

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Wesbanco Bank, Inc.,
Plaintiff Below, Petitioner**

vs) **No. 11-0435** (Pocahontas County No. 09-C-56)

**Kristy D. Mantz,
Defendant Below, Respondent**

FILED
October 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Plaintiff below, Wesbanco Bank, Inc., appeals the circuit court's November 9, 2010 order dismissing this lawsuit with prejudice pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on May 10, 2011. This Court has considered the parties' briefs and the record on appeal. The issues are adequately presented in the parties' written briefs, and the decisional process would not be significantly aided by oral argument. Upon careful consideration, the Court concludes that the circuit court's order should be reversed in a memorandum decision pursuant to Rule 21(d) of the Revised Rules.

The circuit court dismissed the plaintiff's complaint upon finding that plaintiff's counsel had failed to appear at two separate hearings. As authority for the dismissal, the circuit court cited Rule 41(b) of the West Virginia Rules of Civil Procedure. The first paragraph of Rule 41(b) provides, in part: "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. . . ." The third paragraph of Rule 41(b) provides, "[b]efore a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record."

Plaintiff's counsel Robert A. Flaughner denies that he failed to appear at these two hearings. Both parties acknowledge that the circuit court had previously given Mr. Flaughner permission to participate in the hearings by telephone. Mr. Flaughner asserts that he attempted to call in to both hearings using the manner specified by the circuit court, i.e., by calling the

conference call service provider CourtCall – but for whatever reason, the circuit court failed to connect with these calls.

Plaintiff argues that it was given no notice or opportunity to be heard before the case was dismissed pursuant to Rule 41(b). Plaintiff asserts that its counsel had no way to know that the case would be dismissed for failure to appear, particularly since counsel asserts that he did appear in accordance with the court’s instructions.

We apply an abuse of discretion standard of review to an appeal of a circuit court’s order dismissing a complaint pursuant to Rule 41(b). *Caruso v. Pearce*, 223 W.Va. 544, 547, 678 S.E.2d 50, 53 (2009). Upon careful consideration, we conclude that the circuit court abused its discretion by dismissing this complaint without giving the plaintiff notice and the opportunity to be heard on the issue of a Rule 41(b) dismissal. Accordingly, we reverse the circuit court’s November 9, 2010 order and remand with instructions for the circuit court to hold a hearing where plaintiff is given the opportunity to show good cause why the complaint should not be dismissed.

Reversed and remanded with instructions.

ISSUED: October 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh