

[Cite as *Snyder v. Belmont Natl. Bank*, 2010-Ohio-1089.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MARTIN SNYDER, et al.,	)	
	)	CASE NO. 09 BE 9
PLAINTIFFS-APPELLANTS,	)	
	)	
- VS -	)	OPINION
	)	
BELMONT NATIONAL BANK,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Case No. 04CV98.
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JUDGMENT:	Reversed and Remanded.
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APPEARANCES:	
For Plaintiffs-Appellants:	Attorney David Schaffner Schaffner Law Offices Co., LPA 132 Fair Avenue, NW New Philadelphia, OH 44663

For Defendant-Appellee:	Attorney Donna Crow Burech & Crow 121 Newell Avenue St. Clairsville, OH 43950
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JUDGES:  
Hon. Mary DeGenaro  
Hon. Joseph J. Vukovich  
Hon. Gene Donofrio

Dated: March 10, 2010

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the brief of Appellants. Martin and Jean Snyder appeal the March 3, 2009 decision of the Belmont County Court of Common Pleas that dismissed the Snyders' action against Appellees, Belmont National Bank and Belmont Bancorp, nka The Huntington National Bank ("Bank"), for failure to prosecute.

{¶2} The Snyders claim that the trial court abused its discretion by ascribing the dilatory behavior of the Bank to the Snyders, and by dismissing the action for that reason. The Snyders further argue that the trial court erred as a matter of law by rendering a judgment on the merits of the Snyders' case without providing them with notice and an opportunity to contest the dismissal and defend their position.

{¶3} Upon a thorough review of the record, there is no indication that the Snyders were notified that their complaint would be dismissed. Due to the lack of notice, the trial court abused its discretion by sua sponte dismissing the action for failure to prosecute. Accordingly, the decision of the trial court is reversed and the matter is remanded for further proceedings.

#### **Facts and Procedural History**

{¶4} On March 10, 2004, the Snyders filed a complaint against Belmont National Bank and Belmont Bancorp. The action arose from various promissory notes, mortgages and security agreements between the parties. After receiving leave from the trial court, the Bank filed an answer and counterclaim on May 7, 2004.

{¶5} On May 7, 2004, the Bank filed a notice of service of request for answers to interrogatories and admissions upon the Snyders. On May 27, 2004, the Snyders filed notice of service of their answers. On May 25, 2005, after a year of no activity, the trial court set the matter for a pre-trial scheduling conference. The pre-trial was held on July 11, 2005, and a trial was set for January 24, 2006, with a discovery deadline of December 13, 2005, and notice that a final pre-trial order would be filed by December 27, 2005. After receiving leave from the trial court, the Snyders answered the Bank's counterclaim on July 14, 2005.

**{¶6}** On January 6, 2006, the Bank filed a motion to continue trial, noting that a final pre-trial order had never been filed, and explaining that complications had arisen as the Bank had been acquired by Sky Bank. The Snyders filed a response indicating that they did not oppose the motion. The trial court granted the motion and continued the trial to July 11, 2006. On June 27, 2006, the Bank filed a second motion to continue, again identifying complications due to the acquisition by Sky Bank, and noted that very few discovery efforts had been made by either party. The trial court granted the motion and continued the trial to November 30, 2006.

**{¶7}** On October 2, 2006, the Snyders filed notice of service of eight requests for production of documents upon the Bank. On November 2, 2006, the Bank filed a third motion to continue, requesting additional time to respond to discovery requests. The trial court granted the motion and continued the trial to March 8, 2007. On February 7, 2007, the Bank filed a fourth motion to continue, again requesting additional time to complete discovery. The trial court granted the motion, and stated that "[t]he parties shall contact the Court to schedule a final pretrial conference and to establish a trial date when they have completed all discovery."

**{¶8}** On February 16, 2007, the Snyders filed a motion to compel discovery, indicating that the Bank failed to respond to the Snyders' requests for production of documents. The Snyders attached a copy of correspondence sent to the Bank on November 2, 2006, which asked the Bank to reply to the Snyders' earlier eight requests for production of documents. The trial court did not rule on the Snyders' motion. The docket reflects that no further actions were taken by any party or by the trial court until March 4, 2009, at which point the trial court filed a judgment entry dismissing the case due to lack of prosecution.

**{¶9}** On March 30, 2009, the Snyders filed a Civ.R. 60(B) motion to vacate, complaining that the trial court had failed to provide notice to the parties of its intent prior to dismissing the action. The docket does not indicate that the trial court entered any decision on the Snyders' motion.

