

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

BILL DURELL, et al.	:	
	:	Appellate Case No. 2009-CA-69
Plaintiffs-Appellants	:	
	:	Trial Court Case No.
	:	2009-CV-402
v.	:	
	:	
SPRING VALLEY TOWNSHIP	:	(Civil Appeal from
BOARD OF ZONING APPEALS, et al.	:	Common Pleas Court)
	:	
Defendants-Appellees	:	
	:	

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OPINION

Rendered on the 9th day of July, 2010.

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B. RANDALL ROACH, Atty. Reg. #0065537, Martin, McCarty, Randall & Roach, 26 North Wright Avenue, Fairborn, Ohio 45324
Attorney for Plaintiff-Appellant

JONATHAN F. HUNG, Atty. Reg. #0082434, Greene County Prosecutor's Office, 61 Greene Street, Second Floor, Xenia, Ohio 45385
Attorney for Defendant-Appellees

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FAIN, J.

{¶ 1} Plaintiffs-appellants David Mitchell and Bill Durell appeal from the dismissal of their administrative appeal as well as from the dismissal of their action for declaratory judgment. Mitchell and Durell contend that the trial court did not give

them adequate notice, as required by Civ.R. 41(B), before dismissing their administrative appeal. They further contend that the trial court erred by dismissing their declaratory judgment action.

{¶ 2} We conclude that the trial court did abuse its discretion with regard to the dismissal of the administrative appeal, because it failed to give the notice contemplated by Civ.R. 41(B). We also conclude that Mitchell and Durell have waived all but plain error review with regard to the dismissal of the declaratory judgment action. From our review of the record, we conclude that the dismissal of the declaratory judgment action was not plain error.

{¶ 3} Accordingly, that part of the judgment of the trial court dismissing the administrative appeal is Reversed, that part of the judgment dismissing the declaratory judgment action is Affirmed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 4} In 2009, the Spring Valley Board of Zoning Appeals (BZA) granted a zoning variance to a parcel owned by one of the board members of the BZA. Thereafter, on April 6, 2009 two owners of property adjacent to that property, David Mitchell and Bill Durell, filed an administrative appeal from the BZA decision with the Greene County Common Pleas Court. Along with the administrative appeal, Mitchell and Durell also asked for a declaratory judgment that the action of the BZA was barred by the doctrine of res judicata.

{¶ 5} On April 13, the Spring Valley Township and the BZA filed a “Motion for

Partial Dismissal,” in which they sought the dismissal of the declaratory judgment action. On April 27, 2009, the Common Pleas Court filed an entry allowing Mitchell and Durell twenty days in which to file any pleading in opposition to the motion. The entry also noted that the trial court would decide the motion without oral arguments.

{¶ 6} The transcript of proceedings before the BZA was filed with the court on May 18, 2009. Mitchell and Durell did not file any response to the motion to dismiss, and the court entered an order dismissing the declaratory judgment action.

{¶ 7} On June 16, 2009, Mitchell and Durell filed a motion for extension of time in which to file their merit brief in support of their administrative appeal, which was still pending. The motion was granted by an entry allowing them thirty days in which to file their brief. The entry also contained a handwritten notation reading “Last extension.”

{¶ 8} On August 20, 2009, the trial court, sua sponte, entered an order dismissing the administrative appeal for failure to file a brief

{¶ 9} Durell and Mitchell, on September 18, 2009, filed a motion to vacate the dismissal of the administrative appeal, pursuant to Civ.R. 60(B). In their motion, they claimed that they had received approval from opposing counsel for a second extension of time in which to file their merit brief, but that they had failed to file the request for the extension with the court due to “confusion” in counsel’s office. The motion did not purport to seek relief with regard to the dismissal of the declaratory judgment action.

{¶ 10} Before the court had an opportunity to rule on their Civ.R. 60(B) motion, Durell and Mitchell filed an appeal with this court.

{¶ 11} The First and Second Assignments of Error state as follows:

{¶ 12} “THE ACTION OF THE TRIAL COURT CONSTITUTES AN ABUSE OF DISCRETION IN FAILING TO PROVIDE APPELLANTS NOTICE NOR REASONABLE OPPORTUNITY TO RESPOND TO THE COURT’S INTENTION TO DISMISS THE PENDING ACTION.

{¶ 13} “THE ACTION OF THE TRIAL COURT CONSTITUTES AN ABUSE OF DISCRETION WHERE THE SANCTION OF DISMISSAL WITH PREJUDICE WAS IMPOSED WITHOUT FACTS DEMONSTRATING ‘SUBSTANTIAL GROUNDS’ FOR DISMISSAL.”

{¶ 14} In these assignments of error, Mitchell and Durell contend that the court abused its discretion in dismissing their administrative appeal. In support, they cite *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, for the proposition that giving notice of the possibility that an action will be dismissed for failure to prosecute is “an absolute prerequisite” to a dismissal on that ground. The BZA agrees that notice is required prior to dismissal for failure to prosecute. The BZA contends that Durell and Mitchell had adequate notice. Specifically, they argue that constructive notice is provided by the Greene County Local Rules, of which counsel is deemed to have knowledge.

{¶ 15} Civ.R. 41(B)(1) provides:

{¶ 16} “Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff’s counsel, dismiss an action or claim.”

