

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-080

NOVEMBER TERM, 2006

Pownal Mobile Homes	}	APPEALED FROM:
	}	
	}	
v.	}	Bennington Superior Court
	}	
Jessica Caron	}	
	}	DOCKET NO. 392-10-05 Bncv

Trial Judge: John P. Wesley

In the above-entitled cause, the Clerk will enter:

Landlord appeals from a superior court order, which dismissed his eviction action with prejudice for failure to prosecute. Landlord argues that the court abused its discretion in failing to provide him notice before dismissal. We agree and vacate the dismissal order.

Landlord originally filed for eviction on April 18, 2005 in Bennington Superior Court. In that case, based on the parties' agreement, the superior court entered judgment for landlord. The court awarded landlord back

rent, but delayed awarding possession contingent on tenant's timely weekly payment into court towards rental arrears. When tenant failed to pay rent, landlord filed for a writ of possession. The court ultimately denied the motion and required landlord to file a new eviction action. Landlord complied and filed a second eviction action on October 26, 2005. Landlord filed a request for payment of rent into court on November 10, 2005. The superior court held a motion hearing on December 7, 2005, at which landlord did not appear, apparently because tenant had vacated the premises. The court denied the motion and set a date of January 13, 2006 for trial. Landlord was unable to attend and sent his park manager to represent him. The superior court dismissed his case with prejudice for failure to prosecute. Landlord appeals, claiming that the court failed to warn him that the case would be dismissed.

Under V.R.C.P. 41(b), A[t]he court, on its own motion, after reasonable notice to all the parties, may dismiss any action, unless good cause is shown for continuance, when . . . (ii) All parties against whom a judgment for affirmative relief is sought have failed to plead .@ AA dismissal with prejudice is treated as an adjudication on the merits.@ Littlefield v. Town of Colchester, 150 Vt. 249, 251 (1988). When the trial court dismisses a case for lack of prosecution, reversal is ordinarily warranted only if the court abused its discretion. Sharif v. Wellness Int=I Network, Ltd., 376 F.3d 720, 725 (2004).

Although the trial court has discretion in this area, it was required to comply with the provisions of Rule 41(b), including providing Areasonable notice@ to the parties. AThis procedural requirement is intended to afford a party the opportunity to present facts and circumstances in opposition to an impending dismissal or discontinuance and justify the retention of the case on the docket.@ B-W Acceptance Corp. v. Twin State Elec. Supply Co., 127 Vt. 94, 95 (1968) (construing former County Court Rule 3.2). Here, plaintiff received no warning that his case was subject to dismissal. Under these circumstances, we conclude that the court abused its discretion in resorting to the sanction of dismissal. Compare Sharif, 376 F.3d at 725 (vacating dismissal where trial court did not warn plaintiff and plaintiff had actively participated in the case), with Asociacion de Empleados del Instituto de Cultura Puertorriquena v. Rodriguez Morales, 538 F.2d 915, 917 (1976) (affirming dismissal where plaintiffs had notice that court was displeased with their inaction). Thus, we vacate the dismissal and remand for plaintiff to demonstrate why the case should be retained.

Dismissal order for lack of prosecution is vacated; remanded for proceedings consistent with this opinion.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice