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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-323

No. COA21-325

Filed 3 May 2022

Nash County, No. 20 CVS 472

PHYLLIS MILLS, Plaintiff-Appellant,

v.

TARA JACKSON, Defendant-Appellee.

Appeal by plaintiff-appellant from the Order entered 5 January 2021 by Judge Quinton Sumner in Nash County Superior Court. Heard in the Court of Appeals 14 December 2021.

Blue LLP, by Daniel T. Blue, for plaintiff-appellant.

Fields and Cooper, PLLC, by Mark Osterhout, for defendant-appellee.

GORE, Judge.

¶ 1 Plaintiff, Phyllis Mills, appeals from an Order granting defendant Tara Jackson's Motion to Dismiss Ms. Mills's malicious prosecution and abuse of process claims. After careful review of the record and applicable law, we affirm.

I. Factual and Procedural Background

¶ 2 Ms. Mills and Ms. Jackson live in neighboring lots in Rocky Mount, North Carolina. At some point before June 2019, a dispute arose between the parties

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pertaining to the location of a fence Ms. Jackson maintains on her property, which borders Ms. Mills's property. On or about 9 June 2019, Ms. Jackson requested that a magistrate in Nash County issue two criminal charges against Ms. Mills, one for communicating threats in violation of N.C. Gen. Stat. § 14-277.1 and one for injury to real property in violation of N.C. Gen. Stat. § 14-127. In seeking these charges, Ms. Jackson alleged to the magistrate that Ms. Mills had damaged a fence located on Ms. Jackson's property and that Ms. Mills had threatened physical violence against Ms. Jackson. The magistrate issued a criminal summons requiring Ms. Mills to appear in Nash County District Court on the charges alleged. The criminal summons was served on Ms. Mills on 13 June 2019.

¶ 3 On 16 July 2019, a Nash County District Court Judge found Ms. Mills guilty of both alleged offenses. The District Court Judge sentenced Ms. Mills to a forty-five day active term and assessed court costs and restitution against Ms. Mills in the total amount of \$450.00. Ms. Mills appealed the matter to the Superior Court.

¶ 4 Before the matter was heard in Nash County Superior Court, the charge for injury to real property was dismissed by the prosecutor as a civil matter. The charge of communicating threats proceeded to a jury trial before the Nash County Superior Court, where Ms. Mills was found not guilty.

¶ 5 On 7 April 2020, Ms. Mills filed a civil complaint against Ms. Jackson alleging claims of slander, libel, malicious prosecution, and abuse of process. On 11 June 2020,

Ms. Jackson filed a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Ms. Mills subsequently voluntarily dismissed her claims for slander and libel on 31 December 2020. On 5 January 2021, a Nash County Superior Court Judge granted Ms. Jackson’s Motion to Dismiss. Ms. Mills filed a timely Notice of Appeal on 2 February 2021. Ms. Jackson filed a Motion to Dismiss Appeal on 6 July 2021.

II. Motion to Dismiss Appeal

¶ 6

At the outset we must address Ms. Jackson’s Motion to Dismiss the Appeal. Ms. Jackson argues we should dismiss this appeal for violations of Rules 11 and 12 of the North Carolina Rules of Appellate Procedure. She argues Rule 11 was violated because Ms. Mills did not serve upon her a proposed record on appeal that contained a signed certificate of service within thirty-five days after filing notice of appeal. Ms. Jackson also argues that Rule 12 was violated when Ms. Mills did not file the settled record on appeal with this Court’s Clerk of Court within fifteen days of the record on appeal being settled.

¶ 7

“Included among the North Carolina Rules of Appellate Procedure is a litany of nonjurisdictional requirements that are ‘designed primarily to keep the appellate process flowing in an orderly manner.’ Though not jurisdictional, compliance with these rules is mandatory.” *Ramsey v. Ramsey*, 264 N.C. App. 431, 431, 826 S.E.2d 459, 461 (2019) (quoting *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362

N.C. 191, 194, 198, 657 S.E.2d 361, 362, 365 (2008)) (cleaned up). Both Rule 11 and Rule 12 are timing requirements and not jurisdictional.

