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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-586

Filed: 19 December 2017

Mecklenburg County, No. 16 CVS 12490

VIVIAN PAIR, Plaintiff,

v.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS
MEDICAL CENTER-UNIVERSITY, Defendant.

Appeal by plaintiff from order entered 31 January 2017 by Judge Jesse B.
Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals
15 November 2017.

Pamela A. Hunter for plaintiff-appellant.

*Lincoln Derr PLLC, by Scott S. Addison and Tricia M. Derr, for defendant-
appellee.*

ARROWOOD, Judge.

Vivian Pair (“plaintiff”) appeals from an order granting Charlotte-Mecklenburg Hospital Authority’s (“defendant”) motion to dismiss. For the reasons stated herein, we affirm.

I. Background

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On 20 August 2014, plaintiff filed a complaint against defendant alleging medical malpractice. On 28 July 2015, she voluntarily dismissed the suit, obliging her to pay costs under Rule 41(d). On 13 July 2016, she refiled the suit, and defendant filed a Motion for Costs on 25 August 2016.

On 13 September 2016, a consent order was entered, providing as follows:

[w]ithin thirty (30) days of the entry of this Order, Plaintiff shall pay to Defendant CMHA the total amount of costs . . . Pursuant to N.C. Gen. Stat. § 41(d), failure by Plaintiff to pay to Defendant those amounts set forth above within sixty (60) days of the entry of this Order shall result in dismissal of this action.

(the “Consent Order”). Six days after the order was entered, defendant emailed a copy of it to plaintiff. On 3 October 2016, defendant filed a Certificate of Service for the Consent Order.

The payment period set by the Consent Order elapsed on 14 November 2016;¹ on 18 November 2016, plaintiff notified defendant by email that she was sending payment. Four days later, on receipt of payment, defendant notified plaintiff that it would not cash the check and would be moving to dismiss for late payment under the terms of the Consent Order. Defendant moved to dismiss on 23 November 2016. On 31 January 2017, the trial court granted defendant’s Motion to Dismiss and plaintiff timely appealed from this order.

¹ This interval of 62 days is used because 12 November 2016 fell on a Saturday. See N.C. Gen. Stat. § 1A-1, Rule 6 (2015).

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II. Discussion

On appeal, plaintiff raises two arguments: first, that Rule 58 of the North Carolina Rules of Civil Procedure, which tolls the period in which post-trial motions can be filed, applies in this case to extend the period allotted for payment under Rule 41 of the North Carolina Rules of Civil Procedure; second, that because plaintiff's payment was timely under Rule 58, the doctrine of equitable estoppel bars defendant from moving for dismissal under Rule 41. We address each argument in turn.

A dismissal for failure to comply with a court order is an involuntary dismissal. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2015). On review of an involuntary dismissal, the reviewing court asks “(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment.” *In re Johnson*, 366 N.C. 252, 256, 741 S.E.2d 308, 310 (2012) (citation omitted). Conclusions of law are reviewed *de novo*. *Id.*

A. Rule 58

Plaintiff first contends that under Rule 58, because she was not served with a copy of the Consent Order within three days, her sixty-day period for payment was tolled until she was served. Plaintiff argues that under Rule 58, an order is not entered until it is signed, filed, and served. Plaintiff's contention is without merit.

A plaintiff who voluntarily dismisses an action is liable to the defendant for the costs of that action. N.C. Gen. Stat. § 1A-1, Rule 41(d). If she brings the same

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action against the same defendant without first paying those costs, “the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days If the plaintiff does not comply with the order, the court shall dismiss the action.” *Id.*

Dismissal under Rule 41 is a “mandatory directive[,]” not discretionary. *Welch v. Lumpkin*, 199 N.C. App. 593, 597, 681 S.E.2d 850, 853 (2009). We have repeatedly affirmed dismissal where plaintiffs failed to pay costs under Rule 41(d). *See, e.g., Sanford v. Starlite Disco, Inc.*, 66 N.C. App. 470, 471-72, 311 S.E.2d 67, 68 (1984). Even where a defendant falls only one day afoul of the thirty-day statutory requirement, we have declined to find error in dismissing the action. *Fowler v. Riddle*, 240 N.C. App. 602, 772 S.E.2d 873 (2015) (unpub.).

