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NO. COA10-13

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

NORRIS DILLAHUNT, JR.
and JOSIETTA DILLAHUNT,
Plaintiffs,

v.

Craven County
No. 08 CVS 1688

FIRST MOUNT VERNON INDUSTRIAL
LOAN ASSOCIATION, PRODEV XXII,
LLC, THE SHOAF LAW FIRM, P.A.,
LABRADOR FINANCIAL SERVICES, KIM
RICHARDSON, JAMES BOSTIC, JASON
GOLD and JONATHON FRIESEN, in his
capacity as Trustee,
Defendants.

Appeal by plaintiffs from order entered 15 April 2009 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 10 June 2010.

Mills & Economos, L.L.P., by Larry C. Economos, for plaintiffs-appellants.

The Law Offices of Lonnie M. Player, Jr., PLLC, by Lonnie M. Player, Jr., for defendant-appellee First Mount Vernon Industrial Loan Association.

GEER, Judge.

Plaintiffs Norris Dillahunt, Jr. and Josietta Dillahunt appeal from the trial court's order dismissing this action pursuant to Rule 41(b) of the Rules of Civil Procedure for failure to prosecute. Plaintiffs do not dispute that the trial court considered the factors set out in *Wilder v. Wilder*, 146 N.C. App.

574, 553 S.E.2d 425 (2001), but argue that the court's conclusions of law as to those factors are not supported by findings of fact based on competent evidence.

After careful review of the record, we hold that the trial court made sufficient findings of fact supported by the evidence to justify its conclusions of law, based on *Wilder*, regarding plaintiffs' delay of the prosecution of this action, the resulting prejudice suffered by First Mount Vernon Industrial Loan Association ("FMV"), and the need for dismissal with prejudice. Accordingly, we affirm the trial court's order dismissing the action with prejudice.

Facts

On 8 August 2008, plaintiffs filed a complaint in Wake County Superior Court against defendants FMV, ProDev XXII, LLC, John Gonzales, Dale Duncan, the Shoaf Law Firm, P.A., Labrador Financial Services, Kim Richardson, James Bostic, Jason Gold, and Jonathon Friesen (in his capacity as trustee on a deed of trust). The complaint asserted causes of action for fraud, negligence, unfair and deceptive trade practices, predatory lending, usury, and unjust enrichment related to a mortgage loan transaction that closed in Wake County in September 2006 involving real estate in Craven County.

Plaintiffs alleged in their complaint that the loan, made by FMV in the amount of \$275,000.00, was to complete construction on their home in Craven County. The interest rate was 18% with a one-

year balloon payment scheduled for 1 September 2007. Upon default, the interest rate increased to 24%.

According to the complaint, plaintiffs retained Richardson, who worked for Labrador Financial, to assist them in refinancing an existing construction loan. They further alleged that Richardson, Bostic (another employee of Labrador Financial), and Labrador Financial fraudulently induced plaintiffs to enter into a loan with FMV. FMV required an additional guaranty that was signed by plaintiff Norris Dillahunt, Jr.'s parents (Norris Dillahunt, Sr. and Helen Dillahunt) and was secured by other property owned by the parents.

Plaintiffs attended the loan closing at the law offices of Shoaf Law Firm and, they allege, signed various documents at the direction of their attorney, Gold, without his explaining the legal significance of those documents. Included in the documents signed by plaintiffs was a general warranty deed relinquishing ownership of their property to defendant ProDev (defendant Duncan, an attorney, created the limited liability company, while defendant Gonzales was a 60% member of the company). Plaintiffs alleged that defendants were engaging in a fraudulent scheme to divest them of title to their property.

On the same day that they filed the complaint, 8 August 2008, plaintiffs also filed a motion for a temporary restraining order ("TRO") to halt a judicial foreclosure on the property arising out of a prior action filed by FMV in Craven County Superior Court. Plaintiffs stated in that motion that they would "suffer immediate

and irreparable harm by virtue of losing title to their home through foreclosure sale" in the absence of a TRO. The motion also represented that "[t]here is a Notice of hearing set for Monday August 11, 2008 in Craven County, NC in File Number 08 CVS 797, which is a judicial foreclosure on property acquired from plaintiffs as detailed in the attached complaint." The Wake County Superior Court entered a TRO also on 8 August 2008, enjoining FMV, ProDev, and the trustee on the deed of trust, Friesen, from pursuing further foreclosure proceedings. Three days later, on 11 August 2008, plaintiffs filed a notice of *lis pendens* against the property.

On 12 August 2008, FMV filed a motion to dissolve the TRO, for damages, and for Rule 11 sanctions, as well as a motion to dismiss for improper venue or, alternatively, to change venue. Plaintiffs consented to the change of venue, and on 5 September 2008, the trial court entered an order transferring venue from Wake County to Craven County Superior Court. On 25 September 2008, FMV and Duncan filed a joint motion to dismiss and alternatively for judgment on the pleadings. On 17 October 2008, ProDev and Gonzales also filed a joint motion to dismiss and for judgment on the pleadings.

On 25 November 2008, the Wake County Superior Court entered an order dissolving the TRO as improvidently granted and awarded FMV \$2,400.00 in damages. The court found that contrary to the representations in the motion for a TRO, "[n]o judicial foreclosure sale was pending or scheduled in Craven County in File No. 08 CVS 797 at the time Plaintiffs moved for their Temporary Restraining

Order." The trial court held open FMV's motion for Rule 11 sanctions for hearing by the trial judge who entered the TRO. The court ordered that the \$2,400.00 in damages "are immediately payable by Plaintiffs to Defendant FMV."

On 12 January 2009, the Craven County Superior Court entered an order dismissing all the claims against Gonzales and Duncan; denying FMV's and ProDev's motions to dismiss claims against them for unfair and deceptive trade practices, predatory lending, usury, and unjust enrichment; and reserving FMV's and ProDev's motions for judgment on the pleadings. Subsequently, on 3 and 5 February 2009, FMV and ProDev respectively moved to dismiss the claims against them due to plaintiffs' failure to name Helen Dillahunt, individually and in her capacity as the administratrix of the estate of Norris Dillahunt, Sr., as a necessary party to the action.

On 19 February 2009, plaintiffs' attorney, Valderia D. Brunson, who had represented plaintiffs since the filing of the complaint, moved to withdraw, citing the burdensome travel distance and plaintiffs' failure to compensate her for services rendered. On 27 February 2009, FMV filed a motion seeking an order holding plaintiffs in civil contempt for their failure to pay the court-ordered \$2,400.00 in sanctions for the improper TRO.

The trial court conducted a hearing in Craven County Superior Court on FMV's motion on 9 March 2009 in which plaintiffs were represented by counsel prior to Brunson's motion to withdraw being allowed. On 12 March 2009, the trial court granted Brunson's

motion to withdraw finding that (1) plaintiffs had failed to compensate her for services rendered and had failed to provide compensation for associated counsel (although the case was a complicated proceeding requiring associated counsel) and (2) the travel distance had become burdensome for Brunson.¹

On 18 March 2009, the trial court entered an order concluding that plaintiffs' failure to comply with the order requiring payment of damages was "willful and continuing civil contempt" and that plaintiffs had the ability to comply with the order. The court, therefore, found plaintiffs in contempt, but provided that they could purge themselves of the contempt by full payment to FMV of the \$2,400.00 sanction. The court authorized plaintiffs to pay the amount in 12 monthly installments of \$200.00 in certified funds.

On 19 March 2009, FMV filed a motion to dismiss plaintiffs' action pursuant to Rule 41(b) for failure to prosecute. The Craven County Superior Court held a hearing on the motion on 30 March 2009. At the hearing, neither plaintiff had counsel, and Josietta Dillahunt did not even appear. The court entered an order on 15 April 2009 dismissing plaintiffs' complaint with prejudice under Rule 41(b). In the order, the court also directed that the *lis pendens*, which had remained on file until that point, be stricken and made null and void. The court further provided that the order of dismissal could be recorded for purposes of clearing title to

¹On 6 March 2009, attorney C. Scott Holmes, who had not signed any pleadings but had appeared in Wake County Superior Court to assist Brunson in answering motions on 14 August 2008, also filed a motion to withdraw, citing plaintiffs' failure to compensate him. The court entered an order granting Holmes' motion on 9 March 2009.

the property. Plaintiffs timely appealed from that order to this Court.

Discussion

The sole issue on appeal is whether the trial court erred in ordering a dismissal with prejudice pursuant to Rule 41(b) for failure to prosecute. In *Wilder*, this Court held that a trial court must address three factors before dismissing an action for failure to prosecute under Rule 41(b): "(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." 146 N.C. App. at 578, 553 S.E.2d at 428.

The standard of review for a Rule 41(b) dismissal is "(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." *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005). Unchallenged findings of fact "are presumed to be supported by competent evidence, and are binding on appeal." *Justice for Animals, Inc. v. Lenoir County SPCA, Inc.*, 168 N.C. App. 298, 305, 607 S.E.2d 317, 322 (quoting *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 35, 604 S.E.2d 327, 331 (2004)), *aff'd and modified on other grounds per curiam*, 360 N.C. 48, 619 S.E.2d 494 (2005).

In their appellants' brief, plaintiffs challenge all 11 of the trial court's findings of fact. In their assignments of error, however, they only assigned error to findings of fact two, three,

six, nine, 10, and 11. Since plaintiffs filed notice of appeal on 15 May 2009, we apply the version of the Rules of Appellate Procedure in effect on that date. As of 15 May 2009, Rule 10(a) provided that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal." Thus, in reviewing the order, we do not consider plaintiffs' arguments as to findings of fact one, four, five, seven, and eight; those findings are binding on appeal.

The trial court addressed the first *Wilder* factor in its first conclusion of law. That conclusion of law stated: "Plaintiffs' failure to prosecute their claim in derogation of the North Carolina Rules of Civil Procedure is a deliberate scheme to delay Defendant FMV's prior pending judicial foreclosure of Subject Property in 08 CVS 797[,]" the action filed by FMV in Craven County.

This conclusion of law is supported by the following findings of fact. The court first found that plaintiffs filed this action "purely as a collateral attack upon a prior pending judicial foreclosure action filed by Defendant FMV in Craven County Superior Court" against ProDev, Norris Dillahunt, Sr., and Helen Dillahunt in file no. 08 CVS 797. The court next found that plaintiffs "further used their filing as a vehicle for the bad faith imposition of their own *lis pendens* upon the property subject to foreclosure, . . . upon which they live but which they do not own and for which they are not, and have never been, obligated to Defendant FMV under the Note and Deed of Trust in foreclosure in 08

CVS 797" The court found that ProDev is the record owner of the property "having received and recorded a warranty deed for the Subject Property executed by Plaintiffs in September 2006 in exchange for the repayment of Plaintiffs' debt and other obligations encumbering the Subject Property."

The court found that plaintiffs "then improperly obtained a Temporary Restraining Order from the Wake County Superior Court on a fraudulent basis, stating in their Motion that a foreclosure sale of the Craven County property was imminent when they knew it was not." The court noted that, as a result, the Wake County Superior Court "later dissolved the improperly obtained Temporary Restraining Order" and "sanctioned Plaintiffs \$2,400.00 in attorneys' fees for their misuse of the Court." The court observed further that when plaintiffs failed to pay the attorneys' fees, the court found plaintiffs "in continuing and willful contempt and ordered Plaintiffs to purge themselves of such contempt or be incarcerated."

The trial court further found that "[o]ther than improperly moving for the Temporary Restraining Order and filing their bad faith *lis pendens*, Plaintiffs have done nothing to prosecute this case." Of the defendants named in the action, plaintiffs served only FMV, Duncan, ProDev, Gonzales, and Richardson. Although plaintiffs had served Richardson on 18 August 2008, they "have taken no action to default her or otherwise prosecute this action against her." In addition, the court found, "Plaintiffs have taken no action whatsoever to serve the remaining Defendants," including

the Shoaf Law Firm, Labrador Financial, Bostic, Gold, or Friesen. The court found that summonses issued as to those defendants had all expired.

The court determined that "Plaintiffs never had any intention of serving Defendants Shoaf, [Labrador Financial], Bostic, Gold or Friesan [sic] and these parties were named in the action merely as window dressing to lend credence to Plaintiffs' improperly obtained Temporary Restraining Order in Wake County and to further frustrate and promote their collateral attack upon the prior pending judicial foreclosure in 08 CVS 797." In its final finding of fact, the court found that "[t]hough Plaintiffs are not, and have never been, the real parties in interest in the prior pending judicial foreclosure action of the Subject Property in 08 CVS 797, they have interposed this action for the sole purpose of frustrating that foreclosure so that they might continue to live upon the Subject Property without payment of the mortgage, a mortgage upon which no payments have been made for the past two (2) years."

Of these findings, we first consider plaintiffs' challenge to finding of fact two that plaintiffs used their lawsuit as a vehicle for the bad faith filing of a *lis pendens*. Although plaintiffs claim on appeal that the *lis pendens* was prudently filed, the trial court's other findings – namely, (1) that plaintiffs filed the action purely as a collateral attack on the foreclosure to enable plaintiffs to continue to live on the property mortgage-free and (2) that plaintiffs improperly obtained a TRO – support the finding that the *lis pendens* was filed in bad faith.

Plaintiffs also argue as to finding of fact two that the filing was not evidence of a delaying tactic. This argument, however, essentially addresses whether the finding supports the court's conclusion of law regarding the first *Wilder* factor. In making this argument, plaintiffs have missed the trial court's point. With finding of fact one (that the action was purely a collateral attack on the foreclosure) and finding of fact two, the trial court was saying that plaintiffs filed the lawsuit without any intention to prosecute it. Plaintiffs simply wanted to get a *lis pendens* filed (and initially a TRO) to preclude defendants from being able to foreclose on the property. The pendency of the action and the *lis pendens* allowed plaintiffs to continue to live on the property mortgage-free, as the trial court found in finding of fact 11. The significance of these findings is that plaintiffs had an incentive not to prosecute the action, but rather to have it remain pending unresolved. Since plaintiffs have not otherwise materially challenged finding of fact two, it is binding.

