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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-936

Filed: 18 July 2017

Mecklenburg County, No. 15 CVS 12638

THOMAS & CRADDOCK SALES, INC., a North Carolina Corporation, Plaintiff,

v.

GIFT BAG LADY, INC., d/b/a Bag Lady, a California Corporation, Defendant.

Appeal by Defendant from an order imposing discovery sanctions entered 28 March 2016 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 March 2017.

Thad A. Throneburg, for Plaintiff-Appellee.

Lawrence P. Margolis, for Defendant-Appellant.

INMAN, Judge.

Gift Bag Lady, Inc., d/b/a Bag Lady (“Defendant”) appeals from an order granting a motion for sanctions in favor of Thomas & Craddock Sales, Inc. (“Plaintiff”), striking Defendant’s answer and counterclaim, dismissing the latter with prejudice, entering default against Defendant, limiting the introduction of certain evidence by Defendant, and awarding attorney’s fees and costs against Defendant. Defendant contended in its proposed issues on appeal that the trial

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court's order is contrary to Rule 37 of the North Carolina Rules of Civil Procedure and that, in the alternative, the trial court erred by declining to consider lesser sanctions. But in its briefing, Defendant abandons those arguments and instead seeks reversal because no verbatim transcript of the hearing on the motion for sanctions exists. After careful review, we affirm the trial court's order.

I. Factual and Procedural History

Plaintiff initiated this lawsuit against Defendant, a California corporation, on 7 July 2015. Trial was set for 31 March 2016. As part of the pre-trial discovery process, Plaintiff served on Defendant two separate requests for the production of documents, on 17 August and 1 October 2015.

When Defendant had not responded to Plaintiff's first request by 25 October 2015, Plaintiff's counsel sent an email informing Defendant's counsel that he had not received the requested documents. Defendant's counsel did not respond to that email. On 27 October 2015, Plaintiff sent a letter to Defendant's counsel to inquire about when Plaintiff could expect to receive a response to the first request for production.

Defendant's counsel responded by letter on 3 November 2015, enclosed an order for a 30-day extension of time as to Plaintiff's second request for production, and stated he anticipated providing responses to both sets by 3 December 2015. When Defendant failed to meet that anticipated deadline, Plaintiff's counsel sent another letter to Defendant's counsel dated 9 December 2015. Defendant again failed

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to respond. Plaintiff's counsel then sent another email, with the 9 December 2016 letter attached, requesting that defense counsel call to discuss how to proceed. Defense counsel did not respond.

On 21 December 2015, counsel for Defendant telephoned Plaintiff's counsel, stating that he had been unable to comply with the requests because: (1) Defendant had not responded to counsel's attempted communications; and (2) Defendant had failed to produce the requested documents. During the telephone call, Defendant's counsel requested additional time to continue efforts to obtain the documents from Defendant. Plaintiff's counsel informed defense counsel that Plaintiff planned to file a Rule 37 motion due to Defendant's failure to comply with its requests.

On 8 January 2016, Plaintiff filed its motion for sanctions or, in the alternative, to compel discovery. On 16 February 2015, at a hearing on the motion, counsel for Defendant delivered roughly 1,000 documents to Plaintiff. In order to give both parties time to review the documents, the trial court reset the hearing to a later date. In emails between counsel and the trial court, both counsel declined the express offer of the court to schedule an on-the-record discussion and instead consented to an off-the-record telephone conference held 25 February 2016.

Following the 25 February conference, the trial court announced its decision to impose sanctions against Defendant via email dated 11 March 2016, and instructed Plaintiff's counsel to draft and circulate a proposed order. In the email, Judge

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Caldwell explained in detail the reasons for his decision, including the untimeliness of Defendant's responses, the deficiencies in Defendant's production, the reasonableness of Plaintiff's requests, and the prejudice to Plaintiff caused by the delay. The email also explained why the trial court considered the sanctions imposed more appropriate than lesser sanctions.

The court entered its order on 28 March 2016 striking Defendant's answer and counterclaim, and dismissing with prejudice the latter, entering default against Defendant, and limiting the introduction of particular evidence. The order includes detailed findings of fact concerning the case's procedural history, the documents requested and produced, the nature of the discovery violations, and the prejudice suffered by Plaintiff, as well as a finding that the trial court had considered lesser sanctions.

Defendant entered notice of appeal. In perfecting its appeal, Defendant ordered a transcript of the 16 February 2016 hearing pursuant to Rule 7(a)(1) of the North Carolina Rules of Appellate Procedure. Defendant then learned that no recording of the hearing existed, and the trial court's courtroom clerk informed him that the hearing was not recorded "through human error or otherwise." Defendant obtained an extension of time to serve the proposed record on appeal, but undertook no further efforts to reconstruct the hearing or provide a narration of the hearing consistent with Rule 9(c)(1).

II. Analysis

Defendant’s proposed issue on appeal challenges the trial court’s order on the grounds that the order is contrary to Rule 37 of the North Carolina Rules of Civil Procedure or, in the alternative, that the trial court failed to adequately consider lesser sanctions. But in its briefing, Defendant argues only that reversal is necessary “[b]ecause of the lack of any recordings of the proceedings, [and] there is no objective criteria by which the Appellate Court can determine whether Judge Caldwell [erred]” Defendant’s brief includes no discussion of Rule 37 criteria or lesser sanctions. As “[i]ssues not presented and discussed in a party’s brief are deemed abandoned[.]” N.C. R. App. P. 28(a) (2017), we consider only the argument that reversal is necessary due to a lack of a trial transcript. Because we conclude that Defendant’s argument is without merit, we affirm.

The absence of a verbatim transcript of proceedings alone is insufficient to show reversible error. *In re Shackelford*, ___ N.C. App. ___, ___, 789 S.E.2d 15, 18 (2016) (“[T]he unavailability of a verbatim transcript does not *automatically* constitute reversible error in every case.”) (emphasis in original). An appellant must also show prejudice, *id.* at ___, 789 S.E.2d at 18, which is not present where “there are ‘means . . . available for [a party] to compile a narration of the evidence, i.e., reconstructing the testimony with the assistance of those persons present at the hearing.’ ” *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) (quoting

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Miller v. Miller, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988)) (holding that the absence of recorded testimony did not prejudice the respondent or preclude meaningful appellate review where no effort to reconstruct missing portions of a transcript was made, and that reconstruction of a hearing may be conducted through narration before the trial court in settling the record on appeal pursuant to N.C. R. App. P. 9(c)(1)). Thus, to show reversible error for lack of a verbatim transcript, a party must “first . . . [make] sufficient efforts to reconstruct the hearing in the absence of a transcript.” *Matter of Woodard*. ___ N.C. App. ___, ___, 791 S.E.2d 109, 112 (2016) (holding sufficient efforts were made where appellant’s counsel sent letters to six individuals present at a hearing requesting their recollections thereof and included in the record their responses and notes as well as a memorandum from the judge presiding at the hearing). “General allegations of prejudice are insufficient to show reversible error [resulting from the lack of a verbatim transcript]” *Shackleford* at ___, 789 S.E.2d at 18. Resolution of an appeal on these grounds “must be made on a case-by-case basis depending on the unique circumstances of each particular case.” *Woodard* at ___, 791 S.E.2d at 116.

Here, it appears from the record that Defendant made no attempt to reconstruct the missing testimony. Nor has Defendant argued specifically how it was prejudiced by the absence of such evidence. Defendant makes only the blanket assertion that it “has been prejudiced by [the lack of a transcript].” Although a

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detailed email from Judge Caldwell is included in the record,¹ the record contains no evidence of any efforts by Defendant to gather notes and recollections, contact individuals present at the hearing, or attempt to locate and include other sources from which a substitute for the transcript could be constructed. Therefore, we disagree with Defendant's contention that the absence of verbatim transcripts of the proceedings requires reversal of the trial court's order.²

Notwithstanding Defendant's apparent lack of effort in reconstructing the transcript, Judge Caldwell's email, together with the other pleadings and documents in the record, provide a narrative of the proceedings sufficient for meaningful appellate review. The trial court's email recites the deficiencies in Defendant's document production, the untimeliness of the productions, the importance of the unproduced documents to the action, the reasonableness of Plaintiff's discovery requests, and the prejudice suffered by the Plaintiff. The email also noted that "this is an extreme measure, and justified only when no other sanction will sufficiently do justice. In my judicial career, I have rarely allowed these motions. Of course, they

¹ It is unclear from the settled record which party sought to include the email from Judge Caldwell; Defendant's argument in its brief ignores the email, while Plaintiff contends the email, along with the other documents in the record, provides a sufficient alternative to a verbatim transcript.

² We further observe that Defendant consented to resetting the hearing as an off-the-record conference call with opposing counsel, rejecting an express offer from the court to hold an on-the-record telephone conference. "[A] legal error . . . is not a cause for complaint because the error occurred through the fault of the party now complaining. . . . [T]he party who induces an error can't take advantage of it on appeal, or more colloquially, you can't complain about a result you caused." *Romulus v. Romulus*, 215 N.C. App. 495, 528 715 S.E.2d 308, 329 (2011) (internal citations and quotations omitted).

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need to be granted in appropriate cases. I am convinced this is such a case.” The email continues, specifically instructing Plaintiff’s trial counsel to include in his proposed order that the trial court considered lesser sanctions, as is reflected in the final order.

Given that discovery sanction orders are reviewed for abuse of discretion, *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175 (2010), and “should not be disturbed unless manifestly unsupported by reason[,]” *Cheek v. Poole*, 121 N.C. App. 370, 372, 465 S.E.2d 561, 563 (1996) (internal quotations and citations omitted), Judge Caldwell’s email explaining the reasoning behind his decision—together with the discovery requests, responses, motions, and orders in the record on appeal—provide an adequate record from which we could review the order. Also, Defendant has failed to challenge any findings of fact in the order and they are therefore binding on appeal. *Fayetteville Publ’g Co. v. Advanced Internet Technologies, Inc.*, 192 N.C. App. 419, 426, 665 S.E.2d 518, 523 (2008). However, as Defendant has abandoned its appeal on substantive grounds, we need not reach this analysis. *See, e.g., Woodard*, ___ N.C. App. at ___, 791 S.E.2d at 116, n. 3 (affirming a lower court’s order where an adequate alternative to a verbatim transcript was provided and the appellant sought reversal only for “depriv[ation] of the ability to obtain meaningful appellate review due to the unavailability of a verbatim transcript . . . [instead of] also

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argu[ing], in the alternative, specific errors that appear on the face of the order from which appeal is being taken . . .”).

Because Defendant has not “satisfied [its] burden of attempting to reconstruct the record[,]” *State v. Hobbs*, 190 N.C. App. 183, 186, 660 S.E.2d 168, 170 (2008), has failed to allege more than “general allegations of prejudice[,]” *Shackleford* at ___, 789 S.E.2d at 18, and the record contains an adequate alternative to a verbatim transcript, *Woodard* at ___, 791 S.E.2d at 116, Defendant has failed to show reversible error for deprivation of meaningful appellate review.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).