[**Cite as *Gelske v. 800 Constr. Co., Inc.*, 2002-Ohio-3434.**]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80163

ROBERT GELSKE, ET AL.	:	
	:	ACCELERATED DOCKET
Plaintiffs-Appellants	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
800 CONSTRUCTION CO., INC.	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT
OF DECISION: July 3, 2002

CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas Case No. CV-422322

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION: ______________________

APPEARANCES:

For Plaintiffs-Appellants:
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For Defendant-Appellee:
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COLLEEN CONWAY COONEY, J.:

{¶1} This case came to be heard upon the accelerated docket pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Plaintiff-appellant Robert Gelske appeals from the trial court's dismissal of his complaint with prejudice. We find no merit to the appeal and affirm.

{¶3} In September 1997, Robert and Dana Gelske filed a complaint against defendant-appellee 880 Construction Company for faulty construction of an addition to their home.[1] In November 1999, the Gelskes voluntarily dismissed their complaint without prejudice pursuant to Civ.R. 41(A)(1)(a). At that time, the Gelskes were represented by attorney Edward Heben.

{¶4} On November 1, 2000, the Gelskes refiled their complaint. On March 8, 2001, the trial court sent notice that a case management conference was scheduled for April 2, 2001. On April 4, 2001, the trial court's journal entry indicated that the case management conference was conducted and a pretrial conference was set for July 6, 2001, with a further warning that, "Plaintiff's

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[1] Although the complaint was filed by both Robert and Dana Gelske, only Robert's name is listed in the notice of appeal. The complaint named 880 Construction Company, but the notice of appeal names 800 Construction Company.

failure to appear may result in dismissal for failure to prosecute on that date."

{¶5} On April 5, 2001, attorney A. Dale Naticchia filed a "Notice of Substitution of New Counsel" on behalf of the Gelskes.

{¶6} The trial court's docket reflects the following journal entry on July 10, 2001:

> **{¶7}** Plaintiff did not appear and defendant's counsel appeared for pretrial on July 6, 2001. Pretrial is continued to 7/27/01 at 8:30 am. Failure of plaintiff to appear will result in matter being dismissed for want of prosecution [on] that date.

{¶8} On July 30, 2001, the trial court stated in its journal entry as follows:

> **{¶9}** At 9:10 am Plaintiff having failed to appear for pretrial and having been noticed twice previous that a further failure to appear would result in dismissal, same is dismissed this date for want of prosecution.

{¶10} Gelske appeals from the trial court's dismissal and raises one assignment of error.

I.

> **{¶11}** WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED THE SANCTION OF DISMISSAL WITH PREJUDICE FOR FAILURE TO APPEAR AT PRETRIALS.

{¶12} Gelske argues that the trial court abused its discretion in dismissing his case with prejudice because his counsel never

received notice of the pretrials.

{¶13} The trial court is in the best position to judge whether delays in the prosecution of a case are due to legitimate reasons when determining whether dismissal for lack of prosecution is warranted. *Indus. Risk Insurers v. Lorenz Equip. Co.* (1994), 69 Ohio St.3d 576, 581. Thus, the decision to dismiss a complaint for failure to prosecute is within the sound discretion of the trial court, and an appellate court's review of such a dismissal is confined solely to the question of whether the trial court abused its discretion. *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371, citing *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91.

{¶14} Under Civ.R. 41(B)(1), the trial court must give notice to counsel before dismissing an action for want of prosecution. The purpose of requiring notice prior to dismissal is to provide the party in default with the opportunity to correct the default or to explain why the case should not be dismissed with prejudice. *Logsdon v. Nichols* (1995), 72 Ohio St.3d 124, 128.

{¶15} In the instant case, the trial court complied with the notice requirement of Civ.R. 41(B)(1). Each time counsel failed to appear at the scheduled pretrial, the trial court issued notice that continued failure to attend would result in dismissal of the case. Therefore, Gelske's counsel was given the opportunity to correct or explain his prior absence. However, in spite of being warned twice, counsel failed to appear.

