismissal based on a settlement agreement." *Id.* Similarly, the Eighth District found a dismissal to be conditional where the entry stated, "Pursuant to the settlement and agreement of the [Plaintiff] and [Defendants], all claims against these Defendants only are hereby settled and dismissed, with prejudice, at Defendants' costs." *State ex rel. Continental Mtge. Servs., Inc. v. Kilbane-Koch*, 8th Dist. No. 75267, 1999 WL 14002 (Jan. 4, 1999). *See also Fisco v. H.A.M. Landscaping, Inc.*, 8th Dist. No. 80538, 2002-Ohio-6481, ¶ 10 (journal entry stating "the instant matter is settled and dismissed" is clearly a conditional dismissal).

{¶ 17} Other districts, however, have not been so lenient with finding that a dismissal order was conditional. In *Showcase Homes, Inc. v. Ravenna Savings Bank*, the entry stated, "This day came the parties and advised the Court that the within cause has

been settled. It is therefore ordered that the complaint and the parties' respective counterclaims be and hereby are dismissed with prejudice." *Showcase Homes, Inc.*, 126 Ohio App.3d at 329, 710 N.E.2d 347. The Third District noted that the entry contained no conditions or further orders, and thus held that it was an unconditional dismissal. *Id.* at 331. The court concluded, "Therefore, the trial court was without jurisdiction to make any further orders concerning a settlement of a case no longer before it." *Id. See also McDougal v. Ditmore*, 5th Dist. No. 2008 CA 00043, 2009-Ohio-2019, ¶ 16 ("Upon agreement of Counsel for Plaintiffs and Counsel for Defendant, this matter is dismissed with prejudice to refiling" held unconditional); *Smith v. Nagel*, 9th Dist. No. 22664, 2005-Ohio-6222, ¶ 6 ("The court, having been advised that the parties have reached an agreement in this case, orders this matter to be marked 'Settled and Dismissed'" held unconditional); *Baybutt v. Tice*, 10th Dist. Nos. 95APE06-829 and 95APE08-1106, 1995 WL 723688 (Dec. 5, 1995) ("The within action is hereby settled and dismissed with prejudice" held unconditional); *Nova Info Sys., Inc. v. Current Directions, Inc.*, 11th Dist. No. 2006-L-214, 2007-Ohio-4373, ¶ 3-6, 16 ("[By] agreement of the parties * * * The Complaint * * * is hereby dismissed with prejudice" held unconditional).

{¶ 18} Here, the October 12, 2010, order states,

> This day this cause came on for the Court's consideration of Plaintiff [Huntington's] Motion to Dismiss the within cause without prejudice. The Court, *being fully advised in the premises*, finds said motion well taken and hereby grants same.

> It is therefore ORDERED, ADJUDGED AND DECREED that the Complaint of the Plaintiff [Huntington] should be and hereby is dismissed without prejudice.
>
> It is further ORDERED, ADJUDGED AND DECREED that the costs in this matter should be taxed to deposit and the balance due thereafter if any, to the Defendant [Molinari]. (Emphasis added.)

{¶ 19} Notably, the entry does not contain any conditions, nor does it recite the terms of the settlement agreement. In fact, it does not make any reference whatsoever to a settlement agreement between the parties. Thus, even under the reasoning in *Berger*, it does not constitute a conditional dismissal.

{¶ 20} Molinari attempts to escape this result by arguing that the October 12, 2010 order must be read in the context of the entire record. First, the terms of the settlement agreement were read into the record. Next, Huntington filed its motion to dismiss, which reads, "[Huntington] states that all matters between [Molinari] and [Huntington] have been resolved and that the Complaint should be dismissed." Finally, the October 12, 2010 order notes that the trial court is "fully advised in the premises." Molinari contends that this sequence of events leads to the conclusion that the order "was based upon the 'alleged' compliance with the terms and conditions of the settlement agreement that had been read into the Court's record. As such, the dismissal was not 'unconditional' as the settlement was part and parcel to the proceedings."

{¶ 21} However, this effort to insert a condition in the October 12, 2010 order that does not exist on its face does not comport with the rule, which even the Eighth District has acknowledged, that "[t]he determination of whether a dismissal is unconditional, thus depriving a court of jurisdiction to entertain a motion to enforce a settlement agreement, *is dependent upon the terms of the dismissal order*." (Emphasis added.) *Le-Air Molded Plastics, Inc.*, 8th Dist. No. 74543, 2000 WL 218385 (Feb. 24, 2000), *citing Showcase Homes, Inc.*, 126 Ohio App.3d at 331, 710 N.E.2d 347. Therefore, we hold that the October 12, 2010 order unconditionally dismissed the action, and thus the trial court did not err when it determined that it lacked jurisdiction to consider Molinari's motion to enforce the settlement agreement.

