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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1042

Filed: 16 July 2019

Wake County, No. 11 CVS 13969

STELLA MARE RISTORANTE & PIZZERIA, INC. AND STATE FARM FIRE AND CASUALTY COMPANY, Plaintiffs,

v.

OLLIE LOUIS WALL, JR. AND DEBORAH D. WILTZIUS, both individually and D/B/A WALL & WILTZIUS SALON, Defendants.

Appeal by Plaintiff Stella Mare Ristorante & Pizzeria, Inc. from order entered 30 June 2017 by Judge G. Bryan Collins, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 14 March 2019.

Massie Law, PLLC, by Simon Massie, for Plaintiff-Appellant.

Burton, Sue & Anderson, LLP, by Stephanie W. Anderson, for Defendants-Appellees.

McGEE, Chief Judge.

Plaintiff Stella Mare Ristorante & Pizzeria, Inc. (“Stella Mare”) appeals order entered 30 June 2017, granting a Motion to Dismiss for Failure to Prosecute (“the motion”) filed by Ollie Louis Wall, Jr. and Deborah D. Wiltzius, both individually and

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d/b/a Wall & Wiltzius Salon, (“Defendants” or “the Salon”). Stella Mare argues the trial court erred in granting the motion because (1) the findings of fact fail to “support the conclusion that Stella Mare acted in a way which deliberately or unreasonably delayed the matter,” (2) the findings of fact fail to “support[] the conclusion that Stella Mare prejudiced [] Defendant[s] by the mere passage of time[,]” and (3) the trial court abused its discretion by ruling “that Stella Mare failed to prosecute [its] claim.”

I. Factual and Procedural History

Stella Mare is a North Carolina corporation that operated as a restaurant (“the Restaurant”) within the Greystone Village Shopping Center in Raleigh. Defendants owned and operated the Salon next to the Restaurant in the Greystone Village Shopping Center.

Stella Mare contends that, on 4 February 2009, a toilet at the Salon became clogged and overflowed, resulting in “damage and destruction” to the Restaurant because “hundreds of gallons of toilet water” permeated the walls between Stella Mare’s and Defendants’ locations, which overflowed into the Restaurant. Stella Mare filed a complaint against Defendants on 12 September 2011, alleging nuisance, trespass, and negligence. Defendants filed their answer on 11 October 2011.

Defendants filed a motion for summary judgment on 7 June 2012. The trial court heard the motion on 31 July 2012 and entered an order denying summary judgment on 8 August 2012. Defendants filed a Rule 12(b)(6) motion to dismiss on

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23 October 2012. Stella Mare filed a Motion for Joinder of Necessary Party on 30 July 2013 to make Stella Mare’s insurer, State Farm Fire and Casualty Company (“State Farm” together with Stella Mare, “Plaintiffs”), a party to the action. The trial court granted the motion joining State Farm as a plaintiff in the action by order entered 16 September 2013. Plaintiffs filed an amended complaint on 23 September 2013, and Defendants filed an answer to Plaintiffs’ amended complaint on 23 September 2013.

Plaintiffs filed a Motion for Binding Arbitration on 26 September 2014 stating both Erie Insurance Company (“Erie”)—Defendants’ commercial insurance carrier—and State Farm were members of Arbitration Forums, Inc. (“Arbitration Forums”). Arbitration Forums is “an insurance carrier arbitration forum in which both State Farm and Erie [had] agreed to submit claims arising between and from their insured[s].” Stella Mare alleged it “suffered additional out-of-pocket repair costs and damages beyond payments made by State Farm[,]” which Stella Mare hoped to recover through the arbitration process. Although Stella Mare was not a member of Arbitration Forums, Plaintiffs alleged that “the rules and procedures of Arbitration Forums [] allow[ed] for voluntary participation of non-members[.]” Plaintiffs stated in their motion that Stella Mare would consent to “voluntary participation” in binding arbitration proceedings between State Farm and Erie, and asked the trial court “to place [the] matter for further and final disposition within the Arbitration Forums’

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binding arbitration process.” Defendants filed a response to Plaintiffs’ motion for binding arbitration on 12 November 2014, arguing against granting Plaintiffs’ motion.

The trial court entered an order on 22 December 2014 granting Plaintiffs’ motion and stayed Plaintiffs’ action in superior court. The trial court determined arbitration was appropriate because:

[T]here ha[d] been no trial in this action; there ha[d] been no showing that helpful evidence ha[d] been lost to Defendant[s] . . .; there ha[d] been no significant litigation expenses incurred since the time that arbitration became available to the parties; and there ha[d] been no judicial Discovery by any party since the time that arbitration became available[.]

State Farm filed a claim against Erie with Arbitration Forums on 29 February 2016. Stella Mare filed a claim against Erie with Arbitration Forums on 10 March 2016, seeking unpaid damages based upon its allegations against Defendants. Arbitration Forums filed its decision on 27 July 2016, in which it denied State Farm’s claim against Erie. Arbitration Forums stated:

Following State Farm’s inclusion in the pending state court case, they then made a motion to the Superior Court for Stella Mare to be allowed to participate in this forum. Despite the ruling in the state court case, Stella Mare is not a signatory to intra-company arbitration, and their claims are rightly in . . . Superior Court.

Following this decision, Stella Mare and Defendants unsuccessfully attempted to reach a settlement. Stella Mare’s counsel informed Stella Mare on 7 September

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2016 that counsel could no longer represent Stella Mare in this matter. Stella Mare obtained new legal counsel on 10 October 2016. Stella Mare alleged that its previous counsel and new counsel communicated from 9 November 2016 until 28 November 2016 in order to bring Stella Mare’s new counsel current in the matter. Defendants filed a Motion to Dismiss on 20 March 2017, alleging Stella Mare had “neglected or otherwise failed to prosecute” its action. Stella Mare filed a Motion to Lift Stay of Proceedings on 13 April 2017, arguing it should be allowed to pursue its claim in superior court because the matter had been “stayed pending arbitration,” and “the arbitrator determined that the arbitration clause did not apply to [Stella Mare] and [Stella Mare] was not given the opportunity to present [its] claims[.]”

The trial court heard the motions on 15 May 2017, and entered an order on 30 June 2017 granting Defendants’ motion and dismissing with prejudice Stella Mare’s claims for trespass, nuisance, and negligence. Stella Mare appeals.

II. Failure to Prosecute

A. *Standard of Review*

The standard of review in this case is well established:

Where the superior court sits without a jury, the standard of review on appeal is “whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court . . . are conclusive on appeal if there is evidence to support those findings.” “Unchallenged findings of fact are presumed correct and are binding on appeal.”

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Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am., 245 N.C. App. 25, 28, 781 S.E.2d 840, 842 (2016) (internal citations omitted). This Court reviews the trial court's conclusions of law *de novo*. *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (2000). Under Rule 41(b), a trial court may involuntarily dismiss a plaintiff's action when a plaintiff fails "to prosecute or to comply with these rules or any order of court[.]" N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017). This Court has stated:

Dismissal is the most severe sanction available to the court in a civil case. An underlying purpose of the judicial system is to decide cases on their merits, not dismiss parties' causes of action for mere procedural violations. In accord with this purpose, claims should be involuntarily dismissed only when lesser sanctions are not appropriate to remedy the procedural violation.

Wilder v. Wilder, 146 N.C. App. 574, 576, 553 S.E.2d 425, 427 (2001) (internal citations omitted).

In the present case, Stella Mare asserts the trial court did not make sufficient findings of fact to support its conclusions of law. Because Stella Mare does not challenge the substance of the trial court's findings of fact, they "are presumed correct and are binding on appeal." *Greenshields, Inc.*, 245 N.C. App. at 28, 781 S.E.2d at 842 (internal citations omitted).

B. Rule 41(b)

This Court has held that, pursuant to Rule 41(b), "a trial court may enter sanctions for failure to prosecute only where the *plaintiff* or his *attorney* 'manifests

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an intention to thwart the progress of the action to its conclusion’ or ‘fails to progress the action toward its conclusion’ by engaging in some delaying tactic.” *Wilder*, 146 N.C. App. at 577, 553 S.E.2d at 427 (emphasis in original) (internal citations omitted). Further, a trial court must make findings of fact supporting a conclusion that a plaintiff’s actions—or the actions of the plaintiff’s attorney—actually prejudiced the defendant. *See id.* at 578, 553 S.E.2d at 428. In addition, the trial court must first “consider lesser sanctions[.]” *Id.* at 576, 533 S.E.2d at 426.

Based on these requirements, our Court held in *Wilder* that the trial court, before dismissing an action with prejudice, must make sufficient findings of fact to determine: “(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.” *Id.* at 578, 533 S.E.2d at 428. Failure of the trial court to make sufficient findings of fact in support of its conclusions pertaining to *any* of these three factors requires the order dismissing the action with prejudice to be vacated. *See id.* at 578, 533 S.E.2d at 428; *see also Cohen v. McLawhorn*, 208 N.C. App. 492, 498-505, 704 S.E.2d 519, 524-28 (2010).

1. Deliberate or Unreasonable Delay

Stella Mare first argues the trial court failed to make findings of fact to support the first *Wilder* factor: “[N]o findings of fact . . . support the conclusion that Stella

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Mare acted in a way which deliberately or unreasonably delayed the matter.” *Wilder*, 146 N.C. App. at 578, 533 S.E.2d at 428. We agree.

Under the first *Wilder* factor, a trial court must address “whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter[.]” *Id.* at 578, 533 S.E.2d at 428. “[P]rovided a plaintiff has not been lacking in diligence, the mere passage of time does not justify dismissal for failure to prosecute as our courts are primarily concerned with the trial of cases on their merits.” *In re Will of Kersey*, 176 N.C. App. 748, 751, 627 S.E.2d 309, 311 (2006). A dismissal for failure to prosecute under Rule 41(b) “is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion.” *Id.* (internal citation omitted). “Whether a plaintiff or his attorney has manifested an intent to thwart the progress of an action or has engaged in some delaying tactic may be inferred from the facts surrounding the delay in the prosecution of the case.” *Foy v. Hunter*, 106 N.C. App. 614, 618, 418 S.E.2d 299, 302 (1992).

In the present case, the trial court failed to include findings of fact that would support a conclusion that Stella Mare’s actions rose “to the level of demonstrating an intent to thwart progress or to implement a delaying tactic.” *Lusk v. Crawford Paint Co.*, 106 N.C. App. 292, 298, 416 S.E.2d 207, 210 (1992). By way of contrast, in *Greenshields*, this Court upheld a motion to dismiss for failure to prosecute because

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the trial court made findings of fact to support its conclusion that “plaintiff engaged in undue and unreasonable delay.” *Greenshields*, 245 N.C. App. at 33, 781 S.E.2d at 845 (internal quotations omitted) (“[T]here are no facts indicating that plaintiff engaged in any activity with respect to this matter from December 2007 until February 2012 and no justification for such delay.”). The trial court in *Greenshields* concluded the plaintiff’s delay was “deliberate” because the “plaintiff filed a complaint in state court, then chose to litigate in federal bankruptcy court, and then returned to state court.” *Id.*; *see also id.* at 30, 781 S.E.2d at 844 (“[T]he record supports the trial court’s finding that plaintiff’s delay was tactical. Plaintiff filed suit in state court, waited over six years to file suit in federal court, and then tried to amend its federal claim in state court.”).

Moreover, in *Cohen v. McLawhorn*, this Court upheld the trial court’s granting a motion to dismiss for failure to prosecute because the trial court explicitly referenced and included findings of fact to support “the first *Wilder* factor in its first conclusion of law[.]” *Cohen*, 208 N.C. App. at 498-99, 704 S.E.2d at 524. In *Cohen*, the trial court made findings of fact showing the “plaintiff did nothing whatsoever to pursue the case after filing the complaint, he wholly ignored the fact that his case was calendared for trial, and he did not appear or send a representative to attend the trial,” concluding “such a wholesale failure to prosecute can constitute a delaying tactic.” *Id.* at 501, 503, 704 S.E.2d at 526-27,

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Unlike the trial courts' orders dismissing the plaintiffs' cases under Rule 41(b) in both *Greenshields* and *Cohen*, the trial court in the present case failed to include language referring to an "undue," "unreasonable," or "deliberate" delay in both the findings of fact and conclusions of law in its order. The trial court also failed to provide findings of fact to support a conclusion that Stella Mare acted deliberately or unreasonably to delay the matter. Although the trial court found Stella Mare "took no steps to prosecute this matter from [26 July 2016] until [6 April 2017] when counsel served a Notice of Appearance and Motion to Lift Stay," that finding of fact demonstrates only a "mere passage of time," not a deliberate or unreasonable delay in the matter.

