[Cite as *Grippi v. Cantagallo*, 2012-Ohio-5589.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

	:	**O P I N I O N**
LOUIS J. GRIPPI,		
Plaintiff-Appellant,	**:**	**CASE NO. 2011-A-0054**
- vs -	**:**	
ANTHONY CANTAGALLO, et al.,	**:**	
Defendants-Appellees.	**:**	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CV 1185.

Judgment: Affirmed.

Thomas J. Simon, 1105 Bridge Street, P.O. Box 3048, Ashtabula, OH 44005-3048; and *Martin S. Hume*, Martin S. Hume Co., L.P.A., 6 Federal Plaza Central, Suite 905, Youngstown, OH 44503-1506 (For Plaintiff-Appellant).

Julie A. Bickis, *John T. McLandrich*, and *Frank H. Scialdone*, Mazanec, Raskin, Ryder & Keller Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Solon, OH 44139 (For Defendant-Appellee, Anthony Cantagallo).

R. Sean Grayson, Ohio Council 8, AFSCME, AFL-CIO, 6800 North High Street, Worthington, OH 43085-2512 (For Defendant-Appellee, John A. Lyell)

THOMAS R. WRIGHT, J.

{¶1} Plaintiff-appellant, Louis J. Grippi, appeals from a judgment of the Ashtabula County Court of Common Pleas which dismissed his complaint against appellees, Anthony Cantagallo ("Cantagallo"), the Ashtabula City Manager; and John Lyell, the President of American Federation of State, County and Municipal Employees,

Ohio Council 8, AFL-CIO ("Union"). Appellant challenges the trial court's dismissal of the matter *with prejudice*.

{¶2} Originally, appellant filed an unfair labor practice charge against Cantagallo with the State Employment Relations Board ("SERB") based on an alleged violation of R.C. 4117.11(A)(3), a provision of Ohio's collective bargaining act. After having been laid off, appellant wanted to exercise his seniority by "bumping" employees with less seniority, but was advised that he was not allowed to return to work. In response, appellant followed the grievance procedures set forth in the collective bargaining agreement. However, after an unsuccessful attempt at mediation, appellant was notified by a representative of the Union that his grievance did not have merit sufficient to warrant arbitration, and his charge was dismissed on July 22, 2010.

{¶3} Thereafter, on November 15, 2010, appellant filed a two-count complaint against appellees. Under Count One, appellant alleged that Cantagallo wrongfully deprived him of his employment with the City of Ashtabula, Ohio. Under Count Two, appellant alleged that the Union misrepresented him when it refused to arbitrate Cantagallo's purported wrongful discharge of his employment. The Union filed a motion to dismiss pursuant to Civ.R.12(B)(1), lack of jurisdiction over the subject matter, and 12(B)(6), failure to state a claim upon which relief can be granted. Cantagallo preserved his Civ.R.12(B)(6) defense in his answer, and after the pleadings were closed, advanced his failure to state a claim defense by way of a post-answer motion for judgment on the pleadings pursuant to Civ.R. 12(C).

{¶4} The trial court entered an order giving appellant a date certain by which to respond. Pursuant to appellant's subsequent motion for leave, the trial court granted him additional time to respond to appellees' Civ.R. 12 motions. However, appellant

failed to file a response to the motions. On August 10, 2011, the trial court issued its judgment, stating, "[n]o response has been filed to the Motions by the Plaintiff. This matter is **DISMISSED** with prejudice at Plaintiff's costs." (Emphasis sic). Appellant timely filed the present appeal, asserting the following assignment of error:

{¶5} "The trial court erred in dismissing the matter with prejudice."

{¶6} In his single assignment of error, appellant does not argue that the court erred in dismissing the case. He acknowledges that "no claims were stated" and that the trial court did not have subject matter jurisdiction because the allegations in his complaint fell under the purview of R.C. 4117.01, the collective bargaining act, which provides the exclusive remedy for the alleged violations. Rather, he argues that the trial court erred by making that dismissal *with prejudice* rather than without prejudice. This court disagrees.

{¶7} For the purpose of Civ.R. 41, the rule relating to dismissals, "a dismissal with prejudice is said to be 'on the merits' and a dismissal without prejudice is said to be 'otherwise than on the merits.'" *Customized Solutions, Inc. v. Yurchyk & Davis, CPA's Inc*., 7th Dist. No. 03 MA 38, 2003-Ohio-4881, ¶20; s*ee also* Civ.R. 41, Staff Notes, 1970. Where a dismissal is with prejudice, the effect is an adjudication on the merits and the action is vulnerable to a defense of res judicata. *Tower City Prop. v. Cuyahoga Cty. Bd. Of Rev.,* 49 Ohio St.3d 67, 69 (1990); *Manohar v. Massillon Community Hospital*, 122 Ohio App.3d 715, 719 (5th Dist.1997), citing *Griggy v. Eichler*, 11th Dist. No. 1533, 1986 Ohio App. LEXIS 8268, *7 (Sept. 12 1986). Certain exceptions to that rule are set forth in Civ.R. 41(B)(4)(a) and (b), i.e., lack of subject matter jurisdiction and failure to join a party, in which case, the dismissed action is otherwise than on the

merits and without prejudice. A dismissal without prejudice has no res judicata effect. *Chadwick v. Barbae Lou, Inc*., 69 Ohio St.2d 222, 226 (1982).

