

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

MID-WEST TELEPHONE SERVICE, INC.,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-T-0056
SECURITY PRODUCTS COMPANY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Girard Municipal Court, Case No. 2009 CVF 01357.

Judgment: Reversed and remanded.

Robert J. Rohrbaugh, II, Robert J. Rohrbaugh, II, L.L.C., 4800 Market Street, Ste. A, Boardman, OH 44512 (For Plaintiff-Appellant).

Douglas E. Bloom, Dubyak, Connick, Thompson & Bloom, L.L.C., 3401 Enterprise Parkway, #205, Cleveland, OH 44122 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} In this matter, submitted on the record and the briefs of the parties, appellant, Mid-West Telephone Service, Inc., appeals from the judgment entered by the Girard Municipal Court. At issue is whether the trial court erred when it entered its order involuntarily dismissing appellant’s complaint with prejudice. For the reasons discussed below, the judgment of the trial court is reversed and the matter is remanded for further proceedings.

{¶2} On December 11, 2009, appellant filed a complaint against appellee, Security Products Company, alleging breach of contract. On January 8, 2010, appellee filed a motion for a more definite statement pursuant to Civ.R. 12(E). The motion specifically requested a court order compelling appellant to comply with Civ.R. 10(D)(1), requiring appellant to attach a copy of the written contract or explain why the instrument was omitted. On the same date, the trial court granted the motion, ordering appellant to comply with Civ.R. 10(D)(1) within 14 days or face the possibility of the court striking appellant's pleading.

{¶3} The deadline passed and, on February 2, 2010, appellee filed a motion to dismiss appellant's complaint involuntarily pursuant to Civ.R. 41(B). On the same date, appellant filed a "Response to Defendant's Motion for a More Definite Statement," by way of filing another complaint to which it appended what appeared to be a purchase order. The trial court subsequently set a hearing on appellee's motion for March 13, 2010. Both parties appeared at the hearing and, on March 15, 2010, the trial court ordered each party to prepare a memorandum in support of their respective positions.

{¶4} On March 23, 2010, appellee filed its memorandum arguing, pursuant to Civ.R. 41(B), appellant's complaint should be involuntarily dismissed with prejudice for failing to timely file its amended complaint. On April 5, 2010, appellant filed a motion to dismiss, in accordance with Civ.R. 41(A), with an attached judgment entry for the court to sign. On the same date, appellant filed a memorandum arguing, as a result of his motion to dismiss, the matter was no longer pending and, therefore, the court lacked jurisdiction to rule on appellee's Civ.R. 41(B) motion. Appellee filed a response memorandum on April 9, 2010, arguing appellant's position was without merit and the

trial court should consequently grant its motion to dismiss. On April 13, 2010, the trial court entered judgment in appellee's favor, dismissing appellant's complaint involuntarily, with prejudice. This appeal follows.

{¶5} For its sole assignment of error, appellant alleges:

{¶6} "The trial court committed reversible error in sustaining defendant's motion to dismiss."

{¶7} An appellate court reviews a trial court's judgment dismissing a case with prejudice pursuant to Civ.R. 41(B) for an abuse of discretion. See, e.g., *Simeone v. Girard City Bd. of Educ.*, 171 Ohio App.3d 633, 639, 2007-Ohio-1775. Generally, a court abuses its discretion where its judgment comports with neither reason nor the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, at ¶24. Because a dismissal with prejudice is a particularly harsh sanction, however, the Supreme Court of Ohio has observed such a judgment is reviewed using a "heightened abuse of discretion standard." *Jones v. Hartranft*, 78 Ohio St.3d 368, 372, 1997-Ohio-203. In applying this standard, an appellate court should closely scrutinize the case, considering "**** the drawn-out history of the litigation, including a plaintiff's failure to respond to interrogatories until threatened with dismissal, and other evidence that a plaintiff is deliberately proceeding in dilatory fashion or has done so in a previously filed, and voluntarily dismissed, action." *Id.*, citing *Link v. Wabash RR. Co.* (1962), 370 U.S. 626, 633-635.

{¶8} Under its sole assignment of error, appellant claims its motion to dismiss without prejudice stripped the court of jurisdiction to rule on appellee's motion for involuntary dismissal. In essence, appellant claims its motion to dismiss, which was

filed prior to the trial court's judgment, was self-effectuating. This argument is not persuasive.

{¶9} Appellant concedes it filed a motion to dismiss under Civ.R. 41(A). In *Hutz v. Gray*, 11th Dist. No. 2008-T-0100, 2009-Ohio-3410, at ¶27, this court observed:

{¶10} “*** [T]here are three distinct avenues in which a plaintiff may seek dismissal under Civ.R. 41(A), including: (1) dismissing the case without the approval of the opposing party or the trial court pursuant to Civ.R. 41(A)(1)(a); (2) dismissing the action pursuant to Civ.R. 41(A)(1)(b), by filing a stipulation of dismissal agreed to by all parties; or (3) utilizing Civ.R. 41(A)(2) and requesting the trial court to dismiss the claim.” *Id.*, citing *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, at ¶9.

