

[Cite as *Miller v. Plain Dealer Publishing Co.*, 2015-Ohio-1016.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101335

ANGELA MILLER

PLAINTIFF-APPELLANT

vs.

PLAIN DEALER PUBLISHING CO., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-10-739697

BEFORE: E.T. Gallagher, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: March 19, 2015

ATTORNEYS FOR APPELLANT

Wesley Alton Johnston
Rachael P. Kareha
Kenneth C. Podor
The Podor Law Firm, L.L.C.
33565 Solon Road
Solon, Ohio 44139

ATTORNEYS FOR APPELLEES

Brian C. Lee
Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115

Riannon A. Ziegler
101 West Prospect Avenue
Suite 1400
Cleveland, Ohio 44115

EILEEN T. GALLAGHER, J.:

{¶1} Plaintiff-appellant, Angela Miller (“Miller”), appeals from the trial court’s dismissal with prejudice of her complaint against defendants-appellees, Plain Dealer Publishing Co. and Todd Ekstrand (“Ekstrand”) (collectively, “defendants”). Miller assigns the following errors for our review:

1. The trial court erred in dismissing Miller’s case with prejudice for failure to appear at a show cause hearing for which notice was not received by her or her counsel.
2. The trial court erred in denying Miller’s Civ.R. 60(A) and 60(B) motions for relief from judgment.

{¶2} Finding no merit to the appeal, we affirm.

I. Factual and Procedural History

{¶3} This case arose from a motor vehicle accident involving Miller and Ekstrand that occurred in 2007. Miller filed her original complaint and subsequently voluntarily dismissed it pursuant to Civ.R. 41(A)(1). (CV-09-685155.) Miller refiled the complaint, which the trial court dismissed a second time without prejudice because she failed to appear for a proceeding. (CV-10-726745.) In October 2010, Miller refiled her complaint for a third time. (CV-10-739697.)

{¶4} On November 17, 2010, defendants filed a motion to dismiss Miller’s third complaint pursuant to Civ.R. 41, arguing that she refiled the complaint 20 days after the one-year savings statute had expired. The court granted the motion, which was unopposed, and dismissed the complaint with prejudice on December 1, 2010. Miller did not appeal.

{¶5} Three years later, on December 17, 2013, Miller filed a motion for relief from judgment pursuant to Civ.R. 60(B). Through newly acquired counsel, Miller alleged neglect on

the part of her previous attorney and sought to have the trial court reactivate her case. The trial court granted the motion, reinstated the case on December 19, 2013, and set a discovery and trial schedule. Miller later filed a motion to continue a settlement conference set for March 25, 2014, which the court denied. The court also denied Miller's motion to extend time to respond to defendants' discovery requests.

{¶6} Miller failed to appear at the settlement conference, in violation of the trial court's order, and the trial court entered the following journal entry:

SC of 3/25/14 not held as the plaintiff's counsel did not bring his client, as ordered. The SC is reset to 3/27/14 at 3pm. Defendants representative may appear by phone. In the event the plaintiff and/or plaintiffs counsel do not appear, the case will be DWOP [dismissed without prejudice] for failure to prosecute.

Miller complied with the order and appeared on March 27, 2014, but the parties did not reach a settlement agreement.

{¶7} On March 28, 2014, defendants filed a motion to compel Miller to cooperate in discovery, alleging she had not provided responses to their document requests and refused to be deposed. The trial court granted the motion and ordered Miller to produce the documents by March 29, 2014, by 3:00 p.m., and to appear for her deposition on March 31, 2014. Defendants were ordered to inform the trial court as to whether Miller complied with the order no later than 2:00 p.m. on March 31, 2014. The trial court warned Miller in its entry that failure to comply with its order would result in a dismissal *with prejudice*.

{¶8} Defendants advised the court that Miller failed to comply with the court's order. On March 31, 2014, the trial court set a show cause hearing for April 2, 2014, and, again, instructed Miller that failure to comply with its order could result in a dismissal of the case *with*

prejudice. Neither Miller nor her counsel appeared at the show cause hearing, and the trial court dismissed the case with prejudice for failure to prosecute.

II. Law and Analysis

A. Dismissal with Prejudice

{¶9} Miller argues the trial court abused its discretion in dismissing her case with prejudice.

{¶10} As previously stated, the trial court dismissed Miller's complaint pursuant to Civ.R. 41(B)(1), which states:

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.

Thus, under Civ.R. 41(B)(1), the trial court may dismiss an action for failure to prosecute where the plaintiff fails to comply with court's orders as long as the court first provides the plaintiff with notice of the possible dismissal. *Mokrytzky v. Capstar Capital Corp.*, 8th Dist. Cuyahoga No. 91287, 2009-Ohio-238, ¶ 12, citing *Logsdon v. Nichols*, 72 Ohio St.3d 124, 647 N.E.2d 1361 (1995). The Ohio Supreme Court has held that this rule applies to cases where a court dismisses an action because the plaintiff failed to appear for a pretrial. *Perotti v. Ferguson*, 7 Ohio St.3d 1, 454 N.E.2d 951 (1983).

{¶11} The decision to dismiss a case with prejudice under Civ.R. 41(B)(1) is within the trial court's discretion. *Tarquinio v. Estate of Zadnik*, 8th Dist. Cuyahoga Nos. 95767 and 96246, 2011-Ohio-3980, ¶ 20, citing *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 678 N.E.2d 530 (1997). However, because a dismissal with prejudice precludes a judgment on the merits of plaintiff's claims, this court has repeatedly reviewed a trial court's decision to dismiss a case

with prejudice under a heightened abuse-of-discretion standard. *Simmons v. Narine*, 8th Dist. Cuyahoga No. 100545, 2014-Ohio-2771, ¶ 7. See, e.g., *Ocran v. Richlak*, 8th Dist. Cuyahoga No. 99856, 2013-Ohio-4603, ¶ 12, citing *Autovest, L.L.C. v. Swanson*, 8th Dist. Cuyahoga No. 88803, 2007-Ohio-3921, ¶ 18.

