

STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL H. GUN and MARY T. MORGAN,

Plaintiffs-Appellants,

v

GROEB FARMS, INC., ERNEST L. GROEB, JR.,
ERNEST L. GROEB and JEANNE GROEB,

Defendants-Appellees.

UNPUBLISHED

July 17, 1998

No. 202198

Lenawee Circuit Court

LC No. 95-006602 CZ

Before: Murphy, P.J., and Young, Jr. and Michael R. Smith*, JJ.

MEMORANDUM.

Plaintiffs appeal by right the circuit court order of dismissal based on plaintiffs' failure to appear for trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs filed this action on July 31, 1995, alleging breach of contract, improper accounting, and fraud in regard to the purchase of a business by defendants. Plaintiff Gun acted as counsel for plaintiffs. Trial was originally set for October 25, 1996, but was rescheduled for January 17, 1997.

The day before trial, the court confirmed that trial would begin at 9:00 a.m. Instead of arriving earlier, plaintiff Morgan made arrangements to fly from Chicago on the morning of trial, purportedly due to concerns about the weather. The flight was scheduled to arrive at Detroit Metro at 8:05 a.m., leaving insufficient time to arrive for trial. Plaintiff Gun made calls to the courthouse at 8:45 a.m. and 9:05 a.m., leaving messages that he would be late for trial. The messages were not reviewed before the case was called.

The case was called for trial at 9:10 a.m. When plaintiffs had not appeared at 9:20, the court dismissed the case with prejudice at defendants' request. At the hearing on entry of the order of dismissal, the court found that plaintiffs had been repeatedly late for proceedings. The court recalled that the trial date was confirmed on the morning of the day before trial, and plaintiff Gun had been

* Circuit judge, sitting on the Court of Appeals by assignment.

instructed that trial would begin promptly at 9:00 a.m. Gun had been informed that he should be present at that time, even if his witnesses were late. The court entered an order dismissing the case.

A court, in its discretion, may dismiss a case with prejudice or enter a default judgment when a party or counsel fails to appear at a duly scheduled trial. MCR 2.504(B)(1); *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). This Court reviews a trial court's decision to dismiss an action under an abuse of discretion standard. *Id.*; *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 359; 503 NW2d 915 (1993).

Dismissal is a drastic step that should be taken cautiously. *Vicencio, supra*. Before imposing such a sanction, a trial court should carefully evaluate all available options, and conclude that dismissal is just and proper. *Id.* Factors to be considered include: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay, (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

The trial court did not abuse its discretion in dismissing this action. The court could reasonably conclude that plaintiffs' violation was willful based on counsel's inconsistent and unsatisfactory explanation for his failure to appear. Given plaintiffs' prior delays and failure to follow the court's orders, the court acted within its discretion in dismissing the case.

Affirmed.

/s/ William B. Murphy
/s/ Robert P. Young, Jr.
/s/ Michael R. Smith