

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

GREGORY D. BRITT

C. A. No. 25142

Appellee

v.

SPASOJE MISKOVIC, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006-11-7000

Appellants

DECISION AND JOURNAL ENTRY

Dated: September 29, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant Spasoje Miskovic appeals the judgment of the Summit County Court of Common Pleas overruling Miskovic’s objections to the magistrate’s decision and adopting that decision. This Court reverses.

I.

{¶2} Plaintiff-Appellee Gregory Britt began to have money problems after he was laid off from his job and his wife continued to spend money the couple did not have. Britt sought advice from Miskovic, whom he befriended. In order to curtail Britt’s wife’s spending, Miskovic offered to open a bank account in his name and allow Britt to control it by giving Britt signed checks and the bank statements. The relationship continued successfully for six or seven months, at which time Britt had deposited approximately \$6,830 into the account.

{¶3} At this point, tension arose between Miskovic and Britt, and according to Britt, Miskovic refused to give Britt any more signed checks, thereby depriving Britt of access to his

money. Miskovic told Britt that Britt did not have any money in the account. Subsequently, a \$6,000 certificate of deposit (“C.D.”) was purchased with funds from the account from a bank in Puerto Rico.

{¶4} Ultimately, Britt filed a complaint against Miskovic for conversion. Miskovic answered and filed counterclaims for breach of contract, conversion, and fraud. The case was scheduled for a bench trial before a magistrate.

{¶5} On the date of the trial, Miskovic, who was pro se at the time, did not appear. After several telephone conversations between the magistrate and Miskovic, the magistrate elected to proceed with the trial, after dismissing Miskovic’s counterclaims.

{¶6} The magistrate issued a written decision finding in favor of Britt on his claim in the amount of \$6,823.95, plus interest, in actual damages and \$20,471.85 in punitive damages. Miskovic filed objections to the magistrate’s decision. The trial court overruled Miskovic’s objections and adopted the decision of the magistrate.

{¶7} Miskovic has appealed, raising three assignments of error for our review, which we will address out of sequence to facilitate our review.

II.

ASSIGNMENT OF ERROR III

{¶8} In Miskovic’s third assignment of error, he asserts that the trial court erred by failing to grant a continuance and by dismissing his counterclaims pursuant to Civ.R. 41(B)(1) without notice. We agree.

{¶9} In order to understand why Miskovic is correct in his arguments, it is important to recite some of the events that took place prior to the time the magistrate decided to go forward with the trial.

{¶10} On the scheduled date of the trial, July 8, 2009, Miskovic, who was pro se at the time, did not appear. The magistrate had Britt's counsel search the courthouse for Miskovic, but was unable to locate him. Thereafter, the magistrate phoned Miskovic, who informed the magistrate that he had called someone at the court and told that person that he would not be able to come to court as he broke his leg that morning. Miskovic was less than cordial with the magistrate, and the magistrate ultimately ended the conversation with Miskovic, leaving the magistrate unconvinced of the truth of Miskovic's story.

{¶11} At that point the magistrate began to proceed with the matter and asked Britt's counsel if he had any motions to make with respect to Miskovic's counterclaims. Britt's counsel moved to dismiss the counterclaims and the magistrate granted the motion pursuant to Civ.R. 41(B) for failure to prosecute.

{¶12} Britt's counsel began making an opening statement, but was interrupted when an individual came into court and testified that she could confirm that Miskovic had previously called the court to say he would be late.

{¶13} The magistrate then proceeded to call Miskovic back on the phone. The magistrate asked Miskovic to be at the courthouse by 1:00 p.m., but Miskovic said he would not be able to be there until after 3:00 p.m. as he broke his leg and had to have it treated. Miskovic asked that the magistrate reschedule the trial. The magistrate agreed to do so, but told Miskovic that he would have to produce documentation from the doctor or hospital that he did in fact break his leg when he came back to court. Miskovic was not highly cooperative during the process and often was rude. At some point, the magistrate reiterated that he was going to continue the matter and then asked whether Miskovic was going to have a slip from the hospital saying his leg was

broken. While the magistrate was getting his calendar, the court asked Miskovic if he was still on the phone. The magistrate stated that Miskovic hung up.

{¶14} The magistrate again exercised patience and restraint and called Miskovic back once again. The parties and the magistrate then proceeded to discuss possible dates to reschedule the trial:

“The Court: Okay, at the end of the month. How about – what about the 29th? That’s a Wednesday.

“Mr. Miskovic: Yeah.

“The Court: Is that all right?

“Mr. Miskovic: That’s all right. Send me information on it.

“The Court: Okay. Well, I’m telling you I’m going to set this thing for 10:30 on July the 29th. Okay?

“Mr. Miskovic: Okay.

“The Court: Now, I’m going to give you a fax number, my fax number. You need to fax over to me whenever you get done today or whatever something from the hospital, the doctor saying your leg was broken and you couldn’t be here today because you are going to get treatment. Okay? Now, do you want my fax number?

“Mr. Miskovic: No, no, I don’t have time for that.

“The Court: Well, I’ll tell you that if you don’t have time for that –

“Mr. Miskovic: Young man or old man, don’t pester me.

