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NO. COA12-931
NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2013

MARY JANE WILLIARD,¹
Plaintiff,

v.

Davidson County
No. 95 CVD 753

COY ORVILLE WILLIARD,²
Defendant.

Appeal by Plaintiff from Order entered 10 April 2012 by Judge Mary F. Covington in Davidson County District Court. Heard in the Court of Appeals 9 January 2013.

J. Calvin ("Cal") Cunningham III for Plaintiff.

Woodruff Law Firm, P.A., by Jessica S. Bullock and Carolyn J. Woodruff, for Defendant.

STEPHENS, Judge.

¹ Plaintiff's name has also been listed in various court documents as "Mary Jane Williard (Johnson)." In order to maintain consistency between the district court and the Court of Appeals, we employ the version of Plaintiff's name that was listed on the order appealed to this Court from 10 April 2012.

² Defendant's name has also been listed in various court documents as "Coy Orville Williard, Jr." Applying the reasoning from Footnote 1, we employ the district court's 10 April 2012 representation of the Defendant's name here.

Facts and Procedural History

Plaintiff and Defendant were married on 1 May 1983 and remained so for twelve years. During that time they had three children, the youngest of which was born on 19 August 1991. This appeal arises from an action by Plaintiff Mary Jane Williard ("Plaintiff") for (1) divorce from bed and board, (2) alimony, (3) child custody, (4) child support, and (5) equitable distribution of marital property, initiated on 5 May 1995 against Defendant Coy O. Williard ("Defendant"). Defendant responded to Plaintiff's action with a timely answer and counterclaim. Though Plaintiff's first four claims have been disposed of, her fifth remains unresolved and has not been brought to trial.

On 4 November 2004, the Honorable Samuel A. Cathey, district court judge presiding, entered an administrative order closing the equitable distribution file without prejudice to Plaintiff to re-file her action on grounds "that this action is no longer an active lawsuit, that a trial of the case will probably not be necessary, and that the ends of justice will best be served by declaring the case inactive and removing it from the trial docket." Seven years and three months after Judge Cathey's order and nearly seventeen years after the filing of

her original complaint, on 13 February 2012, Plaintiff filed a motion for administrative and scheduling conference and renewed motion to compel Defendant to file an equitable distribution inventory affidavit on her equitable distribution claim. Included within that motion was an affidavit by Plaintiff setting forth her rationale for the lengthy delay in reinitiating her action. Defendant responded on 28 March 2012 with a motion to dismiss for failure to prosecute under Rule 41 of the North Carolina Rules of Civil Procedure. Two weeks later, the trial court issued an order granting Defendant's motion under Rule 41(b) and dismissing Plaintiff's equitable distribution action with prejudice. Plaintiff appeals.

Standard of Review

Rule 41(b) of the North Carolina Rules of Civil Procedure provides that the trial court may dismiss an action on the defendant's motion when the plaintiff has failed to prosecute. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2011). We review the trial court's dismissal under Rule 41(b) by asking "(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010)

(citation and quotation marks omitted). In making such a determination, "[t]he facts found by the trial court are conclusive if supported by competent evidence, even though there may be evidence to support findings to the contrary." *McNeely v. Southern Ry. Co.*, 19 N.C. App. 502, 505, 199 S.E.2d 164, 167 (1973). We review the trial court's conclusions of law *de novo*. *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Where the trial court erroneously labels a finding of fact as a conclusion of law, that conclusion is likewise reviewable *de novo* on appeal. *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646 (2000).

Discussion

When the trial court dismisses a case under Rule 41(b) for failure to prosecute, we require that the court have first considered "whether lesser sanctions were appropriate for plaintiff's failure to prosecute[.]" *Wilder v. Wilder*, 146 N.C. App. 574, 577, 553 S.E.2d 425, 427 (2001). In determining whether lesser sanctions are appropriate, we have directed trial courts to 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 defendant; and

- (3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Id. at 578, 553 S.E.2d at 428. If the court undertakes this calculus before dismissing a case and makes its rationale clear in its disposition, "its resulting order will be reversed on appeal only for an abuse of discretion." *Id.* at 577, 553 S.E.2d at 427 (citation and internal quotation marks omitted).

The trial court's 10 April 2012 order dismissed Plaintiff's action with prejudice on grounds that (1) "[a] substantial amount of time has passed since the filing of the equitable distribution case" and (2) Plaintiff had "manifested such an intention to thwart progress of the action to its conclusion or ha[d] failed to progress the action towards its conclusion by engaging in some delaying tactics." On appeal, Plaintiff argues that the trial court's findings and conclusion do not constitute a proper consideration of the three *Wilder* factors and are not based on competent evidence. We affirm the trial court and address Plaintiff's argument as it applies to each respective *Wilder* factor.

I. Deliberate or Unreasonable Delay

In support of its order to dismiss Plaintiff's action, the trial court first determined Plaintiff had "failed to show up

for . . . court ordered mediation" and, "nearly 4 years later," waived it entirely. The court also found that Plaintiff had failed to appear for mediation in 1999 and, throughout the course of the litigation, hired more than six attorneys, chronically delayed the trial or outcome of the case, and may have purposefully engaged in a delay tactic. Accordingly, the trial court concluded that Plaintiff's eight-year failure to prosecute was sufficient to merit dismissal and not a "mere lapse of time."

Plaintiff attempts to justify the delay using alternative arguments: (1) Plaintiff first protests that she did not engage in delaying tactics and provides a lengthy description of her role furthering the other elements of her case.³ (2) Plaintiff alleges that the trial court erroneously imposed a burden on her "to account for the passage of time."⁴ (3) Plaintiff cites to her own affidavit in an attempt to excuse the length of time taken to re-initiate her equitable distribution action on grounds that Defendant made it difficult to proceed, avowing:

³ This includes a number of failed attempts to calendar the equitable distribution matter at various points occurring before Judge Cathey's decision to close the file.

⁴ We are unaware of any corporeal entity, Plaintiff included, that is tasked with accounting for the passage of time.

- (9) Among other challenges, every time I have sought to resolve support and equitable distribution matters, [Defendant] has tried to reopen custody.
- (10) In short, when I would move to enforce child support or seek to move forward on equitable distribution, [Defendant] would try to take the children's custody away from me.
- (11) I have sought to preserve the custody arrangement, and enforce support requirements, even though this has resulted in equitable distribution remaining unresolved all of these years.
- (12) All of the children are now grown, over the age of majority and are in circumstances where, in my judgment, a final conclusion with [Defendant] will not upset their living arrangements. I have now asked my attorneys to bring equitable distribution to final resolution.

(4) Plaintiff contests the court's findings with regard to her participation at mediation as not supported by the evidence in the record. We are not persuaded.

The trial court need not engage in any particular procedure to satisfy *Wilder*. Rather, the court is required to rely on competent evidence to support its findings, which must, in turn, support its conclusions. See *id.*, 146 N.C. App. at 578, 553 S.E.2d at 428. In determining whether an order is based on

competent evidence, we need only conclude that the court's findings rely on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See, e.g., State ex rel. Utils. Comm'n v. S. Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973) (defining substantial evidence as "more than a scintilla or a permissible inference").

In her brief, Plaintiff focuses her argument largely on her *disagreement* with the trial court's interpretation of the evidence – not the competency of that evidence. This is not sufficient to overturn the trial court's order. *See Foy v. Hunter*, 106 N.C. App. 614, 618, 418 S.E.2d 299, 302 (1992) ("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.") (citation omitted). The fact that there may be evidence in the record to support alternate findings does not mean that the trial court's findings lack competent evidentiary support.

In response to Plaintiff's alternative arguments on appeal, we note the following: (1) The fact that Plaintiff was more insistent with regard to her other claims against Defendant does not excuse her failure to prosecute *this* claim. (2) While "the

mere passage of time" does not justify dismissal for failure to prosecute, "[dismissal] is proper . . . where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic . . . fails to progress the action toward its conclusion." *In re Will of Kersey*, 176 N.C. App. 748, 751, 627 S.E.2d 309, 311 (2006) (citation omitted). (3) Plaintiff's excusatory affidavit does not exempt her from her duty to prosecute. Rather, it serves as an admission of Plaintiff's knowing decision to risk dismissal for failure to prosecute in order to benefit from delaying the matter until her children had reached a certain age. Whatever the merit of that decision for her and her children, it is not a valid excuse. Rather, the delay is manifestly "deliberate" under the first *Wilder* factor. A party's discomfort with the adversarial process, while unfortunate, is not, in and of itself, sufficient reason to delay prosecution for nearly one decade. To find otherwise would allow individual plaintiffs to unduly delay prosecution in myriad cases on grounds that the opposing party might pursue further litigation in our courts. (4) The trial court's determination that Plaintiff failed to appear at mediation, coupled with Plaintiff's employment of multiple different attorneys, constitutes competent evidence to

support the trial court's conclusion that Plaintiff engaged in a delaying tactic. *See Cohen*, 208 N.C. App. at 502-03, 704 S.E.2d at 527 ("[W]e are not talking about a delay in performing a single task. Instead, plaintiff did absolutely nothing to prosecute his case over more than a year's time, and, then, when defendants calendared the trial in order to have the case resolved, plaintiff ignored the trial. . . . [S]uch a wholesale failure to prosecute can constitute a delaying tactic.").

Accordingly, we hold that the near eight-year break between Judge Cathey's administrative order and Plaintiff's renewed motion to compel Defendant to file an equitable distribution inventory affidavit is sufficient to constitute unreasonable delay under Rule 41(b) in this case. Therefore, we conclude that the trial court's findings are based on competent evidence, which support its conclusion, and constitute a proper analysis of the first *Wilder* factor.

II. Prejudice to the Defendant

Plaintiff argues that "[t]he record in this case is devoid of evidence that the passage of time in some manner prejudiced [Defendant]," asserting that Defendant likely benefitted from maintaining possession of a number of "income producing commercial properties and partnerships." Plaintiff does not

support this assertion with evidence from the record. To the extent that Defendant has maintained any marital debt or been otherwise prejudiced, Plaintiff argues that Defendant has also maintained the profits of the property and, thus, was not prejudiced. We are unpersuaded.

"In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

Here, the trial court found that Defendant had been unreasonably prejudiced by Plaintiff's "delay tactics" and "has lost many days, possibly weeks from his employment" as a result. Defendant kept an attorney on retainer for seventeen years and, the court noted, has "maintained the marital debt on all the real property that is also in Plaintiff's name with no financial assistance from Plaintiff[.]"

After a thorough review of the record, we conclude that the trial court's findings as to prejudice are rooted in competent

evidence and are sufficient to support its determination that Defendant was prejudiced. The fact that Defendant may have profited from owning the property does not mean that he did not also suffer a detriment after maintaining both the marital debt on the land and an attorney for seventeen years. Accordingly, we hold that the trial court's findings support its conclusion and constitute a sufficient analysis of the second *Wilder* factor.

III. Alternative Sanctions

Plaintiff contests the trial court's order on grounds that there are other, less severe sanctions that it could have imposed, arguing that the court "completely failed to make findings of fact from evidence in the record that support its conclusion that sanctions short of dismissal were not appropriate." We disagree.

In *Wilder*, we determined that a trial court "must make findings and conclusions which indicate that it considered less drastic sanctions." *Wilder*, 146 N.C. App. at 577, 553 S.E.2d at 427 (citation, quotation marks, and ellipsis omitted). We have interpreted that language to allow a trial court to demonstrate that it has sufficiently considered whether lesser sanctions were available by stating that fact in its order. See *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d

819, 828-29 (2005) (finding a sufficient consideration of lesser sanctions on the trial court's determination that it had "considered the available sanctions for misconduct [and] determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct").

In this case, the court stated that it had "considered other sanctions less severe than dismissal with prejudice[, but was] unable to find anything short of a dismissal that would serve the purpose of Rule 41(b)." In accordance with *In re Pedestrian Walkway Failure*, we hold that this determination constitutes a sufficient analysis to justify dismissal under *Wilder* and Rule 41(b).

IV. Abuse of Discretion

Lastly and alternatively, Plaintiff asserts that even if the court's findings of fact were supported by competent evidence and those findings support its conclusion, it abused its discretion in dismissing her equitable distribution claim. We disagree.

Abuse of discretion exists when "an act is not done according to reason or judgment, but depending on will alone and done without reason." *State v. Edwards*, 172 N.C. App. 821, 825, 616 S.E.2d 634, 636 (2005) (citation and quotation marks

omitted). Thus, the trial court abuses its discretion when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008); *N.C. State Bar v. Talford*, 147 N.C. App. 581, 588, 556 S.E.2d 344, 350 (2001) ("[A]n abuse of discretion occurs only when a court makes a patently arbitrary decision, manifestly unsupported by reason.") (quotation marks omitted).

The trial court's findings in this case are based on competent evidence, and those findings reasonably lead to and support its conclusions, which is sufficient to support its final disposition. We see no evidence that the court's decision was patently arbitrary or manifestly unsupported by reason. Further, the trial court carefully considered all of the factors prescribed by the *Wilder* Court. Accordingly, we hold that the trial court properly dismissed the case under Rule 41(b) and did not abuse its discretion.

AFFIRMED.

Judges STEELMAN and MCCULLOUGH concur.

Report per Rule 30(e).