IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1410

Filed: 20 November 2018

Yadkin County, No. 16 CVS 531

CEDRICK WILDER, Plaintiff,

v.

DAVID LITTERAL, Defendant.

Appeal by Plaintiff from orders entered 9 June 2017 by Judge Patrice A. Hinnant in Yadkin County Superior Court. Heard in the Court of Appeals 8 August 2018.

James B. Wilson & Associates, by James Barret Wilson, Jr., for Plaintiff-Appellant.

No brief filed by Defendant-Appellee.

INMAN, Judge.

Plaintiff-Appellant Cedrick Wilder ("Plaintiff") appeals from orders denying his motion for summary judgment and granting Defendant-Appellee David Litteral's ("Defendant") motion to dismiss. After careful review, we vacate the order denying summary judgment, reverse the order dismissing the action, and remand to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

On 7 October 2011, Plaintiff was entertaining himself at Copy Shop Business Center and Sweepstakes parlor in Jonesville, North Carolina. Plaintiff purchased an electronic sweepstakes card and was lucky enough to win $10. He approached parlor staff to collect his winnings but was instead denied payment, apparently because he had accessed Facebook on one of the sweepstakes computers. An argument ensued and parlor staff telephoned Defendant, the manager of the parlor, to report the dispute. Defendant drove from his house to the parlor to confront Plaintiff. Upon arrival, Defendant brandished a firearm at Plaintiff and shot him in the arm.[1]

Plaintiff filed suit against Defendant on 3 October 2014 for damages arising out of the shooting. On 9 October 2015 Plaintiff voluntarily dismissed his action pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. Plaintiff refiled his action less than a year later on 5 October 2016, alleging negligence, assault and battery, false imprisonment, and negligent infliction of emotional distress. Plaintiff's complaint sought both compensatory damages and attorneys' fees. Plaintiff filed and served requests for admissions, interrogatories, and production of documents on 27 October 2016.

[1] Although no criminal filings are included in the record on appeal, the hearing transcript discloses that Defendant was originally charged with attempted murder but later entered an *Alford* plea to assault with a deadly weapon inflicting serious injury.

Defendant filed his answer on 28 December 2016, denying most of Plaintiff's allegations and asserting various defenses. The answer also contained a motion to dismiss pursuant to Rule 12(b)(6), as well as a motion for court costs arising from Plaintiff's prior voluntary dismissal and for mediation fees. Neither motion was ever calendared, however, and Defendant never responded to Plaintiff's request for admissions.

On 23 March 2017, Plaintiff filed and served a motion for summary judgment; he calendared and filed a notice of hearing for his motion on 4 April 2017. The trial court heard arguments on Plaintiff's motion on 1 May 2017. Plaintiff's counsel contended that his requests for admission were all deemed admitted due to Defendant's failure to respond. As a result, Plaintiff argued, all elements of his causes of action, short of the calculation of damages, had been conclusively established. Defendant's argument focused not on the requests for admission but on his uncalendared, unnoticed motions instead,[2] asserting that all proceedings should be stayed and two of the five causes of action should be dismissed because Plaintiff had failed to pay costs associated with the previously dismissed action. The trial court reserved its ruling for a later date.

[2] Defendant's counsel told the trial court that Defendant had not responded to the request for admissions or timely calendared his motions because "the timing of all of these things was a hot mess . . . ."

On 9 June 2017, the trial court entered two orders: one summarily denying Plaintiff's motion as a "motion for summary judgment on the pleadings[,]" and the other granting Defendant's uncalendared and unheard motion to dismiss.[3] Plaintiff entered timely notice of appeal from both orders.

II. ANALYSIS

A. Standards of Review

This Court reviews an appeal from an order granting a party's motion to dismiss pursuant to Rule 12(b)(6) *de novo*, "review[ing] . . . the pleadings to determine their legal sufficiency." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014) (citations omitted). Such review asks "whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009) (citations and quotation marks omitted). Dismissal is proper in three instances: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the

[3] Although the trial court's order states that it dismissed Plaintiff's complaint under Rule 12(b)(6), it appears from the record that the trial court may have dismissed the action for failure to pay costs pursuant to Rule 41(d). As detailed *infra*, neither party presented substantive argument for dismissal under Rule 12(b)(6), and the balance of Defendant's argument, as well as the trial court's inquiries, focused on Plaintiff's failure to pay costs under the latter rule.

plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

We also apply *de novo* review to an appeal from a grant of summary judgment, affirming "when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). On such review, we view the record evidence in the light most favorable to the nonmovant and, when no genuine issue of material fact appears from the movant's evidence, the nonmovant is tasked with showing the existence of a material fact in dispute. *Id.* at 573, 669 S.E.2d at 576. "Nevertheless, if there is any question as to the weight of the evidence summary judgment should be denied." *Id.* at 573-74, 669 S.E.2d at 577 (citations, alteration, and quotation marks omitted).

B. Defendant's Motion to Dismiss

Plaintiff contends that the trial court erred in dismissing his complaint pursuant to Rule 12(b)(6), arguing that: (1) no such motion had been calendared or noticed as required by Rule 6(d); (2) the complaint sufficiently alleges the causes of action asserted; and (3) to the extent that the trial court dismissed his action for failure to pay costs under Rule 41(d), it did so in contravention of the Rule's plain

language. We agree with Plaintiff's first and third arguments and, as a result, reverse the trial court's order.[4]

Rule 6(d) of the North Carolina Rules of Civil Procedure provides that "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court." N.C. R. Civ. P. 6(d) (2017). Although parties may waive application of the Rule, *J.D. Dawson Co. v. Robertson Marketing, Inc.*, 93 N.C. App. 62, 66, 376 S.E.2d 254, 256-57 (1989), an order entered on a written motion that has not complied with the Rule's requirements may be reversed if the nonmovant: (1) lodges an objection or requests a continuance before the trial court, *Knotts v. Sanford*, 142 N.C. App. 91, 98, 541 S.E.2d 517, 521 (2001); and (2) demonstrates prejudice, *Evans v. Full Circle Prods., Inc.*, 114 N.C. App. 777, 780, 443 S.E.2d 108, 109 (1994). Plaintiff has satisfied both requirements.

The trial transcript below is replete with Plaintiff's objections to the trial court's consideration of Defendant's uncalendared and unnoticed motions:

> [PLAINTIFF'S COUNSEL:] . . . I believe the Defendant's counsel is going to argue . . . that they made a motion to stay the proceedings pending after the Alford plea . . . . So, I would point out to the Court that there is no order in the file. The motion has never been calendared to stay the proceedings. There's nothing that I've been served with or

[4] We express no opinion on the sufficiency of Plaintiff's complaint.

can see in the court file where there's an order staying these proceedings.

. . . .

THE COURT: . . . The court costs and the mediation fee has not yet been paid so far, correct?

[PLAINTIFF'S COUNSEL:] There's been no hearing on any of that.

. . . .

And even though the Defendant's answer contains some perfunctory motions for 12(b)(6), it's never been calendared. It's never requested a notice of hearing, and even though it contained a motion for cost in the previous action, which the only cost that defendant would suffer in duplicity would be the mediation costs. He has no—[t]hat's $175 and even though he says he desires a stay of proceedings, there has been no calendaring of that motion and we submit to the Court that it's incumbent upon the Defendant to prosecute his own motion and that it doesn't just automatically stay the proceedings and it does not relieve him of his duty to respond to our first request for admissions. . . . And we submit to the Court that since the admissions were properly served, there's been no motion to stay the proceedings pending this $175 amount, which is very, very small; that it shouldn't rise to block our rights to prosecute our case; and that the admissions are, in fact, deemed admitted and that's our position on that.

. . . .

Finally, we would argue strenuously that we have properly calendared our motions, we have given the Defense counsel plenty of notice, we have clocked everything in and they didn't clock their motions in. So, we argue that just because there's a motion for costs in a previous action that, that does not stay anything unless that motion is heard and

> a judge says "Hey, you've got to pay [Defendant] $175 and it's stayed." That hasn't happened. If a Court ordered that, that would be paid within 24 minutes not 24 hours.
>
> So, I would think it would be a great additional injustice to [Plaintiff], who's been shot and the Defendant has already had several breaks in the other proceedings, I think it would be a great injustice for the Court to decide that somehow he's not properly here, that the Defendant just gets to file something in his answer, but doesn't have to properly prosecute it and hear it. That he automatically just by saying something and requesting something receives an order that we had no notice of.
>
> . . . .
>
> Now, this $175 mediation fee—if Mr. Wagoner wants us to pay that, he needs to prosecute his motion. There are statues, there's rules, and they're getting all the breaks. They're getting to come in here and argue that we should pay the 175, but that Rule 36 in the admissions means nothing. We should ignore that, but we should pay them the 175 on [Rule 41(d)] that means something.
>
> . . . .
>
> And another thing, we strenuously argue . . . that this stay, just asking for one doesn't mean it's been ordered. I don't get that in any case that I've ever done. I have to file a motion . . . .
>
> . . . .
>
> Today's hearing if they want to discuss what all the work they did . . . , then that's for his motion that he hasn't calendared. It shouldn't color today's hearing.