¶ 8

Rule 25 gives this Court discretion to dismiss the appeal or impose a sanction against a party or attorney for failure to comply with the Rules. N.C.R. App. P. 25. However, such punishment for Rule violations are only appropriate where the party's noncompliance "rise[s] to the level of a 'substantial failure' or 'gross violation.'" *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. "Factors relevant to that determination will include, among others, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Ramsey*, 264 N.C. App. at 432, 826 S.E.2d at 461 (cleaned up). It is well settled that this Court ordinarily "should impose a sanction other than dismissal This systemic preference not only accords fundamental fairness to litigants but also serves to promote public confidence in the administration of justice in our appellate courts." *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366. The sanction imposed should reflect the gravity of the violation. *Id.*

¶ 9

It is clear that some timing violations occurred in this case, we do not believe such violation arose to the level of a "substantial failure" or "gross violation" to warrant dismissal. The rule violations here, which to be clear demonstrate inappropriate decorum on behalf of appellant counsel in this matter and should be avoided at all costs, amount to a mere delay in procedural matters and did not

frustrate this Court’s review of the matter. Thus, in our discretion we decline to impose sanctions on this matter and deny Ms. Jackson’s Motion to Dismiss the Appeal.

III. Discussion

¶ 10 A Rule 12(b)(6) motion to dismiss “tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.” *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

¶ 11 In considering a Rule 12(b)(6) motion to dismiss the trial court must “treat the well-pleaded allegations of the complaint as true and admitted. . . . The facts and permissible inferences set forth in the complaint are to be treated in a light most favorable to the nonmoving party.” *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 261, 265, 827 S.E.2d 458, 465 (2019) (cleaned up). “[T]he essential question raised by a Rule 12(b)(6) motion is whether the complaint, when liberally construed, states a

claim upon which relief can be granted on any theory.” *Id.* at 266, 827 S.E.2d at 465 (cleaned up).

¶ 12 “A Rule 12(b)(6) motion should be granted when the complaint, on its face, reveals (a) that no law supports the plaintiff’s claim, (b) the absence of facts sufficient to form a viable claim, or (c) some fact which necessarily defeats the plaintiff’s claim.” *Id.* (citing *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986)).

A. Malicious Prosecution

¶ 13 Ms. Mills first argues that the trial court erred by granting Ms. Jackson’s motion to dismiss Ms. Mills’s claim for malicious prosecution. Ms. Mills asserts that her claim satisfies all four elements of malicious prosecution and that when all allegations in the complaint are considered in a light most favorable to her, the complaint is sufficient to survive a motion to dismiss. Ms. Jackson contends that the trial court did not err because the facts establish probable cause existed for her prior claims, which necessarily defeats a malicious prosecution claim.

¶ 14 “To establish malicious prosecution, a plaintiff must show that the defendant (1) initiated or participated in the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff.” *Turner v. Thomas*, 369 N.C. 419, 425, 794 S.E.2d 439, 444 (2016). A conclusive showing that any of these elements was not present in the case *sub judice* would

necessarily defeat the malicious prosecution claim and support the trial court's dismissal of the claim.

¶ 15 “[W]here in a former suit the essential issue is decided in favor of the plaintiff on the question of probable cause, that finding is conclusive and plaintiff may not be held liable in a subsequent complaint for malicious prosecution.” *Simpson v. Spears*, 231 N.C. App. 412, 414-15, 752 S.E.2d 508, 509 (2013) (citing *Overton v. Combs*, 182 N.C. 4, 7, 108 S.E.2d 357, 358 (1921)). This rule persists even if a conviction at the district court level is appealed and a different result is reached at the superior court level. Thus, “absent a showing that the conviction in District Court was procured by fraud or other unfair means, the conviction conclusively established the existence of probable cause, even though plaintiff was acquitted in Superior Court.” *Myrick v. Cooley*, 91 N.C. App. 209, 213, 371 S.E.2d 492, 495, *disc. rev. denied*, 323 N.C. 477, 373 S.E.2d 865 (1988) (citations omitted).

¶ 16 In the case *sub judice*, Ms. Mills was initially convicted of communicating threats and injury to real property in Nash County District Court before appealing the matter as of right to Superior Court and a charge being dismissed and the other being acquitted by the jury. Our caselaw and precedent clearly set forth that the initial conviction in District Court, despite a subsequent acquittal on appeal in Superior Court, conclusively establishes probable cause and precludes a subsequent

civil action for malicious prosecution. As a result, we hold that the trial court did not err in dismissing Ms. Mills’s claim for malicious prosecution.

B. Abuse of Process

¶ 17 Ms. Mills also argues the trial court erred in dismissing her claim for abuse of process.

In order to state a claim for the tort of abuse of process, plaintiffs must sufficiently allege (1) an ulterior motive, and (2) an act in the use of the legal process not proper in the regular prosecution of the proceeding. The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by the defendant or used by him to achieve a purpose not within the intended scope of the process used. The act requirement is satisfied when the plaintiff alleges that during the course of the prior proceeding, the defendant committed some wilful act whereby he sought to use the proceeding as a vehicle to gain advantage of the plaintiff in respect to some collateral matter.

Hewes v. Wolfe, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (citations omitted).

“[T]he gravamen of a cause of action for abuse of process is the improper use of the process *after it has been issued*.” *Chidnese v. Chidnese*, 210 N.C. App. 299, 311, 708 S.E.2d 725, 735 (2011) (emphasis in original) (quoting *Petrou v. Hale*, 43 N.C. App. 655, 659, 260 S.E.2d 130, 133 (1979)). “As a result, there is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint.” *Id.* (cleaned up). “In accordance with this principle, our courts have repeatedly upheld dismissal of an abuse of process claim when there are

no allegations that a defendant misused process *after* proceedings had been initiated.” *Id.* (emphasis in original). For example, our Supreme Court in *Stanback* affirmed the dismissal of an abuse of process claim, holding that because the plaintiff failed to allege “that defendant committed any willful act not proper in the regular course of the proceeding once he initiated the suit against her,” the claim was properly dismissed. 297 N.C. at 200, 254 S.E.2d at 624.

¶ 18 Ms. Mills asserts that she sufficiently alleged Ms. Jackson had an ulterior purpose and that Ms. Jackson continuously made false and untrue statements throughout the District and Superior Court proceedings. To support her claims regarding the act requirement, Ms. Mills points to *Chidnese v. Chidnese*, 210 N.C. App. 299, 708 S.E.2d 725 (2011).

¶ 19 We agree that Ms. Mills sufficiently alleged Ms. Jackson had an ulterior purpose in seeking the previous criminal charges against Ms. Mills. However, we cannot agree that Ms. Mills sufficiently alleged an act in the use of the legal process not proper in the regular prosecution of the proceeding. The only allegations relating to the act requirement in Ms. Mills’s complaint was that Ms. Jackson made false statements upon which the magistrate relied in issuing the criminal summons and that Ms. Jackson pursued the case through District and Superior Court. Ms. Mills’s complaint does not allege that Ms. Jackson did so in order to use the criminal

proceedings to gain advantage of Ms. Mills or even that Ms. Jackson knew her statements were false.

¶ 20 Further, the case *sub judice* can be distinguished from *Chidnese*, the case Ms. Mills relies upon. In *Chidnese*, the plaintiff brought two claims for abuse of process, one of which this Court held was properly brought. 210 N.C. App. at 312-13, 708 S.E.2d at 735-36. In the valid claim for abuse of process, the plaintiff, *inter alia*, alleged the defendant knowingly gave false information to obtain a temporary restraining order the plaintiff knew was unavailable in order to “harass, inconvenience, and annoy plaintiff, and to punish her for separating from defendant [].” *Id.* at 313, 708 S.E.2d at 736. In contrast, the Court in *Chidnese* found that false statements were made to assist in “execut[ing an] arrest warrant against plaintiff after it had been issued did not constitute an improper act during the course of a criminal proceeding, and thus cannot provide the basis for an abuse of process claim.” *Id.* at 315, 708 S.E.2d at 737 (citing *Stanback*, 297 N.C. at 200, 254 S.E.2d at 624).

¶ 21 In the case *sub judice*, and unlike in *Chidnese*, Ms. Mills made no allegations that Ms. Jackson knowingly made false statements to the magistrate judge or sought process she knew was factually unavailable to her. Further, while we may believe that seeking a criminal summons from a magistrate in a dispute over personal property is an abuse of the process available to the citizens of North Carolina, Ms. Jackson sought process the North Carolina General Assembly has made available to

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her and did not seek improper use of that process or to manipulate proceedings outside of the process of criminal proceedings once that process had been initiated. Thus, under our precedent we must hold that the trial court did not err in dismissing Ms. Mills's claim for abuse of process.

IV. Conclusion

¶ 22 For the foregoing reasons we deny Ms. Jackson's Motion to Dismiss the Appeal and hold that the trial court did not err in granting Ms. Jackson's Motion to Dismiss brought pursuant to North Carolina Rules of Civil Procedure Rule 12(b)(6). The Order appealed from is affirmed.

AFFIRMED.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).