

PROCTER V. FEZ CLUB, 1966-NMSC-083, 76 N.M. 241, 414 P.2d 219 (S. Ct. 1966)

**RAY PROCTER and PAULINE PROCTER, Plaintiffs-Appellants,
vs.
FEZ CLUB, a corporation, Defendant-Appellee**

No. 7845

SUPREME COURT OF NEW MEXICO

1966-NMSC-083, 76 N.M. 241, 414 P.2d 219

May 09, 1966

Appeal from the District Court of Bernalillo County, Macpherson, Jr., Judge

COUNSEL

McATEE, TOULOUSE, MARCHIONDO, RUUD & GALLAGHER, Albuquerque, New Mexico, Attorneys for Appellants.

MODRALL, SEYMOUR, SPERLING, ROEHL & HARRIS, Albuquerque, New Mexico, Attorneys for Appellee.

JUDGES

WOOD, Judge, wrote the opinion.

WE CONCUR:

DAVID W. CARMODY, C.J., J. C. COMPTON, J.

AUTHOR: WOOD

OPINION

WOOD, Judge, Court of Appeals.

{1} This appeal involves a dismissal under Rule 41(e) (§ 21-1-1(41)(e), N.M.S.A. 1953). The complaint was filed July 20, 1962. The answer was filed August 15, 1962. Plaintiff filed a motion for immediate trial setting on November 13, 1963. Defendant's motion to dismiss was filed September 1, 1964. The order dismissing under Rule 41(e) was filed December 21, 1964.

{2} Plaintiffs' motion to set the case for trial, made prior to defendant's motion to dismiss, prevents a dismissal under Rule 41(e). *Martin v. Leonard Motor-EI Paso*, 75 N.M. 219, 402 P.2d 954; *Foster v. Schwartzman*, 75 N.M. 632, 409 P.2d 267; *Kennedy v. Nelson*, 76 N.M. 299, 414 P.2d 518, decided March 21, 1966.

{3} The order of the trial court is reversed. The case is remanded with instructions to reinstate the complaint and to place the cause on the trial docket.

{4} IT IS SO ORDERED.

WE CONCUR:

DAVID W. CARMODY, C.J., J. C. COMPTON, J.