“The Court: Well, you know – you still on the phone? Are you still on the phone, [Mr. Miskovic]? [Mr. Miskovic] has just hung up on me. As far as I’m concerned we’ve given him every opportunity to go ahead with this matter. He’s hung up on me now. I’m just trying to f[ind] out whether he was injured or not and we’ll go forward with the trial. We’ve done everything we can do.”

The magistrate then proceeded to conduct the trial as originally scheduled.

{¶15} It is clear from the record that Miskovic was certainly not entirely cooperative and pleasant, and we commend the magistrate for maintaining a professional attitude and demeanor.

However, we still conclude that the trial court did err in overruling Miskovic's objection contending that the magistrate erred in dismissing his counterclaims and in failing to continue the trial.

Failure to Continue the Trial

{¶16} Miskovic argues that the trial court erred in overruling his objection to the magistrate's decision concerning the magistrate's failure to continue the trial. We agree.

{¶17} In the instant matter, while the magistrate may not have been required to reschedule the trial date, especially if the magistrate did not believe Miskovic's explanation for his absence, the fact is that the magistrate *did* reschedule the trial. The magistrate specifically stated that he was "going to set [the trial] for 10:30 on July the 29th." And while it was certainly inappropriate for Miskovic to hang up on the magistrate, at the point when the conversation ended, Miskovic could only reasonably conclude that the trial was being continued and had been rescheduled for July 29th. It was only after Miskovic hung up on the magistrate that the magistrate decided not to continue the matter until the 29th and to proceed that day with the trial. Miskovic had no notice, or even reason to assume, that the trial would still take place on July 8th. Additionally, prior to the phone call during which the date for the trial was rescheduled, the magistrate first told Miskovic that he did not have to produce a doctor's note until he returned to court.

{¶18} "Both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution guarantee due process of law, and thus guarantee a reasonable opportunity to be heard after a reasonable notice of such hearing." (Internal quotations and citations omitted.) *Ohio Valley Radiology Assoc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 125. The Supreme Court has noted that "Ohio courts have

traditionally held that while some form of notice of a trial date is required to satisfy due process, an entry of the date of trial on the court's docket constitutes reasonable, constructive notice of that fact.” *Id.* at 124. “Because the judgment of the trial court was entered after a trial which was conducted without reasonable notice to [Miskovic], it violated both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.” *Id.* at 125.

Dismissal of Counterclaims

{¶19} Miskovic also asserts that the trial court erred in overruling his objection with the respect to the magistrate’s dismissal of his counterclaims. We agree.

{¶20} The magistrate dismissed Miskovic’s counterclaims pursuant to Civ.R. 41(B)(1). Civ.R. 41(B)(1) provides that “[w]here 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.” Civ.R. 41(C) notes that “[t]he provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.” Thus, inherent within the rule is a notice requirement. See *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 2-3. Where the party is pro se, that notice must be provided to the party. *Id.* at 3; see, also, *Gasper v. Brewer*, 2nd Dist. No. 20566, 2005-Ohio-909, at ¶6. In some circumstances, implied notice is sufficient. *Sunkin v. Collision Pro, Inc.*, 174 Ohio App.3d 56, 2007-Ohio-6046, at ¶16. This Court “has previously held that notice of dismissal for failure to prosecute may be implied when a party fails to appear at trial.” *Holt v. Ayers* (1998), 127 Ohio App.3d 535, 537, fn. 1, citing *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 224.

{¶21} However, we conclude in light of the specific facts of this case, the instant matter is distinguishable from *Schreiner*. Here, at the time when Britt’s counsel moved to dismiss

Miskovic's counterclaims, Miskovic was not present in the court room or on the phone with the magistrate. Thus, it is clear that Miskovic did not have actual notice of the possibility of dismissal. And while at this point, it perhaps would have been reasonable for Miskovic to assume that his counterclaims were subject to dismissal since the trial was going to proceed, the subsequent actions of the magistrate in rescheduling the trial without informing Miskovic of the dismissal of his counterclaims were such that no reasonable person would have assumed that the counterclaims were not still pending. When the magistrate called Miskovic shortly after dismissing the counterclaims, during which time the magistrate rescheduled the trial, the magistrate did not inform Miskovic of Britt's counsel's motion, nor did the magistrate inform him that the counterclaims were dismissed with prejudice. Therefore, having not been provided with any information or notice to the contrary, it was reasonable for Miskovic to assume that his counterclaims remained pending. Thus, we conclude the trial court erred in overruling Miskovic's objection to the magistrate's decision on this point.

{¶22} In light of the foregoing, we reverse the judgment of the trial court and remand the matter for a new trial.

ASSIGNMENTS OF ERROR I & II

{¶23} In light of our resolution of Miskovic's third assignment of error, Miskovic's remaining assignments of error are rendered moot and we decline to address them. App.R. 12(A)(1)(c).

III.

{¶24} Miskovic's third assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed, and the matter is remanded for proceedings

consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

MICHAEL T. CALLAHAN, Attorney at Law, for Appellant.

ALFRED E. SCHRADER, Attorney at Law, for Appellee.