

[Cite as *Citimortgage, Inc. v. Robson*, 2010-Ohio-458.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITIMORTGAGE, INC.	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 0079
	:	
	:	
DONALD SCOTT ROBSON, et al.,	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Civil Appeal from Richland County Court of Common Pleas Case No. 2008 CV 2293
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JUDGMENT:	Reversed and Remanded
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DATE OF JUDGMENT ENTRY:	February 1, 2010
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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JAMES L. BLUNT, II
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Edwards, P.J.

{¶1} Appellant, Donald Scott Robson, appeals a judgment of the Richland County Common Pleas Court dismissing his counterclaim filed against appellee Citimortgage, Inc., on a foreclosure action filed by appellee.

STATEMENT OF FACTS AND CASE

{¶2} On December 23, 2008, appellee filed the instant foreclosure action against appellant. Appellant filed a counterclaim against appellee seeking damages for trespass, alleging that appellee's agents entered the home without appellant's permission and broke an alarm system.

{¶3} Appellee's motion for summary judgment on its complaint for foreclosure was granted on May 20, 2009. In the same entry, the court states, "Defendants Counterclaim is overruled for lack of merit." Appellant assigns a single error on appeal:

{¶4} "THE TRIAL COURT ERRED BY SUA SPONTE DISMISSING DEFENDANT'S COUNTERCLAIM, WHERE THE DEFENDANT DID NOT FAIL TO PROSECUTE HIS CLAIM, DID NOT FAIL TO COMPLY WITH THE CIVIL RULES, NOR FAILED TO COMPLY WITH AN ORDER OF THE TRIAL COURT."

{¶5} A trial court can sua sponte dismiss a claim with prejudice only in limited circumstances. *Tokles v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 632, 605 N.E.2d 936, 944. A court may dismiss a claim if the party asserting it fails to prosecute its action or fails to comply with the Civil Rules or a court order. Civ. R. 41(B)(1), (C). "The law favors deciding cases on their merits unless the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial

grounds for a dismissal with prejudice for a failure to prosecute or obey a court order.”
Id., citing *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 223, 369 N.E.2d 800,803.

{¶6} Appellee argues that the trial court properly dismissed the counterclaim because appellant failed to comply with a scheduling order of the court filed January 9, 2008. This order states in pertinent part, “All parties in this case who contend that they are entitled to full or partial summary or default judgment as to issues in the case shall file their joint or separate motions of summary or default judgment and supporting documentation no later than two weeks before the scheduling conference.” Appellee argues that pursuant to this order, appellant was required to file a motion for summary judgment on his counterclaim by May 4, 2009, two weeks prior to the telephone scheduling conference set for May 18, 2009. Because appellant failed to file a motion for summary judgment, appellee argues the court did not err in sua sponte dismissing the counterclaim.

{¶7} The scheduling order of the court did not order appellant to file a motion for summary judgment. The order provides that only parties who *contend* that they are entitled to summary judgment must file in the specified time frame. If appellant did not contend that he was entitled to summary judgment, he was not required to file a motion and the court could not sua sponte dismiss his counterclaim for failing to file a motion for summary judgment.

{¶8} Further, the court’s entry dismissing the counterclaim does not state that the claim is dismissed for failure to comply with the court’s scheduling order. The entry specifically states that the counterclaim is dismissed for “lack of merit.” The counterclaim facially states a claim for trespass. There was no dispositive motion or

evidence before the court concerning the counterclaim. The court therefore erred in dismissing the counterclaim for lack of merit.

{¶9} The assignment of error is sustained.

{¶10} The judgment of the Richland County Common Pleas Court dismissing appellant's counterclaim is reversed. This cause is remanded to that court for further proceedings according to law, consistent with this opinion.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/r0120

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITIMORTGAGE, INC.	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DONALD SCOTT ROBSON, et al.,	:	
	:	
Defendant-Appellant	:	CASE NO. 2009 CA 0079

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas dismissing the appellant's counterclaim is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellee.

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES