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NO. COA01-300

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

TIFFANY NEWTON,

Plaintiff,

v.

Mecklenburg County

No. 99 CVS 6883

MYRON V. NICHOLSON, M.D.,
J. BRUCE TAYLOR, M.D. AND
EASTOVER OBSTETRICS &
GYNECOLOGY ASSOCIATES,

Defendants.

Appeal by plaintiff from order entered 24 October 2000 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 February 2002.

Pamela A. Hunter for plaintiff-appellant.

Parker Poe Adams & Bernstein, L.L.P. by John H. Beyer, for defendants-appellees.

TIMMONS-GOODSON, Judge.

On 17 October 1997, Tiffany Newton ("plaintiff") filed a complaint against Myron V. Nicholson, M.D., J. Bruce Taylor, M.D. and Eastover Obstetrics & Gynecology Associates (collectively, "defendants") alleging medical malpractice on the part of the defendants. When plaintiff failed to serve responses to written discovery requests, defendants filed a motion to dismiss. On 1 July 1998, without having responded to defendants' written discovery requests, plaintiff filed a voluntary dismissal pursuant

to N.C. Gen. Stat. § 1A-1, Rule 41(a).

On 4 May 1999, plaintiff filed a second complaint. Upon filing an answer, defendants served plaintiff with interrogatories and a request for production of documents. Because plaintiff failed to serve responses to defendants' discovery requests, defendants filed a motion to compel discovery dated 26 August 1999.

On 11 October 1999, plaintiff served defendants with purported responses to defendants' first set of interrogatories and request for production of documents. After defendants reviewed the responses, defendants prepared a Consent Order that was signed by both parties. The Consent Order outlined the deficiencies in plaintiff's responses and required her to supplement her discovery responses within fifteen days. The Consent Order, entered on 13 October 1999 by Judge Claude S. Sitton, required all discovery to be completed by 1 August 2000. Judge Sitton further imposed costs on plaintiff as an appropriate sanction pursuant to N.C. Gen. Stat. § 1A-1, Rule 37.

Plaintiff thereafter failed to supplement her discovery responses pursuant to the Consent Order. Defendants, therefore, filed a motion to dismiss which was denied on 3 January 2000. More than six months after serving their interrogatories and document requests, defendants received complete responses from the plaintiff.

On 8 November 1999, defendants served plaintiff with interrogatories seeking information regarding plaintiff's certifying experts pursuant to Rule 9(j). Again, plaintiff failed

to respond to defendants' written discovery requests. On 1 February 2000, defendants filed a motion to dismiss or in the alternative, a motion to compel and to impose sanctions. Defendants' motion to dismiss was denied. More than four months after serving their Rule 9(j) interrogatories, defendants received responses from plaintiff.

Pursuant to the Scheduling Order, all discovery requests were to be completed by 1 August 1999. In light of the deadline, defendants made three separate requests to depose plaintiff's only expert witness, Dr. Frank Stangl. Plaintiff cancelled and rescheduled the deposition twice. Due to the unsuccessful attempts in scheduling a deposition, the parties agreed to participate in a Mediation Settlement Conference. On 28 September 1999, Judge Shirley L. Fulton entered an order for alternative dispute resolution. The mediator for the matter served plaintiff with written notice for the conference scheduled for 29 August 2000. Defendants and defense counsel appeared at the mediation; however, neither plaintiff nor plaintiff's counsel appeared.

The case was set for trial on 23 October 2000. After plaintiff cancelled the deposition of her expert witness and failed to appear for mediation, defendants filed a motion to dismiss pursuant to Rule 41(b). On 3 October 2000, Judge Morgan entered an order dismissing with prejudice all claims asserted by plaintiff. From this order, plaintiff appeals.

In her first assignment of error, plaintiff contends that the

trial court erred in granting defendants' Rule 41(b) motion to dismiss for failure to prosecute. We disagree.

Rule 41(b) provides for the involuntary dismissal of a cause of action "[f]or failure of the plaintiff to prosecute or to comply with [the] rules or any order of the court[.]" N.C. Gen. Stat. § 1A-1, Rule 41(b) (1999). "'Dismissal for failure to prosecute is proper only [when] the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion.'" *Jones v. Stone*, 52 N.C. App. 505, 505, 279 S.E.2d 13, 15 (quoting *Green v. Eure, Secretary of State*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 601 (1973)), *disc. review denied*, 304 N.C. 195, 285 S.E.2d 99 (1981). A court's authority to dismiss an action on these grounds is "essential to the prompt and efficient administration of justice." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987). A trial court is required to make findings and conclusions that indicate it has considered less drastic sanctions. *Foy v. Hunter*, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992). "If the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion." *Id.*

In the instant case, after making findings of fact detailing a course of conduct by plaintiff that resulted in litigation delays, the trial court entered the following conclusions of law:

1. Since refileing this action in April, 1999, [t]he Plaintiff has consistently failed to respond to Defendants' discovery requests as required by the North Carolina Rules of Civil

Procedure.

2. Plaintiff failed to supplement her responses to the Defendants' First Set of Interrogatories and Request for Production of Documents according to the deadline set by the Consent Order signed by Judge Sitton October 13, 1999.

3. Plaintiff has violated Paragraph 3 of the Consent Discovery Scheduling Order agreed to and signed by the parties August 12, 1999, which requires the parties "to make their best efforts to make available at mutually convenient times and places the experts identified by them for deposition without the necessity of further Orders of this Court." To date, Plaintiff has failed to make her only "for trial" expert available for a deposition, and has in fact canceled such deposition on two (2) occasions after it was scheduled.

4. Plaintiff has violated the Court's Order for Alternative Dispute Resolution by failing to appear and participate in a properly scheduled and noticed Mediated Settlement Conference.

5. Although the Court has considered other, less severe sanctions, and whether the same might be appropriate under 37(b), the Court concludes that Plaintiff's acts and omissions since the filing of this action constitute a pattern of conduct which demonstrates that the Plaintiff has failed to prosecute this action, thereby warranting the entry of an Order pursuant to 41(b) dismissing this action.

In light of the findings and conclusions of law made by the trial court, we conclude that the trial court did not abuse its discretion in granting defendants' motion to dismiss. The record reveals that plaintiff failed to respond to written discovery requests, failed to supplement her discovery responses in the time specified according to the Consent Order, failed to make her expert witness available in accordance with the Consent Order and failed

to appear at mediation in violation of the order entered for alternative dispute resolution. Indeed, the trial court considered and imposed less severe sanctions before dismissing the case when costs were imposed on the plaintiff earlier in the proceedings. However, plaintiff's repeated violations of the rules of civil procedure and repeated attempts to continuously "thwart any progress of this action," justified the trial court's dismissal pursuant to Rule 41(b). Accordingly, we affirm the order of the trial court.

Affirmed.

Judges WYNN and TYSON concur.

Report per Rule 30(e).