Finally, the trial court's failure to consider whether Stella Mare acted deliberately or unreasonably to delay the case is made evident by the fact that the order contains no such conclusion of law. Because the trial court failed to make findings of fact and conclusions of law demonstrating it considered the first *Wilder* factor, we vacate the 30 June 2017 order, and remand for further action. *See Wilder*, 146 N.C. App. at 578, 533 S.E.2d at 428.

2. Prejudice to Defendants

We also agree with Stella Mare's argument that the trial court failed to make findings of fact to support the second *Wilder* factor: "[N]o findings of fact . . . support[] the conclusion that Stella Mare prejudiced [] Defendant[s.]" *See id.*

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Under the second *Wilder* factor, a trial court must address “the amount of prejudice, if any, to the defendant” resulting from the plaintiff’s delay. *Id.* In the present case, as with the first *Wilder* factor, the trial court failed to make a conclusion of law in its 30 June 2017 order resolving the second *Wilder* factor. In addition, the trial court failed to make findings of fact that would support such a conclusion.

In *Cohen*, this Court held the trial court satisfied the second *Wilder* factor in its order because it included findings of fact “on the damage done to [the] defendants in their profession or business as a result of the inability to have the claims of professional negligence and unethical behavior resolved.” *Cohen*, 208 N.C. App. at 503, 704 S.E. 2d at 527. From these findings, the trial court supported its legal conclusion: “The defendant [sic] has been prejudiced by the delay caused by the plaintiff in that his [sic] professional competence has been impugned by the unsubstantiated and unproven allegations contained in the Complaint[.]” *Id.* (internal quotations omitted). Similarly, in *Greenshields*, we also held the trial court satisfied the second *Wilder* factor in its order because it made findings of fact explicitly pointing to plaintiff’s actions that prejudiced the defendant. *Greenshields*, 245 N.C. App. at 33-34, 781 S.E.2d at 845-46 (“The trial court found that plaintiff’s extra-contractual claims arose over nine years ago, and defendants have had to retain counsel, file written motions, attend hearings, and argue motions . . . [and] plaintiff [was] seeking to change the character of the claims.”).

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In the present case, the trial court failed to include language referencing “prejudice to the Defendants” and otherwise failed to make findings of fact that could support a conclusion that Stella Mare’s actions prejudiced Defendants. The trial court’s findings of fact only suffice to show there was a passage of time between Stella Mare’s actions in prosecuting the case, and the trial court made no conclusion of law that Defendants were actually prejudiced by Stella Mare’s lack of action. Therefore, the 30 June 2017 order is also vacated, based on the trial court’s failure to demonstrate it considered the second *Wilder* factor. *See Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428 (“We hold that the conclusion that there was prejudice to the defendant is insufficiently supported by factual findings, and must be vacated.”).¹

III. Conclusion

Because we have determined that we must vacate the 30 June 2017 order due to the trial court’s failure to make adequate findings and conclusions to satisfy the requirements of *Wilder*, we need not address Stella Mare’s third argument. For the reasons stated above, this Court holds that the trial court erred in dismissing Stella Mare’s case with prejudice for failure to prosecute.

In sum, we hold that the trial judge must address the three [*Wilder*] factors . . . before deciding whether to dismiss the

¹ We do not address the third *Wilder* factor—“the reason, if one exists, that sanctions short of dismissal would not suffice,” *Wilder*, 146 N.C. App. at 578, 533 S.E.2d at 428—because Stella Mare does not argue that issue on appeal. However, we note that, because a dismissal for failure to prosecute is a drastic and severe sanction, a “trial court must, before dismissing an action with prejudice, make findings and conclusions which indicate that it has considered less drastic sanctions.” *Cohen*, 208 N.C. App. at 504, 704 S.E.2d at 528.

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plaintiff's claim with prejudice under Rule 41(b), for failure to prosecute. Accordingly, the trial court's order dismissing with prejudice plaintiff's claim . . . is vacated, and this case is remanded to the trial court for further proceedings consistent with this opinion.

Wilder, 146 N.C. App. at 578, 553 S.E.2d at 428.

VACATED AND REMANDED.

Judges BERGER and MURPHY concur.

Report per Rule 30(e).