THE STATE OF NEW HAMPSHIRE
SUPREME COURT

DOCKET NO.: 2019-0264

RIVERBEND CONDO ASSOCIATION

v.

GROUNDHOG LANDSCAPING & PROPERTY MAINTENANCE, INC.

RULE 7 MANDATORY APPEAL FROM HILLSBOROUGH SUPERIOR COURT

# BRIEF OF RIVERBEND CONDO ASSOCIATION

Respectfully submitted,
Riverbend Condo Association
By and through their attorneys
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Oral argument waived

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## QUESTION PRESENTED

I. Did the trial court err in dismissing the case when *res judicata* did not bar the claim?

This issue is preserved by the Plaintiff's Objection to Defendant's Motion to Dismiss: *Res Judicata* (October 23, 2018) found at A.17-A.20 and the Plaintiff's Motion to Reconsider (March 28, 2019) found at A.33-A.39.[1]

## TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS

RSA § 508:10 Second Suit

If judgment is rendered against the plaintiff in an action brought within the time limited therefor, or upon a writ of error thereon, and the right of action is not barred by the judgment, a new action may be brought thereon in one year after the judgment.

N.H. Super. Ct. R. 35 Trial Management Conference

(I) *Jury Trials*

(a) In every case scheduled for jury trial, the court shall schedule a Trial Management Conference which shall take place within 14 days before jury selection, or at such other time as the court shall order. At the Conference, parties will be present or available by telephone, prepared to discuss conduct of the trial and settlement.

(b) 14 days prior to the Trial Management Conference, unless another time is directed by the court or agreed to by the parties, all parties shall file with the court and serve on the other parties Pretrial Statements, which shall include, by numbered paragraphs, a detailed, comprehensive, and good faith statement, setting forth the following:

1. A summary of the case that can be read by the court to the jury at the beginning of trial;
2. Disputed issues of fact;
3. Applicable law;
4. Disputed issues of law;

[1] References to the appendix are as follows: "A." followed by the page number

5. Specific claims of liability by the party making the claim;
6. Defendant's specific defenses;
7. Itemized special damages;
8. Specification of injuries with a statement as to which, if any, are claimed to be permanent;
9. The status of settlement negotiations;
10. A list of all exhibits to be offered in the direct case of each party. The parties, or their counsel, shall bring exhibits, or exact copies of them, to court on the day of the Trial Management Conference for examination by opposing parties or their representatives;
11. A list of all depositions to be read into evidence;
12. A waiver of claims or defenses, if any;
13. A list of the names and addresses of all witnesses who may be called;
14. Whether there will be a request for a view and, if so, who shall pay the cost in the first instance;
15. The names and addresses of the trial attorneys or non-attorney representatives.

(c) Except for good cause shown, only witnesses listed in the Pretrial Statement will be allowed to testify and only exhibits, so listed, will be received in evidence.

(d) Preliminary requests for instructions about unusual or complex questions of law shall be submitted in writing at the Trial Management Conference. Supplementary requests may be proposed at any time prior to the time the court completes its instructions to the jury.

(II) *Bench Trials*

The court may direct the parties to attend a Trial Management Conference in non-jury cases. Written pretrial statements are not required in non-jury cases unless ordered by the court. Requests for findings of fact and rulings of law shall be submitted in writing in accordance with a schedule to be determined by the court.

N.H. Super. Ct. R. 41 Dismissal of Actions

All cases which shall have been pending upon the docket for 3 years, without any action being shown on the docket other than being placed on the trial list, shall be marked "dismissed," and notice thereof sent to the parties or representatives who have appeared in the action.

Fed. R. Civ. P. 41 Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

## STATEMENT OF THE CASE & FACTS

The Plaintiff, on July 6, 2017, filed a Small Claim Complaint against the Defendant. On August 14, 2017 the Defendant filed its Response to Small Claim and requested a jury trial in Superior Court. A case structuring and ADR order was distributed to the parties on October 26, 2017. Said order scheduled a final trial management conference for August 6, 2018. Neither party appeared for the final trial management conference and the Court (Abramson, J.) issued an order stating: "Neither party appeared at [the] final trial management conference this date. Trial is cancelled and case is dismissed" (A.1). On August 21, 2018, the Plaintiff filed a Motion to Re-Open (A.2-A.3), which was denied as untimely filed by the Court (Abramson, J.) on September 5, 2018 (A.7).

