

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**George M. Whiting III,  
Petitioner Below, Petitioner**

**FILED**  
September 21, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**vs.) No. 11-0575** (Marion County 09-P-124)

**Marion County Sheriff's Department,  
Respondent Below, Respondent**

**MEMORANDUM DECISION**

Petitioner George M. Whiting III, pro se, appeals the February 28, 2011, order of the Circuit Court of Marion County dismissing his petition against the Marion County Sheriff's Department for a failure to prosecute pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. Respondent Marion County Sheriff's Department, by Charles A. Shields, its attorney, filed a summary response. Petitioner also filed a "summary response."<sup>1</sup>

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On November 2, 2009, petitioner filed a petition against respondent alleging that respondent had illegally sold "my proper and legally reclaimed property," which petitioner identified as 707 Ogden Avenue, Fairmont, West Virginia, at a tax sale. As relief, petitioner sought monetary damages from respondent in the amount of \$750,000.

Respondent moved to dismiss and argued that respondent had immunity from liability under West Virginia Code § 11A-3-5(b) "if a loss or claim results from the sale of a tax lien conducted pursuant to the provisions of this article or from any subsequent conveyance of the property to which the lien attaches." Petitioner responded to the motion to dismiss on December 7, 2009.

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<sup>1</sup> Petitioner filed his "summary response" "in apparent response to a directive from this Court to respondent to file a brief, or a summary response, upon the late filing of his merits brief.

After petitioner's response to the motion, the case fell into a period of dormancy for more than one year. On January 24, 2011, the circuit court sent both parties a letter that the case was subject to dismissal for a failure to prosecute pursuant to Rule 41(b) and referred to the guidelines set forth in *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996).<sup>2</sup> The circuit court set a hearing on its intent to dismiss for February 28, 2011. The circuit court directed that if petitioner filed a motion alleging there was good cause why the case should not be dismissed, the motion would be heard at the February 28, 2011, hearing.

On February 24, 2011, petitioner wrote the circuit court a letter that as a lay person, he is ignorant "[as to] how to pursue [the case] with the presentation of facts and/or evidence to the court" and that he had insufficient funds to hire an attorney. The matter proceeded to the February 28, 2011, hearing where, according to the clerk's notes, petitioner told the circuit court that he desired to continue with his case.<sup>3</sup> The circuit court informed petitioner that it was going to reserve his objection and dismiss the case. Following the hearing, the circuit court entered an order dismissing petitioner's case for a failure to prosecute pursuant to Rule 41(b), citing *Dimon*.

On appeal, petitioner argues that the circuit court committed error in not protecting him and not allowing him to pursue a remedy for the violation of his due process rights. Petitioner addresses the merits of his case in alleging that notice of the tax sale should have been sent to the legal heirs of the property and that respondent's sale of the property deprived him of enjoyment of the property he inherited. Petitioner maintains that he deserves \$750,000 in damages. In its summary response, respondent asserts that the circuit court provided petitioner with his opportunity to be heard, considered his arguments, and was able to observe his demeanor and

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<sup>2</sup> Rule 41(b) of the West Virginia Rules of Civil Procedure provides in pertinent part as follows:

Any court in which is pending an action wherein for more than one year there has been no order or proceeding, or wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued. The court may direct that such order be published in such newspaper as the court may name. The court may, on motion, reinstate on its trial docket any action dismissed under this rule, and set aside any nonsuit that may be entered by reason of the nonappearance of plaintiff, within three terms after entry of the order of dismissal or nonsuit; but an order of reinstatement shall not be entered until the accrued costs are paid.

Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record.

Syllabus Point Three, *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996), sets forth the guidelines for giving the parties notice and an opportunity to be heard.

<sup>3</sup> Respondent also appeared at the February 28, 2011, hearing through its attorney.

nonverbal communications. Respondent argues that the circuit court's dismissal pursuant to Rule 41(b) should not be disturbed. Respondent further argues that even if petitioner's case is reinstated, it should be dismissed on its merits because of respondent's immunity under West Virginia Code § 11A-3-5(b).<sup>4</sup>

"We review a circuit court's order dismissing a case for inactivity pursuant to Rule 41(b) under an abuse of discretion standard." *Caruso v. Pearce*, 223 W.Va. 544, 547, 678 S.E.2d 50, 53 (2009). Under Syllabus Point Three of *Dimon*, supra, petitioner had the initial burden at the February 28, 2011, hearing "of going forward with evidence as to good cause for not dismissing the action."<sup>5</sup>

The only information petitioner communicated to the circuit court at the hearing was a desire to continue his case. Petitioner did not present evidence of good cause as to why he did not fulfill "[his] continuing duty to monitor a case from the filing until the final judgment." *Dimon*, 198 W.Va. at 45, 479 S.E.2d at 344. In the letter he earlier wrote the circuit court in response to the court's notice of intent to dismiss, petitioner stated that he did not know how to present his case to the court and that he was financially unable to hire an attorney. Petitioner's status as a pro se litigant did not relieve him of the duty *Dimon* speaks of about continuing to monitor his case. See *Blair v. Maynard*, 174 W.Va. 247, 253, 324 S.E.2d 391, 396 (1984) ("The court should strive . . . to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake.") (Underlined emphasis added.); see also *W.Va. Department of Health and Human Resources Employees Federal Credit Union v. Tennant*, 215 W.Va. 387, 391-94, 599 S.E.2d 810, 814-17 (2004) (finding that the pro se litigant waived her right to a jury trial when she neither filed a demand for a jury trial once she removed the case to the circuit court nor objected to the lack of a jury during the bench trial). Therefore, after careful consideration, this Court concludes that the circuit court did not abuse its discretion in dismissing petitioner's case for a failure to prosecute pursuant to Rule 41(b).

For the foregoing reasons, we find no error in the circuit court's decision and affirm its February 28, 2011, order dismissing petitioner's petition.

Affirmed.

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<sup>4</sup> Respondent notes that the proper remedy for petitioner to seek would be setting aside of the tax deed. See W.Va. Code § 11A-4-4.

<sup>5</sup> If the plaintiff does come forward with good cause, the burden then shifts to the defendant to show he would be substantially prejudiced if the case is not dismissed.

**ISSUED:** September 21, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Margaret L. Workman  
Justice Thomas E. McHugh