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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1117

Filed: 19 July 2016

North Carolina Industrial Commission, I.C. No. TA-23470

TERRY LYTLE, Plaintiff

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant.

Appeal by plaintiff from order entered 8 July 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 March 2016.

Terry Lytle, pro se, for plaintiff-appellant.

Roy Cooper, Attorney General, by Zachary Padget, Associate Attorney General, for defendant-appellee.

DAVIS, Judge.

Terry Lytle (“Plaintiff”) appeals from an order of the North Carolina Industrial Commission (the “Commission”) denying his Request for Assistance/Intervention and dismissing his claim for failure to prosecute. After careful review, we affirm.

Factual Background

Plaintiff, who is incarcerated with the North Carolina Department of Public Safety (“DPS”), filed a claim with the Commission on 7 January 2013 alleging that DPS was liable under the North Carolina Tort Claims Act, N.C. Gen. Stat. §§ 143-

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291 *et seq.*, because one or more of its prison guards lost or damaged several items of his property while searching his cell. After holding a hearing, Deputy Commissioner Sumit Gupta (“Deputy Commissioner Gupta”) issued a decision and order on 30 October 2014 concluding that Plaintiff’s claim should be denied because he failed to establish the essential elements of negligence.

Plaintiff filed a notice of appeal on 7 November 2014. The Commission informed Plaintiff by letter dated 17 November 2014 that if he wished to appeal Deputy Commissioner Gupta’s decision he needed to file within 25 days from his receipt of the hearing transcript a Form T-44, “Application for Review,” stating his grounds for appeal and, if he so chose, an accompanying brief.

Plaintiff filed with the Commission a Request for Assistance/Intervention on 18 December 2014 in which he alleged that DPS had violated his due process rights by interfering with his ability to receive the hearing transcript and requested the Commission’s assistance in remedying the situation. He acknowledged that the hearing transcript had arrived at the prison in which he was incarcerated on 15 December 2014 but stated that he refused to accept it because a prison employee had removed the binding of the transcript for safety purposes. Defendant did not assert that the transcript itself was incomplete or that — other than the removal of the binding — the transcript had been tampered with in any way. The Commission

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construed this Request for Assistance/Intervention as a motion and held it in abeyance.

DPS filed its brief with the Commission on 17 April 2015. Plaintiff never filed a Form T-44 or a brief. After hearing the case without oral argument, the Commission issued an order on 8 July 2015 denying Plaintiff's Request for Assistance/Intervention and dismissing his claim with prejudice for failure to prosecute under Rule 41(b) of the North Carolina Rules of Civil Procedure based on his failure to file a Form T-44 or a brief. Plaintiff filed a timely notice of appeal to this Court.

Analysis

The only issues properly before us on appeal are whether the Commission erred in rejecting Plaintiff's Request for Assistance/Intervention and dismissing his claim for failure to prosecute.¹ Appellate review of an order of the Commission is limited to "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusion and decision." *Nunn v. N.C. Dep't of Pub. Safety*, 227 N.C. App. 95,

¹ In his appellate brief, Plaintiff makes reference to various arguments that he did not actually raise before the Commission and that were not ruled upon by the Commission. Accordingly, only the matters decided in the Commission's 8 July 2015 order — the order from which Plaintiff is presently appealing — are properly before us. See N.C.R. App. P. 10(a) ("In order to preserve an issue for appellate review, a party must have presented to the trial court 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.").

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98, 741 S.E.2d 481, 483 (2013) (citation omitted). The Commission's "findings of fact are conclusive on appeal when supported by competent evidence, even though there is evidence which would support findings to the contrary." *Id.* (citation omitted). The Commission's conclusions of law are reviewed *de novo*. *Id.*

The Commission specifically addressed Plaintiff's argument regarding the removal of the binding on the hearing transcript as follows:

Plaintiff's assertion, that it is manifestly unreasonable to deny him the binding around his transcript since he has access to other materials with which to make weapons, is creative, but not persuasive. Plaintiff does not allege that the transcript was tampered with, or had pages removed, but objected to the principle of having to suffer the indignity of an unbound transcript. The United States Supreme Court has held that to have standing to bring a claim of denial of access to court, a plaintiff must demonstrate that the alleged infringement "hindered his efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Here, plaintiff had full access to the transcript, but refused to accept delivery of the same. Whether the transcript is bound or unbound has no impact on the plaintiff's access to the transcript; therefore, the plaintiff's request for assistance/intervention is DENIED.

Plaintiff's brief before this Court provides no legal authority or persuasive argument demonstrating that the removal of the binding violated his legal rights. Accordingly, we overrule Plaintiff's argument on this issue.

Finally, we address the Commission's dismissal of Plaintiff's claim. The Commission has "the inherent authority to dismiss a claim with or without prejudice for failure to prosecute." *Harvey v. Cedar Creek BP*, 149 N.C. App. 873, 874, 562

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S.E.2d 80, 81 (2002). Because the Tort Claims Act does not address the circumstances under which a claim may be dismissed for failure to prosecute, “this Court looks to G.S. § 1A-1, Rule 41(b) for guidance.” *Lee v. Roses*, 162 N.C. App. 129, 132, 590 S.E.2d 404, 407 (2004); *see also Pate v. N.C. Dep’t of Transp.*, 176 N.C. App. 530, 533, 626 S.E.2d 661, 664 (“[T]he North Carolina Rules of Civil Procedure apply in tort claims before the Commission, to the extent that such rules are not inconsistent with the Tort Claims Act[.]”), *disc. review denied*, 360 N.C. 535, 633 S.E.2d 819 (2006).

Pursuant to Rule 41(b), a claim may be dismissed “[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court” N.C.R. Civ. P. 41(b). A finding of failure to prosecute pursuant to Rule 41(b) requires a determination by the Commission “that plaintiff or his attorney manifests an intent to thwart the progress of the action or engages in some delaying tactic.” *Lee*, 162 N.C. App. at 132, 590 S.E.2d at 407 (citation, quotation marks, and brackets omitted). “Such a finding is a finding of fact, and findings of fact by the Industrial Commission are conclusive on appeal as long as there is any competent evidence to support them.” *Id.*

Once a failure to prosecute has been found, the Commission has authority to impose appropriate sanctions, including involuntary dismissal of the action. *Id.* However, before a claim may be involuntarily dismissed, the Commission must address the following factors:

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(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 caused by the plaintiff's failure to prosecute; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Lentz v. Phil's Toy Store, 228 N.C. App. 416, 421, 747 S.E.2d 127, 131 (2013) (citation and brackets omitted).

Here, we cannot conclude that the Commission erred by involuntarily dismissing Plaintiff's claim for failure to prosecute. The Commission addressed the above-referenced factors as follows:

4. In the instant case, the Commission served acknowledgment of notice of appeal on plaintiff on 17 November 2014. This acknowledgment included instructions for filing a Form T-44 or brief within 25 days of receipt of transcript. The Full Commission concludes that plaintiff's failure to accept his transcript has caused unreasonable delay in the adjudication of his claim. Defendant has invested time and incurred costs and expenses in preparing for and defending against plaintiff's tort claim. Defendant has, therefore, been prejudiced by plaintiff's failure to prosecute his claim.

5. Defendant is entitled to a resolution of this claim and has participated reasonably and actively to reach a resolution. Given plaintiff's failure to prosecute his claim, there is no sanction short of dismissal with prejudice that will suffice in this case and there is nothing in the record to indicate that any alternative sanctions would allow this action to progress toward a conclusion.

(Internal citations omitted).

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On appeal to this Court, Plaintiff makes the blanket assertion that he has been “stymied and thwarted every step of the way,” but he does not show how the Commission’s findings and conclusions are in any way incorrect. Rather, competent evidence shows that *Plaintiff’s* refusal to accept the hearing transcript on the specious ground that the absence of binding violated his due process rights and *Plaintiff’s* failure to abide by the Commission’s rules and file a Form T-44 or a brief within 25 days of when the transcript had reached him “manifest[ed] an intent to thwart the progress of the action” *Lee*, 162 N.C. App. at 132, 590 S.E.2d at 407 (citation, quotation marks, and brackets omitted).

Moreover, dismissal of Plaintiff’s claim was an appropriate sanction for his failure to prosecute given that (1) Plaintiff’s groundless refusal to accept the transcript and failure to file a Form T-44 or a brief — despite clearly being informed that he must do so within 25 days of receiving the transcript — unreasonably delayed the matter; (2) DPS was prejudiced by having to expend resources to litigate a tort claim for nearly three years that Plaintiff ultimately failed to prosecute; and (3) there was no indication in the record that a disposition short of dismissal would suffice given Plaintiff’s gamesmanship and unwillingness to abide by the Commission’s rules and pursue his claim. *See Lentz*, 228 N.C. App. at 421, 747 S.E.2d at 131 (holding that dismissal for failure to prosecute requires analysis of “(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the

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amount of prejudice, if any, to the defendant caused by the plaintiff's failure to prosecute; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice" (citation and brackets omitted)). Accordingly, the Commission did not err in dismissing Plaintiff's claim.

Conclusion

For the reasons stated above, we affirm the Commission's 8 July 2015 order.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).