{¶12} In the instant case, Miller argues the trial court abused its discretion in dismissing her case with prejudice for failure to appear at the show cause hearing because neither she nor her counsel ever received notice of the hearing. She argues that her counsel did not receive notice of the hearing because he changed his email address in or around the time the notice was sent. Miller cites R.C. 4123.522, a workers' compensation statute that provides a sort of "mailbox rule," and argues that her counsel's change of email address successfully rebuts the presumption that once sent, notice is subsequently received. However, R.C. 4123.522 only applies in workers' compensation cases and is inapplicable here.

{¶13} Nevertheless, the so called "mailbox rule" is a common law rule that provides a rebuttable presumption that a letter sent by ordinary U.S. mail is presumed received in due course. *Amir v. Werner*, 9th Dist. Summit No. 26174, 2012-Ohio-5863, ¶ 12; *U.S. Bank, N.A. v. Lawson*, 5th Dist. Delaware No. 13CAE030021, 2014-Ohio-463, ¶ 33. There is no analogous rule for messages sent by email. And even if there were a "mailbox rule" that applied to email messages, Miller could not rebut the presumption that he received notice. Under the mailbox rule, the party alleging the failure to receive notice must first prove that

(1) the failure of notice was due to circumstances beyond the party's or the party's representative's control, (2) the failure of notice was not due to the party's or the party's representative's fault or neglect, and (3) neither the party nor the party's representative had prior actual knowledge of the information contained in the notice.

State ex rel. LTV Steel Co. v. Indus. Comm., 88 Ohio St.3d 284, 286, 725 N.E.2d 639 (2000), citing *Weiss v. Ferro Corp.*, 44 Ohio St.3d 178, 180, 542 N.E.2d 340 (1989).

{¶14} Miller’s counsel failed to provide his new email address to the clerk of courts in a timely manner. In a journal entry dated July 7, 2014, the court stated: “The clerk also noted that he (counsel) did not indicate a new email address until 4/3/14.” The two journal entries providing notice of the show cause hearing were docketed on March 31, 2014. Therefore, counsel’s failure to receive notice was due to his own delay in updating his email address.

{¶15} Furthermore, the trial court did not dismiss Miller’s case solely because she failed to appear on April 2, 2014. This case has been fraught with delays and Miller has repeatedly failed to appear for hearings. The trial court is in the best position to judge whether delays in the prosecution of a case are due to legitimate reasons when determining whether dismissal for lack of prosecution is warranted. *Gelske v. 800 Constr. Co.*, 8th Dist. Cuyahoga No. 80163, 2002-Ohio-3434, ¶ 13, citing *Indus. Risk Insurers v. Lorenz Equip. Co.*, 69 Ohio St.3d 576, 581, 635 N.E.2d 14 (1994).

{¶16} In considering whether dismissal is warranted for a party’s lack of prosecution, a trial court may take into account the entire history of the litigation, including a party’s prior dilatory conduct. *Jones, supra*, 78 Ohio St.3d at 372, 678 N.E.2d 530. A trial court’s orders are not to be taken lightly. *Shoreway Circle, Inc. v. Skoch Co.*, 92 Ohio App.3d 823, 637 N.E.2d 355 (8th Dist.1994). The harsh remedy of dismissal with prejudice is warranted where the record shows that a party has repeatedly, deliberately, and without explanation, failed to comply with the trial court’s orders. *Simmons, supra*, 8th Dist. Cuyahoga No. 100545, 2014-Ohio-2771, ¶ 17.

{¶17} Based on the particular facts of this case, we find the trial court did not abuse its discretion in dismissing Miller’s case with prejudice.

{¶18} Accordingly, Miller’s first assignment of error is overruled.

B. Civ.R. 60(B) Motion for Relief from Judgment

{¶19} In the second assignment of error, Miller argues the trial court erred in denying her motion for relief from judgment.

{¶20} Miller filed her notice of appeal of the trial court's order dismissing her case with prejudice on May 2, 2014, in 8th Dist. Cuyahoga No. 101335. On July 3, 2014, Miller filed a motion seeking relief from the judgment pursuant to Civ.R. 60(A) and 60(B) dismissing her case in the trial court. The motion was opposed, and the trial court denied it on July 10, 2014. Miller filed a notice of appeal of that denial on August 1, 2014, in 8th Dist. Cuyahoga No. 101761.

{¶21} Initially, the appeal of the dismissal with prejudice and the appeal of the denial of the motion for relief from judgment were consolidated. However, this court sua sponte dismissed Miller's appeal of the denial of her relief from judgment motion in 8th Dist. Cuyahoga No. 101761 because her first appeal was pending at the time she filed it and at the time the trial court ruled on it. Thus, the trial court was without jurisdiction to rule on it, and the order is void. *Huntington Natl. Bank v. Syroka*, 6th Dist. Lucas No. L-09-1240, 2010-Ohio-1358. This court is without jurisdiction to review the appeal of a void judgment. *State v. Shazor*, 8th Dist. Cuyahoga No. 93846, 2010-Ohio-3197, ¶ 5. Therefore, we cannot review Miller's second assignment of error because it relates solely to the trial court's denial of her motion for relief from judgment.

{¶22} Accordingly, Miller's second assignment of error is moot.

III. Conclusion

{¶23} The trial court did not abuse its discretion in dismissing Miller's complaint with prejudice.

{¶24} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR