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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-630

Filed: 5 June 2018

Cumberland County, No. 15 CVS 8010

GREATER HARVEST GLOBAL MINISTRIES, INC., Plaintiff,

v.

BLACKWELL HEATING & AIR CONDITIONING, INC., Defendant.

Appeal by Plaintiff from orders entered 28 November 2016, 9 December 2016, and 29 December 2016 by Judges Winston Gilchrist, Richard T. Brown, and James M. Webb, respectively, in Cumberland County Superior Court. Heard in the Court of Appeals 16 November 2017.

Hatcher Legal, PLLC, by Nichole M. Hatcher, for Plaintiff-Appellant.

Anderson, Johnson, Lawrence, & Butler, L.L.P., by Steven C. Lawrence, for Defendant-Appellee.

INMAN, Judge.

This appeal arises from a dispute over two air conditioning units installed in a church, and the litigation that followed.

Greater Harvest Global Ministries, Inc. ("Plaintiff") appeals from a series of orders in which the trial court: denied Plaintiff's motion for summary judgment on

its claims against Blackwell Heating & Air Conditioning, Inc. ("Defendant"); ordered a mistrial following improper testimony by Plaintiff's president; and ultimately dismissed the action as a sanction for discovery misconduct by Plaintiff and its counsel.

After careful review, we hold that the trial court did not abuse its discretion by dismissing Plaintiff's suit as a sanction. Because we affirm the dismissal of the action, we need not address Plaintiff's appeals from the denial of its motion for summary judgment and the trial court's ordering of a new trial, which are now moot.

Factual and Procedural History

In April 2014, Plaintiff contracted with Defendant for the installation of two air conditioning units in Plaintiff's building in Fayetteville, North Carolina. The contract provided for a one-year warranty on labor and most parts and a five-year warranty on the compressor and coils of each unit, for a total price of $8,103.27.

Defendant installed the units on the roof of Plaintiff's building on 12 May 2014. The next day, Plaintiff notified Defendant that the units were leaking and not working properly, and that the leak caused damage to one of Plaintiff's chairs and carpet. After speaking with Plaintiff's president, Jamaal Dunham, Defendant's president, John Blackwell, visited the church and met with Mr. Dunham to seek a resolution. A discussion regarding the air conditioning units devolved into a heated verbal exchange, and Mr. Blackwell was escorted from the church. As a result, Mr.

Dunham filed a complaint with the Better Business Bureau and expressed an intention to pursue a civil remedy for damages or replacement of the air conditioning units. Mr. Dunham also expressed that he would report Mr. Blackwell to criminal authorities for assault of on a child, because, as Mr. Blackwell was leaving the church, he shook Mr. Dunham's toddler son's foot "as a gesture of happiness and playfulness."[1]

Plaintiff continued to notify Defendant that the air conditioning units were not working. Defendant investigated and determined that Plaintiff mishandled remote control devices, causing the units to malfunction, and refused to allow Defendant to correct the problem. In July 2014, Defendant advised Plaintiff to find another service professional to address the problems with the units and instructed Mr. Dunham not to contact any of Defendant's employees.

Plaintiff filed a civil action in Wake County against Defendant in May 2015, alleging breach of contract, breach of the covenant of good faith and fair dealing, unfair and deceptive trade practices, unjust enrichment, and equitable estoppel, and seeking both compensatory and punitive damages.[2] The case was transferred to

[1] In June 2014, Mr. Dunham's wife filed a criminal complaint against Mr. Blackwell, which resulted in a misdemeanor charge for assaulting a child. Mr. Blackwell was found not guilty following a trial in Cumberland County District Court in September 2014.

[2] The complaint also named Mr. Blackwell as a defendant, however all claims against Mr. Blackwell were dismissed by the trial court and Plaintiff has not appealed that dismissal.

Cumberland County in October 2015.[3] In March 2016, the trial court dismissed all claims against Defendant except for the breach of contract and breach of the covenant of good faith and fair dealing.[4] Defendant denied liability, asserting that Plaintiff's agents and employees failed and refused to follow proper operating procedures for use of the air conditioning units, prevented Defendant's agents and employees from correcting the use, and abused and harassed Defendant's agents and employees.

The parties then entered into a protracted discovery, which involved repeated motions to compel and competing motions for sanctions. On 28 April 2016, the trial court resolved the first round of these motions, by granting Defendant's motion to compel Plaintiff to produce documents and to resume the deposition of Mr. Dunham.[5] The trial court also denied Plaintiff's motion to compel further discovery responses, denied Plaintiff's motion for a protective order, determined that Plaintiff had engaged in improper discovery methods, and expressly found no sanctionable conduct by counsel for either party. In an attempt to mitigate communication issues between counsel and in light of a scheduling conflict for promptly resuming the deposition, Defendant's lead counsel suggested and the trial court agreed that the associate for Defendant's counsel should conduct the deposition of Mr. Dunham.

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[3] Plaintiff has not appealed the transfer of venue.

[4] Plaintiff has not appealed the dismissal of the other claims.

[5] The motion to resume the deposition of Mr. Dunham arose after counsel for Plaintiff abruptly ended Mr. Dunham's deposition after fifteen minutes.

The resumed deposition of Mr. Dunham was originally set for May 2016, but had to be rescheduled after Plaintiff failed to produce documents ordered to be produced by the trial court. A new deposition was not scheduled until November 2016, because Plaintiff's counsel was ordered not to travel by her doctor.

When the November 2016 deposition was finally scheduled, Plaintiff's counsel objected on the basis that Defendant's lead counsel, not his associate, would be conducting the deposition. Plaintiff's lead and associate counsel asserted that they were "not comfortable" attending a deposition conducted by Defendant's lead counsel. Plaintiff's counsel did not file a motion for a protective order, but rather simply did not appear or produce the witness at the scheduled deposition.

Defendant filed another motion for sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure, contending, among other things that Plaintiff violated the trial court's previous order compelling the deposition of Mr. Dunham. Defendant also asserted that Plaintiff caused Defendant to incur unnecessary litigation costs by: filing the action in the wrong county, refusing to transfer venue to the proper county, resisting basic discovery, maliciously filing a criminal proceeding against Defendant's president, and improperly filing complaints against Defendant's counsel. Following a hearing on the sanctions motion, Judge James Webb, aware that trial was calendared for 5 December 2016, ordered Mr. Dunham to appear for

the completion of his deposition and expressly deferred ruling on the sanctions motion until 12 December 2016.

Between Judge Webb's November order and the 12 December 2016 hearing on the sanctions motion, the trial court denied Plaintiff's motion for summary judgment and the case proceeded to trial.

During the trial before a jury and Judge Richard Brown, Plaintiff's president on direct examination identified and mischaracterized an inadmissible settlement demand as a final request for repairs. As a result, Judge Brown entered an order declaring a mistrial for a violation of Rule 408 of the North Carolina Rules of Evidence.

At the 12 December 2016 hearing, Judge Webb reviewed additional evidence, including the transcript of the final session of Mr. Dunham's deposition. The trial court found that Plaintiff, through counsel and Mr. Dunham, willfully disobeyed a court order to appear for the completion of his deposition, and that Plaintiff's counsel misrepresented a procedural fact to the trial court during the November hearing on the motion for sanctions. The trial court further found that during the completion of Mr. Dunham's deposition, Plaintiff's counsel repeatedly made improper and "clearly invalid" objections, which unnecessarily increased the length of the deposition, intentionally misrepresented the content of a court order, and improperly instructed Mr. Dunham not to answer questions.

By order entered on 29 December 2016, the trial court concluded:

> having considered sanctions less severe than dismissal, and in its discretion, having determined that such sanctions would not be adequate in light of the seriousness and continued misconduct of the Plaintiff, by and through its president, Jamaal Dunham, as well as Plaintiff's counsel, is of the opinion that the Defendant's motion should be ALLOWED[.]

The trial court dismissed Plaintiff's claims with prejudice and awarded Defendant reasonable costs and fees in the amount of $5,634.80 pursuant to Rule 37 of the North Carolina Rules of Civil Procedure.

Plaintiff filed an improper notice of appeal in Wake County on 28 December 2016, and a proper notice of appeal in Cumberland County on 4 January 2016. Plaintiff appeals from the trial court's orders denying Plaintiff's motion for summary judgment, granting a mistrial, and allowing Defendant's motion for sanctions.[6]

Discussion

Plaintiff argues that the trial court had no authority to dismiss the action for discovery violations following the order for a mistrial, and, assuming the trial court had authority, the trial court nonetheless abused its discretion in dismissing the action. This argument is without merit.

