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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-261

No. COA20-504

Filed 1 June 2021

Moore County, Nos. 19 CRS 050823, 000458

STATE OF NORTH CAROLINA

v.

JESUS TAPIA RAMIREZ, Defendant; and

ZACHARY T. RILEY, Bail Agent; and

BANKERS INSURANCE COMPANY, Surety; and

MOORE COUNTY BOARD OF EDUCATION, Judgment Creditor.

Appeal by Surety from orders entered 17 February and 10 March 2020 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 23 March 2021.

Brian Elston Law, by Brian D. Elston, and Van Camp, Meacham & Newman, PLLC, by Richard Lee Yelverton, for Surety-Appellant.

Tharrington Smith, LLC, by Stephen G. Rawson and Rod Malone, for Judgment Creditor-Appellee.

INMAN, Judge.

¶ 1 Surety-Appellant Bankers Insurance Company ("Surety") appeals from orders

denying its voluntary dismissal and motions to set aside bond forfeitures. On appeal, Surety argues that its voluntary dismissal and payment of the bonds automatically served to extinguish its actions to set aside the forfeitures notwithstanding a pending motion for sanctions under N.C. Gen. Stat. § 15A-544.5(d)(8) filed by Judgment Creditor Moore County Board of Education (the "Board"). Specifically, Surety contends that, because sanctions under the statute are wholly dependent on a denial of a motion to set aside, the Board's motion for sanctions does not constitute affirmative relief barring Surety's unilateral voluntary dismissal. After careful review, and in light of binding precedent, we agree with Surety and reverse the order of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The evidence presented to the trial court and the record tend to show the following:

¶ 3 Defendant Jesus Tapia Ramirez ("Ramirez") was arrested in March 2019 for forcible sex offense. The trial court set bond in the amount of $50,000 and Surety filed an appearance bond for that amount to secure Ramirez's release pretrial. Ramirez was then indicted on a separate charge of indecent liberties with a child and assessed a second secured bond in the amount of $35,000. Surety posted bond for that amount and Ramirez was released pending a hearing on 28 May 2019.

¶ 4 Ramirez failed to appear for his hearing, so the trial court issued an order for his arrest. On 19 June 2019, the trial court issued bond forfeiture notices to Surety to recover the total bond amount of $85,000.

¶ 5 In an effort to find Ramirez, Surety's bail agent, Zachary T. Riley ("Riley") spoke to Ramirez's wife, relatives, and former employers about his possible whereabouts. With the help of a detective in Southern Pines, North Carolina, Riley was able to recover cell data from Ramirez's phone, including data showing Ramirez had last placed a call to a phone number in Mexico. Riley then hired a private investigator in Houston, Texas, to determine whether Ramirez had fled to Mexico.

¶ 6 The investigator eventually met with an individual in Mexico City who provided him with a purported death certificate for Ramirez in exchange for $9,000. The investigator also met with a man who purported to be the doctor named on the death certificate and confirmed Ramirez's death. The investigator then sent Riley several documents allegedly issued by the Mexican government showing Ramirez had died in June of 2019, including: (1) the purported "Mexican United States Civil Registry Death Certificate;" (2) a purported birth certificate from the state of Veracruz for Ramirez corroborating the biographical information on the purported death certificate; and (3) licensing information for the doctor named on the purported death certificate. The investigator also sent Riley a photograph purporting to show Ramirez's gravesite.

¶ 7 Riley provided the documents he received from the investigator to an attorney familiar with Mexican vital records to confirm their legitimacy. Satisfied with the vital documents' veracity, Riley filed them with motions to set aside the bond forfeitures on behalf of Surety on the ground that Ramirez was deceased.

¶ 8 The Board's attorney responded to Surety's motions by checking the legitimacy of the purported vital records with the Consulate General of Mexico in Raleigh. The Consul General replied to the Board's inquiry with a letter stating that "the death record was not found in the name of [Ramirez], and as for the [death certificate] itself it is a non-valid document." The Board subsequently filed objections to Surety's motions to set aside on 26 November 2019 and filed the Consul General's letter with the trial court.

¶ 9 When Riley received the Board's objections, he again sought to verify whether Ramirez was deceased. Riley's counsel also hired an attorney in Mexico to review the documents and try to locate the originals. That attorney informed Riley's counsel that the "documents seem to [b]e regular" on initial review and that a paralegal would confirm their authenticity by obtaining official copies. After the paralegal unsuccessfully searched several government records offices for Ramirez's death certificate, the attorney in Mexico informed Riley's counsel that the vital documents did not appear to be valid, but that there was still "a small possibility" that the search

of Mexico's National Civil Records could reveal a document that was missed in previous searches.

¶ 10 The Board filed a motion for sanctions on 17 January 2020 pursuant to N.C. Gen. Stat. § 15A-544.5(d)(8) for Surety's filing of fraudulent documents. The following month, Surety paid $85,000 to the Moore County Clerk of Court in satisfaction of the forfeiture notices. The Board thereafter amended its motion for sanctions to include a request for sanctions under N.C. Gen. Stat. § 15A-544.5(b)(5) for failure to attach necessary documentation to the motions to set aside. On 13 February 2020, Riley filed a notice of voluntary dismissal of the motions to set aside pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

¶ 11 The parties appeared at a hearing on all pending motions on 17 February 2019. At the outset of the hearing, Riley and Surety argued that their voluntary dismissal of their motions to set aside and payment of the bond forfeiture amounts extinguished the action, including the Board's pending motion for sanctions. The Board argued that its motion for sanctions was "a claim for affirmative relief, and [Riley and the Surety] should not be able to dispose of [the Board's] motion for sanctions by filing a voluntary dismissal." The Board also made clear that it was pursuing only statutory sanctions and was "not seeking . . . sanctions under Rule 11 [of the North Carolina Rules of Civil Procedure]."

¶ 12 Following arguments of counsel, the trial court determined that the voluntary dismissal was ineffective and proceeded to consider the motions to set aside the bond forfeitures. After hearing the evidence summarized above, the trial court denied the motions. The trial court continued the hearing on the Board's motion for sanctions "to give the parties the opportunity to further investigate and present to the Court, if they so choose, additional evidence." The trial court thereafter entered written orders decreeing the notice of voluntary dismissal ineffective and denying the motions to set aside. Surety appeals.

II. ANALYSIS

¶ 13 Surety argues that its notice of voluntary dismissal under Rule 41(a)(1) and its payment of the bonds automatically extinguished its motions to set aside and the trial court therefore lacked jurisdiction to hear any subsequent motions in the action. The Board asserts the trial court correctly deemed the notice of dismissal ineffective because the statutory sanctions sought by the Board fall within the affirmative relief exception to Rule 41(a)(1). The Board also asserts—for the first time—that the bad faith exception to Rule 41(a)(1) should apply.

¶ 14 Following recent precedent from this Court, we agree with Surety that the statutory sanctions sought by the Board are not independent affirmative relief. We decline to consider the Board's argument concerning the bad faith exception to Rule 41(a)(1) because that argument was not presented to the trial court and neither the

trial court's factual findings nor the record conclusively establish that the Surety acted in bad faith. As a result, we hold the trial court lacked jurisdiction to hear any further motions in this action after Surety filed its notice of voluntary dismissal. The trial court's order deeming the notice of voluntary dismissal ineffective is reversed, and the trial court's subsequent orders are vacated for want of jurisdiction.

1. Standard of Review

¶ 15 We review questions of subject matter jurisdiction *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Issues of statutory interpretation, including those concerning the applicability of Rule 41(a)(1), also present questions of law subject to *de novo* review. *Cole v. N.C. Dep't of Pub. Safety*, 253 N.C. App. 270, 274, 800 S.E.2d 708, 711-12 (2017).

2. Affirmative Relief Exception to Rule 41(a)(1)

¶ 16 Rule 41(a)(1) provides, in pertinent part, that "an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2019). A voluntary dismissal under the Rule is ordinarily "effective upon being filed . . . . Once a dismissal is requested under (a)(1) no court action is required." *Moore v. Pate*, 112 N.C. App. 833, 836, 437 S.E.2d 1, 2 (1993). And "[i]t is well settled that a Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d), which authorizes the

court to enter specific orders apportioning and taxing costs." *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (cleaned up) (quoting *Walker Frames v. Shively*, 123 N.C. App. 643, 646, 473 S.E.2d 776, 778 (1996)). In short, "[a]fter a plaintiff takes a Rule 41(a) dismissal, . . . the court has no role to play." *Id.* (cleaned up) (quoting *Universidad Central Del Caribe, Inc., v. Liaison Comm. On Med. Educ.*, 760 F.2d 14, 18 n.4 (1st Cir. 1985)).

¶ 17 There are, however, exceptions to this rule. A litigant may not unilaterally dismiss an action under Rule 41 when another party has "set up some ground for affirmative relief or some right or advantage . . . has supervened." *McCarley v. McCarley*, 289 N.C. 109, 112, 221 S.E.2d 490, 492 (1976). Affirmative relief barring unilateral dismissal under Rule 41(a)(1) is defined as "that for which the defendant might maintain an action *entirely independent of plaintiff's claim*, and which he might proceed to establish and recover *even if plaintiff abandoned his cause of action*." *Id.* at 113-14, 221 S.E.2d at 493-94 (quotation marks and citation omitted) (emphasis added).

3. Sanctions Under N.C. Gen. Stat. § 15A-544.5(d)(8) Are Not Independent Affirmative Relief

¶ 18 The Board in this case moved for sanctions under N.C. Gen. Stat. § 15A-544.5(d)(8). Per that statute:

> If at the hearing [on the motion to set aside the bond forfeiture] the court determines that the motion to set aside

> was not signed or that the documentation required to be attached . . . is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional.

N.C. Gen. Stat. § 15A-544.5(d)(8) (2019).

¶ 19 The parties disagree over whether these sanctions amount to independent affirmative relief, *i.e.,* whether they are pursuable "entirely independent" of a surety's motion to set aside and may be "recover[ed] even if [the surety] abandoned his cause of action." *McCarley*, 289 N.C. at 113-14, 221 S.E.2d at 493-94. This question is resolved by this Court's recent decision in *State v. Doss*, ___ N.C. App. ___, 851 S.E.2d 642 (2020), filed after briefing in this case closed.

¶ 20 In *Doss*, a bail agent moved to set aside a forfeiture and a county board of education filed an objection to the motion. ___ N.C. App. at ___, 851 S.E.2d at 643-44. At the hearing on the matter, the trial court granted the bail agent's motion but also imposed sanctions under N.C. Gen. Stat. § 15A-544.5(d)(8). *Id.* at ___, 851 S.E.2d at 643. This Court held that the trial court abused its discretion in imposing sanctions, and explained that these statutory sanctions are entirely dependent on—and only available after—the motion to set aside is resolved against the surety:

> Read in its entirety, the plain language of Section 15A-544.5(d)(8) requires the trial court to first hold a hearing and make a determination regarding the underlying

> motion to set aside. The trial court's authority to order sanctions against the surety who filed a motion to set aside is triggered *only after the trial court makes this initial determination. A trial court may only impose sanctions under Section 15A-544.5(d)(8) when the motion to set aside is denied . . . .*

Doss, ___ N.C. App. at ___, 851 S.E.2d at 645 (cleaned up) (emphasis added).

¶ 21 We are bound by *Doss*'s interpretation of N.C. Gen. Stat. § 15A-544.5(d)(8). That interpretation establishes these statutory sanctions are only available following a decision denying a surety's motion to set aside on the merits. Because these sanctions are not available absent resolution of a surety's motion to set aside, they are not affirmative relief "entirely independent" of Surety's motion to set aside and for which the Board can "recover even if [Surety] abandoned [its] cause of action." *McCarley*, 289 N.C. at 113-14, 221 S.E.2d at 493-94. For this reason, we hold the affirmative relief exception to an automatic dismissal under Rule 41(a)(1) does not apply.[1]

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[1] The Board also seeks to analogize this case to precedents allowing Rule 11 sanctions to proceed in the face of a voluntary dismissal. *See generally Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992) (holding trial courts have jurisdiction to consider Rule 11 sanctions following a voluntary dismissal). We note, however, that the Board's counsel expressly stated to the trial court that it was *not* seeking Rule 11 sanctions. Further, nothing in the plain language of Rule 11 discloses that those sanctions are contingent on the ultimate outcome in the underlying case, whereas sanctions under N.C. Gen. Stat. § 15A-544.5(d)(8) are available only after the trial court rules a surety has failed to prove its motion to set aside. *Doss*, ___ N.C. App. at ___, 851 S.E.2d at 645. Finally, Rule 11 sanctions, unlike the affirmative relief exception, do not render a voluntary dismissal ineffective to terminate an action but are instead within the trial court's jurisdiction as "collateral issues . . . that [may]

¶ 22 The Board also cites *McCarley* for the contention that a separate exception to Rule 41(a)(1)'s automatic effect applies when "some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action." *Id.* at 112, S.E.2d at 492. The Board cites no caselaw recognizing this language as establishing a "supervening advantage" exception distinct from the affirmative relief exception, and we can find none. In any event, it does not appear that the Board's motion for sanctions under N.C. Gen. Stat. § 15A-544.5(d)(8) could have "supervened" given Surety's motions to set aside had not been heard at the time Surety filed its notice of dismissal and those statutory sanctions were unavailable unless and until the trial court resolved Surety's motions to set aside against it. *Doss,* ___ N.C. App. at ___, 851 S.E.2d at 645.

4. The Record Does Not Conclusively Establish Bad Faith

¶ 23 Beyond the affirmative relief exception, the Board argues that the trial court's order deeming the notice of dismissal ineffective should be affirmed on the basis that the Surety sought dismissal in bad faith. *See, e.g., Brisson*, 351 N.C. at 597, 528 S.E.2d at 573 (recognizing the bad faith exception to Rule 41(a)(1)). We note that this argument was not raised below, was not relied upon by the trial court based on its written order, and the record does not otherwise conclusively establish bad faith. We

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require consideration *after the action has been terminated*." *Bryson*, 330 N.C. at 653, 412 S.E.2d at 331 (emphasis added).

decline to adopt the Board's position for these reasons.

¶ 24 The Board's counsel's argument before the trial court did not mention the bad faith exception to Rule 41(a)(1). Rule 10(c) of the North Carolina Rules of Appellate Procedure permits an appellee to raise issues "based on any action or omission of the trial court *that was properly preserved for appellate review* and that deprived the appellee of an alternative basis in law for supporting the . . . determination from which appeal has been taken." N.C. R. App. P. 10(c) (2021) (emphasis added). Arguments properly preserved for appellate review are those "*presented to the trial court* [through] a timely request, objection, or motion, *stating the specific grounds for the ruling the party desired the court to make* if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (emphasis added). The Board did not argue or cite any law on bad faith below, and the issue is therefore unpreserved.

¶ 25 The Board also points out that the trial court did not state the basis in its order for declaring the notice of dismissal ineffective, suggesting the trial court may have relied on the bad faith exception in ruling against Surety. However, the order does state that the trial court made its findings of fact and held the notice of dismissal ineffective "[a]fter . . . hearing arguments of counsel." Because the Board did not rely on the bad faith exception in its arguments and caselaw presented to the trial court, it appears from the transcript and the face of the order that the trial court did not deem the notice of dismissal ineffective based on any bad faith actions of Surety.

¶ 26 The bad faith cases relied on by the Board are also distinguishable from this appeal based on the record and findings before us. In *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989), the bad faith intent of the plaintiff seeking dismissal was established by a judicial admission on the record that the plaintiff filed his original complaint with no intent to prosecute his case in violation of Rule 11. 316 N.C. at 325, 341 S.E.2d at 543. Similarly, in *Market America, Inc. v. Lee*, 257 N.C. App. 98, 809 S.E.2d 32 (2017), the trial court found as facts that: (1) the plaintiff filed its voluntary dismissal between an oral ruling dismissing its complaint and entry of a written order to that effect; (2) "[t]he timing of the filing . . . permits no conclusion other than that [Market America] was attempting to prevent the [c]ourt from dismissing [Market America's] claims[;]" and (3) the "voluntary dismissal, taken under these circumstances, cannot be said to have been made in good faith." 257 N.C. App. at 104, 809 S.E.2d at 37. In contrast to both *Estrada* and *Market America*, Surety did not admit to bad faith and the trial court made no findings as to Surety's malintent in filing its notice of dismissal. Indeed, as reflected in the transcript and the written order, the trial court rendered its decision at the hearing without taking any evidence and based its determination only on the legal argument of counsel. And, as conceded by the Board, the trial court expressly declined to resolve the question of whether the documents filed by Surety were fraudulent at the hearing.

¶ 27 The Board nonetheless asserts that the evidence taken *after* the trial court orally announced its decision is sufficient to demonstrate bad faith. This argument is unavailing. First, the trial court made no findings on this issue and, "[a]s the court in *Estrada* noted, 'appellate court[s] cannot make findings of fact.' " *Hawkins v. State*, 117 N.C. App. 615, 623, 453 S.E.2d 233, 238 (1995) (quoting *Estrada*, 316 N.C. at 324, 341 S.E.2d at 542-43). Second, the evidence introduced at trial is far from unequivocal on this point. Riley, Surety's bail agent, testified that he filed the purported vital records only after taking several steps to verify their authenticity. He further testified that when the Board filed its objections and letter from Mexico's Consul General contesting the documents' veracity, he and Surety undertook additional investigative steps and ultimately abandoned their claim to the bonds when that investigation failed to confirm the documents were legitimate. Riley made clear in his testimony that he "no longer st[ood] by" the purported death records following the Board's objection and Surety's subsequent investigation, and "obviously that's why we paid the bond[s]." This is decidedly *not* a bad faith basis for dismissal; as our Supreme Court noted in *Brisson*, it is entirely permissible for a party to file a voluntary dismissal when it "fears dismissal of the case for . . . evidentiary failures."

351 N.C. at 597, 528 S.E.2d at 573.[2] *See also Market America*, 257 N.C. App. at 106, 809 S.E.2d at 38 ("Taking a voluntary dismissal based on concerns about the *potential* for a future adverse ruling by the Court is permissible."). The record before us thus does not present "circumstances [in which the dismissal] cannot possibly be said to have been taken in good faith." *Market America*, 257 N.C. App. at 106, 809 S.E.2d at 38 (quotation marks and citation omitted).

¶ 28 The Board also argues that reversal here would undermine the intent and public policy behind the statutory sanctions because sureties would be encouraged to file motions to set aside and "dodge the consequences if they get caught." This is not so, however. First, a motion for sanctions can be brought after a motion to set aside is denied, giving a district attorney or school board an opportunity to litigate the motion to set aside on the merits before pursuing sanctions for any discovered misconduct. *See State v. Cortez*, 229 N.C. App. 247, 266-67 & n.7, 747 S.E.2d 346, 359-60 & n.7 (2013) (noting N.C. Gen. Stat. § 15A-544.5(d) "lacks direction as to when a party must move for monetary sanctions pursuant to this subsection in order for such motion to be considered timely" and holding a motion for sanctions brought three months after final disposition of the motion to set aside was timely filed). Second,

[2] As Surety notes in its reply brief, it would be paradoxical to say that a party is acting in bad faith when it declines to pursue a claim that it can no longer assert in good faith based on the evidence.

Rule 11 sanctions are available independent of a surety's voluntary dismissal. *Bryson*, 330 N.C. at 653, 412 S.E.2d at 331. Third, bail agents are subject to licensure and discipline by the Commissioner of Insurance and may face punishments up to the revocation of or refusal to renew their licenses for untrustworthy, dishonest, or fraudulent conduct. *See* N.C. Gen. Stat. § 58-71-80(a) (2019) (allowing disciplinary action for, among other things, "[f]raudulent, coercive, or dishonest practices in the conduct of business," and "[w]hen in the judgment of the Commissioner, the licensee has in the conduct of the licensee's affairs under the license, demonstrated . . . untrustworthiness; or that the licensee is no longer in good faith carrying on in the bail bond business"); *State v. Evans*, 166 N.C. App. 432, 439-40, 601 S.E.2d 877, 881-82 (Wynn, J., dissenting) (noting that a violation of N.C. Gen. Stat. § 15A-544.5 could be grounds for disciplinary action against a bail agent).

III. CONCLUSION

¶ 29 For the foregoing reasons, the trial court's order deeming Surety's notice of voluntary dismissal ineffective is reversed and the subsequent orders of the trial court on the motions to set aside are vacated for want of jurisdiction.

REVERSED IN PART AND VACATED IN PART.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).