

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Judah Hargrove,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-439
v.	:	(C.P.C. No. 10CVH-09-14102)
	:	
Department of Rehabilitation and	:	(REGULAR CALENDAR)
Corrections,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on February 2, 2012

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*Judah Hargrove, pro se.*

*Michael DeWine, Attorney General, and Jason Fuller, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Judah Hargrove, appeals from a judgment of the Franklin County Court of Common Pleas dismissing his complaint against defendant-appellee, the Ohio Department of Rehabilitation and Corrections ("ODRC"). Because the trial court did not abuse its discretion, we affirm that judgment.

{¶2} Appellant, an inmate at the Warren Correctional Institution, filed a complaint against the ODRC in which he asserted claims apparently arising from his placement on

parole and the revocation of that parole. The ODRC filed a motion to dismiss appellant's complaint based in part on appellant's failure to file an affidavit of his prior actions as required by R.C. 2969.25(A). In response, appellant sought to amend his complaint to include such an affidavit. The trial court concluded that appellant failed to file an affidavit of prior actions as required by R.C. 2969.25(A) and, accordingly, dismissed appellant's complaint with prejudice.

{¶3} Appellant appeals and assigns the following error:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF WHEN IT DISMISSED PLAINTIFF'S ACTION PURSUANT TO OH.CIV.R. 41(B)(1) AND R.C. § 2969 WITHOUT PRIOR NOTICE OR EXPLORING ALTERNATIVES TO DISMISSAL.

{¶4} R.C. 2969.25(A) requires an inmate to file, at the time he commences a civil action against a government entity or employee, an affidavit listing each civil action or appeal that he has filed in the past five years and providing specific information regarding each action or appeal. Compliance with the provisions of R.C. 2969.25 is mandatory and failure to satisfy the statutory requirements is grounds for dismissal. *State ex rel. Washington v. Ohio Adult Parole Auth.*, 87 Ohio St.3d 258, 1999-Ohio-53; *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 1998-Ohio-218. Appellant does not dispute that he did not file the affidavit of prior actions required by R.C. 2969.25(A) at the time he commenced this action. Belated attempts to comply with these provisions do not excuse noncompliance. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, ¶9. Thus, dismissal was proper in this case.

{¶5} Appellant contends, however, that the trial court erred by dismissing his complaint without first providing him notice of the impending dismissal pursuant to Civ.R. 41(B)(1). We disagree.

{¶6} The trial court dismissed appellant's complaint for his failure to comply with the requirements of R.C. 2969.25(A). Loc.R. 9.02(A) of the Franklin County Court of Common Pleas provides that the failure of an inmate to comply with R.C. 2969.25 shall be grounds for dismissal pursuant to Civ.R. 41(B)(1). A trial court's decision to dismiss an action pursuant to Civ.R. 41(B)(1) is within the sound discretion of the trial court. *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47. Therefore, we review such a dismissal for an abuse of discretion. *Id.*; *Pearson v. Mansfield Corr. Inst.*, 10th Dist. No. 02AP-96, 2002-Ohio-5011, ¶19.

{¶7} Civ.R. 41(B)(1) permits a trial court to dismiss an action with prejudice only after providing plaintiff's counsel with notice. *Tymachko v. Ohio Dept. of Mental Health*, 10th Dist. No. 04AP-1285, 2005-Ohio-3454, ¶15, citing *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99, 101 (notice requirement applies to all dismissals with prejudice). A party receives sufficient notice under that rule once it is informed that dismissal is a possibility and it has a reasonable opportunity to defend against dismissal. *Huntington Natl. Bank v. Zeune*, 10th Dist. No. 08AP-1020, 2009-Ohio-3482, ¶24; *Quonset Hut* at 49. This court has repeatedly held that a party receives sufficient notice pursuant to Civ.R. 41(B)(1) if that party is served with a motion to dismiss and has an opportunity to file a responsive motion. *Zeune* at ¶24; *Tymachko* at ¶19-20; *Pearson* at ¶23. See also *Sunkin v. Collision Pro., Inc.*, 174 Ohio App.3d 56, 2007-Ohio-6046, ¶16,

citing *Sazima v. Chalko* (1999), 86 Ohio St.3d 151, 156 ("A pending motion to dismiss, for example, is sufficient for notice to be charged to the plaintiff.").

{¶8} Here, the ODRC filed its motion to dismiss on October 29, 2010. Appellant does not dispute receipt of the motion and, in response, filed a motion in an attempt to justify and/or cure his failure to comply with the filing requirements of R.C. 2969.25 on November 17. The trial court did not dismiss appellant's complaint for another five months. Thus, appellant had a reasonable opportunity to defend against the motion to dismiss, even though in this case belated attempts to cure noncompliance with R.C. 2969.25 cannot excuse the original noncompliant filings. *Fuqua*. Appellant's receipt of the ODRC's motion to dismiss and his opportunity to respond to that motion was sufficient notice to allow the trial court to subsequently dismiss his complaint with prejudice pursuant to Civ.R. 41(B)(1).

{¶9} Appellant, however, relies on a recent opinion from this court in which we reversed a trial court's decision to dismiss an inmate's complaint based on the inmate's failure to file affidavits as required by R.C. 2969.25(C). *Semenchuk v. Ohio Adult Parole Auth.*, 10th Dist. No. 10AP-753, 2011-Ohio-1939. We reversed that decision because the trial court failed to provide the inmate with notice before it dismissed the complaint with prejudice pursuant to Civ.R. 41(B)(1). *Id.* at ¶5-9. Appellant's reliance on that case is misplaced, as *Semenchuk* is factually distinguishable. In *Semenchuk*, there is no indication whether the defendant filed a motion to dismiss or whether the trial court acted sua sponte. *Id.* at ¶3. This is significant because, while a motion to dismiss generally constitutes sufficient notice to allow for dismissal, a trial court must give plaintiff notice before it may sua sponte dismiss a complaint pursuant to Civ.R. 41(B)(1). *Cecil & Geiser*,

*L.L.P. v. Plymale*, 10th Dist. No. 11AP-167, 2011-Ohio-5468, ¶23. Thus, in *Semenchuk*, it was not clear whether the inmate had sufficient notice to allow the trial court to dismiss pursuant to Civ.R. 41(B)(1). In the present case, it is clear that appellant received notice because the ODRC filed a motion to dismiss appellant's complaint.

{¶10} Appellant received sufficient notice to allow the trial court to dismiss his complaint pursuant to Civ.R. 41(B)(1) due to his failure to comply with R.C. 2969.25. Accordingly, the trial court did not abuse its discretion by dismissing appellant's complaint and we overrule appellant's assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

SADLER and DORRIAN, JJ., concur.

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