

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

VINCENT ALAN PARKER, :  
 :  
 Plaintiff-Appellant, :  
 : No. 113536  
 v. :  
 :  
 NANCY M. RUSSO, ET AL., :  
 :  
 Defendants-Appellees. :  
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JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: September 26, 2024**

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Civil Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CV-21-955368

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***Appearances:***

Vincent Alan Parker, *pro se*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kelli K. Perk, Assistant Prosecuting Attorney, *for appellees* Judge Nancy M. Russo and John R. Kosko.

David Yost, Ohio Attorney General, and Byers B. Emmerling and Stephen P. Tabatowski, Assistant Attorneys General, *for appellee* Judge Colleen C. Cooney.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Plaintiff-appellant, Vincent A. Parker (“Parker”), appeals the dismissal of his complaint with prejudice and claims the following errors:

1. The trial court abused its discretion and committed plain error which violated plaintiff’s procedural due process rights when the trial court dismissed plaintiff-appellant’s declaratory judgment action with prejudice, in violation of Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution.
2. The trial court abused its discretion and committed plain error when it failed to set the declaratory judgment action for trial pursuant to Ohio Cuyahoga County General Division Local Rule 15.0(B) and failed to set a case management conference in accordance with Cuyahoga County Court of Common Pleas rules of the General Division 21.0 case management and pretrial procedures in violation of Civil Rule 16(A)-(E), Civil Rule 26(F)(1)(2)&(3), and Civil Rule 83(A)[,] which violated procedural due process of [the] Fourteenth Amendment of the United States Constitution.
3. The trial court abused its discretion and committed plain error when it granted defendants[’] motion to dismiss, pursuant to Civil Rule 12(B)(1), (6) & (7) which is reversible error, in violation of procedural due process in violation of the Fourteenth Amendment of the United States Constitution and the Ohio Constitution and Article I Section 16 of the Ohio Constitution.
4. The trial court abused its discretion and committed plain error when it denied every motion filed by plaintiff, during the seventeen[-]month period in which declaratory judgment was pending in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.
5. The trial court abused its discretion and committed structural error when it demonstrated judicial bias towards plaintiff which denied procedural due process, in violation of the Fourteenth Amendment of the United States Constitution.
6. The trial court abused its discretion and committed [prejudicial] error when it failed to issue findings of fact and conclusions of law which were timely requested before there was a final judgment, in

violation of procedural due process pursuant to the Fourteenth Amendment to the United States Constitution.

{¶ 2} We find that Parker failed to prosecute his claim by failing to properly serve certain defendants in violation of the trial court’s order and that his complaint failed to state a claim on which relief could be granted. We, therefore, affirm the trial court’s judgment dismissing his complaint with prejudice.

### **I. Facts and Procedural History**

{¶ 3} In June 1995, Parker pleaded guilty to one count of aggravated murder with a felony-murder specification and one count of aggravated robbery in Cuyahoga C.P. No. CR-95-320034-ZA. As part of the plea agreement, the State agreed to not pursue the death penalty on the aggravated-murder charge. It also agreed to nolle additional charges in that case as well as the assault charge in Cuyahoga C.P. No. CR-94-318382-ZA.

{¶ 4} Following a delayed appeal, this court vacated the guilty pleas and remanded the case to the trial court for additional proceedings. *See State v. Parker*, 2001-Ohio-4120 (8th Dist.). In reversing the trial court’s judgment, this court held that a single judge lacked jurisdiction to accept Parker’s guilty plea due to the death penalty specification that remained in the indictment. *Id.* The Ohio Supreme Court affirmed this court’s decision. *See State v. Parker*, 2002-Ohio-2833.