{¶8} "It is well recognized that a court speaks through its journals * * *. To journalize a decision means that certain formal requirements have been met, i.e., the decision is reduced to writing, signed by a judge, and filed with the clerk so that it may become a part of the permanent record of the court." *San Filipo v. San Filipo*, 81 Ohio App.3d 111, 112, (9th Dist.1991), citing *State v. Ellington*, 36 Ohio App.3d 76, 77-78 (9th Dist. 1987). Accordingly, considering the rubric of formality, permanency, and intentionality associated with a court's filing of its journal entries, this court presumes that in stating the matter is dismissed "with prejudice," the trial court here specifically meant to do so and was not acting out of mechanical adherence to standard boilerplate language or rote procedure.

{¶9} One of the bases of appellant's arguments is that a dismissal for lack of jurisdiction over the subject matter under Civ.R. 12(B)(1) is a failure "other than on the merits" pursuant to Civ.R. 41(B)(4), and thus, should operate as a dismissal without prejudice. As previously explained, because the trial court dismissed the case "with prejudice," this court presumes that it intended to do so, and therefore, Civ.R. 12(B)(1), lack of subject matter jurisdiction, was not the reason for the dismissal. Otherwise, the trial court's dismissal would have been "without prejudice" pursuant to the exception set forth in Civ.R. 41(B)(4)(a).

{¶10} We turn now to appellant's argument that a dismissal pursuant to Civ.R. 12(B)(6) should have been made without prejudice because it is merely procedural in nature and not a judgment on the merits of the case. Appellant's contention is not supported by the weight of current case law.

{¶11} This court reviews the trial court's judgment dismissing appellant's complaint pursuant to Civ.R. 12(B)(6) de novo. *Goss v. Kmart Corp*., 11th Dist. No 2006-T-0117, 2007-Ohio-3200, ¶17. The determination as to whether a dismissal is with or without prejudice rests within the discretion of the court. *Quonset Hut, Inc. v. Ford Motor Co.,* 80 Ohio St.3d 46, 47 (1997). Because a dismissal with prejudice forever bars a plaintiff review of the merits of his claim, appellate "abuse of discretion" review is heightened when reviewing decisions that forever deny a review of a claim's merits. *Jones v. Hartranft*, 78 Ohio St.3d 368, 372 (1997).

{¶12} Civ.R. 41(B)(1), which governs involuntary dismissals, provides that when a plaintiff fails to comply with the civil rules, the court may dismiss the action, either on the motion of a defendant or on its own motion. Civ.R. 41(B)(3) provides that a dismissal under Civ.R. 41(B) and any dismissal not provided for in Civ.R. 41, except as set forth in Civ.R. 41(B)(4), lack of subject matter jurisdiction or failure to join a party, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

{¶13} A dismissal under Civ.R. 12(B)(6) for failure to state a claim is a dismissal under Civ.R. 41(B)(1) for failure to comply with the civil rules. *Customized Solutions, Inc.,* 2003-Ohio-4881 at ¶23. Therefore, a dismissal under Civ.R. 12(B)(6) operates as an adjudication on the merits and properly results in a dismissal with prejudice. *See Reasoner v. City of Columbus*, 10th Dist. No. 04AP-800, 2005-Ohio-468, ¶8-10; *Collins v. Natl. City Bank*, 2nd Dist. No. 19884, 2003-Ohio-6893, ¶51; *Cairns v. Ohio Sav. Bank,* 109 Ohio App.3d 644, 650 (8th Dist.1996); *Birgel v. Bd. Of Commrs.,* 12th Dist. No. CA94-02-042, 1995 Ohio App. LEXIS 160, *4 (Jan. 23, 1995); *Mayrides v. Franklin Cty. Prosecutor's Office,* 71 Ohio App.3d 381 (10th Dist.1991); *City of Euclid v. Weir*,

10th Dist. No. 77AP-958, 1978 Ohio App. LEXIS 10727, *4 (June 27, 1978). Yet, even if a dismissal under Civ.R. 12(B)(6) were not a dismissal under Civ.R. 41(B)(1), "it would at least fall under Civ.R. 41(B)(3)'s catch-all provision, 'and any dismissal not provided for in this rule.'" *Customized Solutions, Inc*., at ¶23.

{¶14} Appellant cites to the case of *Plummer v. Hose*, 83 Ohio App.3d 392 (5th Dist.1993), for the contrary proposition that a Civ.R. 12(B)(6) dismissal is procedural in nature and not a judgment on the merits of the case. *Id*. at 393. This court's research reveals that the majority of appellate courts that have considered this question have determined that the more persuasive, sound conclusion is that dismissal of a complaint under Civ.R. 12(B)(6) is an adjudication upon the merits. *See discussion*, *Customized Solutions*, *Inc.* at ¶8-11.

{¶15} Based on the foregoing, the trial court did not abuse its discretion in dismissing appellant's complaint with prejudice. Accordingly, appellant's assignment of error does not have merit and is overruled. It is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Please is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.