The Plaintiff, on September 17, 2018, filed a new complaint. The Defendant was served with this new complaint on October 5, 2018. The Defendant, on October 23, 2018 filed a Motion to Dismiss: *Res Judicata* (A.8-A.16). The Plaintiff filed an Objection on October 24, 2018 (A.17-A.20). The Court (Anderson, J.) then held a hearing on the Defendant's Motion to Dismiss on January 29, 2019 (T.1-T.20)[2]. Following this hearing, the Court granted the Defendant's Motion on March 18, 2019 (A.27-A.32). A Motion to Reconsider was filed by the Plaintiff on March 28, 2019 (A.33-A.39) and the Defendant filed an Objection on April 4, 2019 (A.40-A.44). The Court denied the Plaintiff's Motion to Reconsider on May 2, 2019 (A.45-A.49). The Plaintiff then commenced this appeal by Rule 7 Notice of Mandatory Appeal dated May 17, 2019.

[2] References to the transcript are as follows: "T." followed by the page number

## SUMMARY OF ARGUMENT

The trial court (Anderson, J.) erred as a matter of law when it granted the Defendant's Motion to Dismiss on the grounds of *res judicata* as the prior dismissal was not a final judgment on the merits. Neither party appeared at the final trial management conference and the Court (Abramson, J.) dismissed the matter as to both parties. The dismissal notice was silent as to whether the Court (Abramson, J.) intended the dismissal to be with or without prejudice and merely states that "[t]rial is canceled and case is dismissed." (A.1). The dismissal should be presumed to be without prejudice as it was a procedural dismissal and not an adjudication on the merits. The dismissal in this matter can be best characterized as a failure to prosecute. A failure to prosecute is not a final judgment on the merits and is not conclusive as to the rights of the parties. The Court (Abramson, J.) did not order that there would be no further action for the same cause and there was no substantive order entered.

Finally, in making its decision, the trial court improperly relied on the Federal Rules of Civil Procedure for guidance. The trial court specifically looked to Rule 41 (b) of the Rules, which explicitly states that a silent dismissal order constitutes an on the merits finding. However, there is no local rule similar and it has long been the practice of New Hampshire courts to look to the Federal Rules for guidance only when the rules are comparable. Had there been an intention to follow the Federal Rules and their interpretation, the local rules on this particular subject would have been similar rather than non-existent.

## ARGUMENT

### *Res Judicata* Does Not Bar the Claim

The saving statute, embodied in New Hampshire RSA 508:10, provides that "[i]f judgment is rendered against the plaintiff in an action brought within the time limited therefor, or upon a writ of error thereon, and the right of action is not barred by the judgment, a new action may be brought thereon in one year after the judgment." "The test for RSA 508:10 "is whether the right of action is, or is not, barred by the first judgment."" *Berg v. Kelley*, 134 N.H. 255, 257 (1991) (quoting *Milford Quarry & Constr. Co. v. Boston & M. R.R.*, 78 N.H. 176, 177 (1916)). "The test is plainly *not* whether the prior judgment of dismissal was based on any mistake committed by the plaintiff or his counsel." *Roberts v. GMC*, 140 N.H. 723, 725 (1996).

*Res judicata* is a potential bar to a new action. The Court (Anderson, J.) found *res judicata* applicable to this matter in ordering dismissal (A.31). *Res judicata* applies "if three elements are met: (1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits." *Gray v. Kelly*, 161 N.H. 160, 164 (2010). The parties did not dispute that the first two elements were met and thus the disagreement focused on whether the Court's (Abramson, J.) prior dismissal order constituted a "final judgment on the merits." (A.29).

#### (a) The Prior Dismissal Was Not a Final Judgment

A final judgment is required in order for *res judicata* to apply. Here the Court's (Abramson, J.) order merely stated that the case was "dismissed" and trial "cancelled."

The Plaintiff asserts that the order does not constitute a final judgment. A “”judgment” is the judicial act of the court that constitutes the final determination of the rights of the parties.” *Brady v. Duran*, 119 N.H. 467, 469 (1979).