The record also supports the element of prejudice required for relief from an order allowing a motion absent compliance with Rule 6(d). The transcript indicates

that neither party considered Defendant's Rule 12(b)(6) motion to be before the trial court. Defendant's counsel impliedly acknowledged that his motions were not on for hearing, stating that the parties had appeared "to be heard on this summary judgment motion." Consistent with this understanding, neither party offered any substantive argument regarding whether Plaintiff's complaint failed to state a claim.[5] Although Defendant's counsel made a conclusory statement that two of Plaintiff's causes of action failed because they were brought after the statute of limitations expired, he cited no authority for such a proposition and failed to address the remaining three causes of action in any way. Finally, Defendant's contentions responded to Plaintiff's summary judgment argument as opposed to supporting a motion to dismiss for failure to state a claim. Defense counsel argued that "even if the Court was compelled by [Plaintiff's counsel's] argument that he's got these admissions, those, standing alone, don't take away from the fact that two of the claims are outside of the statute of limitations period for which they can be filed." We hold that Plaintiff has demonstrated prejudice from this record, as his complaint was dismissed on a motion that was never noticed, calendared, or substantively argued before the trial court.[6]

---

[5] This is in stark contrast to Plaintiff's argument as to the propriety of granting summary judgment, which contained numerous citations to the relevant Rules of Civil Procedure and case law interpreting them.

[6] We acknowledge that the trial court may have been hesitant to consider summary judgment when a previously filed motion to dismiss had not yet been heard. That said, it is a movant's

The trial court's order cannot be affirmed based on the application of Rule 41(d). The plain language of that Rule provides:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. *If the plaintiff does not comply with the order, the court shall dismiss the action.*

N.C. R. Civ. P. 41(d) (2017) (emphasis added). Because no stay and order for costs was ever entered in this action, Plaintiff's complaint was not subject to dismissal. We reverse the trial court's dismissal of Plaintiff's complaint.

C. Summary Judgment

---

responsibility—and not the trial court's—to calendar, notice, and prosecute his own motion. To the extent that the trial court felt summary judgment was premature in light of Defendant's pending, uncalendared motions, a more appropriate course of action would have been to calendar and set for hearing Defendant's motions for a later date and continue the summary judgment hearing. We hasten to add, however, that nothing prohibited the trial court from simply proceeding to rule on Plaintiff's summary judgment motion without consideration of the unresolved motion to dismiss. *See Kavanau Real Estate Trust v. Durham*, 41 N.C. App. 256, 261-62, 254 S.E.2d 638, 641 (1979) (noting that amendments to the Federal Rules of Civil Procedure, and by extension North Carolina's identical Rules of Civil Procedure, were adopted for the express purpose of allowing a plaintiff to move for summary judgment while a defendant's motion to dismiss was still pending), *aff'd*, 299 N.C. 510, 263 S.E.2d 595 (1980). *See also* N.C. R. Civ. P. 56(a) ("A party seeking to recover upon a claim . . . may, *at any time* after the expiration of 30 days from the commencement of the action . . . , move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." (emphasis added)). Alternatively, the trial court could have entered summary judgment in Defendant's favor on some or all of Plaintiff's causes of action, but, as explained *infra*, only after considering those facts deemed judicially admitted by Defendant's failure to respond to the requests for admissions.

Plaintiff also argues on appeal that the trial court erred in denying his motion for summary judgment, asserting instead that his unanswered requests for admission entitle him to judgment as a matter of law. The face of the trial court's order, however, discloses that the trial court failed to consider Plaintiff's motion at all. We vacate the order denying Plaintiff's motion for summary judgment and remand for the trial court to rule on the motion in the first instance.

