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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-587

No. COA21-22

Filed 16 August 2022

Dare County, No. 11 CVS 250

TOWN OF NAGS HEAD, Plaintiff,

v.

BUDLONG ENTERPRISES, INC. and ALAN W. BUDLONG, Defendants.

Appeal by plaintiff from order entered 5 August 2020 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 6 April 2022.

Hornthal, Riley, Ellis & Maland, L.L.P., by Benjamin M. Gallop and M. H. Hood Ellis, for plaintiff-appellant.

Nexsen Pruet, PLLC, by Norman W. Shearin, Lisa P. Sumner, and David P. Ferrell, for defendants-appellees.

DIETZ, Judge.

¶ 1 Almost nine years after the Town of Nags Head brought a condemnation action against Defendants, the Town asked to amend its condemnation complaint to add a new legal theory based on the public trust doctrine. The trial court held a hearing on the motion to amend and entered an order denying the motion.

¶ 2 We affirm the trial court's order denying the motion to amend on the ground of undue delay—a ruling that was reasoned and within the trial court's sound

discretion. Because we affirm the order on that basis, we decline to address the trial court's alternative ruling based on futility. But, as explained in more detail below, we hold that the issue of whether a public trust doctrine argument can be asserted in this proceeding without first amending the complaint, and the corresponding issue of whether the court must conduct a hearing under N.C. Gen. Stat. § 40A-47, are issues that are not resolved by the challenged order and should be addressed by the trial court when the case returns from this appeal.

Facts and Procedural History

¶ 3 This case concerns a beach nourishment project in the Town of Nags Head designed to limit the harmful impacts of intense storms and beach erosion along the shoreline of this scenic portion of our state.

¶ 4 To conduct the beach nourishment, the Town concluded that it needed an easement across the beach area of approximately one thousand private oceanfront properties. The Town sent notices to impacted property owners stating that the Town would bring a condemnation action to acquire the easement rights unless the property owners voluntarily granted the necessary easement.

¶ 5 A group of impacted property owners refused to consent to the voluntary easements. In March 2011, the Town brought condemnation actions like this one against these property owners. The parties litigated these related cases for several years, although little progress was made in moving the cases forward. Then, in

September 2014, the trial court stayed this case and many others with the consent of the parties, while a lead case made its way through the courts. *See Town of Nags Head v. Richardson*, 260 N.C. App. 325, 817 S.E.2d 874 (2018), *aff'd per curiam with mod.*, 372 N.C. 349, 828 S.E.2d 154 (2019).

¶ 6 In *Richardson*, after a jury awarded the property owners $60,000 as compensation, the trial court inquired about a new legal theory concerning the public trust doctrine. *Id.* at 332, 337, 817 S.E.2d at 881, 884. Then, eight months after the jury verdict in *Richardson*, the trial court granted the Town's motion for JNOV relying on the public trust doctrine, a legal theory that the court had raised on its own initiative and which the Town had not advanced up to that point. *Id.*

¶ 7 On appeal, this Court (and, by a per curiam affirmance, our Supreme Court) held that the public trust doctrine was not timely asserted by the Town and could not be considered on appeal. *Id.* at 340, 817 S.E.2d at 886. Importantly, in a footnote, this Court explained that although "we hold that the Town is estopped from advancing the argument that it already possessed the Easement Rights pursuant to the public trust doctrine in this action, nothing in this opinion should be read to preclude condemnors in other actions from asserting such an argument prior to a 40A-47 hearing, timely and appropriately amending their complaints and pleadings if able, or otherwise raising the issue when proper before the trial court." *Id.* at 340 n.8, 817 S.E.2d at 886 n.8.

¶ 8 In October 2019, after the Supreme Court issued its decision in *Richardson*, the Town moved to lift the stay in this case and moved for leave to amend its complaint to assert the public trust doctrine issue identified in *Richardson*.

¶ 9 In August 2020, the trial court entered an order denying the Town's motion. The court held that the motion to amend was both untimely and futile. The court's order also stated that the complaint failed "to allege and thereby give rise to any issue as to the existence of public trust rights or any other issue requiring a hearing on all other issues pursuant to N.C. Gen. Stat. § 40A-47." The trial court's order further stated that the beach nourishment project "enabled by this condemnation, is not a non-compensable exercise of the Town's police powers but constitutes a physical invasion and taking of a portion of the Defendants' property described in the complaint for which they are entitled to be compensated under the State and Federal Constitutions."

¶ 10 The Town appealed the trial court's order denying its motion to amend.

Analysis

¶ 11 The Town argues that the trial court erred in denying its motion for leave to amend its complaint.

¶ 12 In this circumstance, where a request to amend a pleading is made long after the initial pleading is filed, a party may amend by leave of court. N.C. R. Civ. P. 15(a). Leave "shall be freely given when justice so requires." *Id.* Our Supreme Court has

identified permissible reasons to deny leave to amend to include "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Harrold v. Dowd*, 149 N.C. App. 777, 785–86, 561 S.E.2d 914, 920 (2002).

¶ 13 The trial court's denial of a motion to amend based on any of these grounds is reviewed for abuse of discretion. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). A trial court abuses its discretion only when its ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

¶ 14 Here, the trial court relied on two separate grounds to deny leave to amend: undue delay and futility. We begin by addressing the court's ruling based on undue delay. "In deciding if there was undue delay, the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit." *Draughon v. Harnett Cty. Bd. of Educ.*, 166 N.C. App. 464, 467, 602 S.E.2d 721, 724 (2004). The court also may examine whether the movant offers a reason for seeking the amendment that explains why the delay occurred. *See*, *e.g.*, *Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 447–48, 678 S.E.2d 671, 681 (2009); *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000).

¶ 15 Here, the trial court was well within its sound discretion to deny the motion to

amend based on undue delay. At the hearing on the motion, the Town acknowledged that it had been roughly nine years since the Town brought the initial complaint and the Town offered no explanation for why it did not raise the issue in the initial filing. Indeed, at the hearing, Defendants argued against the motion to amend by explaining that the Town could have raised the issue at the outset:

> [DEFENDANTS' COUNSEL]: Where I was going, Your Honor, is that it seems so much clearer to me when you look at this from the perspective of the procedural side, which is this is a case where it started in 2011, there has been a lot of case law since then that's developed on the issues that you've been discussing, but the argument was there to be made at the time they filed the complaints in 2011, and this is not a normal I want to amend –
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> THE COURT: Tell me that again.
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> [DEFENDANTS' COUNSEL]: That's what I'm saying, Your Honor. The argument that this was public trust rights could have been made back in 2011 regardless of all the case law that's happened since then. There were four years before the stay was put into effect.

¶ 16 In response, the Town never explained why it was unable to assert the public trust doctrine earlier in the proceeding, instead focusing largely on how this Court, in *Richardson*, signaled that the Town could raise that issue in other cases by "timely and appropriately amending their complaints and pleadings if able." *Richardson*, 260 N.C. App. at 340 n.8, 817 S.E.2d at 886 n.8.

¶ 17 Defendants also argued that, if the Town truly believed the public trust

doctrine applied, it could simply dismiss the condemnation action and proceed with the project because there was no need for condemnation. But, Defendants argued, the Town wanted to assert the public trust doctrine in this action to avoid attorneys' fees or other consequences for abandoning a condemnation action pending for nearly a decade:

> THE COURT: What they're saying is you could end it right now by the dismissal. If you're confident in your position, you can end it right now, right, with a stroke of your pen but –
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> . . .
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> [TOWN'S COUNSEL]: . . . I'm confident in my personal opinion that this is what the law is, but like we've all talked about, there is no appellate decision answering the question that will potentially go up from whatever 40A-47 hearing happens, and at that point, then hopefully –
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> THE COURT: Okay. So back to my question . . . why don't you just dismiss it?
>
> [TOWN'S COUNSEL]: Well, because then I'll have to tell my clients that I think this is the law but you better not go ride that truck out there on that person's beach until we get an appellate decision to do it.
>
> . . .
>
> [DEFENDANTS' COUNSEL]: Your Honor, there's the right to have that decision made back in 2011. They can get an appellate decision in another case. In these cases, they came out of the gate saying there was a taking. Now they want to take it back without having to face the prospect of having to pay attorneys' fees.

¶ 18 Ultimately, as the hearing transcript indicates, the trial court determined that there was undue delay without a sufficient explanation to justify amendment in the interests of justice. That decision, weighing the length of the delay, the lack of explanation for the delay, and the potential for prejudice, was a reasoned one and not manifestly arbitrary. *Briley*, 348 N.C. at 547, 501 S.E.2d at 656. Accordingly, under the applicable standard of review, we affirm the trial court's denial of the motion to amend based on undue delay.

¶ 19 Because we affirm the trial court on this basis, we need not address the court's alternative ground to deny the motion to amend—addressing the purported futility of the amendment—because our analysis on that issue would not impact the outcome of this appeal. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 357, 323 S.E.2d 294, 314 (1984). But to avoid confusion on remand, we note that the trial court's order stated that the initial complaint "fails to allege and thereby give rise to any issue as to the existence of public trust rights or any other issue requiring a hearing on all other issues pursuant to N.C. Gen. Stat. § 40A-47."

¶ 20 It is unclear from the record what the trial court intended with this language. To be sure, once the trial court denied leave to amend the complaint, there was another question that arose in the case: whether a public trust doctrine argument could be asserted in this proceeding without first amending the complaint, and the

corresponding issue of whether the court must conduct a hearing under N.C. Gen. Stat. § 40A-47. From this record, we cannot be sure whether the court was adjudicating this separate question or instead providing additional reasoning for the two stated grounds to deny leave to amend.

¶ 21 We therefore reject this portion of the challenged order. When this case returns to the trial court, the court can address these issues, if necessary, on proper motions from the parties so that there is a record from which this Court can conduct meaningful appellate review of the issue.

Conclusion

¶ 22 We affirm the trial court's order.

AFFIRMED.

Judges DILLON and GRIFFIN concur.

Report per Rule 30(e).