The saving statute is "designed to insure a diligent suitor the right to a hearing in court until he reaches a judgment on the merits." *Berg,* 134 N.H. at 257 (quotation omitted). Its purpose "is not to be frittered away by any narrow construction." *Id.* (quotation omitted). "The statute benefits suitors who are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them with a cause of action, yet undetermined." *Id.* (quotation omitted).

An order dismissing a case is not automatically a judgment for purposes of *res judicata*. This Court has previously held that “a default judgment entered for failure of a party to comply with the superior court discovery rules constitutes a judgment on the merits” for *res judicata* purposes. *Barton v. Barton*, 125 N.H. 433, 435 (1984). This Court has also held that “unlike *Barton*, a judgment of default was never entered in this matter. A “final default” does not constitute a judgment for purposes of res judicata.” *Donovan v. Canobie Lake Park Corp.*, 127 N.H. 762, 763 (1986). In *Donovan* a conditional default was entered against the plaintiff for failure to answer interrogatories and the trial court granted the defendant’s motion to make the conditional default final. *Id*. This Court found *Barton* to be “materially distinguishable” despite both cases dealing with defaults entered as a result of failures to comply with different court rules. *Id*. at 764. Thus the claims in *Donovan* were not barred by *res judicata*.

The holding in *Barton* was applicable to a specific set of circumstances, that being where a default judgment was entered for failure to comply with discovery rules. This present matter is materially distinguishable and, in fact, is more distinguishable from *Barton* than the issue in *Donovan.* The *Donovan* holding relied on the fact that a "final default" is dissimilar to a "default judgment." Here the order here merely stated that the case was "dismissed" and there was no mention of a default or a judgment in the Court's (Abramson, J.) order. Clearly the parties had not received a final judgment at this stage and the rights of the parties are still yet to be determined.

In determining that there was a final judgment issued here, the Court (Anderson, J.) relied extensively on the holding in *Foster v. Bedell*, 136 N.H. 728 (1993). The Court (Anderson, J.) characterized the holding there to be "that an involuntary dismissal for failure to follow a court order is considered a judgment on the merits" (A.31). The Court (Anderson, J.) held that the Plaintiff's failure here to attend the final trial management conference was a violation of a court order in the same sense (A.31). However, the sole issue on appeal in *Foster* was "whether a nonsuit for failure to file a pretrial statement is a judgment on the merits, thereby barring by *res judicata* a second suit alleging the same cause of action." *Id.* at 729. Notably, the parties here failed to file pretrial statements. The Court (Abramson, J.) could have found both parties in violation of Superior Court Rule 35, but declined to do so. More specifically, the trial court in *Foster* "ordered pretrial statements to be completed and returned by March 4, 1991, or the noncomplying party would be "defaulted/nonsuited."" *Id*. The court there made an explicit order and subsequently nonsuited the plaintiffs when they failed to comply with the order. The

notice of the final trial management conference here, which follows the standard final pretrial conference order indicating that "[f]ailure to appear at the trial management conference … may result in dismissal, default or other sanctions" (A.28), is different than the explicit and specific order issued in *Foster*. The *Foster* court did not use words such as "may" and made it clear that a nonsuit would be entered if the parties failed to comply.

Notably, the *Foster* court did not hold that the failure to follow a court order is a judgment on the merits as the Court (Anderson, J.) indicated (A.31). Rather, it stated "[w]e hold that the Fosters' failure to comply with the court's order on the filing of pretrial statements and the resulting dismissal was a judgment on the merits precluding them from availing themselves of the saving statute."*Id*. at 730. The language of this holding indicates that it is applicable to the specific failure of the Fosters and not necessarily to every potential violation of court rule or order. This is in line with the holdings in *Barton* and *Donovan*. In all decisions, this Court declined to explicitly extend the holdings to violations of all court rules or orders.

**(b) The Prior Dismissal Was Not On the Merits**

A finding that a judgment was on the merits is also required in order for *res judicata* to apply and have preclusive effect. The Court (Anderson, J.) primarily based its decision of an on the merits finding on the fact that it found the dismissal to be with prejudice and through its reliance on guidance of the Federal Rules of Civil Procedure (A.30-A.31). The initial order of dismissal by the Court (Abramson, J.) made no mention of any finding being on the merits or concluding the proceedings definitively.

A judgment on the merits is defined "[f]or res judicata purposes [as] one which determines the rights and liabilities of the parties based on the ultimate fact as disclosed by the pleadings or issues presented for trial." Black's Law Dictionary 843 (9th ed. 1991). "[T]he purpose of procedural law is to *facilitate* decision of the case on the merits." *Nashua v. Public Utilities Commission*, 101 N.H. 503, 506 (1959) (emphasis added). "A judgment is upon the merits when it contains an order that there shall be no further action for the same cause." *Moore v. Lebanon*, 96 N.H. 20, 22 (1949).

Here there was no order stating there would be no further action for the same cause. A dismissal for failure to attend a final trial management conference is, on its face, not an on the merits finding. It is for this reason that the Federal Rule cited as guidance by the Court (Anderson, J.) specifies that certain dismissals "operate[] as an adjudication on the merits." See Fed. R. Civ. P. 41(b). Though it was improper for the Court (Anderson, J.) to rely on the Federal Rules, the facts here would not constitute an on the merits dismissal even if Rule 41(b) were applicable. The Federal Rule could have applied here had the Defendant moved to dismiss the action as a result of the Plaintiff's failure to prosecute or comply with court rules. Here the Defendant made no motion and the dismissal order went to both parties who failed to appear for the final trial management conference.

In any event, the Court (Anderson, J.) should not have relied on the Federal Rule for guidance as there is no rule similar within this State. This Court has held that "[i]t has long been the practice of this court to examine the interpretation of federal legislation that is **similar** to our State's law." *Minuteman v. Microsoft Corp.*, 147 N.H. 634, 637 (2002) (emphasis added). "The use of language so closely paralleling that of [a] federal act

suggests [to this court] a purpose to carry with it the interpretation given to the language of that Act." *Id*. (citing *Wiseman v. State*, 98 N.H. 393, 397 (1953)). "Because Superior Court Rule 27-A, which provides the criteria for class certification, is similar to its federal counterpart, Federal Rule of Civil Procedure 23, we rely upon federal cases interpreting the federal rule as analytic aids." *In re Bayview Crematory, LLC*, 155 N.H. 781, 784 (2007) (citing *Cantwell v. J&R Props. Unltd., Inc.*, 155 N.H. 508, 511 (2007)).

Rule 41 of the New Hampshire Rules is also entitled "Dismissal of Actions." However, it states that "[a]ll cases which shall have been pending upon the docket for 3 years, without any action being shown on the docket other than being placed on the trial list, shall be marked "dismissed," and notice thereof sent to the parties or representatives who have appeared in the action." There is no mention regarding how a dismissal under this state's rule 41 operates and, in any event, this instant matter was not dismissed under this rule. Had there been an intention to follow the Federal Rule, the language would certainly be similar as required by the precedent of this Court.

There must be a rule, statute, or case law that indicates a dismissal for failure to attend a final trial management conference is an on the merits decision when the order is silent. Absent such authority, the dismissal cannot be considered to be on the merits. The Federal Rules are not sufficient authority as they should not be relied upon where there is no similar local rule.

**(c) The Prior Dismissal Was Not With Prejudice**

Essential to the Court's (Anderson, J.) finding that *res judicata* barred this action was the finding that the prior dismissal, while silent, was a "with prejudice" dismissal. (A.31).

The Court (Anderson, J.) noted that there appears to be no definitive guidance on New Hampshire regarding the presumption of silent orders (A.30). The Plaintiff argued that the dismissal should be presumed without prejudice as it was merely procedural and was completely silent (A.30).