{¶16} Counsel contends that he did not receive notice of the dates of the pretrials. However, the docket indicates that notice was issued to him as the attorney of record. Furthermore, when he replaced Gelske's prior attorney, counsel should have made efforts to become aware of pending matters, either by contacting prior counsel, opposing counsel, or checking the docket. By doing so, counsel would have been well informed regarding the dates on which pretrials were scheduled.

{¶17} Although the sanction seems severe, in a case where the attorney fails to attend two set pretrials, after being advised twice that nonattendance would result in dismissal, we do not find the court abused its discretion in dismissing the case with prejudice pursuant to Civ.R. 41(B).

{¶18} Gelske's assignment of error has no merit and is overruled.

Judgment is affirmed.

It is ordered that appellee recover of appellants its costs

herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County 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.

JAMES J. SWEENEY, P.J. CONCURS

DIANE KARPINSKI, J. CONCURS WITH

SEPARATE CONCURRING OPINION

JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) 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(E). See, also, S.Ct.Prac.R. II, Section 2(A)(a).

KARPINSKI, J., CONCURRING:

{¶19} I concur with the majority opinion but write separately because the majority opinion fails to address appellant's argument.

Appellant argues that the trial court erred in two ways: (1) it dismissed his case with prejudice although Cuyahoga County Common Pleas Local Rule 21III(H), he says, requires dismissal without prejudice rather than with prejudice, and (2) the court failed to contact him by phone before imposing this sanction as required also, he says, by Local Rule 21.

{¶20} Local Rule 21 states in pertinent part:

> **{¶21}** (H) Any judge presiding at a pretrial conference or trial shall have authority:
>
> **{¶22}** (1) After notice, dismiss [sic] an action without prejudice for want of prosecution upon failure of plaintiff and/or his counsel to appear in person at any pretrial conference as required by Part III (B) of this Rule.
>
> **{¶23}** ***
>
> **{¶24}** (5) The sanctions contained in (H)(1)-(4) should not be imposed until a reasonable attempt is made by the Court or opposing counsel present at the pretrial to contact the missing counsel by telephone to determine whether that counsel's noncompliance with these rules can be reasonably explained.

{¶25} The builder, on the other hand, counters that the court had the authority to dismiss the action under Civ.R. 41(B)(1) and (3), which states in pertinent part:

> **{¶26}** (1) Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court *** on its own

> motion may, after notice to the plaintiff's counsel, dismiss any action or claim.

{¶27} ***

{¶28} (3) A dismissal under this subdivision *** operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

{¶29} The builder cites numerous cases supporting the trial court's action.

{¶30} There is no doubt, as the majority states, that under the Civil Rule, the court had the authority to dismiss with prejudice. The question is whether Local Rule 21 restricts the Civil Rule and to what extent. Obviously, the authority to dismiss with prejudice does not arise from the Local Rule. That authority is expressly granted to the judge by virtue of Civ. R. 41(B)(1) and (3). The local rule addresses only authority to dismiss without prejudice. The local rule does not expressly deny the court authority to dismiss with prejudice on the basis of want of prosecution. In fact, the local rule does not say anything at all about dismissing a case with prejudice.

{¶31} The rule does establish a condition to be met in order for the court to dismiss: the court must make a reasonable attempt to contact the missing counsel to learn the reason for counsel's absence. This condition, however, is required only for the sanctions expressly contained in Local Rule 21III(H)(1) through

(4), and dismissal with prejudice is not one of the itemized sanctions. It seems common sense that if the court must meet such a requirement for a dismissal without prejudice, then the court should be expected to meet the same requirement for the more drastic decision to dismiss with prejudice.

{¶32} Litigants are not controlled, however, by what a court assumes but leaves unarticulated in its rules. If the court intends to impose this requirement in all dismissals for want of prosecution, whether with or without prejudice, then the court must expressly say so.

{¶33} In the case at bar the court dismissed the case with prejudice. Since the local rule does not address this situation, the local rule does not apply.

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