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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-781

Filed: 3 October 2017

Mecklenburg County, No. 13 CVS 9860

SUDESH H. KEDAR, Plaintiff

v.

HEMANT PATEL, Defendant

Appeal by defendant from order entered 23 November 2015 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 August 2017.

*The Honnold Law Firm, P.A., by Bradley B. Honnold, for plaintiff-appellee.*

*Wesley S. White, for defendant-appellant.*

CALABRIA, Judge.

Where plaintiff sought sanctions against defendant, and the trial court adequately considered lesser sanctions before entering its order, the trial court did not abuse its discretion in imposing sanctions. We affirm.

I. Factual and Procedural Background

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On 28 May 2013, Sudesh Kedar (“plaintiff”) filed a complaint against Hemant Patel (“defendant”). In his complaint, plaintiff first noted that he had married his former wife, Kiran Kedar (“Kiran”), on 9 October 1999; that he and Kiran had separated on 28 October 2010; and that a judgment of absolute divorce was entered on 28 March 2013. He then alleged that, during plaintiff’s marriage to his now ex-wife, defendant engaged in an illicit and adulterous sexual relationship with Kiran. Plaintiff alleged various tortious interferences with his enjoyment of his marriage, including an allegation that defendant’s conduct ultimately caused the separation and divorce. On 20 June 2013, defendant filed an answer and motion to dismiss. The motion to dismiss alleged that plaintiff’s complaint failed to state a claim, and that the applicable statute of limitations had passed. Defendant further raised the defenses of estoppel and waiver and unclean hands.

On 26 November 2013, plaintiff filed a motion to compel discovery. The matter was heard on 8 January 2014, and neither defendant nor counsel for defendant appeared. On 27 January 2014, the trial court entered an order granting plaintiff’s motion. This order found, *inter alia*, that (1) defendant’s responses to plaintiff’s first set of interrogatories were not verified; (2) defendant declined to respond to various letters from plaintiff’s counsel; (3) defendant invoked his Fifth Amendment right in response to certain interrogatories and requests for documents; (4) an immunity order protected defendant from prosecution, such that his Fifth Amendment privilege

did not apply; and (5) the trial court reviewed plaintiff's counsel's fees and found them reasonable. The trial court therefore concluded that defendant's failure to comply with discovery obligations justified the imposition of sanctions. The trial court ordered defendant to sign and verify full interrogatory responses, produce all requested documents, and pay plaintiff's attorney's fees in the amount of \$1,142.00.

On 11 March 2015, plaintiff filed a motion for contempt and for show cause order, alleging that defendant failed to fully respond to interrogatories and to fully provide requested documents. The motion also alleged that defendant had failed to pay plaintiff's attorney's fees as ordered. On 26 August 2015, plaintiff filed an amended motion for contempt and for show cause order. This amended motion alleged that defendant was still in noncompliance with the trial court's order compelling discovery and awarding attorney's fees.

On 22 September 2015, the trial court conducted a hearing on plaintiff's amended motion for contempt. On 23 November 2015, the trial court entered a written order on the motion. In this order, the trial court found that defendant still had not complied with discovery requests, still had not produced requested documents, and remained in noncompliance with the trial court's 27 January 2014 order. The trial court further found that plaintiff's requested attorney's fees were reasonable. The trial court therefore imposed the following sanctions upon defendant: (1) defendant's answer was stricken; (2) the trial court entered a default

against defendant; and (3) the trial court awarded attorney's fees to plaintiff in the amount of \$4,091.82. The trial court further ordered defendant to comply with its previous order to produce requested documents. In light of sanctions, the trial court declined to find defendant in contempt.

Defendant filed timely notice of appeal to this Court. On 21 September 2016, plaintiff moved to dismiss defendant's appeal, alleging various delays in filing the record on appeal. On 7 October 2016, this Court granted plaintiff's motion to dismiss the appeal. On 24 October 2016, defendant filed a petition for rehearing, alleging that defendant's delays were nonjurisdictional and did not justify dismissal. On 7 November 2016, this Court granted defendant's petition for rehearing.

## II. Sanctions

In his sole argument on appeal, defendant contends that the trial court erred in entering its order on sanctions. We disagree.

### A. Standard of Review

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996).

"[A]s Rule 37(a)(4) requires the award of expenses to be reasonable, the record must contain findings of fact to support the award of any expenses, including

attorney's fees." *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988).

B. Analysis

Defendant first contends that the trial court erred in awarding sanctions because plaintiff sought a contempt order, rather than sanctions. This is demonstrably false. Plaintiff's amended motion for contempt specifically contained the following prayer for relief:

1. That an Order to Show Cause be issued against the Defendant to show cause, if any, why he should not be held in willful civil and/or criminal contempt for violating prior Orders of the Court;
2. That an Order be issued ordering Defendant to immediately comply with the terms of the prior Orders of this Court;
3. That the Court enter an Order *sanctioning Defendant for his past and present contempt* and requiring Defendant to pay Plaintiff's reasonable attorney's fees; and
4. For such other relief as the Court deems just and proper.

(Emphasis added.) It is clear, therefore, that although the motion was captioned as a motion for contempt and to show cause, it included a request for sanctions. The trial court did not abuse its discretion in granting the requested relief.

Defendant next contends that the trial court did not consider lesser sanctions. Defendant relies upon *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618

S.E.2d 819, 828 (2005), for the principle that a court may only strike a party's pleadings as a sanction after considering lesser sanctions. While the principle is true, defendant's argument is demonstrably false. In the instant case, the trial court's order on sanctions contained the following finding:

The Court has considered the sanctions available to it under to N.C. Gen. Stat. Chapter 5A and N.C. Gen. Stat. § 1A-1, Rule 37, *including the appropriateness of lesser sanctions*. The Court has considered that Defendant has failed to voluntarily fulfill his obligations under the Rules of Civil Procedure, that he has failed to obey this Court's Order to produce discovery, even when sanctioned at that time with an award of attorney's fees, and that Defendant waited until after the present motion was filed and until a few days before this matter was to be heard to make an effort to produce some information and, yet, he still did not fully comply as ordered.

(Emphasis added.) This finding is even more detailed than the finding in *Pedestrian Walkway Failure*, which this Court found adequately considered lesser sanctions. As such, we hold that the trial court in the instant case adequately considered lesser sanctions.

Because the trial court did not abuse its discretion in granting the relief plaintiff sought, and the trial court adequately considered lesser sanctions, we hold that the trial court did not abuse its discretion in entering its order imposing sanctions.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

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*Opinion of the Court*

Report per Rule 30(e).