

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

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| BAC HOME LOANS SERVICING, L.P., | : | OPINION |
| f.k.a. COUNTRYWIDE HOME LOANS | | |
| SERVICING, L.P., | : | |
| | | |
| Plaintiff-Appellant, | : | |
| | | CASE NO. 2011-P-0045 |
| - vs - | : | |
| | | |
| DAWN TESTA, a.k.a. | : | |
| DAWN L. TESTA, et al., | : | |
| | | |
| Defendants-Appellees. | | |

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2010 CV 1924.

Judgment: Reversed and remanded.

Stacy L. Hart, Adam R. Fogelman, and Jennifer N. Heller, Lerner, Sampson & Rothfuss, L.P.A., 120 East Fourth Street, 8th Floor, P.O. Box 5480, Cincinnati, OH 45201-5480 (For Plaintiff-Appellant).

Kristen Pederzoli and David E. Butz, Krugliak, Wilkins, Griffiths & Dougherty Co., LPA, 4775 Munson Street, N.W., P.O. Box 36963, Canton, OH 44735-6963 (For Defendants-Appellees).

THOMAS R. WRIGHT, J.

{¶1} Appellant, BAC Home Loans Servicing, L.P., f.k.a. Countrywide Home Loans Servicing, L.P. (“BAC”), appeals from a judgment of the Portage County Court of Common Pleas dismissing its complaint in foreclosure with prejudice for failure to negotiate in good faith pursuant to the court’s mediation policy.

{¶2} Appellees, Dawn and Dan Testa (“the Testas”), purchased residential property in Portage County. Dawn signed a promissory note and the Testas granted a mortgage on the property to America’s Wholesale Lender. The note and mortgage were subsequently assigned to BAC. The Testas later experienced financial difficulties and requested, but did not receive, a loan modification. They ultimately defaulted on their obligation.

{¶3} BAC filed a complaint in foreclosure alleging a default under the note and demanding enforcement of the mortgage. The Testas filed an answer and a request for mediation. A mediation conference was held with the trial court’s mediator. The mediator issued the following status report:

{¶4} “A mediation conference took place on March 8, 2011, resulting in the following:

{¶5} “Well before today’s conference the homeowners (through counsel) had provided Plaintiff with all the information required for a loan modification review. Through no fault of the homeowners or their counsel, no action was taken nor was a decision made regarding a loan modification. After a telephone conference today with Plaintiff’s representative and its counsel, Defendants for at least the third time are providing the requisite information necessary for a loan modification.

{¶6} “The [mediator] will follow up with counsel on April 8, 2011. This matter shall remain in mediation until further notice.”

{¶7} There is no indication that the follow-up occurred, and no subsequent status report was issued. Instead, approximately two months after the March 8, 2011 mediation conference, the trial court dismissed BAC’s complaint with prejudice without

providing BAC or its counsel with notice of its intent to dismiss. The court determined that BAC failed to negotiate in good faith pursuant to the court's mediation policy. In its judgment, the court cited to and relied upon the mediator's status report, finding that the Testas timely complied with BAC's request to supply the requisite information in order to modify their loan, but that there had been no response from BAC. BAC filed a timely appeal, asserting the following assignments of error:

{¶8} “[1.] The Trial Court abused its discretion in dismissing BAC's Complaint with prejudice, without notice to BAC or its counsel, as required by Civ.R. 41(B)(1).

{¶9} “[2.] The Trial Court erred in dismissing BAC's Complaint with prejudice having relied upon mediation information reported in violation of the Uniform Mediation Act.”

{¶10} In its first assignment of error, BAC argues the trial court abused its discretion in sua sponte dismissing its complaint with prejudice without providing BAC or its counsel with notice of its intent to dismiss as required by Civ.R. 41(B)(1). BAC further contends that it did not fail to negotiate in good faith pursuant to the Court's policy because it was under the proper assumption, based on the mediator's written report, that the case would continue to be mediated, and that the mediator would take express action to initiate that process.

{¶11} Civ.R. 41(B)(1) governs involuntary dismissals and states: “[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.” (Emphasis added). Due process and the notice requirement of Civ.R. 41(B)(1) are satisfied “when counsel has been informed that

dismissal is a possibility and has had a reasonable opportunity to defend against dismissal.” *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 46, 49 (1997). The purpose of this notice requirement is to provide a plaintiff with an opportunity to comply with the particular order, correct the defect, or proceed before dismissal. *Perotti v Ferguson*, 7 Ohio St.3d. 1, 3 (1983). The notice requirement of Civ.R. 41(B) is an absolute prerequisite to dismissal. *Id.*; See also *Moore v. Emmanuel Family Training Ctr., Inc.*, 18 Ohio St.3d 64, 69 (1985).

{¶12} Dismissals under Civ.R. 41(B) are punitive in nature and should only be utilized when necessary to vindicate the court’s authority. *Mid-West Tel. Serv., Inc. v. Sec. Prods. Co.*, 11th Dist. No. 2010-T-0056, 2011-Ohio-3296, ¶12. The law favors deciding cases on their merits and a dismissal with prejudice should be reserved for extreme situations, such as when a plaintiff’s conduct was so ““negligent, irresponsible, contumacious or dilatory (* * *)” that such a dismissal is warranted.” *Id.* at ¶14, citing *Nozik v. Dalheim*, 11th Dist. No. 96-L-205, 1998 Ohio App. LEXIS 1072, *5 (Mar. 20, 1998), quoting *Schreiner v. Karson*, 52 Ohio App.2d 219, 223 (9th Dist.1977). “Ordinarily, Ohio courts have followed the policy of imposing the least severe sanction, or at least a sanction short of outright dismissal of the action with prejudice, unless the plaintiff’s conduct evidences bad faith.” *Transamerica Ins. Group v. Maytag, Inc.* 99 Ohio App.3d 203, 206 (9th Dist. No. 1994), citing *Evans v. Smith*, 75 Ohio App.3d 160, 163 (1991).

{¶13} Because a dismissal with prejudice is a particularly harsh sanction, such a judgment is reviewed using the “heightened abuse of discretion standard.” *Mid-West Tel. Serv., Inc.*, at ¶7, quoting *Jones v. Hartranft*, 78 Ohio St.3d 368, 372 (1997). An

abuse of discretion is the trial court's ""failure to exercise sound, reasonable, and legal decision-making."" *Hammonds v. Eggett*, 11th Dist. No. 2010-G-2980, 2011-Ohio-6510, at ¶16, quoting *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶14} In the underlying case, the record does not reflect that BAC or its counsel were given any notice prior to the court's decision to dismiss its complaint with prejudice, in violation of Civ.R. 41(B)(1). In the status report, the mediator stated that he would "follow up" with counsel on April 8, 2011, and that the matter "shall remain in mediation until further notice." However, no follow-up occurred and no subsequent status report was ever issued. Accordingly, dismissal was not warranted or permitted.

{¶15} In further support of its argument, BAC relies on *Palisades Collection, LLC v. Person*, 2nd Dist. No. 21545, 2007-Ohio-2362. In *Palisades*, the plaintiff submitted a voluntary dismissal of its complaint without prejudice to the trial court pursuant to Civ. R. 41(A)(1). *Id.* at ¶3. However, the dismissal was not filed with the court until six weeks later, at which time the plaintiff received a time-stamped copy of the dismissal. *Id.* Believing its complaint had been dismissed without prejudice, the plaintiff did not appear at the scheduled trial. *Id.* Consequently, the trial court dismissed the plaintiff's complaint with prejudice for failure to appear at trial. *Id.* The record did not reflect that the plaintiff was given notice prior to the court's decision to dismiss the complaint with prejudice. *Id.* On appeal, the plaintiff argued that the trial court abused its discretion in failing to provide notice that it intended to dismiss its case with prejudice under Civ.R. 41(B)(1). *Id.* at ¶8. The Second District agreed and held that because the record disclosed no notice to the appellant or its counsel that the action was subject to

dismissal with prejudice, the trial court abused its discretion in dismissing the appellant's complaint with prejudice. *Id.* at ¶12.