{¶ 5} On remand, Parker was represented by defendant-appellee Fernando Mack (“Attorney Mack”) and defendant John Moroney (“Attorney Moroney”), and the State was represented by defendant-appellee, John R. Kosko (“Prosecutor

Kosko”). In 2003, Parker and the State entered into another plea agreement pursuant to which Parker pleaded guilty to one count of murder, in violation of R.C. 2903.02, an unclassified felony. Defendant-appellee, Judge Nancy Margaret Russo (“Judge Russo”), accepted Parker’s guilty plea and the remaining counts were nolle. Judge Russo sentenced Parker to a prison term of 15 years to life. Parker appealed the trial court’s judgment, and this court, in an opinion authored by defendant-appellee, Judge Colleen Conway Cooney (“Judge Cooney”), affirmed the judgment of conviction and sentence. *See State v. Parker*, 2004-Ohio-2976 (8th Dist.).

{¶ 6} In November 2021, Parker, pro se, filed a complaint for declaratory judgment against Judge Cooney, Judge Russo, Attorneys Mack and Moroney, and Prosecutor Kosko (collectively “appellees”), seeking a declaration that appellees breached the plea agreement. He also alleged that Judge Cooney improperly affirmed his conviction on appeal.

{¶ 7} Appellees Judge Russo and Prosecutor Kosko filed a motion to dismiss and a suggestion of death with regard to Attorney Moroney. Parker did not oppose the motion. However, on March 1, 2022, Parker filed a motion for leave to file an amended complaint, which the trial court granted. In the amended complaint, Parker added claims for fraud and breach of fiduciary duty to the breach-of-contract claim against the same defendants. Parker also filed a motion for service by publication to serve the complaint on Attorney Mack, and an application for default against all defendants.

**{¶ 8}** In response to the amended complaint, Judge Russo and Prosecutor Kosko filed a second motion to dismiss, arguing that Parker’s declaratory judgment action was an impermissible collateral attack on his criminal conviction, that he failed to join the State of Ohio, a necessary and indispensable party, that they were entitled to absolute immunity from Parker’s claims, and that Parker’s claims for breach of contract, fraud, and breach of fiduciary duty were barred by the applicable statutes of limitations. Judge Cooney also filed a motion to dismiss the amended complaint, arguing that the declaratory judgment action was an impermissible collateral attack on his criminal conviction and that Judge Cooney has absolute immunity from Parker’s claims.

**{¶ 9}** In May 2022, the trial court issued a judgment entry granting the original motion to dismiss filed by Judge Russo and Prosecutor Kosko in December 2021, thereby dismissing them from the case. However, before addressing the merits of the motion, the court noted that it had erroneously granted Parker’s motion for leave to amend the complaint because Parker failed to comply with Civ.R. 5’s requirement to certify that he had served the motion on the parties. The trial court, therefore, vacated its earlier order granting Parker leave to amend the complaint, and struck the motion for leave, the amended complaint, and the application for default judgment from the record.

**{¶ 10}** The trial court also noted that Parker had not yet obtained service of the complaint on either Judge Cooney or Attorney Mack, and it ordered Parker to “attempt service upon those Defendants within thirty (30) days of [the] Order or the

Court [would] dismiss [the] action pursuant to Civ.R. 41(B)(1) for failure to prosecute.”

{¶ 11} Finally, the court noted that a suggestion of death for Attorney Moroney was filed and served upon all the parties, but no substitution was made even though more than 90 days had passed since the suggestion of death was filed. Therefore, the court dismissed Attorney Moroney from the case, leaving Attorney Mack and Judge Cooney as the only remaining named defendants in the case.

{¶ 12} On September 26, 2022, four months after the trial court issued its May 26, 2022 order, Parker requested service on Judge Cooney and Attorney Mack by certified mail. The docket reflects that Attorney Mack was served on October 31, 2022. However, a docket entry, dated November 29, 2022, indicates that the U.S. Postal Service had not returned the certified mail issued to Judge Cooney after 60 days. Parker nevertheless filed an application for default against Judge Cooney on December 7, 2022.

{¶ 13} On April 6, 2023, the trial court issued its final order dismissing Parker’s complaint in its entirety with prejudice. The court stated that in its May 26, 2022 order dismissing Parker’s claims against Judge Russo, Prosecutor Kosko, and Attorney Moroney, Parker had been ordered to serve Judge Cooney and Attorney Mack within 30 days. The trial court observed that Parker “did not attempt service on Defendants Colleen Conway Cooney or Fernando Mack, until September 26, 2022, in direct contravention of this Court’s May 26, 2022 Journal Entry.” Consequently, the trial court dismissed Parker’s remaining claims pursuant to

Civ.R. 41(B)(1) due to his failure to prosecute and his failure to comply with its May 26, 2022 order. The court further noted that it had put Parker on notice that a dismissal could result from his failure to comply with the May 26, 2022 order and that he had been afforded almost one and one-half years to perfect service on these defendants. Parker now appeals the trial court's judgment dismissing his complaint with prejudice.

## **II. Law and Analysis**

### **A. Failure to Prosecute**

{¶ 14} In the first assignment of error, Parker argues the trial court abused its discretion and committed plain error when it dismissed his complaint for declaratory judgment with prejudice. He argues the trial court should not have dismissed his complaint for failure to prosecute due to his failure to serve Attorney Mack and Judge Cooney because they evaded service.

{¶ 15} However, Civ.R. 41(B)(1) permits the trial court to dismiss an action or claim for failure to prosecute. The rule states that “[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.”

{¶ 16} A trial court’s decision dismissing an action pursuant to Civ.R. 41(B)(1) is generally within the trial court’s discretion and will not be reversed absent an abuse of that discretion. *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 47 (1997), citing *Jones v. Hartranft*, 78 Ohio St.3d 368, 371 (1997). An abuse

of discretion occurs when a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35. However, in *Hartranft*, the Ohio Supreme Court held that appellate courts should apply a heightened abuse-of-discretion standard to a trial court's dismissal "with prejudice" because a dismissal "with prejudice" forever denies the plaintiff a review of his or her claims on the merits. *Id.* at 372.

{¶ 17} Nevertheless, there is no abuse of discretion when ""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."" *Quonset Hut, Inc.* at 48 , quoting *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 632 (1992), quoting *Schreiner v. Karson*, 52 Ohio App.2d 219, 223 (9th Dist. 1977). *See also DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 193 (1982) (flagrant and substantial disregard for court rules can justify a dismissal on procedural grounds).

{¶ 18} The court's May 26, 2022 order clearly required Parker to serve Attorney Mack and Judge Cooney within 30 days from the date of the order. The court's order also notified Parker that his failure to serve the remaining defendants within 30 days would result in a dismissal pursuant to Civ.R. 41(B)(1). Despite this clear warning, Parker did not even attempt to serve Attorney Mack or Judge Cooney until September 26, 2022. The fact that Parker did not even attempt to serve the remaining defendants for months after the court's order demonstrates dilatory conduct and a complete and flagrant disregard for the court's order. Therefore,



Parker’s claim that Judge Cooney and Attorney Mack evaded service is irrelevant since Parker did not even attempt service until three months after the court’s deadline had passed.

**{¶ 19}** Parker nevertheless argues that Judge Cooney waived service by voluntarily filing a motion to dismiss his complaint. However, “[t]he only way in which a party can voluntarily submit to a court’s jurisdiction is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading.” *Mellon v. O’Brien*, 2023-Ohio-2393, ¶ 17 (8th Dist.), quoting *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 2007-Ohio-3762, ¶ 13, citing *Maryhew v. Yova*, 11 Ohio St.3d 154, 156-157 (1984). “[W]hen the affirmative defense of insufficiency of service of process is properly raised and properly preserved, a party’s active participation in litigation of a case does not constitute waiver of that defense.” *Gliozzo* at ¶ 11. *See also Ackman v. Mercy Health W. Hosp., L.L.C.*, 2024-Ohio-3159, ¶ 2, citing *Gliozzo* at syllabus.

**{¶ 20}** Judge Cooney raised the defense of insufficiency of process in both her motions to dismiss. Therefore, her active participation in the case did not constitute a waiver of insufficient service, and Parker was still required to perfect service on her. And, as previously stated, Parker failed to serve Judge Cooney within the timeframe required by the court’s May 26, 2022 order.