{¶ 22} Accordingly, Molinari's second assignment of error is not well-taken.

C. Denial of Molinari's Civ.R. 60(B) Motion

{¶ 23} In her final assignment of error, Molinari contends that the trial court erred as a matter of law when it denied her Civ.R. 60(B) motion on the grounds that the October 12, 2010 order did not operate as an adjudication on the merits, and consequently was not a final judgment, order, or proceeding within the meaning of Civ.R. 60(B).[3] Molinari presents two arguments in support of her assignment of error. First, she argues that the cases relied upon by the trial court to determine that the dismissal was not a final judgment, order, or proceeding are inapplicable because they dealt with Civ.R. 41(A)(1) dismissals, whereas this dismissal was under Civ.R. 41(A)(2). Second, she argues that if

[3] Civ.R. 60(B) provides, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding * * *."

Civ.R. 60(B) relief is unavailable, she will be "stripped of rights to challenge [Huntington's] actions using all tools and remedies normally available to a party opponent."

{¶ 24} As an initial matter, in reviewing the denial of a Civ.R. 60(B) motion, an appellate court applies an abuse of discretion standard. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). A ruling will be reversed for an abuse of discretion only where it appears that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 25} Concerning her first argument, three distinct avenues exist in which a plaintiff may seek voluntary dismissal under Civ.R. 41(A): (1) without the approval of the court or opposing party by dismissing the case by written notice before trial begins, (2) without the approval of the court by filing a stipulation of dismissal agreed to by all parties, or (3) by moving the court to dismiss the case. *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254, ¶ 9. The Ohio Supreme Court has held that a dismissal under the first method—Civ.R. 41(A)(1)(a)—that is without prejudice, and that does not operate as an adjudication on the merits,[4] is not a final judgment, order, or proceeding within the meaning of Civ.R. 60(B). *Hensley v. Henry*, 61 Ohio St.2d 277, 400 N.E.2d 1352 (1980), syllabus. The Ohio Supreme Court has also held that a dismissal without prejudice realized under the third method—Civ.R. 41(A)(2)—is not an adjudication on the merits. *Chadwick v. Barba Lou, Inc.*, 69 Ohio St.2d 222, 226, 431

[4] Civ.R. 41(A)(1) provides that "a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court."

N.E.2d 660 (1982). Therefore, since dismissal under Civ.R. 41(A)(2) is not an adjudication on the merits, we see no error in applying the rationale in *Hensley*, and holding that a Civ.R. 41(A)(2) dismissal without prejudice is not a final judgment, order, or proceeding within the meaning of Civ.R. 60(B). *See Siket v. L.K. Comstock & Co., Inc.*, 11th Dist. No. 12-080, 1987 WL 18006 (Sept. 30, 1987) ("a 41(A)(2) voluntary dismissal without prejudice and based on an action not previously dismissed in any court is not a final judgment, order or proceeding from which Civ.R. 60(B) can provide relief"). Thus, the trial court did not abuse its discretion in denying Molinari's motion to vacate the October 12, 2010 order.

{¶ 26} Although our resolution of Molinari's first argument renders discussion of her second argument unnecessary, we will address it briefly because it underscores her argument throughout this appeal. Essentially, Molinari seeks reinstatement of jurisdiction over the original cause of action so that she can pursue what she perceives to be the most efficient means of enforcing the settlement agreement. In her own words, she argues she was "denied the expediency of a show cause motion, and denied the opportunity to seek remedies associated with a show cause motion." However, Molinari has not been denied all remedies for Huntington's alleged wrongdoings. Indeed, several courts have noted that recourse can be sought in a separate breach of contract action. *See Smith v. Nagel*, 9th Dist. No. 22664, 2005-Ohio-6222, ¶ 7, fn. 1; *Baybutt v. Tice*, 10th Dist. Nos. 95APE06-829, 95APE08-1106, 1995 WL 723688 (Dec. 5, 1995).

{¶ 27} Accordingly, Molinari's third assignment of error is not well-taken.

III. Conclusion

{¶ 28} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Molinari is ordered to pay the costs of this appeal 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE