

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

C. DOUGLAS THOMAS,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2009-G-2906
TARGET STORES,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 M 000449.

Judgment: Appeal dismissed.

C. Douglas Thomas, pro se, 115 Farwood Drive, Moreland Hills, OH 44131 (Plaintiff-Appellant).

Nicole M. Monachino, Jackson Lewis, L.L.P., Park Center Plaza I, 6100 Oak Tree Boulevard, #400, Cleveland, OH 44131 (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Mr. C. Douglas Thomas appeals from the judgment of the Geauga County Court of Common Pleas overruling his motion for relief from judgment pursuant to Civ.R. 60(B) after his case was dismissed without prejudice pursuant to Civ.R. 41(B) for failure to prosecute.

{¶2} Mr. Thomas contends the trial court abused its discretion and violated his due process rights by overruling his motion without holding a hearing or considering the evidence.

{¶3} We find no abuse of discretion in the trial court's decision. Mr. Thomas' complaint was dismissed without prejudice for lack of prosecution pursuant to Civ.R. 41(B). As such, he is able to file his complaint anew in accordance with R.C. 2305.19, Ohio's savings statute, within one year of the trial court's dismissal.

{¶4} Because the trial court's dismissal of his complaint was without prejudice, he cannot now appeal. The involuntary dismissal without prejudice does not adjudicate the merits of the case, no substantial rights were affected, and it is not a final appealable order -- nor is the order denying his motion for relief from that judgment. Thus, lacking jurisdiction at this time to consider to Mr. Thomas' appeal, we dismiss.

{¶5} **Substantive and Procedural History**

{¶6} Mr. Thomas filed a complaint in April 2008, alleging claims of unpaid wages against appellee, Target Stores. The trial court issued a status call order on May 29, 2008, which included notice to both parties that failure to comply would result in dismissal of the case pursuant to Civ.R. 41(B)(1) and/or (3), as well as Geauga County Court of Common Pleas Loc.R. 9(F).

{¶7} The trial court then issued a pretrial order on July 28, 2008, informing the parties that a pretrial conference was scheduled for April 2, 2009. The order instructed the parties that within five days prior to the pretrial conference a pretrial statement shall be submitted to the court. In addition, the order again informed the parties that "pursuant to Civ.R. 41(B)(1), failure to comply with this order may result in dismissal of claims, default judgment, or other appropriate sanctions upon the motion of opposing parties or upon the Court's own motion."

{¶8} Accordingly, Target Stores timely filed its pretrial statement with the court on March 27, 2009, six days before the pretrial conference. Mr. Thomas admits

receiving its pretrial statement. Further, a review of the docket reveals that Mr. Thomas received notice of all of the court's orders prior to the pretrial conference.

{¶9} On April 2, 2009, Mr. Thomas failed to appear at the pretrial conference, seek a continuance of the conference, or file a pretrial statement as ordered by the court. The court dismissed Mr. Thomas' complaint, without prejudice, on April 7, 2009.

{¶10} Mr. Thomas then filed a motion for relief from judgment a month later, which the trial court overruled on May 29, 2009.

{¶11} Mr. Thomas now appeals this judgment, raising three assignments of error for our review:

{¶12} “[1.] The trial court abused its discretion and committed reversible error when it failed to consider evidence submitted by the appellant or conduct a hearing to determine the facts in the Civil Rule 60 Motion.

{¶13} “[2.] The trial court abused its discretion and committed reversible error when it sua sponte dismissed appellant's complaint without first giving prior notice of the intent to dismiss.

{¶14} “[3.] The trial court abused its discretion and committed reversible error by violating due process and Article I Sec. 16 of the Ohio Constitution dismissing appellant's complaint without notice or an opportunity to respond prior to the dismissal of the complaint.”

{¶15} **Lack of a Final Appealable Order**

{¶16} We dismiss Mr. Thomas' appeal sua sponte because we lack jurisdiction to consider this appeal as the trial court's dismissal without prejudice is not a final appealable order.

{¶17} Because the involuntary dismissal was not a final appealable order, the order declining to grant Civ.R. 60(B) relief cannot be a final order. *Davis v. Paige*, 5th Dist. No. 2007 CA 00248, 2008-Ohio-6415; *Whitaker Merrell v. Guepel Co.* (1972), 29 Ohio St.2d 184; *Hensley v. Henry* (1980), 61 Ohio St.2d 277.

{¶18} “Pursuant to Civ.R. 41(B)(3), a dismissal under Civ.R. 41(B)(1) ‘operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.’ In general, a dismissal without prejudice constitutes ‘an adjudication otherwise than on the merits’ with no res judicata bar to refiling the suit.” *Arner v. Bank*, 11th Dist. No. 2008-A-0056, 2008-Ohio-5857, ¶2, quoting *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 225, fn. 2; see, also, *Beil v. Key Bank*, 11th Dist. No. 2007-L-193, 2007-Ohio-7118, ¶2. “As this court has previously stated, a dismissal without prejudice leaves the parties in the same position they were in prior to the action being filed.” *Id.*, citing *Thomas*, citing *Johnson v. H&M Auto Service*, 10th Dist. No. 07AP-123, 2007-Ohio-5794, ¶7. Thus, in most cases, such as this one, “a dismissal without prejudice is not a final appealable order because a party may refile or amend a complaint.” *Id.* See, also, *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, ¶24; *Ebbets Partners, Ltd. v. Day*, 171 Ohio App.3d 20, 2007-Ohio-1667.

{¶19} We remind Mr. Thomas that “[u]nder Ohio’s savings statute, R.C. 2305.19, an action that ‘fails otherwise than upon the merits’ may be refiled by a plaintiff ‘within one year after the date of *** the plaintiff’s failure otherwise than upon the merits.’” *Dues v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 08AP-943, 2009-Ohio-1668, ¶10. Thus, Ohio’s savings statute provides relief for Mr. Thomas by permitting him to refile his complaint within one year from the trial court’s dismissal of his complaint.

{¶20} Accordingly, the trial court’s dismissal without prejudice was not a final appealable order, and this court is without jurisdiction to consider appellant’s assignments of error. *Id.*, citing *Johnson* at ¶9. See, also, *Selmon v. Crestview Nursing & Rehab. Ctr.*, 7th Dist. No. 09 BE 3, 2009-Ohio-5078; *Davis*.

{¶21} We recognize that Mr. Thomas proceeded pro se, but that does not excuse him for ignorance of the rules as “[w]hile one has the right to represent himself or herself and one may proceed into litigation as a pro se litigant, the pro se litigant is to be treated the same as one trained in the law as far as the requirement to follow procedural law and adherence to court rules. If the courts treat pro se litigants differently, the court begins to depart from its duty of impartiality and prejudices the handling of the case as it relates to other litigants represented by counsel.” *Craft v. Edwards*, 11th Dist. No. 2007-A-0095, 2008-Ohio-4971, ¶41, quoting *State v. Pryor*, 10th Dist. No. 07-AP-90, 2007-Ohio-4275, ¶9. Thus, whether acting in a pro se capacity or represented by counsel, “[a] party has a general duty to check the docket and to keep himself current regarding the status of the case.” *Landmark America, Inc. v. Jeries*, 11th Dist. No. 2009-L-009, 2009-Ohio-6709, ¶28, quoting *Landspan Corp. v. Curtis*, 8th Dist. No. 91664, 2008-Ohio-6292, ¶14, citing *State v. Vernon*, 11th Dist. No. 2006-L-146, 2007-Ohio-3376.

{¶22} Based upon the foregoing, Mr. Thomas’ appeal is hereby dismissed for lack of a final appealable order.

CYNTHIA WESTCOTT RICE, J.,
TIMOTHY P. CANNON, J.,
concur.