MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert Lynn Company, Inc., Kevin Stumler, and Julianna Stumler,

Appellants-Plaintiffs,

v.

Floyd County, Indiana, Floyd County Plan Commission, Callie Potts, Charles Freiberger, John

December 20, 2021

Court of Appeals Case No. 21A-PL-1345

Appeal from the Floyd Circuit Court

The Honorable Vicki L. Carmichael, Special Judge

Trial Court Cause No. 22C01-1302-PL-306

Schellenberger, Don Loughmiller, Chris Lane, Rebecca Gardenour, Paul Maymon, and Jeff Fessel, individually,

Appellees-Defendants

Crone, Judge.

Case Summary

[1] Robert Lynn Company, Inc., Kevin Stumler, and Julianna Stumler (collectively the Company) appeal the dismissal of their complaint for failure to prosecute against Floyd County, Indiana, the Floyd County Plan Commission, Callie Potts, Charles Freiberger, John Schellenberger, Don Loughmiller, Chris Lane, Rebecca Gardenour, Paul Maymon, and Jeff Fessel, individually (collectively the Plan Commission). Concluding that the trial court's decision to dismiss the action is not clearly erroneous, we affirm.

Facts and Procedural History

[2] As alleged in the complaint, the Company owns certain real estate in a proposed subdivision. In July 2006, the Plan Commission granted the Company's application for approval of the primary plat for the subdivision. Appellants' App. Vol. 2 at 37. After a remonstrance challenge to the primary plat was resolved, the Plan Commission granted the Company two requests for

a twelve-month extension to submit its application for final approval of the primary plat. In October 2012, the Company sought a third extension, which the Plan Commission denied in January 2013 (the zoning decision). *Id*. at 39.

[3] On February 27, 2013, the Company filed a complaint against the Plan Commission alleging claims of inverse condemnation and deprivation of civil rights resulting from the zoning decision, and an alternative petition for judicial review of the zoning decision. *Id*. at 47. In August 2014, the trial court ruled that judicial review of the zoning decision would proceed first. Following several time extensions requested by both parties, a bench trial was set for October 2014, which was rescheduled for February 2015. The parties agreed to continue the trial, and the trial court issued an order generally continuing the hearing. Meanwhile, from 2013 to January 2017, the Company was involved in a bankruptcy proceeding involving some of the real estate in the subdivision.

[4] On June 6, 2017, the Plan Commission filed its first motion to dismiss for failure to prosecute pursuant to Indiana Trial Rule 41(E), asserting that two years had passed since any action had been taken by the Company. *Id*. at 197. The Company filed a response, asserting that the delay in prosecuting the case was the result of a bankruptcy proceeding related to the real estate at issue. *Id*. at 201-03. The Company also filed a motion to dismiss its petition for judicial review of the zoning decision because that issue had become moot and requested an evidentiary hearing on the inverse condemnation claim. *Id*. at 202-03.

[5] Following a hearing on the motion to dismiss, on July 11, 2017, the trial court issued an order denying the motion. Appellants' App. Vol. 3 at 2-4. The trial court found that the inverse condemnation claim "could not move forward until the bankruptcy trustee's superior interests of real property that is the subject of this proceeding were fully satisfied, and this did not occur until January 2017." *Id*. at 2. In addition, the court found that any delay since January 2017 in setting an evidentiary hearing on the inverse condemnation claim was not unduly prejudicial to the interests of the Plan Commission. *Id*. In this order, the trial court also granted the Company's motion to dismiss its petition for judicial review, and pursuant to the stipulation of the parties, the trial court ordered that the claim for deprivation of civil rights would be generally continued pending final resolution of the inverse condemnation claim. *Id*.

[6] On November 28, 2017, the Plan Commission deposed Robert Lynn, after which the parties' counsel agreed that the most efficient way to move the case forward would be to prepare an agreed stipulation of facts to be used in preparation of a summary judgment motion to be filed by the Plan Commission. *Id*. at 23; Tr. Vol. 2 at 19. On January 24, 2018, the trial court entered a case management plan and scheduled a summary judgment hearing for July 19, 2018, and, if the Company's claim survived summary judgment, an evidentiary hearing for August 23, 2018. Appellants' App. Vol. 2 at 24. On March 29, 2018, the Plan Commission's counsel emailed the Company's counsel the proposed stipulation of facts for review. Appellants' App. Vol. 3 at

19. The Plan Commission received neither an agreement to nor a rejection of the proposed stipulation.

[7] On July 17, 2018, the trial court clerk emailed the party's counsels regarding the summary judgment hearing scheduled for July 19, 2018. *Id*. at 25. The Company's counsel informed the clerk that the hearing was not on his calendar. *Id*. The Plan Commission's counsel informed the clerk that it had not filed a summary judgment motion because the Company had not responded to the proposed stipulation of facts, and the Plan Commission requested that the summary judgment hearing and the evidentiary hearing be moved so that the Company could respond. *Id*. at 7, 23-24. The same day, the Company's counsel informed the Plan Commission's counsel that he would respond to the proposed stipulation of facts in fourteen days, but the Plan Commission did not receive a response. *Id*. at 7, 23.

[8] On August 20, 2018, the trial court clerk emailed the parties' counsels regarding the scheduled August 23, 2018 evidentiary hearing. *Id*. at 28. On August 20, the Company's counsel emailed the clerk explaining that the hearing should have been cancelled, that the Plan Commission would be filing a summary judgment motion, and that he would review the proposed stipulation by the end of the next day. *Id*. However, the Plan Commission did not receive a response to the proposed stipulation from the Company. The Plan Commission's counsel then contacted the Company's counsel regarding the proposed stipulation on January 7, February 3, May 8, and October 30, 2019, and received no response. *Id*. at 7-8, 19, 22.

[9] On July 9, 2020, the trial court sent an email to the parties notifying them that it was purging old cases and dismissal of their case was appropriate. *Id*. at 32. The Plan Commission's counsel contacted the Company's counsel regarding dismissal, and he replied that he would confer with his client and respond to the trial court by the following Tuesday. *Id*. at 31. The Plan Commission received no response from the Company, and the record does not show that the trial court received a response. On August 5 and September 14, 2020, the Plan Commission's counsel sent emails to the Company's counsel regarding dismissal and received no responses. *Id*. at 30. On September 16, 2020, the trial court sent another email to the parties regarding possible dismissal of the case, but the Company did not respond. *Id*. at 34.

[10] On October 29, 2020, the Plan Commission filed its renewed motion to dismiss for failure to prosecute, which the trial court granted. *Id*. at 5, 72. The Company then requested a hearing, which the trial court granted. Following the hearing, on June 3, 2021, the trial court issued an order granting the Plan Commission's motion to dismiss. Specifically, the trial court found that the Company's inaction has "spanned [] nearly three years[;]" the bankruptcy proceedings were concluded more than four years earlier; any inaction due to the Company's need to find alternative counsel was insufficient to justify the delay; the Plan Commission made "repeated efforts to proceed with the case and have continually been met by indifference[;]" the Company was solely responsible for the delay; the Plan Commission had experienced prejudice and had to bear extra costs due to the Company's inaction; the Company was "only

stirred to action by the [first] Motion to Dismiss and threat of dismissal [and s]ince that time ha[s] not exhibited any desire to pursue this matter[;]" and "[g]iven the extraordinary length of delay and [the Company's] failure to provide appropriate justification for [its] failure to prosecute, dismissal is the only appropriate remedy." Appealed Order at 1-3. This appeal ensued.

Discussion and Decision

[11] The Company asserts that the trial court erred in dismissing its action for failure to prosecute. Generally, we review involuntary dismissals for an abuse of discretion, which occurs only where the trial court's decision is against the logic and effect of the facts and circumstances before it. *Gillespie v. Niles*, 956 N.E.2d 744, 747 (Ind. Ct. App. 2011). "The judgment below is presumed to be valid, and an appellant bears the burden of proving otherwise." *Bank of Am., N.A. v. Congress-Jones*, 122 N.E.3d 859, 863 (Ind. Ct. App. 2019). We will affirm if there is any evidence that supports the trial court's decision. *Id*.

[12] Where, as here, a trial court enters findings, we apply a two-tier standard of review, considering whether the evidence supports the findings, and whether the findings support the judgment. *Samples v. Wilson*, 12 N.E.3d 946, 950 (Ind. Ct. App. 2014).

> Findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. In conducting our review, we consider only the evidence favorable to the judgment and all reasonable inferences

> flowing therefrom. We will neither reweigh the evidence nor assess witness credibility.

Dana Cos. v. Chaffee Rentals, 1 N.E.3d 738, 747 (Ind. Ct. App. 2013) (quoting *Barkwill v. Cornelia H. Barkwill Revocable Trust*, 902 N.E.2d 836, 839 (Ind. Ct. App. 2009), *trans. denied*), *trans. denied* (2014).

[13] The trial court dismissed the Company's action pursuant to Indiana Trial Rule 41(E), which reads in relevant part,

> [W]hen no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

The purpose of Trial Rule 41(E) is to ensure that plaintiffs will diligently pursue their claims. *Chapo v. Jefferson Cnty. Plan Comm'n*, 926 N.E.2d 504, 508 (Ind. Ct. App. 2010). "The burden of moving litigation forward is upon the plaintiff, not the court." *Petrovski v. Neiswinger*, 85 N.E.3d 922, 925 (Ind. Ct. App. 2017). Courts cannot be asked to carry cases on their dockets indefinitely, nor should adverse parties be left with a lawsuit hanging over their heads indefinitely. *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*.

[14] When determining whether to dismiss a case for failure to prosecute, a trial court balances nine factors:

> (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part.

Petrovski, 85 N.E.3d at 925. The weight accorded to any particular factor depends upon the facts of that case. *Bank of Am.*, 122 N.E.3d at 864. Dismissal may be justified solely by a lengthy period of inactivity, especially if the plaintiff has no excuse for the delay. *Baker Mach., Inc. v. Superior Canopy Corp.*, 883 N.E.2d 818, 823 (Ind. Ct. App. 2008), *trans. denied*. "Although Indiana does not require trial courts to impose lesser sanctions before applying the ultimate sanction of dismissal, we view dismissals with disfavor, and dismissals are considered extreme remedies that should be granted only under limited circumstances." *Petrovski*, 85 N.E.3d at 925.

[15] The Company first asserts that the trial court incorrectly found that the length of delay weighed in favor of dismissal. We disagree. The evidence shows that from the time the Plan Commission took Lynn's deposition on November 28, 2017, until the Plan Commission filed its renewed motion to dismiss on October 29, 2020, two years and eleven months had passed. That is a significant delay, which far exceeds the sixty days of inactivity required under Rule 41(E).

"A lengthy period of inactivity may be enough to justify dismissal in the circumstances of a particular case." *Lee v. Friedman*, 637 N.E.2d 1318, 1320 (Ind. Ct. App. 1994); *see also Lee v. Pugh*, 811 N.E.2d 881, 886 (Ind. Ct. App. 2004) (affirming Trial Rule 41(E) dismissal following a three-month period of delay); *Belcaster*, 785 N.E.2d at 1168 (affirming Trial Rule 41(E) dismissal after a ten-month delay).

[16] The Company also contends that the trial court failed to recognize that the Plan Commission contributed to the delay by telling the Company that it would be moving for summary judgment, and the Company "*could not* move forward with their evidentiary hearing until the summary judgment disposition." Reply Br. at 7. We are unpersuaded. After Lynn's deposition, the Plan Commission contacted the Company numerous times, with the Company either not responding at all or responding that it would review the proposed stipulation of facts and get back to the Plan Commission without following through. The Company completely ignores its conduct in this regard and provides no justification whatsoever for it. The Company asserts that the Plan Commission could have filed a summary judgment motion without the proposed stipulation, but the Company could have simply informed the Plan Commission that it would not agree to the stipulation. Furthermore, in light of the fact that the Plan Commission had not filed the summary judgment motion, the Company could have informed the trial court of that failure and requested that an

evidentiary hearing be set, but it did not.[1] The Company also failed to take any action after the trial court informed the parties that it was purging old cases. These facts not only show that the Company is responsible for the lengthy delay but also support the trial court's finding that the Company engaged in dilatory conduct.

[17] The Company next argues that the trial court erred in finding that the Plan Commission suffered prejudice from the delay. Again, we disagree. We note that the Plan Commission filed two motions to dismiss, conducted a deposition, prepared a stipulation of facts, and has had this lawsuit hanging over it since February 2013. These facts are sufficient to support the trial court's finding of prejudice.

[18] Finally, the Company asserts that the trial court erred in finding that lesser sanctions were inappropriate. The trial court cited the "extraordinary length of delay" and the Company's "failure to provide appropriate justification for [its] failure to prosecute." Appealed Order at 2. In addition, the trial court noted that the first motion to dismiss was necessary to prod the Company into action. The record shows that following the resolution of the bankruptcy proceeding in January 2017, the Company took no action in the case until the Plan Commission filed the first motion to dismiss in June 2017. We conclude that

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[1] The Company also argues that the COVID-19 pandemic caused the most recent, long delay in the proceedings, but the pandemic does not explain the Company's failure to respond to opposing counsel regarding the proposed stipulation, which obviously could have been done by email, or request an evidentiary hearing, which could have been held remotely.

the trial court's decision to dismiss the Company's action is supported by the findings, which are supported by the evidence. Therefore, we conclude that the trial court did not clearly err by dismissing the Company's complaint.

[19] Affirmed.

Bradford, C.J., and Tavitas, J., concur.