Under Rule 58, the party who prepares an order is required to serve the opposing party with a copy of that order.² N.C. Gen. Stat. § 1A-1, Rule 58. If service takes longer than three days, the time limits provided by Rules 50(b), 52(b), and 59 are tolled until all parties are served. Rule 58 provides that a judgment “is entered when it is reduced to writing, signed by the judge, and filed with the clerk.” N.C. Gen. Stat. § 1A-1, Rule 58. We have explicitly held that any tolling under Rule 58 “does not affect whether judgment was entered.” *Huebner v. Triangle Research*

² Although the text of Rule 58 refers to “judgments,” it has been extended to orders. *See, e.g., Watson v. Price*, 211 N.C. App. 369, 370, 712 S.E.2d 154, 155, *disc. review denied*, 365 N.C. 356, 718 S.E.2d 398 (2011).

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Collaborative, 193 N.C. App. 420, 424, 667 S.E.2d 309, 311 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 132 (2009). As Rule 58’s service requirement only applies “after the judgment is entered,” a contrary holding would be senseless. N.C. Gen. Stat. § 1A-1, Rule 58. Here, the Consent Order was reduced to writing, signed, and filed on 13 September 2016, meaning that the date from which the sixty-day payment period is calculated is 13 September 2016.

Plaintiff next argues that Rule 58 tolled the Consent Order’s sixty-day period for payment. Plaintiff seeks to apply Rule 58 tolling to the payment required under a Rule 41(d) order. Neither the rule’s text nor our precedent lends any support to this novel approach.

Rule 58 tolls the period allotted for three filings: motions for judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b); motions to amend pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b); and motions for new trials pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. *See also Huebner*, 193 N.C. App. at 424, 667 S.E.2d at 311 (“[Rule 58] expands the time in which a party can bring certain post-trial motions when the judgment is not properly served . . .”). Where other Rules incorporate Rule 58 tolling, they do so explicitly. *See, e.g.,* N.C. R. App. P. 3(c) (“a party must file . . . within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 . . .”).

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We have also held that a consent order is fundamentally a contract between the parties. *See Wells v. City of Wilmington*, 241 N.C. App. 640, 647-48, 774 S.E.2d 355, 360-61 (2015). The manner in which we construe consent orders “is well-established.” *Hemric v. Groce*, 169 N.C. App. 69, 75, 609 S.E.2d 276, 282 (2005). “Where the plain language of a consent judgment is clear,” that language controls. *See Wells*, 241 N.C. App. at 648, 774 S.E.2d at 360-61; *see also Hemric*, 169 N.C. App. at 75, 609 S.E.2d at 282.

Here, the parties agreed to a consent order providing that “pursuant to [Rule 41(d)], failure by Plaintiff to pay Defendant . . . within sixty (60) days of the *entry* of this Order shall result in dismissal of this action.” (emphasis added). Plaintiff thus contracted to pay her Rule 41(d) costs within sixty days of the order’s entry or else have her suit dismissed. As detailed above, the Consent Order was entered on 13 September 2016, meaning that the sixty-day payment period ended on 14 November 2016. *See* N.C. Gen. Stat. § 1A-1, Rule 6 (providing that deadlines falling on weekends are extended to the next business day). Plaintiff did not send payment until 18 November 2016. By the plain language of the Consent Order, plaintiff’s failure to pay by 14 November 2016 justified the trial court’s dismissal of her suit.

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B. Equitable Estoppel

Finally, plaintiff argues that defendant, having agreed to accept payment within sixty days of the entry of the Consent Order, is now estopped from refusing payment and moving for dismissal on the basis of non-payment. This argument rests on plaintiff's belief, discussed *supra*, that she actually paid within the required sixty days.

Because plaintiff did not pay within the required sixty days, equitable estoppel is not applicable. If plaintiff had complied with the Consent Order by making timely payment, dismissal under Rule 41(b) would have been inappropriate, but these are not the facts presented in the case *sub judice*.

III. Conclusion

Under the plain language of Rule 41(d), plaintiff had thirty days from the entry of an order to pay the costs of her previously dismissed case. By consent, defendant agreed to permit a total of sixty days from the *entry* of the order. The Consent Order was entered when reduced to writing, signed by the judge, and filed by the clerk. The trial court's judgment is AFFIRMED.

AFFIRMED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).