**{¶ 21}** Parker argues that Judge Cooney was “deemed served” because he attempted service on September 28, 2022, and the docket shows that his attempt at certified mail service “was not returned to the clerk after 60 days[.]” However,

certified mail service is effective upon certified delivery. *Pavlik v. Casalicchio*, 2001 Ohio App. LEXIS 5421 (8th Dist. Dec. 6, 2001), citing *Mitchell v. Mitchell*, 64 Ohio St.2d 49 (1980). Without a return receipt indicating that the certified mail was delivered, service is not complete. Only service by regular mail is deemed complete upon mailing. *Hamrick v. Maloof*, 2021-Ohio-1535, ¶ 17 (9th Dist.); *O'Brien v. Univ. Community Tenants Union, Inc.*, 1975 Ohio App. LEXIS 7387 (10th Dist. Mar. 27, 1975).

**{¶ 22}** The docket only shows an unsuccessful attempt to serve Judge Cooney by certified mail. Moreover, as previously stated, Parker failed to attempt service on Judge Cooney and Attorney Mack until September 28, 2022, more than three months after the court's deadline had passed.

**{¶ 23}** Finally, Parker argues the trial court violated his right to procedural due process by dismissing the complaint for failure to prosecute. Indeed, litigants are entitled to “the due process guarantee of prior notice.” *Robinson v. Miller*, 2016-Ohio-7828, ¶ 11; *Lorain Natl. Bank v. AC DC Leasing, Inc.*, 2010-Ohio-163, ¶ 22 (8th Dist.) (“Due process considerations mandate that the trial court give [the plaintiff] notice before dismissing its case with prejudice.”). “The purpose of notice is to provide the party in default an opportunity to explain the default or to correct it, or to explain why the case should not be dismissed with prejudice.” *Quonset Hut, Inc.*, 80 Ohio St.3d at 48, quoting *Logsdon v. Nichols*, 72 Ohio St.3d 124, 128 (1995).

**{¶ 24}** The cover sheet of the trial court's May 26, 2022 journal entry clearly warns in all capital letters that “failure to comply with [the] court's order may result

in sanctions, including, but not limited to dismissal of [his] action pursuant to Civ.R. 41(B)(1).” (May 26, 2022, journal entry.) Again, Parker did not attempt to perfect service on Judge Cooney and Attorney Mack for three months after the court entered the judgment with this warning. Therefore, Parker was on notice that his complaint might be dismissed for failure to prosecute, and the trial court was within its discretion to dismiss Parker’s complaint with prejudice as a result of his dilatory refusal to comply with the court’s order to prosecute his claims.

{¶ 25} The first assignment of error is overruled.

### **B. Failure to State a Claim**

{¶ 26} We next discuss Parker’s third assignment of error because it also relates to the dismissal of Parker’s complaint with prejudice. In the third assignment of error, Parker argues the trial court committed plain error when it dismissed his complaint pursuant to Civ.R. 12(B)(1), (B)(6), and (B)(7). We focus on Parker’s argument that the court erred in dismissing the complaint for failure to state a claim pursuant to Civ.R. 12(B)(6) because it tests the sufficiency of the complaint and is dispositive of the remaining issues in this appeal. *Antoon v. Cleveland Clinic Found.*, 2015-Ohio-421, ¶ 7 (8th Dist.).

{¶ 27} A trial court’s review of a Civ.R. 12(B)(6) motion to dismiss is limited to the four corners of the complaint along with any documents properly attached to, or incorporated within, the complaint. *Glazer v. Chase Home Fin. L.L.C.*, 2013-Ohio-5589, ¶ 38 (8th Dist.). In our review of a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all

reasonable inferences in favor of the plaintiff. *Jenkins v. Cleveland*, 2017-Ohio-1054, ¶ 8 (8th Dist.), citing *Johnson v. Microsoft Corp.*, 2005-Ohio-4985, ¶ 6. For a party to ultimately prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a trial court granting relief. *Id.*, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975).

**{¶ 28}** We review a trial court's ruling on a Civ.R. 12(B)(6) motion to dismiss *de novo*. *Perrysburg Twp. v. Rossford*, 2004-Ohio-4362, ¶ 5. In a *de novo* review, we review the merits of the case independently, without any deference to the trial court. *Sosic v. Stephen Hovancsek & Assocs., Inc.*, 2021-Ohio-2592, ¶ 21 (8th Dist.).