{¶11} Appellant's motion was a request for dismissal and was therefore filed pursuant to Civ.R. 41(A)(2). Because the motion required the court's action, it was not self-effectuating. To achieve this result, plaintiff was required to file a “notice of dismissal” pursuant to Civ.R. 41(A)(1)(a). While there may be strategic reasons why appellant moved the court for a dismissal rather than noticing the same (e.g., avoiding a potential future “double dismissal” problem), it is clear that filing the request did not act to divest the court of jurisdiction to rule upon appellee's Civ.R. 41(B) motion. In this respect, appellant's argument is not well taken.

{¶12} The question still remains, however, whether, under these circumstances, the trial court abused its discretion in dismissing the action with prejudice. Civ.R. 41(B)(1) states that where a plaintiff fails to comply with any court order, the court may, after notice to plaintiff's counsel, dismiss an action or claim. Under this rule, counsel has notice of an impending dismissal with prejudice for failure to comply with an order

“*** 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.* (1997), 80 Ohio St.3d 46, syllabus; see, also, *Zils v. Hinton* (July 17, 2000), 5th Dist. No. 2000CA00095, 2000 Ohio App. LEXIS 3258, *2. It bears emphasis, however, that dismissals under Civ.R. 41(B) are punitive in nature. *Armstrong v. Revco D.S., Inc.* (Nov. 24, 1993), 8th Dist. No. 64044, 1993 Ohio App. LEXIS 5655, *6; see, also, 2 Klein Darling, Civil Practice, (1997), 228-229, Section 41-30. Given this characteristic, Civ.R. 41(B) should be utilized only when necessary to vindicate the court’s authority. *Thompson v. The Ohio State Univ. Hosps.*, 10th Dist. No. 06AP-1117, 2007-Ohio-4668, at ¶38, citing *Gruenspan Co., LPA v. Thompson*, 8th Dist. No. 80748, 2003-Ohio-3641, at ¶7.

{¶13} In this case, appellant failed to timely comply with the trial court’s January 8, 2010 order. After appellee moved the court to dismiss appellant’s complaint with prejudice, appellant filed a pleading which purported to comply with the original order. Evidently, the trial court determined appellant’s pleading was sufficient to merit a hearing on the issue. The record indicates both parties appeared at the hearing after which the trial court ordered each to brief their position. Appellee complied with the trial court’s order and appellant moved the trial court for a voluntary dismissal. At the time it rendered final judgment, consequently, the trial court had two motions pending: appellee’s Civ.R. 41(B) motion to dismiss with prejudice and appellant’s Civ.R. 41(A)(2) motion to dismiss without prejudice. Granting the former acted as an adjudication on the merits and thus foreclosed the possibility of the matter being re-filed in the future.

We believe, under these circumstances, the trial court's decision was unreasonably harsh.

{¶14} In *Jones*, supra, the Supreme Court emphasized that the disposition of cases on their merits is a policy favored in the law, which therefore militates against dismissals with prejudice. *Id.* at 371. In this spirit, our court has held that 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. *Nozik v. Dalheim*, 11th Dist. No. 96-L-205, 1998 Ohio App. LEXIS 1072, *5, quoting *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 223.

{¶15} Although appellant failed to timely comply with the court's January 8, 2010 order, it did ultimately comply with the substantive requirements of the order by filing a "Response to Defendant's Motion for a More Definite Statement" on February 2, 2010, a mere 10 days beyond the original deadline. It therefore appears appellant's only significant misstep in the proceedings was its 10-day lag in meeting the deadline set by the court. Nothing in the record indicates appellant conducted itself in an otherwise negligent, irresponsible, intractable, or dilatory fashion. The case had been open for a mere four months; appellant, through counsel, addressed all other orders of the court; and nothing indicates appellant had voluntarily dismissed the case previously.

{¶16} As indicated above, Civ.R. 41(B) provides for penalty dismissals. Although the court possesses the discretion to dismiss a cause with prejudice, it does not have sweeping authority to impose harsh sanctions. *Ina v. George Fraam & Sons, Inc.* (1993), 85 Ohio App.3d 229, 231. Indeed, "[a]n abuse of discretion will be found where the trial court has not considered other less drastic alternatives." *Id.*, citing

Schreiner, supra, at 222-223. There were less drastic alternatives available to the court in this case. A review of the court's judgment entry, however, does not indicate it actually considered those options.¹ Given our heightened standard, we find the trial court's order was disproportionately and unreasonably onerous in light of appellant's conduct as disclosed by the record. We therefore hold the trial court abused its discretion in dismissing appellant's cause with prejudice.

{¶17} Appellant's assignment of error is sustained.

{¶18} For the reasons discussed above, the judgment of the Girard Municipal Court is reversed and the matter remanded.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.

1. The entry simply states: "Upon consideration of Defendant's Memorandum in Support of Involuntary Dismissal with Prejudice and for good cause appearing, it is hereby ordered that Plaintiff's claim is hereby dismissed with prejudice."