1. Standard of Review

[6] Plaintiff's notice of appeal cites other orders, however, Plaintiff has failed to brief those arguments on appeal and therefore has abandoned the additional issues. N.C. R. App. P. Rule 28(b)(6) (2017).

Whether to impose sanctions pursuant to a violation of Rule 37 for a failure to comply with discovery requests and orders is a matter left within the sound discretion of the trial court and may not be overturned on appeal absent a showing of abuse of discretion. *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992). Moreover, "[t]he choice of sanctions under Rule 37 [likewise] lies within the [trial] court's discretion . . . ." *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984) (citation omitted). It is well-settled in North Carolina that before a trial court may impose dismissal as a sanction, the trial court must first consider lesser sanctions. *Gross v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993). However, where the record indicates, or permits the inference, that the trial court has considered such lesser sanctions, this Court may not overturn the decision absent a showing of abuse of discretion. *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 609, 611 (2006). "An abuse of discretion may arise if there is no record evidence which indicates that [a] defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred." *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 264, 618 S.E.2d 796, 803 (2005) (citations omitted).

2. Trial Court's Authority to Enter Sanctions

As an initial matter, we hold that the trial court's deferral of its ruling on Defendant's Rule 37 motion for sanctions until after the trial does not divest the trial

court of jurisdiction. Our courts have held similarly with regard to Rule 11 sanctions that a change in the procedural posture of a case does not divest a trial court of jurisdiction to make a ruling on such a motion. *See, e.g., Bryson v. Sullivan*, 330 N.C. 664, 653, 412 S.E.2d 327, 331 (1992) (holding that the plaintiffs' filing of a voluntary dismissal with prejudice "does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated"); *see also VSD Commc'n, Inc. v. Lone Wolf Pub. Group, Inc.*, 124 N.C. App. 642, 644, 478 S.E.2d 214, 216 (1996) (holding that Rule 11 motions "have a life of their own and they address the propriety of the adversary proceedings that have previously occurred in the case without regard to whether the adversary proceedings in question are continuing when the motion for fees is filed").

Here, Judge Webb was well aware of the already extended nature of this case. It is apparent from his November order, deferring his ruling on the Rule 37 motion and ordering Mr. Dunham to appear for his deposition, that Judge Webb sought to expedite the resolution of this matter. In the 12 December 2016 hearing, Judge Webb reviewed the proceedings, including the additional discovery, and properly ruled upon Defendant's motion. Because the trial court was not divested of jurisdiction, we hold

that the trial court was within its authority to rule on the motion for sanctions despite deferring the ruling until after additional proceedings occurred.[7]

Plaintiff argues that Judge Webb's dismissal of the action effectively constitutes an improper overruling of Judge Brown's order for a new trial. We reject this argument. In *Global Furniture, Inc. v. Proctor*, 165 N.C. App. 229, 598 S.E.2d 232 (2004), we held that a trial court's imposition of sanctions for discovery misconduct, including dismissal of an action, is not prevented by another trial court's entry of default against the opposing party. *Id.* at 233, 598 S.E.2d at 235 (holding that the trial court had authority to impose sanctions following entry of default, but vacating the trial court's sanction order for failure to consider lesser sanctions). Accordingly, we hold that Judge Webb's deferred ruling dismissing the action did not improperly overrule Judge Brown's order for a new trial.

3. Propriety of the Sanctions Order

Plaintiff next challenges the trial court's dismissal of the action because Plaintiff made a good faith attempt to comply with all the discovery requests and orders. We disagree.

[7] We note that Plaintiff's initial attempt to appeal the matter on 28 December 2016 was improper as it was filed in the wrong venue, and therefore the trial court retained jurisdiction over the case until 4 January 2016 when Plaintiff properly noticed its appeal.

The trial court's order contains twenty detailed findings of fact regarding the procedural history of the case and the issues arising during discovery. Plaintiff does not argue that these findings are unsupported by evidence in the record.[8] These unchallenged findings are "presumed 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).

Plaintiff asserts that there were additional considerations favorable to Plaintiff that would support a finding that Plaintiff did not violate any discovery orders and acted in good faith. This Court, when applying an abuse of discretion standard, has no authority to reweigh the evidence. *See, e.g., Fayetteville Publ'g Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 426, 665 S.E.2d 518, 523 (2008).