**{¶ 29}** As previously stated, the trial court struck Parker's amended complaint because Parker failed to comply with Civ.R. 5's requirement to certify that he served the motion on the parties, leaving Parker's original complaint in place. Parker's original complaint asserted a single claim for breach of contract, alleging that appellees failed to fulfill "the agreed exchange of performances" when he entered his guilty plea. (Complaint at ¶ 1.) He further asserted that as a result of the alleged breach of contract, he did not enter his guilty plea knowingly, intelligently, or voluntarily. In his prayer for relief, Parker asked the court for "[a] declaration . . . that Defendant's [sic] breached the contract by giving Plaintiff erroneous information concerning his guilty plea, in violation of Contract Law."

**{¶ 30}** It is clear, from the face of the complaint, that Parker's breach-of-contract claim is an attempt to challenge the validity of his guilty plea. Yet,

declaratory relief is generally only available to a plaintiff who can show that (1) a real controversy exists between the parties, (2) the controversy is justiciable, and (3) speedy relief is necessary to preserve the rights of the parties. *Smith v. Gall*, 2023-Ohio-2692, ¶ 34 (8th Dist.), citing *Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 511 (1992); *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St.2d 93, 97 (1973). Therefore, “[a] trial court properly dismisses a complaint for declaratory judgment where there is no real controversy or justiciable issue between the parties.” *Moore v. Ohio Parole Bd.*, 2023-Ohio-3651, ¶ 10 (10th Dist.), citing *Norman v. Franklin Cty. Prosecuting Atty.*, 2016-Ohio-5499, ¶ 9 (10th Dist.). Hence,

“[a] declaratory judgment action . . . cannot be used as a substitute for an appeal or as a collateral attack upon a conviction. Declaratory relief ‘does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or postconviction remedies.’ *Shannon v. Sequechi*, 365 F.2d 827, 829 (10th Cir. 1966). A declaratory judgment action is simply not part of the criminal appellate process. *State v. Brooks*, 133 Ohio App.3d 521, 525 (4th Dist. 1999).”

*Moore v. Russo*, 2017-Ohio-9166, ¶ 15 (8th Dist.), quoting *Moore v. Mason*, 2005-Ohio-1188, ¶ 14 (8th Dist.).

**{¶ 31}** In his complaint, Parker admits that he filed a delayed appeal on May 3, 1999, and that Judge Cooney rendered an opinion on his direct appeal following remand on June 10, 2004. (Complaint at ¶ 7 and 13.) Therefore, it is evident from the face of the complaint that Parker was afforded legal process through which he could challenge the validity of his guilty plea, and his conviction

was affirmed on appeal by a three-judge panel. And since Parker could not legally use a declaratory judgment action to challenge either the validity of his guilty plea or his conviction, his complaint failed to state a claim upon which relief could be granted. Therefore, the trial court properly dismissed Parker's complaint for failure to state a claim upon which relief could be granted.

**{¶ 32}** The third assignment of error is overruled.

**{¶ 33}** Having concluded that the trial court acted within its discretion in dismissing the complaint for failure to prosecute pursuant to Civ.R. 41(B)(1) and because the complaint failed to state a claim upon which relief could be granted, the remaining assignments of error pertaining to (1) the court's alleged failure to hold a case management conference or trial, (2) the court's failure to issue findings of fact or conclusions of law, (3) the court's alleged bias, and (4) the alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are moot.

**{¶ 34}** Judgment affirmed.

**{¶ 35}** The trial court properly dismissed the complaint for failure to state a claim where plaintiff attempted to use a declaratory judgment action to collaterally attack the validity of his guilty plea that had been affirmed on appeal.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27  
of the Rules of Appellate Procedure.

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EILEEN T. GALLAGHER, PRESIDING JUDGE

MICHAEL JOHN RYAN, J., and  
ANITA LASTER MAYS, J., CONCUR