"A judgment entered "with prejudice" constitutes a judgment on the merits of a matter, even if it resulted from a violation of a procedural rule." *Roberts*, 140 N.H. at 727. "[I]f a court enters judgment "with prejudice," and no claims pled within that lawsuit are segregated from that judgment, the saving statute cannot revive that suit." *Moulton-Garland v. Cabletron Sys., Inc.* 143 N.H. 540, 542 (1999). The language here indicates that the judgment must be actually entered with prejudice in order to have preclusive effect under the doctrine of *res judicata*. See *Amatucci v. O'Brien*, 2017 U.S. Dist. LEXIS 22227, *18 (the Court "dismissed the claims in Amatucci I with prejudice, which was a final judgment on the merits."). see also *Ingress v. Merrimack Mortg. Co.*, 2012 U.S. Dist. LEXIS 15093, *11 (the Court "dismissed the claims against Sand Canyon with prejudice, and a "dismissal with prejudice is deemed an adjudication on the merits for purposes of *res judicata*.") (citing *Oriental Bank & Trust v. Pardo Gonzalez*, 509 F. Supp. 2d 127, 135 (D.P.R. 2007)).

It should be noted that the Court (Anderson, J.) dismissed the Plaintiff's argument that the dismissal was procedural, at least in part, on the basis that "[a] procedural dismissal may be a substantive decision on the merits of a claim barring refilling under RSA 508:10." *Jenks v. Menard*, 145 N.H. 236, 238 (2000). The Court (Anderson, J.) misconstrues this statement as it relates to the present matter. The *Jenks* court continued

to state that "[w]e distinguish between 'purely procedural' dismissals, which do not bar subsequent actions, and those dismissals which are 'procedural,' but rest also on a substantive decision on the merits of the case, which do bar subsequent actions." *Id.* (quoting *In re Proposed Rules of Civil Procedure*, 139 N.H. 512, 516-17 (1995)). The instant matter involved a purely procedural dismissal and not a substantive dismissal. It was not a "dismissal of a writ for failing to state a claim upon which relief may be granted" which "is a substantive decision based on the merits of the case." *Id*. at 239.

**(d) The Prior Dismissal Was a Failure to Prosecute**

The dismissal by the Court (Abramson, J.) can be best characterized as a failure to prosecute. The Court (Anderson, J.) acknowledged the case law holding that a dismissal for failure to prosecute is generally without prejudice (A.48). However, it noted that the prior case law did not involve violations of a court rule (A.48). Nonetheless, the Plaintiff asserts that there is no basis to treat the dismissal as anything but a failure to prosecute.

"The law is quite clear that, in the absence of a statute or rule of court to the contrary, which we do not have, a dismissal for failure to prosecute is not an adjudication on the merits and not a bar to a second suit under" RSA 508:10. *Carveth v. Latham*, 110 N.H. 232, 234 (1970). "[W]e see no reason to treat a voluntary nonsuit any differently than a dismissal for failure to prosecute. Unless specifically provided for by the parties or by the court, neither sort of dismissal constitutes "a final judgment on the merits, conclusive as to the rights of the parties and their privies, . . . constituting an absolute bar to subsequent litigation involving the same cause of action." *Town of Plaistow v. Riddle*, 141 N.H. 307, 310 (1996) (citing *Innie v. W & R Inc.*, 116 N.H. 315, 316 (1976)).

As previously noted, the rights of the parties have not yet been determined. Here the Plaintiff failed to go forward with prosecuting the case by failing to attend the final trial management conference and subsequently failing to file a timely motion to reconsider. The Court (Abramson, J.) never rendered a decision stating that the Plaintiff violated a rule or order. Rather, both parties failed to appear and the Court (Abramson, J.) assumed that the action had been abandoned or settled.

## CONCLUSION

Based on the foregoing, the Appellant, Riverbend Condo Association, respectfully requests that this Honorable Court:

A. Reverse the decision of the trial court; and,

B. Rule that *res judicata* does not bar the second suit; and,

C. Grant such further relief as may be just and appropriate.

## ORAL ARGUMENT

The Appellant waives oral argument.

**APPELLANT'S CERTIFICATION**

Undersigned counsel hereby certifies that the appealed decision is in writing, a copy of which is appended to this brief. Undersigned counsel further certifies that this brief complies with Sup. Ct. R. 26 (7) and contains fewer than 9,500 words.

Respectfully submitted,
Riverbend Condo Association
By and through their attorneys,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that this brief has been electronically filed with the New Hampshire Supreme Court on this 19th day of August, 2019 and further certifies that a copy of this brief has been electronically submitted to John Curran, Esq., counsel for the Defendant.

/s/ Joseph Prieto
Joseph Prieto, Esq.

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