{¶ 17} In addition to Civ.R. 41(B)(1), Loc.R. 2.37 of the Greene County Common Pleas Court, General Division, governs the prosecution of appeals from administrative

agencies. That rule provides, in pertinent part:

{¶ 18} “Unless the Court has authorized an extension of time, the appellant shall file a claim of error, brief, and all other essential papers within twenty (20) days after the notice of appeal has been filed or the filing of the transcript, which is later. Failure to file briefs and Assignment of Error within the requisite period of time *may* result in dismissal of the appeal as directed by the court.” Greene County Local Rule 2.37(II)(A); (emphasis added).

{¶ 19} The Ohio Supreme Court has stated that “Civ.R. 41(B)(1) permits a trial court to dismiss an action for failure to comply with a court order, but only after notice to plaintiff’s counsel. * * * [A] dismissal with prejudice is proper only ‘when counsel has been informed that dismissal is a possibility and *has had a reasonable opportunity to defend against dismissal.*’ * * * ‘[T]he notice requirement of Civ.R. 41(B)(1) applies to *all* dismissals with prejudice, * * * .’ ” *Hillabrand v. Drypers Corp.* (2000), 87 Ohio St.3d 517, 518, internal citations omitted, emphasis in original. “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.*

{¶ 20} The decision to dismiss an action pursuant to Civ.R. 41(B)(1) lies within the discretion of the trial court. *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 1997-Ohio-203. Appellate review of a dismissal under Civ.R. 41(B)(1) is limited to determining whether the trial court abused its discretion. *Id.* The term “abuse of discretion” implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 21} We agree with the BZA that counsel is presumed to have constructive

notice of the local rules of court. But those rules only contemplate the possibility that an administrative appeal may be dismissed upon a failure to comply; they cannot be taken to express the trial court's intention, in a particular case, to dismiss an administrative appeal. As we understand Civ.R. 41(B), before a trial court may carry out its intention to dismiss an action for failure to prosecute, or for failure to comply with rules of court, the trial court must afford the party adversely affected by the dismissal with notice and an opportunity to be heard, if only in writing. Durell and Mitchell did not have that opportunity here.

{¶ 22} The First and Second assignments of error are sustained.

III

{¶ 23} The Third Assignment of Error states:

{¶ 24} "THE ACTION OF THE TRIAL COURT DISMISSING APPELLANT'S DECLARATORY JUDGMENT AND CONSTITUTIONAL CHALLENGES REGARDING THE CONFLICTING INTERESTS OF BOARD MEMBERS, THE ABSENCE OF A FAIR AND IMPARTIAL TRIBUNAL AND THE ISSUE OF RES JUDICATA CONSTITUTES PREJUDICIAL ERROR."

{¶ 25} Durrell and Mitchell contend that the trial court erred by dismissing the declaratory action portion of their complaint.

{¶ 26} The BZA filed its motion on April 13, 2009. Thereafter, on April 27, the trial court entered a notice in which it granted Durell and Mitchell twenty days to respond to the motion. The notice also indicated that the court would decide the motion without a hearing.

{¶ 27} Durell and Mitchell failed to file any response to the motion to dismiss. The trial court did not rule on the motion to dismiss until June 3, 2009 – 37 days after entering the notice setting filing dates. Durell and Mitchell did not enter any objection to the BZA's motion or to the decision of the trial court granting the BZA's motion at any point prior to this appeal.

{¶ 28} Durell and Mitchell do not claim that they were not given notice of the pendency of the motion, or that they did not receive an adequate opportunity to object or respond thereto. Given their failure to respond to the motion, the trial court could have reasonably concluded that they did not object to the dismissal of the declaratory judgment action. We find, given their failure to note an objection, they have waived all but plain error review.

{¶ 29} The BZA's motion to dismiss was based upon its claim that Durell and Mitchell had failed to exhaust their administrative remedies prior to filing the declaratory judgment action. The BZA further argued that Durell and Mitchell had failed to join all necessary parties with regard to the action.

{¶ 30} When a property owner is adversely affected by the grant of a zoning variance, that owner may seek a declaratory judgment as an alternative remedy to a Chapter 2506 appeal, if the property owner asserts a challenge to the constitutionality of zoning restrictions. *Schomaeker v. First Nat. Bank of Ottawa* (1981), 66 Ohio St.2d 304, 312. A review of the complaint herein demonstrates that no challenge to the constitutionality of the zoning restrictions was asserted. Accordingly, we cannot say that the trial court erred in dismissing the declaratory judgment action.

{¶ 31} The Third Assignment of Error is overruled.

IV

{¶ 32} The First and Second assignments of error having been sustained, and the Third Assignment of Error having been overruled, the order of the trial court dismissing Durell and Mitchell's administrative appeal is Reversed, the order of the trial court dismissing their complaint for a declaratory judgment is Affirmed, and this cause is Remanded for further proceedings consistent with this opinion. On remand, the trial court remains free to require Mitchell and Durell to obtain leave and to show excusable neglect or good cause for their untimely filing; we hold only that the trial court erred in dismissing their administrative appeal where the record does not reflect proper notice to Mitchell and Durell of the trial court's intention to dismiss their administrative appeal.

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DONOVAN, P.J., and KLINE, J., concur.

(Hon. Roger L. Kline, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

- B. Randall Roach
- Jonathan F. Hung
- Hon. Stephen Wolaver