The trial court found that Plaintiff and Plaintiff's counsel willfully disobeyed a court order by objecting to notice of a court-ordered deposition and unilaterally refusing to produce the witness, Mr. Dunham. The trial court found that during one hearing on Defendant's motion for sanctions, counsel for Plaintiff falsely contended that Defendant's counsel engaged in *ex parte* communications with the trial court by submitting a proposed order without providing a copy to counsel for Plaintiff; this

[8] To the extent that Plaintiff argues there was no evidence to support a finding that there was a "failure of discovery on the part of the Plaintiff; refusal of the court's order; or prejudice against the Defendant[,]" a review of Plaintiff's brief shows that this assertion is in relation to Plaintiff's argument that additional evidence exists in the record to support a finding contrary to the trial court's findings.

contention was shown to be a misrepresentation of fact. The trial court found that Plaintiff's counsel's instructions to Mr. Dunham not to respond to questions in the deposition were baseless "and constituted a violation of the Court's earlier Order and an intentional disruption of Defendant's deposition of Mr. Dunham." The trial court found that Plaintiff's counsel asserted a baseless and time consuming speaking objection during the same deposition that intentionally misrepresented the trial court's earlier discovery order. The trial court also found that Mr. Dunham "was intentionally evasive and non-cooperative in his responses during deposition, and failed and refused to provide discoverable information in his testimony."

Our review of the record reveals ample evidence supporting the trial court's findings above. We discern no abuse of discretion by the trial court in dismissing Plaintiff's action as a sanction for Plaintiff's failure to comply with discovery orders. Plaintiff's argument is overruled.

Plaintiff also argues that the trial court erred because it found that Plaintiff asserted an invalid objection when Plaintiff's counsel instructed Mr. Dunham not to confirm whether he agreed with an affidavit filed by his wife in a different court proceeding based on spousal immunity. It is for the court—and not the litigant—to determine whether a claim of privilege is valid. *See Stone v. Martin*, 56 N.C. App. 473, 476, 289 S.E.2d 898, 901 (1982) ("Determination of whether the privilege applies must be by the court, not the individual claiming the privilege."). In the context of

this appeal, Plaintiff's argument—like the objection by Plaintiff's counsel in the deposition—is specious. Mr. Dunham was asked, and refused to answer on the basis of spousal immunity, whether he agreed with the statement of facts in a criminal complaint filed by his wife against Mr. Blackwell. The question did not seek the content of a privileged communication between Mr. Dunham and his wife. It sought to establish whether Mr. Dunham agreed or disagreed with a statement regarding events occurring in the presence of him, his wife, and third parties, contained in a document filed with the court.

Plaintiff also asserts that the trial court failed to consider lesser sanctions before dismissing the action. This assertion directly conflicts with the explicit language of Judge Webb's order. The order for sanctions states that "the Court *having considered sanctions less severe than dismissal*, *and . . . having determined that such sanctions would not be adequate* . . . is of the opinion that Defendant's motion should be allowed." (Emphasis added). As we noted in *Badillo*, "the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate." 177 N.C. App. at 735, 629 S.E.2d at 911 (citation omitted). We can see no material difference between the order here and the language of the trial court's order in *Badillo*; accordingly, we reject Plaintiff's assertion that Judge Webb failed to consider lesser sanctions.

Like the misconduct which led to the dismissal of claims in *In re Pedestrian*, 173 N.C. App. at 251, 618 S.E.2d at 829 (affirming a trial court's order that considering each act of misconduct by the plaintiff and their cumulative effect, and the available sanctions, sanctions less than dismissal would not be adequate), and *Fayetteville Publ'g*, 192 N.C. App. at 427, 665 S.E.2d at 523 (affirming a trial court's order that, after considering all possible sanctions, the appropriate remedy in light of the misconduct by the defendant was dismissal of its counterclaims), the misconduct demonstrated by the record in this appeal reflects intentional and repeated acts by counsel and client in defiance of the Rules of Civil Procedure, the Rules of Evidence, and orders of the trial court. It is unfortunate that misconduct by counsel and client has resulted in the dismissal of the action and imposition of sanctions approaching the amount of the disputed contract.

Conclusion

For the foregoing reasons, we hold that the trial court was properly with authority to rule on the deferred Rule 37 motion for sanctions, and did not abuse its discretion in allowing Defendant's motion to dismiss Plaintiff's claims with prejudice as a sanction for the discovery violations.

AFFIRMED.

Judges HUNTER and BERGER concur.

Report per Rule 30(e).