[Cite as *Hughley v. Southeastern Correctional Inst.*, 2010-Ohio-5497.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KEVIN HUGHLEY

Plaintiff-Appellant

-vs-

SOUTHEASTERN CORRECTIONAL INSTITUTION, et al.

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 10 CA 43

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 08 CV 975
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	November 8, 2010

APPEARANCES:

For Plaintiff-Appellant

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For Defendants-Appellees

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ASSISTANT ATTORNEY GENERAL
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Wise, J.

{¶1} Plaintiff-appellant Kevin Hughley appeals the July 2, 2010, Entry entered by the Fairfield County Court of Common Pleas, which dismissed his Complaint without prejudice for his repeated failure to comply with Civ.R. 5(A).

{¶2} Defendants-appellees are Southeastern Correctional Institution, et al.

STATEMENT OF THE FACTS AND CASE

{¶3} The relevant facts and procedural case history are as follows:

{¶4} Appellant is a former inmate of the Southeastern Correctional Institution in Lancaster, Fairfield County, Ohio. In June, 2008, the Rules Infraction Board ("RIB") found Appellant guilty of violating certain rules of inmate conduct. Appellant exhausted all of his administrative remedies with respect to the RIB's decision.

{¶5} On August 4, 2008, Appellant filed a 1983 action against Appellees, seeking unspecified damages for pain and mental anguish, asserting constitutional violations based upon RIB's failure to give him twenty-four hours notice of his hearing and RIB's prohibiting him from calling witnesses. Appellant also claims that there was insufficient evidence to support the RIB's finding and further alleges malicious prosecution with respect to the conduct report.

{¶6} On September 8, 2008, Appellant filed a Motion for Default Judgment for failure to respond to his Complaint.

{¶7} On September 25, 2008, Appellant filed a second Motion for Default Judgment.

{¶8} On November 12, 2008, Appellant filed a Motion to Start Default Judgment.

{¶9} On March 20, 2009, Appellees moved the trial court to allow them to file a responsive pleading *instanter* and also contemporaneously filed a motion to dismiss, asserting the trial court lacked subject matter jurisdiction over Appellant's Complaint. Appellant filed a memorandum in opposition to Appellees' motion to dismiss.

{¶10} By Entry filed April 7, 2009, the trial court dismissed the action in its entirety, finding it did not have subject matter jurisdiction over a civil action against the State and its agencies pursuant to R.C. 2743.03.

{¶11} On April 14, 2009, Appellant appealed and this Court sustained his sole assignment of error, holding:

{¶12} "Appellant's claims against Appellees, although not artfully drafted, can be classified as constitutional claims actionable under § 1983. As such, we find the claims cannot be brought in the Court of Claims, and the trial court erred in dismissing Appellant's action."

{¶13} The matter was remanded to the trial court and reinstated.

{¶14} On February 22, 2010, Appellant filed a Motion for Leave to Amend his Complaint and a Motion to be Relieved from the electronic filing requirements of Civ.R. 36. Appellant did not serve Appellees with said motions.

{¶15} On March 24, 2010, the trial court, having received no response or opposition from Appellees, granted Appellant's motions.

{¶16} Upon receipt of the trial court's Entry, Appellees became aware of Appellant's February 22, 2010, motions and filed a Motion for Reconsideration with the trial court advising the court that they had never been served with copies of the motions.

{¶17} Appellant filed an Opposition to Defendants' Motion for Reconsideration, again failing to serve Appellees.

{¶18} On April 14, 2010, Appellant filed a Motion to Compel responses to his requests for admission, again not serving Appellees.

{¶19} On April 22, 2010, Appellees moved to strike Appellant's Motion to Compel and his Opposition to Defendants' Motion for Reconsideration. Appellees also moved the trial court to dismiss Appellant's Complaint for his repeated failure to serve Appellees with his motions.

{¶20} In support of their motion, Appellees attached copies of the unserved motions from the Clerk of Court wherein Appellant falsely certified that he had sent said motions and further directed the trial court's attention to three other cases where Appellant was admonished for failure to serve pleadings. Counsel for Appellees also reminded the trial court that she had been representing Appellees since the case's inception two years prior and that Appellant had even called her office on several occasions, so Appellant was certainly aware of her name and address.

{¶21} On May 11, 2010, the trial court sustained Appellees' Motion to Strike and rescinded its March 24, 2010, Order permitting Appellant to amend his Complaint. The trial court also advised Appellant of his intent to dismiss Appellant's Complaint based on his repeated failure to properly serve Appellees and gave him fourteen days to file a written objection and explain why his case should not be dismissed.

{¶22} After moving for and having been granted an extension of time on May 24, 2010, Appellant filed an objection to the trial court's Order on June 11, 2010, claiming that he did properly serve Appellees, and attached his own affidavit to that effect.

{¶23} By Judgment Entry filed July 2, 2010, the trial court dismissed Appellant's case without prejudice.

{¶24} Appellant now appeals, raising the following errors for review:

ASSIGNMENTS OF ERROR

{¶25} "I. TRIAL COURT ERRED & ABUSED ITS DISCRETION BY DENYING DEFAULT WHEN EXCUSABLE NEGLECT WASN'T SHOWN BY APPELLEES.

{¶26} "II. TRIAL COURT ERRED & ABUSED HIS [SIC] DISCRETION BY SUA SPONTE DISMISSING COMPLIANT ON ALLEDGED [SIC] PROCEDURAL DEFAULT NEARLY 2 YEARS AFTER COMPLAINT WAS FILED, ESPECIALLY SINCE IN AFFIDAVIT FROM APPELLANT SWORE TO SERVING APPELLEES."

{¶27} This appeal is assigned to the accelerated calendar pursuant to App.R. 11.1 The purpose of an accelerated appeal is to allow this Court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158, 463 N.E.2d 655.

I.

{¶28} In his first assignment of error, Appellant contends the trial court erred in denying his motion for default judgment. We disagree.

{¶29} The Judgment Entry of the trial court denying Appellant's motion for default judgment was filed on April 7, 2009. Appellant did not raise this issue in his first appeal, and has therefore waived such argument.

{¶30} Appellant's first assignment of error is overruled.

II.

{¶31} In his second assignment of error, Appellant claims that the trial court erred in sua sponte dismissing his Complaint. We disagree.

{¶32} Upon review, we find that Appellant's failure to serve Appellees with copies of motions and other pleadings was an obvious violation of the Civil Rules.

{¶33} Civ.R. 5(A) requires:

{¶34} "(A) Service: when required

{¶35} **"**Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. Service is not required on parties in default for failure to appear except that pleadings asserting new or additional claims for relief or for additional damages against them shall be served upon them in the manner provided for service of summons in Civ.R. 4 through Civ.R. 4.6."

{¶36} As to the method of service, Civ.R. 5(B) states:

{¶37} "Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or party shall be made by delivering a copy to the person to be served, transmitting it to the office of the person to be served by facsimile

transmission, mailing it to the last known address of the person to be served or, if no address is known, leaving it with the clerk of the court. The served copy shall be accompanied by a completed copy of the proof of service required by division (D) of this rule. “Delivering a copy” within this rule means: handing it to the attorney or party; leaving it at the office of the person to be served with a clerk or other person in charge; if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion then residing in the dwelling house or usual place of abode. Service by mail is complete upon mailing. Service by facsimile transmission is complete upon transmission.”

{¶38} In the instant case, the trial court sua sponte dismissed Appellant’s complaint pursuant to Civ.R.41(B), which provides that, when a plaintiff fails to comply with the Civil Rules, the court may dismiss the action.

{¶39} A dismissal is authorized by Civ.R. 41(B)(1), which provides that a trial court, sua sponte or upon a motion of the defendant, may dismiss an action or claim where the plaintiff fails to prosecute or fails to comply with the civil rules or any court order.

{¶40} Such a dismissal, however, may be accomplished only after the trial court provides notice to plaintiff's counsel of its intention to dismiss the case. Civ.R. 41(B)(1) requires courts to give prior notice of intent to dismiss in order to provide a non-complying party a final chance to obey. *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 48, 684 N.E.2d 319; *Rankin v. Willow Park Convalescent Home* (1994),

99 Ohio App.3d 110, 112, 649 N.E.2d 1320. Generally, a party has notice of an impending dismissal with prejudice for failure to comply with a court's order when counsel has been informed that dismissal is a possibility and a reasonable opportunity has been provided to defend against dismissal. *Quonset Hut,* syllabus; see, also, *Id.* at 48 (stating that a party may have notice of an impending dismissal when the party is aware that the opposing party has filed a motion to dismiss). “The purpose of notice is to provide the party in default an opportunity to explain the default or to correct it, or to explain why the case should not be dismissed with prejudice.” *Id.* at 48, quoting *Logsdon v. Nichols* (1995), 72 Ohio St.3d 124, 128, 647 N.E.2d 1361 (internal quotation omitted).

{¶41} “In considering dismissal under Civ.R. 41(B)(1), a trial court may properly take into account the entire history of the litigation * * * [.][D]ismissal is reserved for those cases in which ‘the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order.’ ” *Sazimav. Chalko,* 86 Ohio St.3d at 158, 1999-Ohio-92.

{¶42} However, Appellant herein is facing the apparent anomaly under Ohio law that a decision may be final, but not appealable. Civil Rule 41(B)(1) provides in pertinent part as follows: “Where the plaintiff fails to * * * comply with * * * any court order, the court * * * on its own motion may, after notice to plaintiff's counsel, dismiss an action or claim.” Civil Rule 41(B)(3) provides in pertinent part as follows:

{¶43} "A dismissal under division (B) of this rule * * * operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies."

{¶44} Therefore, the Civil Rules allow a trial court judge to dismiss a case without prejudice for failing to follow a court order. The respondent judge was acting within his discretion when he dismissed Appellant's case without prejudice, finding that Appellant's actions were making it "virtually impossible for the case to proceed in a timely fashion."

{¶45} That was and is a final order.

{¶46} However, a dismissal without prejudice is generally not appealable, even if it is final. In *Natl. City Commercial Capital Corp. v. AAAA At Your Serv. Inc.,* 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663 ¶ 8, the Supreme Court of Ohio held:

{¶47} "Ordinarily, a dismissal 'otherwise than on the merits' does not prevent a party from refiling and, therefore, ordinarily, such a dismissal is not a final, appealable order."

{¶48} We therefore hold the judgment entry appealed from is not a final appealable order, and the appeal is dismissed for want of jurisdiction.

{¶49} For the reasons stated in the foregoing opinion, the appeal of the judgment of the Court of Common Pleas, Fairfield County, Ohio, is dismissed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

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JUDGES

JWW/d 1028

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KEVIN HUGHLEY	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
SOUTHEASTERN CORRECTIONAL INSTITUTION, et al.	:	
	:	
Defendants-Appellees	:	Case No. 10 CA 43

For the reasons stated in our accompanying Memorandum-Opinion, the appeal of the judgment of the Court of Common Pleas of Fairfield County, Ohio, is dismissed.

Costs assessed to Appellant.

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JUDGES