[Cite as *Coleman v. Showroom Transport*, 2010-Ohio-1439.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93675

WARREN COLEMAN, ET AL.

PLAINTIFFS-APPELLANTS

vs.

SHOWROOM TRANSPORT, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-690069

BEFORE: Sweeney, J., Kilbane, P.J., and Blackmon, J.

RELEASED: April 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiffs-appellants, Warren Coleman and West End Lumber ("plaintiffs") appeal from the trial court's decision that dismissed their action without prejudice. For the reasons that follow, we dismiss the appeal for lack of a final, appealable order.

{¶ 2} In April 2009, plaintiffs commenced this action asserting five causes of action against Showroom Transport ("Showroom") seeking money damages and injunctive relief under the Telephone Consumer Protection Act ("TCPA") due to the alleged receipt of one unsolicited advertisement by facsimile.

{¶ 3} The matter was scheduled for a pretrial case management conference on June 22, 2009, and plaintiffs' counsel was instructed to notify all parties of the date and time. Showroom did not appear at the conference and failed to file an answer. By order dated June 22, 2009, the trial court instructed that "motion for default is due on or before 6/30/09. Default hearing set for 7/13/09 at 1:00 p.m. * * * Plaintiff ordered to send a copy of the motion for default along with notification of the time, date, and place of the default hearing to defendant at least seven days before the hearing and provide proof of notice to the court. Failure to timely file the MDJ or notify the defendant in accordance with this entry will result in a DWOP [dismissal without prejudice]. * * *"

{¶ 4} Plaintiffs did not comply with the June 22nd court order.[1] On July 7, 2009, the trial court, citing Civ.R. 41(A)(1), dismissed the action without prejudice for failure to comply with the court order.

{¶ 5} Plaintiffs now appeal assigning three errors for our review.

{¶ 6} "I. The trial court erred in ordering dismissal of plaintiffs' complaint."

Here, plaintiffs complain that the trial court erred by dismissing the action pursuant to Civ.R. 41(A)(1). This was an obvious clerical error as Civ.R. 41(A)(1) pertains to voluntary dismissals by the plaintiff or stipulated dismissals by the parties, neither of which occurred in this matter.

{¶ 7} A review of the record reveals the trial court's clear intention to dismiss the matter without prejudice if there was noncompliance with its June 22nd court order. Trial courts are vested with this authority pursuant to Civ.R. 41(B)(1), which provides:

{¶ 8} "(B) Involuntary dismissal: effect thereof

{¶ 9} "(1) Failure to prosecute. *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." (Emphasis added.)

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[1]Plaintiff did thereafter file a motion and brief in support of class certification, which the trial court did not address.

{¶ 10} Because the judgment entry contains an obvious clerical error, it shall be corrected to reflect a dismissal without prejudice pursuant to Civ.R. 41(B)(1) and this assignment of error is accordingly overruled. See *State v. Blair* (May 27, 1999), Cuyahoga App. No. 73975 ("clerical errors in journal entries may be corrected by this Court pursuant to App.R. 12(A)(1)(a)").

{¶ 11} "II. Is it an abuse of discretion for a trial court to dismiss a civil action, *sua sponte*, when there has been no failure of prosecution by the plaintiffs, nor violation of any rule or court order?

{¶ 12} "III. Is it an abuse of discretion for a trial court to dismiss a civil action, *sua sponte*, when the plaintiff has filed a motion for class certification?"

{¶ 13} As set forth previously, the trial court dismissed this action without prejudice. This was an adjudication that was otherwise than on the merits in that "[a] dismissal without prejudice relieves the court of all jurisdiction over the matter, and the action is treated as though it had never been commenced." *Stafford v. Hetman* (June 4, 1998), Cuyahoga App. No. 72825. It did not create a final, appealable order because "it did not determine the action." Id., citing *Cent. Mut. Ins. Co. v. Bradford-White Co.* (1987), 35 Ohio App.3d 26, 519 N.E.2d 422; *Westerhaus v. Weintraut* (Aug. 31, 1995), Cuyahoga App. No. 68605 [other citations omitted].[2]

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[2]Cf. Compare *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 453, N.E.2d 648 (concluding error occurred from involuntary dismissal without prejudice in the absence of

{¶ 14} There is a recognized difference in finality between an involuntary dismissal without prejudice that prevents refiling as opposed to here, where even the trial court's order of dismissal notes plaintiffs' ability to refile this action. The former constitutes a final, appealable order and the later does not. *Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶8. In this case, plaintiffs had notice of the trial court's intention to dismiss without prejudice for noncompliance with its order. The dismissal without prejudice was otherwise than on the merits and plaintiffs do not assert that it prevented them from refiling their case.

{¶ 15} Plaintiffs finally posit that the dismissal without prejudice was in error because they believe it operated to extinguish the claims of all putative members.[3] This argument appears to be without merit. In *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 2002-Ohio-892, 763 N.E.2d 160, the Ohio

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notifying parties of court's intent to dismiss), with *Tower City Properties v. Cuyahoga Cty. Bd. of Revision* (1990), 49 Ohio St.3d 67, 551 N.E.2d 122, 123-124, citing *Hensley v. Henry* (1980), 61 Ohio St.2d 277, 15 O.O.3d 283, 400 N.E.2d 1352, syllabus: "'[u]nless plaintiff's Civ.R. 41(A)(1)(a) notice of dismissal operates as an adjudication upon the merits under Civ.R. 41(A)(1), it is not a final judgment, order or proceeding, within the meaning of Civ.R. 60(B).'" The Ohio Supreme Court later explained the apparent conflict in authority by stating,"it is not common for us to review cases that have been dismissed other than on the merits, [but] we have done so when * * * justice so requires." *Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶11.

[3]According to plaintiffs, the applicable statute of limitations for the proposed class members' TCPA claims expired on April 14, 2009.

Supreme Court held: "the filing of a class action, whether in Ohio or the federal court system, tolls the statute of limitations as to all asserted class members of the class who would have been parties had the suit been permitted to continue as a class action." In this matter, after filing the initial complaint, plaintiffs later filed a motion to certify a class. As long as the action for class certification was timely commenced, the savings statute will apply to the claims of all asserted class members. *Howard v. Allen* (1972), 30 Ohio St.2d 130, 283 N.E.2d 167, syllabus, modified to the extent stated in *Vaccariello*, supra. The court's dismissal did not create a final order on this ground either. Because we lack a final, appealable order, the appeal is dismissed.

{¶ 16} Appeal dismissed.

It is ordered that appellees recover from appellants their costs herein taxed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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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JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR