

[Cite as *Penaranda v. DNJ Holdings, L.L.C.*, 2010-Ohio-5848.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

LYDIA PENARANDA,	:	APPEAL NO. C-090739
	:	TRIAL NO. A-0800366
Plaintiff-Appellant,	:	
vs.	:	<i>DECISION.</i>
DNJ HOLDINGS, LLC,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed from Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 3, 2010

Lydia Penaranda, pro se,

Emily Supinger and Manley Burke, LPA, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Plaintiff-appellant Lydia Penaranda appeals from the judgment of the Hamilton County Court of Common Pleas dismissing her complaint with prejudice under Civ.R. 41(B)(1) for failure to prosecute.

{¶2} On January 11, 2008, Penaranda filed her complaint against defendant-appellee DNJ Holdings, LLC, (“DNJ”) for breach of general-warranty covenants and for monetary damages. DNJ filed a counterclaim against Penaranda for trespass and breach of a general warranty deed.

{¶3} At first, Penaranda was represented by counsel, but later she proceeded pro se. The parties worked on a settlement. On August 27, 2009, DNJ moved the court to enforce a settlement. The motion was supported by the affidavit of DNJ’s attorney, Emily Supinger. Supinger indicated that Penaranda had orally committed to a settlement agreement that had been sent to her home address; that Penaranda had failed to appear for two telephone conferences and a trial-setting report; and that Penaranda had not responded to a letter dated August 13, 2009, asking for her response to the settlement.

{¶4} DNJ’s motion was heard on September 18, 2009. Penaranda did not attend. On that same date, the trial court sua sponte entered a dismissal of Penaranda’s complaint with prejudice under Civ.R. 41(B). In its decision, the court indicated that the case had been set “for motion to enforce settlement/dismissal for lack of prosecution” and that Penaranda “had failed to appear before the Court under threat of dismissal.”

{¶5} DNJ then moved to voluntarily dismiss its counterclaim. The trial court entered a voluntary dismissal of the counterclaim, making the entry dismissing Penaranda's complaint a final order.

{¶6} The record discloses no notice to Penaranda of the September 18, 2009, hearing or that the action was subject to dismissal with prejudice.

{¶7} In her sole assignment of error, Penaranda now contends that the trial court erred by dismissing her complaint for failure to prosecute without giving her notice as required by Civ.R. 41. We agree.

{¶8} Civ.R. 41(B)(1), which governs involuntary dismissals for failure to prosecute, requires as a condition precedent to dismissal that the court give notice of its intention to dismiss the case.¹ The notice provision allows a party the opportunity to correct or explain a default before a dismissal.² Thus, a court may only dismiss an action or claim for failure to prosecute after providing notice of its intent to do so to the plaintiff's counsel or, in this case, to the pro se plaintiff.³

{¶9} In this case, the trial court believed that it had provided the requisite notice to Penaranda before dismissing her complaint. But the appellate record, consisting of the transcript of the docket and journal entries and the transcript of the proceedings, does not demonstrate that notice was sent to Penaranda. Thus, the record does not demonstrate that the court complied with the notice requirement of Civ.R. 41(B)(1) before dismissing Penaranda's complaint with prejudice.

{¶10} Since the dismissal entered in this case was in violation of the provisions of Civ.R. 41(B)(1), we sustain the assignment of error, reverse the

¹ *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 2-3, 454 N.E.2d 951.

² See *id.* at 3; *Logsdon v. Nichols* (1995), 72 Ohio St.3d 124, 128, 1995-Ohio-225, 647 N.E.2d 1361.

³ *Perotti* at 3.

judgment of the trial court, and remand the cause to the trial court for further proceedings in accordance with law.

Judgment reversed and cause remanded.

CUNNINGHAM, P.J., HENDON and MALLORY, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.