{¶16} Accordingly, based on the foregoing, this court concludes that the trial court abused its discretion in dismissing BAC's complaint with prejudice without first providing the required notice under Civ.R. 41(B)(1). BAC's first assignment of error is well-taken.

{¶17} In its second assignment of error, BAC contends the trial court erred in dismissing its complaint with prejudice because it relied upon mediation communication in violation of the Uniform Mediation Act ("UMA"). Ohio has adopted the UMA at R.C. 2710.06(B). Pursuant to the UMA, a mediator is allowed to present the court with a mediation report; however, a mediator may only disclose the following:

{¶18} "(1) Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; (2) A mediation communication as permitted by * * * the Revised Code; [and] (3) A mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against abuse, neglect, abandonment, or exploitation." R.C. 2710.06(B)(1)-(3).

{¶19} R.C. 2710.01(B) defines "mediation communication" as "a statement, whether oral, in a record, verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." The communication expressed in the mediator's report here was clearly made "for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a

mediator,” and thus, constituted protected “mediation communication” under R.C. 2710.01(B). This is particularly true in light of the fact that the mediator reconvened the matter to a date certain.

{¶20} “Mediation communications are privileged against disclosure pursuant to R.C. 2710.03. * * * [A] ‘mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.’ R.C. 2710.03 (B)(1).” *Anthony v. Andrews*, 11th Dist. No. 2008-P-0091, 2009-Ohio-6378, ¶14. Furthermore:

{¶21} “[A] mediator [is] only allowed to disclose whether the mediation [has] occurred or terminated, the statute does not permit for the reasoning to be disclosed. The statute also expressly provides a privileged communication disclosed by a mediator ‘shall not be considered by a court, administrative agency, or arbitrator.’ R.C. 2710.06(C)” *Anthony* at ¶22. R.C. 2710.06 does not permit the reasoning of the mediator to be disclosed in his or her report. *Id.* Moreover, a court “cannot rule based on mediation communication or an improper mediation report.” *Id.* at ¶23.

{¶22} BAC stresses that the court improperly relied on inaccurate and privileged information disclosed by the mediator in reaching its decision. Specifically, BAC asserts the court’s judgment improperly cited the status report and disclosed information beyond that permitted under R.C. 2710.06(B). This court agrees.

{¶23} The court dismissed BAC’s complaint with prejudice due to BAC’s alleged failure to negotiate in good faith pursuant to the court’s mediation policy. As stated, in its judgment, the court cited to the mediator’s status report and relied upon the following mediation communication in reaching its decision: that well before the conference, the Testas had provided BAC with all the information required for a loan modification

review; through no fault of the Testas, BAC took no action and made no decision; and that after a telephone conference with BAC's counsel, the Testas for at least the third time provided the requisite information.

{¶24} The mediator here went beyond his permitted authority in disclosing more than just whether the mediation had occurred or was terminated; whether a settlement was reached; and the attendance of the parties. R.C. 2710.06(B)(1). Rather, the mediator provided a factual background of the matter as well as injected his opinion and reasoning as to which party was not at fault. Furthermore, the trial court, in its judgment entry, concluded that the plaintiff failed to "negotiate in good faith," a conclusion based on improper reliance upon a "mediation communication" that exceeded the boundaries of R.C. 2710.06(B). *Anthony* at ¶23.

{¶25} Accordingly, we conclude the court erred in considering and basing its ruling on mediation communication and an improper mediation report. R.C. 2710.01(B); R.C. 2710.06(C); *Anthony* at ¶23. BAC's second assignment of error also has merit.

{¶26} For the foregoing reasons, BAC's assignments of error are well-taken and the judgment of the Portage County Court of Common Pleas is reversed and remanded for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.