

STATE OF MICHIGAN
COURT OF APPEALS

BOCCACCIO BOYER,

Plaintiff-Counter-Defendant-
Appellant,

v

DETROIT TEACHERS CREDIT UNION,

Defendant-Counter-Plaintiff,

and

BAUSCHKE & ASSOCIATES, LTD,

Defendant-Counter-Plaintiff-
Appellee,

and

RON DESOCHERS,

Defendant.

UNPUBLISHED
December 28, 2004

No. 249812
Wayne Circuit Court
LC No. 01-110696-CZ

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals by right the order dismissing the case based on the failure of the parties to appear for trial. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After having been adjourned once, trial of this case was set to begin February 10, 2003. Trial was put on hold while the court finished another trial. Counsel apparently believed that the trial date would be reset. When plaintiff's counsel called the court to discuss a new trial date, he learned that the case had been dismissed because none of the parties or their counsel appeared for the February 24, 2003 trial date. When plaintiff moved to reinstate the case, the trial court noted that it had spoken with plaintiff's counsel the week before the trial date and had been told that the parties would be there. The court denied plaintiff's motion for reconsideration or rehearing,

again noting that it distinctly recalled the conversation with plaintiff's counsel, and that plaintiff did not allege any misunderstanding.

A court in its discretion may dismiss a case with prejudice if a plaintiff fails to comply with a court order, and the defendant moves for dismissal. MCR 2.504(B)(1); *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). A written order scheduling a trial would clearly constitute a "court order," but because defendant did not appear either, defendant did not and cannot move to dismiss for plaintiff's failure to attend trial. This Court reviews a trial court's decision to dismiss an action under the abuse of discretion standard. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 359; 503 NW2d 915 (1993).

The issue as framed by plaintiff is whether this was a duly scheduled trial. This boils down to a credibility contest between plaintiff's counsel and the trial judge. Plaintiff's counsel denied any timely communication, while the judge distinctly remembered a telephone conversation with plaintiff's counsel in which counsel represented that the parties would be present for trial on February 24, 2003. While there is little evidence to corroborate either version, we note that an e-mail from plaintiff's counsel to defense counsel indicates that counsel had a "sick feeling" that the court expected the trial to start on Monday, the 24th. Further, it seems that defense counsel was equally confused or thought the trial was to be rescheduled. It is important to note that defendant also did not appear for trial on February 24, 2003. So, defendant was not present and did not move for dismissal. In any event, the entire scenario is vague, so it is difficult to assess blame.

Moreover, dismissal is a drastic step that should be taken cautiously. *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 251; 477 NW2d 133 (1991). Before imposing a sanction of dismissal, a trial court is required to carefully evaluate all available options on the record and conclude that dismissal is just and proper. *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995); *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991). There may be a history of this case that supports the trial court's harsh sanction but from our record perspective, it is not clear, especially when neither party appeared for trial. Where a trial court fails to evaluate other available options on the record, it is an abuse of discretion to impose the sanction of dismissal. *Vicencio, supra*. Because the trial court failed to evaluate other options on the record, we remand for the court to undertake such an evaluation and to exercise its discretion.

We reverse and remand. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens