

STATE OF MICHIGAN
COURT OF APPEALS

DAVID O'NEAL,

Plaintiff-Appellant,

v

SUSAN LYNN O'NEAL, a/k/a SUSAN L.
HARVEY,

Defendant-Appellee.

UNPUBLISHED

August 1, 1997

No. 188497

Muskegon Circuit Court

LC No. 94-30444-DO

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Plaintiff, acting in propria persona, appeals as of right from an order dismissing a contempt action initiated against defendant. We reverse and remand.

Plaintiff, an inmate at the Carson City Correctional Facility, and defendant were divorced on July 6, 1994. Pursuant to the judgment of divorce, the parties agreed to take certain actions in regard to rental property jointly held by the parties. In particular, defendant was to cooperate with the manager of the property and allow for the collection of rents and the application of those rents to the present mortgage on the property. In addition, defendant retained the power to sell the property, with the proceeds of the sale being divided according to the parties' respective interests.

Plaintiff filed an ex parte motion, pursuant to MCR 3.606, seeking an order to show cause why defendant should not be punished for committing contempt outside the immediate presence of the court with respect to the judgment of divorce and the rental property. In the motion, plaintiff averred that defendant evicted the tenants of the rental property without first having an agreed buyer or having entered into a binding purchase agreement as required by the judgment of divorce. The trial court granted plaintiff's motion and ordered plaintiff to submit a proposed order to show cause within seven days. Upon plaintiff's failure to submit the order within the specified seven-day time period, the trial court dismissed plaintiff's action.

Although plaintiff raises ostensibly separate issues, he essentially argues that the trial court erred in dismissing his case for his failure to timely submit an order to show cause. This Court

reviews a lower court's order of dismissal for abuse of discretion. *Thorne v Carter*, 149 Mich App 90, 93; 385 NW2d 738 (1986). However, dismissal with prejudice of a claim is a harsh remedy and should be applied only in extreme situations. *North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986); *Mudge v Macomb County*, 210 Mich App 436, 444; 534 NW2d 539 (1995). Although this is a post-judgment proceeding, it is still an involuntary dismissal pursuant to MCR 2.504(B)(3). Because MCR 2.504(B)(3) provides that unless the court provides otherwise, an involuntary dismissal operates as an adjudication on the merits, we find that, under the circumstances of this case, the trial court erred in reaching the harsh result.

The only conceivable justification for the trial court's dismissal of plaintiff's action is plaintiff's delay in submitting to the court a proposed order to show cause. Our Supreme Court has recognized that "[t]he trial court's front-line responsibility for the administration of justice mandates the potential use of sanctions for delay." *North, supra*. However, the countervailing policy favoring litigation of claims on the merits will frequently be overriding. *Id.* Therefore, before invoking the harsh remedy of dismissal with prejudice, "the trial court should evaluate the length, circumstances, and reasons for the delay in light of the need for administrative efficiency and the policy favoring the decisions of cases on their merits." *Id.* In this regard, the Supreme Court has posited four factors for trial courts to consider: (1) the degree of plaintiff's personal responsibility for the delay; (2) the amount of prejudice to defendant caused by the delay; (3) whether there exists a lengthy history of deliberate delay; and (4) whether imposition of lesser sanctions would not better serve the interests of justice. *Id.*

Applying these considerations to the instant case, none of the factors support the trial court's decision to dismiss the action. Here, it is unclear whether plaintiff's delay in submitting an order to show cause was willful or accidental by virtue of his incarceration. Even if we find that plaintiff was fully responsible for the delay, the remaining factors contradict the trial court's action. Given the nature of the order to show cause, defendant was not unduly prejudiced by the delay. In addition, plaintiff did not have a lengthy history of deliberate delay or refusing to comply with previous court orders. Finally, if plaintiff's delay in submitting the order required a sanction, a lesser sanction than dismissal would have better served the interests of justice given our legal system's policy favoring litigation of claims on the merits. *Id.* We therefore find that the trial court abused its discretion in dismissing plaintiff's action.

Reversed and remanded. We do not retain jurisdiction.

/s/ Maureen P. Reilly
/s/ Harold Hood
/s/ William B. Murphy