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NO. COA06-580

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

NORTHLAND CABLE TELEVISION,
INC. d/b/a NORTHLAND CABLE

Plaintiff,

v.

Macon County
No. 03 CVS 424

HIGHLANDS CABLE GROUP, LLC,
and NINIAN ULYSSES BOND,
INDIVIDUALLY,

Defendants,

and

THE HIGHLANDS CABLE GROUP, LP,

Additional Party Defendants.

Appeal by defendants from order and judgment entered 31 August 2005 and 9 September 2005, respectively, by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 16 November 2006.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Larry McDevitt, W. Carleton Metcalf and Claire Vujanovic, for plaintiff-appellee.

Creighton W. Sossomon, for defendant-appellants.

JACKSON, Judge.

Northland Cable Television, Inc. ("plaintiff") filed a verified complaint on 27 August 2003 against Highlands Cable Group, LLC and Ninian Ulysses Bond ("defendants") alleging claims of interference with personal property and conversion, interference with contract, trade disparagement, and violation of the Unfair and Deceptive Trade Practices Act of North Carolina. Both plaintiff and defendants are in the business of providing cable television services in the town of Highlands and in Macon County, North Carolina. Defendants' answer, dated 23 April 2004, included allegations of several affirmative defenses and counterclaims alleging malicious damage to property, conversion, tortious interference with a contract, trespass, and violation of our state's Unfair and Deceptive Trade Practices Act. Defendants' answer stated that two documents, Exhibits A and B, were attached to the answer, and were to be incorporated by reference into the answer. However, when plaintiff was served with defendants' pleading, no documents were attached.

On 6 May 2004, plaintiff served defendants with a request for a written statement of monetary relief sought in connection with defendants' counterclaims, including defendants' claim for punitive damages. Defendants failed to produce a written statement of monetary relief sought within thirty days as required by Rule 8 of our rules of civil procedure. See N.C. Gen. Stat. § 1A-1, Rule 8(a)(2) (2003). Plaintiffs filed a reply and motion to dismiss on 25 May 2004, and filed a subsequent motion to dismiss or, in the alternative, motion to compel, on 26 July 2004. Plaintiff's 26

July 2004 motion sought an order compelling defendants to respond fully and completely to plaintiff's request for a written statement of monetary relief sought, along with plaintiff's costs and attorneys' fees associated with the preparation of the motion, pursuant to Rule 37 of our rules of civil procedure.

The parties entered into a consent order filed 13 September 2004, in which defendant was ordered to produce a written statement of monetary relief sought no later than 20 September 2004. Plaintiff reserved its right to assert its request for costs and attorneys' fees at a later time, along with the ability to pursue other remedies, should defendants fail to comply with the terms of the consent order. Defendants subsequently failed to produce a written statement of monetary relief sought by 20 September 2004, as ordered.

On 20 September 2004, plaintiff filed a motion to compel verification of answers to interrogatories, and motion to dismiss defendants' counterclaim or, in the alternative, motion to compel the production of documents. Plaintiff served its first set of interrogatories on defendants on 16 April 2004, along with its first request for production of documents. Defendants then served plaintiff with its objections and responses to plaintiff's interrogatories on 20 May 2004, however the objections and responses were not verified in writing under oath by either defendant. Defendants' objections and responses to the interrogatories and request for the production of documents alleged that several of the documents requested were privileged. In

addition, plaintiff still had not received copies of Exhibits A and B which were alleged to have been attached to defendants' answer. Plaintiff served defendants with a second request for the production of documents on 22 July 2004, specifically requesting production of Exhibits A and B. In the 20 September 2004 motion, plaintiff also asked the court to award it costs and attorneys' fees associated with the preparation, filing, and hearing of this motion, pursuant to Rule 37.

On 30 September 2004, plaintiff filed a motion to dismiss defendants' counterclaims and a motion for sanctions based upon defendants' failure to comply with the parties' 13 September 2004 consent order. Again, plaintiff sought as a sanction, an award of attorneys' fees and costs in connection with the preparation, filing, and hearing of this motion, along with the fees and costs associated with plaintiff's original motion to compel filed 22 July 2004. Defendants subsequently provided plaintiff with a partial written statement of monetary relief sought on 7 October 2004.

In a discovery order entered 4 October 2004 - the result of a hearing held 20 September 2004 - defendants were ordered to produce, by 12 October 2004, full and specific responses to plaintiff's first set of interrogatories signed under oath by the party making them. Defendants also were ordered to produce several of the specific documents as requested by plaintiff by 12 October 2004. Any documents which defendants claimed were protected by privilege or were confidential were ordered to be provided to the trial court for an *in camera* inspection by 5 October 2004. The

trial court further ordered defendant Bond to appear for a deposition on 26 October 2004, and plaintiff was awarded attorneys' fees and costs in the amount of \$2,168.91, which was to be paid by defendants no later than 1 November 2004.

Defendants did not comply with the trial court's 4 October 2004 discovery order in that they not only failed to produce any documents to the trial court for an *in camera* inspection by the 5 October 2004 deadline, but they also failed to comply fully with the order to produce documents. Although defendant Bond did notify plaintiff that he would be unable to appear as ordered at the 26 October 2004 deposition, he did not provide plaintiff with information regarding the nature and specifics of his alleged "family emergency." Moreover, defendants failed to pay plaintiff's attorneys' fees and costs as ordered by 1 November 2004. On 9 November 2004, plaintiff filed a motion to dismiss defendants' counterclaims, motion to strike defendants' answer, and motion for sanctions, all arising out of defendants' failure to comply with the trial court's 4 October 2004 discovery order.

On 9 November 2004, defendant Bond filed a motion for protective order, stating that he would be unable to appear at a scheduled 11 November 2004 deposition to which he had been subpoenaed by plaintiff. Defendant Bond's counsel stated that Bond had been called to Memphis, Tennessee to help attend to his wife's grandmother who was ill and in need of assistance. However, at his deposition, defendant Bond testified that the reason he was not at

the 11 November 2004 deposition was due to his having to assist his fiancé in getting her grandmother a flu shot in western Tennessee.

In a discovery order entered 1 December 2004, the trial court found that defendants had failed to produce a written statement of monetary relief sought by 20 September 2004 as ordered, and that the statement produced on 7 October 2004 failed to state the amount of defendants' claim for punitive damages. The trial court also found that defendants failed to produce any documents for the ordered *in camera* inspection, they failed to comply fully with the order for the production of documents, defendant Bond failed to appear to be deposed as ordered and subpoenaed on two separate occasions, and defendants failed to pay plaintiff's attorneys' fees and costs as ordered. The trial court specifically stated that "[t]he actions of the Defendant Bond and his co-Defendants . . . demonstrate a pattern of failure not only to comply with the Rules of Civil Procedure, but perhaps more importantly, a failure to comply with the Orders of this Court." Defendant Bond was then ordered to appear for a deposition on 15 December 2004. Defendants also were ordered to produce a full and complete written statement of monetary relief sought and to fully comply with the order for the production of documents no later than 15 December 2004. The trial court reserved ruling on defendant Bond's motion for a protective order and plaintiff's remaining motions until 15 December 2004. On 15 December 2004, defendants finally provided a statement of monetary relief sought, and provided plaintiff with some, but not all, of the documents requested.

After scheduling three dates for defendant Bond's deposition, he appeared and was deposed on 15 December 2004. During the deposition, defendant Bond alluded to "thousands of photographs" which he had in his possession, but which he had failed to produce in discovery. Defendant Bond then admitted that he failed to produce the thousands of photographs because he did not believe that photographs were documents, or alternatively, he had not had an opportunity to review them. Defendant Bond also stated that he possessed several additional documents which had not been turned over to plaintiff as requested and ordered. Throughout the deposition, defendant Bond repeatedly gave incomplete and evasive answers to plaintiff's questions.

In a motion dated 11 January 2005, plaintiff sought sanctions and the dismissal of defendants' counterclaims due to defendants' repeated failures to comply fully with the trial court's previous discovery orders. Plaintiff also sought to have defendants' answer stricken and an award of attorneys' fees and costs entered. On 2 February 2005, plaintiff's counsel filed an affidavit in support of plaintiff's request for attorneys' fees. The affidavit provided that plaintiff's counsel's total fees and costs in connection with plaintiff's various motions to compel discovery, motions for sanctions, and motions to dismiss, along with hearings on the motions, totaled \$26,298.67. A hearing on plaintiff's 11 January 2005 motion was held 24 January 2005. In an order entered 24 March 2005, the trial court again found as fact that "[d]efendants have engaged in a pattern and practice of failing to comply with the

Rules of Civil Procedure and the Orders of this Court with respect to discovery matters." The trial court, after considering lesser sanctions, ordered defendants' counterclaims to be stricken and dismissed with prejudice. Defendants were ordered to pay the original award of attorneys' fees and costs, with interest, no later than 25 March 2005. Defendants also were ordered to pay, no later than 1 July 2005, plaintiff's additional attorneys' fees and costs in the amount of \$26,298.67.

On 4 February 2004, defendants filed an objection to plaintiff's affidavit in support of the motion for attorneys' fees and a motion for a hearing on the requested fees. Defendants' objection was overruled and their motion was denied in an order entered 28 March 2005.

As a result of information learned during defendant Bond's deposition, plaintiff filed a motion for leave to amend its complaint on 1 June 2005. Specifically, plaintiff sought to add Highlands Cable Group, LP as an additional defendant, and to substitute The Cable Group, LLC for defendant Highlands Cable Group, LLC. During his deposition, defendant Bond testified that Highlands Cable Group, LLC was now known as The Cable Group, LLC. He also testified that The Cable Group, LLC is the general partner of Highlands Cable Group, LP. Defendant Bond also stated that Highlands Cable Group, LP was the actual provider of cable service to residences in Macon County and the town of Highlands, North Carolina.

On 1 July 2005, defendants filed a motion pursuant to civil procedure Rule 60 seeking relief from the trial court's 24 March 2005 Order. On 7 July 2005, plaintiff filed motions to shorten the time for hearing, strike defendants' answer, and show cause why defendants should not be held in civil and criminal contempt. Plaintiff's motion was based upon defendants' failure to comply with the trial court's 24 March 2005 discovery order.

A hearing on the parties' motions was held 18 July 2005. In a detailed order entered 31 August 2005, the trial court granted plaintiff's motion to amend its complaint. With regards to plaintiff's motion to amend its complaint to add a new defendant and change the name of an existing defendant, the trial court specifically found that:

2. Highlands Cable Group, LLC's name has been changed and is now known by the name "Cable Group, LLC" (hereinafter referred to as "LLC").
3. Bond and LLC, in their Answer and Counterclaim, responded as if LLC were the corporate Defendant who controls the cable television system complained of. Examples of Defendants' responses are as follows:
 - a. Admitted the allegations in paragraph 4 of Plaintiff's Complaint which alleged that LLC "is in the business of providing cable television programming services to the residences and businesses in the Town of Highlands and Macon County, North Carolina."
 - b. Under the heading "Sixth Defense", stated that LLC installs service connections to customers.
 - c. Alleged in paragraphs 1 and 2 of the Counterclaim that LLC and Plaintiff are competing

- providers of cable television services.
- d. Alleged in numerous paragraphs in the Counterclaim that Plaintiff vandalized LLC's property which includes the head-end premises as well as various equipment used in operating a cable system.
4. In response to interrogatory number 7 of Plaintiff's First Set of Interrogatories, LLC asserted for the first time that it does not provide cable service. Instead it asserted that "The Highlands Cable Group Limited Partnership" (hereinafter referred to as "LP") is the provider of cable service. Inconsistently, in response to Interrogatory number 10, LLC responded that Plaintiff tampered with "its" (LLC's) cable service equipment.
 5. Defendant Bond is the Managing Member of LLC.
 6. The only other member of LLC, Jim Orton, has limited, if any, contact with LLC or LP.
 7. LLC is the General Partner of LP.
 8. The Limited Partners of LP do not meet regularly. Bond, at his discretion, holds meetings approximately once a year among those Partners who happen to be in town. No minutes are recorded at these meetings.
 9. During the relevant period of time and continuing today, Defendant Bond exerts complete managerial, financial, and business control over both LLC and LP. Defendant Bond created and operates the cable television system which Defendants Bond and LLC now claim is owned and operated by LP. Defendant Bond's domination of this operation includes determining the policies and business practices of all acts undertaken by both LLC and LP, controlling the share distribution and sales of LP, and controlling all finances including, but not limited to, the billing of customers, the hiring and firing of employees and subcontractors, determining wages and hours of said employees and subcontractors, and deciding when expenditures need to be made in service

- of the cable system or for his own personal benefit.
10. Defendants did not contend that they would be prejudiced either by the joinder of LP as a party Defendant or by the name change in the pleadings caption from "Highlands Cable Group, LLC" to "Cable Group, LLC".
 11. Defendants will suffer no prejudice due to either the joinder of LP as a party Defendant or the name change from "Highlands Cable Group, LLC" to "Cable Group, LLC" in the pleadings caption.
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30. Defendants LLC and LP function as a single business enterprise under the dominion and control of Defendant Bond. LLC and LP have no separate roles independent of each other or of Defendant Bond.
 31. The financial function of Bond, The Ninian U. Bond Living Trust, LLC, and LP bears a striking resemblance to the elusive pea under the shell.

The trial court found that the home in which defendant Bond resided was titled in The Ninian U. Bond Living Trust, LLC ("the Trust"), of which defendant Bond is the trustee and beneficiary. The trial court also found that Highlands Cable Group, LP pays defendant Bond's car payments, along with all utilities, house payments, and bank loan payments associated with the home in which defendant Bond resides. Based upon these findings, the trial court concluded that both The Cable Group, LLC and Highlands Cable Group, LP "are mere instrumentalities or alter egos of Defendant Bond, generally, and specifically as it relates to the matters before this Court." The trial court then ordered, as sanctions for defendants' repeated failure to comply with the prior discovery orders, that defendants' answer be stricken and the litigation was to proceed as though no

answer had been filed. The trial court entered judgment against all defendants, including the newly added defendant. The trial court also ordered that the 24 March 2005 order awarding plaintiff with attorneys' fees and costs be converted into a judgment against all defendants jointly and severally, with interest as allowed by law. On 9 September 2005, a judgment was entered against all defendants in the amount of \$26,796.54. Defendants subsequently paid the full amount of the judgment plus interest on 14 September 2005.

Defendants appeal from both the 31 August 2005 order and the judgment entered 9 September 2005. However, defendants' assignments of error and brief deal solely with the 31 August 2005 order, therefore defendants' appeal from the 9 September 2005 judgment is deemed abandoned. N.C. R. App. P. 10(a) and 28(a) (2006).

On appeal defendants contend the trial court exceeded its authority and erred in ordering sanctions against defendants Bond and Highlands Cable Group, LLC, or The Cable Group, LLC, which included the striking of defendants' answer and entering default against the original defendants.

Rule 37(b)(2) of our rules of civil procedure provides that when a party "fails to obey an order to provide or permit discovery," the trial court may enter, among other things, "[a]n order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." N.C. Gen.

Stat. § 1A-1, Rule 37(b)(2) (2005). “Sanctions under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion.” *Clark v. Penland*, 146 N.C. App. 288, 290-91, 552 S.E.2d 243, 245 (2001) (quoting *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995)). A trial court will be found to have abused its discretion only upon a showing that the trial court’s ruling is “manifestly unsupported by reason.” *Id.* at 291, 552 S.E.2d at 245 (quoting *Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564, *cert. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996)).

In the instant case, the trial court made numerous findings of fact concerning defendants’ repeated failure to comply with plaintiff’s requests for discovery and the trial court’s own numerous discovery orders. Defendants have failed to assign error to any of the trial court’s thirty-one findings of fact. Findings of fact not assigned as error are deemed to be supported by competent evidence, and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Thus, all of the trial court’s findings which led to the order of sanctions are deemed binding on appeal. The trial court specifically stated that it considered lesser sanctions than those imposed in its order, and it concluded that the lesser sanctions were not appropriate given defendants’ “pattern of willful noncompliance.” The trial court also considered greater sanctions and concluded that greater sanctions, “including the incarceration of Defendant Bond and

fining of Defendants, while appropriate, will not be applied." Based upon the record before us, we hold the trial court did not abuse its discretion in ordering sanctions against defendants Bond and Highlands Cable Group, LLC, or The Cable Group, LLC, which included the striking of their answer and entry of default.

Defendants also contend the trial court erred in applying the imposed sanctions against the newly added defendant, Highlands Cable Group, LP, in addition to the original defendants. Although defendants did not object to the joinder of Highlands Cable Group, LP as a new party, nor did they object to the relation back of the amendment, defendants did however object to the immediate striking of the answer and entry of default as it relates to the newly added defendant.

While Rule 15 of our rules of civil procedure permits a party to amend its complaint to add a new defendant, our courts have held that an amendment to a complaint which adds a new party may not relate back to the filing date of the original complaint. See *White v. Crisp*, 138 N.C. App. 516, 530 S.E.2d 87 (2000); *Crossman v. Moore*, 115 N.C. App. 372, 444 S.E.2d 630 (1994), *aff'd*, 341 N.C. 185, 459 S.E.2d 715 (1995). Thus, the trial court acted properly in permitting plaintiff to amend its complaint and add defendant Highlands Cable Group, LP to the action, however the trial court did not have the authority to permit the amendment adding the new defendant to relate back to the date of the original complaint. Further, while the imposition of sanctions pursuant to Rule 37 may be within the discretion of the trial court, we cannot hold that

the imposition of sanctions upon a separate and newly added corporate defendant are proper when the new defendant did not commit the acts which serve as the basis for the sanctions. In the instant case, defendants Bond and Highlands Cable Group, LLC, or The Cable Group, LLC, were the parties responsible for failing to comply with the numerous prior discovery orders. Defendant Highlands Cable Group, LP is a separate and distinct legal entity from the other defendants, and was not a party to this action at the time the discovery orders were entered. As such, defendant Highlands Cable Group, LP may not be subject to the sanction of having its answer stricken and having default entered against it immediately upon its joinder as a party.

We hold the trial court acted properly in allowing the joinder of defendant Highlands Cable Group, LP as a new defendant, however the trial court abused its discretion in imposing sanctions against the newly added defendant. The trial court's striking of defendants' answer and entry of default therefore is reversed as to defendant Highlands Cable Group, LP only.

Affirmed in part, reversed in part.

Judges GEER and LEVINSON concur.

Report per Rule 30(e).