

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

SAMUEL BATES ARNER,	:	MEMORANDUM OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2008-A-0056
ANDOVER BANK,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 1143.

Judgment: Appeal dismissed.

Samuel Bates Arner, pro se, 4399 Bulah Road, Jefferson, OH 44047 (Plaintiff-Appellant).

Richard B. Kotila, McCombs & Kotila, 100 Public Square, P.O. Box 217, Andover, OH 44003 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} On September 10, 2008, plaintiff-appellant, Samuel Bates Arner, pro se, filed a notice of appeal from a February 10, 2004 judgment entry of the Ashtabula County Court of Common Pleas. In that entry, the trial court ordered that “pursuant to Plaintiff’s request, this matter is dismissed without prejudice.”

{¶2} 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. *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, at ¶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 to *Johnson v. H & M Auto Service et al.*, 10th Dist. No. 07AP-123, 2007-Ohio-5794, 2007 Ohio App. LEXIS 5094, at ¶7. We further note that a dismissal without prejudice is not a final appealable order because a party may refile or amend a complaint. *Id.*

{¶3} In the case at bar, the trial court specified that the action was dismissed without prejudice. Thus, since Samuel could refile his claims within one year of his dismissal, the trial court's dismissal without prejudice is not a final appealable order. Hence, this court lacks jurisdiction at this time to consider this appeal.

{¶4} In addition, even if there was a final appealable order, Samuel's appeal was untimely filed pursuant to App.R. 4(A). Samuel filed his appeal on September 10, 2008, from a February 10, 2004 judgment entry. The notice of appeal was filed more than four and a half years after the trial court issued its judgment. Samuel's notice of appeal was due on Thursday, March 11, 2004, which was not a holiday or a weekend.

{¶5} For the foregoing reasons, this appeal is dismissed, sua sponte.

{¶6} Appeal dismissed.

DIANE V. GRENDALL, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.