IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-73

Filed: 5 November 2019

North Carolina Industrial Commission, I.C. No. TA-26234

TERRY LYTLE, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant.

Appeal by plaintiff from order entered 26 September 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 August 2019.

N.C. Prisoner Legal Services, Inc., by Daniel K. Siegel, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

ZACHARY, Judge.

Plaintiff Terry Lytle appeals from an order of the Industrial Commission dismissing his tort claim against the North Carolina Department of Public Safety. After careful review, we reverse the dismissal of Plaintiff's claim.

Background

On 13 April 2017, Plaintiff filed a claim against the Department of Public Safety ("Defendant") under the Tort Claims Act, N.C. Gen. Stat. § 143-291 *et seq.*,

seeking over $10,000 in damages. Plaintiff, an inmate at the Lumberton Correctional Institution in Robeson County, alleged that he had been sexually assaulted by another inmate. Defendant filed a motion to stay discovery, as well as to dismiss the action. Special Deputy Commissioner Brian Liebman ("the Special Deputy") granted the motion to stay discovery, and a hearing date was set on the motion to dismiss.

On 21 December 2017, the Special Deputy conducted a telephonic hearing on Defendant's motion to dismiss, as well as a motion by Plaintiff to amend his complaint. After hearing arguments, the Special Deputy denied Defendant's motion to dismiss and informed Plaintiff that he had 120 days to complete discovery. Plaintiff became exasperated by what he perceived to be an unacceptable delay, and moved for summary judgment.

The Special Deputy explained that he would consider Plaintiff's motion for summary judgment in his order, and offered Plaintiff the chance to make any discovery requests at that time. Without addressing the issue of discovery, Plaintiff renewed his motion for summary judgment. Attempts by the Special Deputy to focus Plaintiff's attention on the issue of discovery were repeatedly ignored. As their colloquy continued without any progress, Plaintiff became more confrontational. The Special Deputy warned Plaintiff that if he did not lower his voice and cease using profanity, his claim would be dismissed "for abusive behavior." Still refusing to address any discovery requests, Plaintiff announced his intention to "appeal

everything." Convinced that Plaintiff was refusing to cooperate, the Special Deputy terminated the hearing.

On 12 January 2018, the Special Deputy entered an order dismissing Plaintiff's claim with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) for failure to prosecute. Plaintiff filed notice of appeal to the Full Commission of the North Carolina Industrial Commission, which affirmed the Special Deputy's order. Plaintiff timely appealed to this Court.

Discussion

Plaintiff contends that the Commission's order fails to account for (1) whether Plaintiff deliberately and unnecessarily delayed the case; (2) whether Defendant was prejudiced by Plaintiff's actions; and (3) whether less drastic sanctions were viable alternatives. We agree.

I.

A. Standard of Review

"It has long been the rule in this State that the Industrial Commission must make findings of fact and conclusions of law to determine the issues raised by the evidence in a case before it." *Martinez v. W. Carolina Univ.*, 49 N.C. App. 234, 239, 271 S.E.2d 91, 94 (1980). "Thus, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings

of fact justify its conclusions of law and decision." *Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. 725, 728, 615 S.E.2d 69, 72-73 (2005) (internal quotation marks omitted).

B. The Tort Claims Act and Rule 41(b)

The North Carolina Tort Claims Act is found in Article 31 of our General Statutes, which governs the laws and procedures for "Tort Claims Against State Departments and Agencies." N.C. Gen. Stat. §§ 143-291–143-300.1A (2017). The North Carolina Industrial Commission is statutorily authorized to act as an original court "for the purpose of hearing and passing upon tort claims." *Id.* § 143-291(a). "If the Commission finds that there was negligence on the part of an officer, employee, . . . or agent of the State while acting within the scope of his . . . employment," the Commission will determine the appropriate amount of damages to award the claimant. *Id.*

N.C. Gen. Stat. § 1A-1, Rule 1 provides that the North Carolina Rules of Civil Procedure "shall also govern the procedure in tort actions brought before the Industrial Commission except when differing procedure is prescribed by statute." In that there is no instruction as to when a claimant's case should be dismissed with prejudice under either the Tort Claims Act or the Tort Claims Rules, Civil Procedure Rule 41(b) serves to guide this Court's analysis. *See Lee v. Roses*, 162 N.C. App. 129, 133, 590 S.E.2d 404, 407 (2004) (stating that "[o]nce a failure to prosecute has been

found, the Commission has authority to impose appropriate sanctions," which may include dismissal under Rule 41(b)).

Rule 41(b) authorizes a trial court to dismiss a party's case: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him." N.C. Gen. Stat. § 1A-1, Rule 41(b). The Rule is in large part a housekeeping measure used to effectuate the efficient administration of judicial business. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987). Discretion to sanction a party for failure to prosecute exists "where the plaintiff or his attorney manifests an intent to thwart the progress of the action or engages in some delaying tactic." *Spencer v. Albemarle Hosp.*, 156 N.C. App. 675, 678, 577 S.E.2d 151, 153 (2003) (brackets and internal quotation marks omitted).

When imposing sanctions, "the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience." *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 420-21, 378 S.E.2d 196, 200-01 (1989). While dismissal of a case with prejudice is a possible sanction, this "is the most severe sanction available to the court in a civil case." *Id.* at 421, 378 S.E.2d at 200. Lesser sanctions will normally suffice, so the decision to dismiss with prejudice should be tempered by the vigilant exercise of judicial restraint. *See McLean v. Mechanic*, 116 N.C. App. 271, 275, 447 S.E.2d 459, 461 (1994). Simply put,

the law favors disposition of a party's claims on the merits. *See Rivenbark*, 93 N.C. App. at 420-21, 378 S.E.2d at 200.