The trial court's order contains the following finding: "The Court finds that Plaintiff filed a motion for summary judgment *upon the pleadings*." (emphasis added). Such a statement is perplexing for several reasons, not least among them that "summary judgment upon the pleadings" is not a motion recognized by our Rules of Civil Procedure.[7] It appears instead that the trial court treated Plaintiff's motion as a motion for judgment on the pleadings pursuant to Rule 12(c), basing its order only on "review of the file, pleadings . . . , and oral arguments[.]" *Cf. Presbyterian Hosp. v. McCartha*, 66 N.C. App. 177, 178, 310 S.E.2d 409, 410 (1984) (holding that an order captioned as a "judgment on the pleadings" was in actuality a summary judgment order because the order "recites that matters other than the pleadings were

[7] This Court can find only one case, far predating our Rules of Civil Procedure, that mentions the concept of a "summary judgment upon the pleadings[,]" and only in the context of demurrers. *New Bern Banking & Trust Co. v. Duffy*, 156 N.C. 83, ___, 72 S.E. 96, 98 (1911). Demurrers were abolished by Rule 7 of the Rules of Civil Procedure in 1967. N.C. R. Civ. P. 7(c) (2017). And, while a summary judgment motion "made on the basis of the pleadings alone" is treated as a motion to dismiss under Rule 12(b)(6), *Shoffner Industries, Inc. v. W. B. Lloyd Const. Co.*, 42 N.C. App. 259, 262, 257 S.E.2d 50, 53 (1979) (citation omitted), Plaintiff's motion was based on the pleadings *and* his unanswered requests for admission.

considered"), *overruled on other grounds*, *N.C. Baptist Hosp., Inc. v. Harris*, 319 N.C. 347, 354 S.E.2d 471 (1987). The Rule, however, requires that a motion for judgment on the pleadings be treated as a summary judgment motion where "matters outside the pleadings are presented to and not excluded by the court." N.C. R. Civ. P. 12(c). Conclusively established admissions are "matters outside the pleadings" and may establish a basis for summary judgment. *See, e.g., Rahim v. Truck Air of the Carolinas, Inc.*, 123 N.C. App. 609, 614-15, 473 S.E.2d 688, 691-92 (1996) (affirming entry of summary judgment where the nonmovant did not respond to requests for admissions).

Here, Plaintiff's requests for admission went unanswered and were presented to the trial court; pursuant to Rule 36, those unanswered requests were "conclusively established unless the court on motion permits withdrawal or amendment of the admission." N.C. R. Civ. P. 36(b) (2017). No such motion was made by Defendant and, as a result, those admissions were "judicially established." *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 162, 394 S.E.2d 698, 701 (1990). Short of a motion and order allowing withdrawal and amendment of those admissions, the trial court was not free to disregard them. *See Eury v. N.C. Emp't Sec. Comm'n*, 115 N.C. App. 590, 599, 446 S.E.2d 383, 389 (1994) ("A judicial admission is a formal concession . . . for the purpose of withdrawing a particular fact from the realm of dispute. Such an admission is not evidence, but it, instead, serves *to remove the admitted fact from the*

trial by formally conceding its existence." (emphasis added; citations and quotation marks omitted)). To the extent the trial court treated Plaintiff's motion as a motion for judgment on the pleadings, it acted under a misapprehension of the law and failed to enter a ruling on Plaintiff's summary judgment motion in the first instance.

In addition to the trial court's erroneous treatment of Plaintiff's motion for summary judgment as one for judgment on the pleadings, the record below includes one final point of confusion. Both the order dismissing Plaintiff's complaint and the order denying summary judgment were entered simultaneously; it is unclear, then, whether the trial court denied Plaintiff's motion for summary judgment simply because it was also dismissing his complaint.

Given all of the irregularities, we conclude that the trial court's order denying summary judgment must be vacated and the matter remanded for rehearing. *See, e.g., State v. Grundler*, 249 N.C. 399, 402, 106 S.E.2d 488, 490 (1959) ("[I]t is uniformly held by decisions of this Court that where it appears that the judge below has ruled upon [a] matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light."); *cf. Edwards v. Edwards*, 110 N.C. App. 1, 15, 428 S.E.2d 834, 841 (1993) (remanding an order with instructions where the basis for the ruling was unclear).

III. CONCLUSION

For the foregoing reasons, the trial court's order dismissing Plaintiff's complaint is reversed and its order denying his motion for summary judgment is vacated and remanded for rehearing. On any rehearing of Plaintiff's summary judgment motion on remand, the trial court shall consider all evidence and judicial admissions before it; it shall also hear any other motions properly calendared and noticed for hearing consistent with the applicable Rules of Civil Procedure.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and DAVIS concur.