**{¶10}** The Snyders timely filed their notice of the present appeal. The Bank filed a

voluntary waiver of brief and oral argument.

**Civ.R. 41(B)(1) Dismissal**

{¶11} In their second assignment of error, which we will address first as it is dispositive of the appeal, the Snyders assert:

{¶12} "The trial court erred and abused its discretion as a matter law [sic] to the prejudice of plaintiffs-appellants by issuing an order of dismissal for an alleged failure to prosecute their claims without first issuing a notice of the trial court's intention to issue said order of dismissal."

{¶13} A trial court may dismiss an action pursuant to Civ.R. 41(B)(1) when a plaintiff fails to prosecute the action. *Sazima v. Chalko*, 86 Ohio St.3d 151, 155, 1999-Ohio-92, 712 N.E.2d 729. "Where 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." Civ.R. 41(B)(1). A dismissal for failure to prosecute constitutes adjudication on the merits unless the trial court's order specifies otherwise. Civ.R. 41(B)(3).

{¶14} The decision to dismiss a case pursuant to Civ.R. 41(B)(1) is normally left to the discretion of the trial court. *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 1997-Ohio-203, 678 N.E.2d 530. Appellate review of a dismissal under Civ.R. 41(B)(1) is therefore limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion is more than an error of law or of judgment; it implies an unreasonable, arbitrary, or unconscionable attitude on the part of the court. *Id.*

{¶15} The language of Civ.R. 41(B)(1) requires that a plaintiff receive notice before dismissal, in order to allow the plaintiff to correct his prior inaction or explain why the case should not be dismissed with prejudice. *Sazima*, supra, at 155-157. This is because "[a] dismissal on the merits is a harsh remedy that calls for the due process guarantee of prior notice." *Id.* at 155, quoting *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99, 101, 22 OBR 133, 488 N.E.2d 881. The notice requirement of Civ.R. 41(B)(1) may be satisfied by express notice, or by implied notice if warranted by the circumstances of the case, as long as the litigant "has been informed that dismissal is a

possibility and has had a reasonable opportunity to defend against dismissal." *Id.*, quoting *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 684 N.E.2d 319, syllabus.

{¶16} This Court and the Ohio Supreme Court have consistently held that it is reversible error for the trial court to dismiss a plaintiff's case for failure to prosecute without first providing notice. *Logsdon v. Nichols*, 72 Ohio St.3d 124, 128-129, 1995-Ohio-225, 647 N.E.2d 1361; *Levy v. Morrissey* (1986), 25 Ohio St.3d 367, 368-369, 25 OBR 416, 496 N.E.2d 923; *Smith v. Ramsey*, 7th Dist. No. 05 NO 329, 2006-Ohio-4859, at ¶13-16; *Brown v. Brown*, 7th Dist. No. 02 CA 77, 2003-Ohio-4878, at ¶11; *Grenga Machine and Welding v. Manganaro*, 7th Dist. No. 01 CA 193, 2002-Ohio-3014, at ¶11-12; *Ball v. Sugar*, 7th Dist. No. 01 C.A. 36, 2002-Ohio-2405, at ¶12-14.

{¶17} In the case at hand, there is no indication in the record that the Snyders received any notice that the case would be dismissed. The trial court did not provide any express warning that it would dismiss the case for failure to prosecute. Further, the record does not indicate any implied notice of potential dismissal, such as a motion to dismiss by the Bank, or the Snyders' noncompliance with an outstanding order of the trial court. Given the various instances of inaction during the proceedings for spans of one to two years at a time, the trial court may have had cause to dismiss the action for failure to prosecute. However, because the trial court did not provide the notice required by Civ.R. 41(B)(1), the trial court's dismissal of the Snyders' complaint was an abuse of discretion, requiring reversal. Accordingly, the Snyders' second assignment of error is meritorious.

{¶18} The Snyders' first assignment of error asserts:

{¶19} "The trial court erred and abused its discretion to the prejudice of plaintiffs-appellants by dismissing their case for an alleged failure to prosecute their claims. The court's dismissal order was completely contrary to the facts as documented by appellants' pleadings in the trial court."

{¶20} Given our resolution of the Snyders' second assignment of error, their first assignment of error is rendered moot.

{¶21} The trial court's sua sponte dismissal without adequate prior notice to the

Snyders constituted an abuse of discretion. The judgment of the trial court is hereby reversed, and this cause is remanded for further proceedings.

Vukovich, P.J., concurs.

Donofrio, J., concurs.