II.

There is no precise rule as to what circumstances justify a dismissal for failure to prosecute. *See Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001). In determining the propriety of dismissal, the trial court—and here, the Commission—must consider three factors: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the other party; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.*

Turning to the facts of the instant case, we evaluate each factor to determine whether competent evidence supports the conclusion that Plaintiff's case should be dismissed with prejudice.

A. Undue Delay

The Commission found and concluded that "Plaintiff deliberately refused to comply with the Special Deputy Commissioner's Order to either comply and agree to proceed with discovery or waive discovery and move forward with an evidentiary hearing." In its own order, the Commission stated that "[d]espite being given several opportunities on the record to comply, Plaintiff adamantly and repeatedly refused to proceed and comply with discovery and the Special Deputy Commissioner's Orders."

Such findings led the Commission to conclude that Plaintiff was unnecessarily delaying the case.

Our reading of the transcript yields a different conclusion; in fact, Plaintiff's behavior demonstrated his strong desire to rapidly resolve the matter. First, at the hearing before the Special Deputy, Plaintiff withdrew his motion to amend his complaint, specifically because it would have delayed the resolution of the case. Second, it is clear from the transcript that Plaintiff's exasperation and rowdiness were related to learning that discovery would last four additional months, when he wanted to proceed immediately on the merits. This is also evident from the fact that Plaintiff moved for summary judgment multiple times during the hearing.

In regard to Plaintiff's agitation during the hearing, careful review of the transcript indicates that Plaintiff's behavior arose from his mistaken belief that Defendant had admitted the allegations of Plaintiff's complaint, as Defendant had not yet filed an answer to his complaint:

> MR. LYTLE: This is – this is what I'm – this is what I'm saying. If – if the – they don't have no – they didn't deny my claim, they didn't deny nothing. They denied not one thing. You know, you had – you had two – you had two things. That's all we've got here. You have a claim and you have a answer, that's it. You've got a complaint and an answer, that's it. They did not answer. If you don't form (phonetic) a denial, then it's admitted. It's admitted. Any (unintelligible) that's not denied, it's admitted. It came with a frivolous Motion to Dismiss. I filed two administrative (unintelligible), exhausted them all the way. I never, ever not once claimed constitutional rights. I

> never not once said that, hey, you know, can I get you to overturn the discipline. I never said none of that.

This Court has previously observed that a party's misapprehension of the situation should be considered when determining whether there was any calculated intent to delay the proceedings. *See Green v. Eure*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 601 (1973) (holding that a Rule 41(b) dismissal was improper when the "plaintiff's failure to proceed did not arise out of a deliberate attempt to delay, but out of misunderstanding").

Moreover, it is difficult to understand how Plaintiff's actions could have caused any significant delay. After informing Plaintiff that he could either take 120 days for discovery or make his discovery requests at the hearing, the Special Deputy warned that, should Plaintiff abstain from making a decision, "I'm just going to say that you've waived discovery and you're going to go to full evidentiary hearing without it." Common sense would suggest that, upon waiving discovery, the action could proceed to a full evidentiary hearing sooner than had the parties engaged in discovery.

Although we acknowledge that Plaintiff used profanity and repeatedly spoke over the Special Deputy, it is entirely possible that the uncooperativeness arose, in part, because Plaintiff and the Special Deputy were speaking on the telephone. An in-person hearing or videoconference, rather than a telephonic hearing, might have produced a more cordial colloquy. Nevertheless, neither the Special Deputy nor the

Commission could have reasonably concluded that Plaintiff was unduly delaying the case. Thus, this factor weighs in Plaintiff's favor.

B. Prejudice to Defendant

Prejudice to Defendant is only briefly mentioned in the Commission's order: "Plaintiff's refusal to proceed with discovery or move forward with an evidentiary hearing prejudiced Defendant from defending against Plaintiff's claims." The order, however, does not provide any explanation as to how or why Plaintiff's actions prejudiced Defendant, which makes the statement a conclusion of law. *See Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428 ("The only mention of prejudice to the defendant in the order is contained in finding number 17, which reveals no factual basis and thus is actually a conclusion of law."). It follows that the Commission's conclusion regarding prejudice to Defendant is insufficiently supported by factual findings. *See id.*

C. Consideration of Less Drastic Sanctions

In its order, the Commission made just a single, conclusory statement regarding this final factor: "Given Plaintiff's staunch unwillingness to comply with the rules and orders of the court, sanctions short of dismissal would not suffice." There is no mention of any alternative sanctions or why they would be unacceptable. *See McLean*, 116 N.C. App. at 275, 447 S.E.2d at 461 (observing that dismissal with prejudice "should be imposed only where the trial court determines that less drastic

sanctions are insufficient"). The character and magnitude of the harm must be carefully evaluated so that the sanction is proportional to the party's disobedience. *Rivenbark*, 93 N.C. App. at 420-21, 378 S.E.2d at 200-01. Accordingly, case law makes clear that findings of fact are required to substantiate why dismissal is warranted. *See Cohen v. McLawhorn*, 208 N.C. App. 492, 504, 704 S.E.2d 519, 528 (2010) (stating that before dismissing an action with prejudice pursuant to Rule 41(b), the trial court must "make findings and conclusions which indicate that it has considered less drastic sanctions"). The Commission therefore erred in failing to provide an explanation of why lesser sanctions were insufficient.

Conclusion

"Dismissal is the most severe sanction available to the court in a civil case." *Wilder*, 146 N.C. App. at 576, 553 S.E.2d at 427. Our review of the Commission's order indicates that Plaintiff's behavior did not rise to a level warranting dismissal with prejudice. For these reasons, we reverse the Commission's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges DILLON and BROOK concur.

Report per Rule 30(e).