With respect to finding of fact three – that plaintiffs improperly obtained a TRO on a fraudulent basis – plaintiffs blame their attorney, Brunson, for having improperly obtained the TRO. In North Carolina, there is "a presumption in favor of an attorney's authority to act for the client he professes to represent." *Gentry v. Hill*, 57 N.C. App. 151, 154, 290 S.E.2d 777, 779 (1982). The burden is on the client to rebut the presumption. *Id.* In *Long v. Joyner*, 155 N.C. App. 129, 134-35, 574 S.E.2d 171, 175 (2002), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 624

(2003), this Court, relying upon that presumption, held that sanctions for failing to respond to requests for information about the defendants' expert witnesses could be imposed against the defendants even though only the attorney had communicated with the experts. The Court explained that "defendants' attorney was presumed to be working on the defendants' behalf when he hired expert witnesses and obtained their opinions for use at trial" and, therefore, "the attorney's actions can be imputed to his clients" *Id.* at 135, 574 S.E.2d at 175. See also *Montgomery v. Montgomery*, 110 N.C. App. 234, 240, 429 S.E.2d 438, 442 (1993) ("An attorney acting on behalf of his or her client is presumed to have authority to do so at the request of the client.").

In this case, Brunson is presumed to have been working on plaintiffs' behalf when she filed the initial complaint and sought the TRO. Although plaintiffs may not have personally filed the motion, they expected to receive the benefit of the issuance of the TRO based on Brunson's having filed the motion. We note that even after the trial court held the hearing on the motion to dissolve the TRO, plaintiffs each chose to sign verifications of the complaint on 26 September 2008. Plaintiffs have made no attempt to rebut the presumption that Brunson was acting on behalf of plaintiffs, with their knowledge and in accordance with the authority granted to her. Accordingly, Brunson's actions are imputed to plaintiffs, and they are bound by them.²

²Plaintiffs repeat this argument with respect to other findings of fact, but make no attempt to show that Brunson was not authorized to act on their behalf at any pertinent time.

Plaintiffs next challenge finding of fact six in which the court found that plaintiffs did nothing to prosecute the case other than improperly moving for the TRO and filing the bad faith *lis pendens*. Plaintiffs point out that since the filing of the complaint, they timely served five defendants, consented to a change in venue, defended two motions to dismiss, and, as of the hearing on the 41(b) motion, were "actively seeking" to replace their counsel who had withdrawn.

The trial court did not overlook plaintiffs' service of some of the defendants. In finding of fact seven, the court recognized that plaintiffs had served FMV, Duncan, ProDev, Gonzales, and Richardson, but, in findings of fact eight and nine, also pointed out the lack of any effort to proceed against the other defendants.

As for plaintiffs' consent to a change in venue and defense of the motions to dismiss, we do not consider these actions to be indicative of any initiative or active effort by plaintiffs to move the case forward. These actions were necessary to keep the lawsuit against FMV pending and the *lis pendens* in place. The record contains no indication of any efforts by plaintiffs, such as pursuit of discovery, to resolve their claims or obtain relief apart from the TRO and the *lis pendens*. In particular, although plaintiffs had sought substantial damages against Richardson in the complaint, they did not bother to seek entry of default or a default judgment against Richardson even though she had failed to file an answer. Plaintiffs' assertion that they were "actively seeking" to replace Brunson is unsupported by any evidence in the

record. Further supportive of plaintiffs' having no intent to prosecute this action was the fact that Brunson was allowed to withdraw because, the trial court found, plaintiffs would not pay her legal fees and would not pay the fees necessary to retain associate counsel given the complicated nature of the case.

With respect to finding of fact nine – that they took "no action whatsoever" to serve the Shoaf Law Firm, Labrador Financial, Bostic, Gold, or Friesen – plaintiffs argue only that it is irrelevant to the conclusion regarding plaintiffs' failure to prosecute their claim against FMV. Plaintiffs do not, however, challenge the sufficiency of the evidence to support this finding, and it is, therefore, binding.

Plaintiffs also challenge finding of fact 10 that plaintiffs never had any intent to serve the remaining defendants and that those parties were only added to give credence to the improperly obtained TRO and to further promote their collateral attack on the pending judicial foreclosure. This finding is supported by evidence that plaintiffs served two Virginia business entities (FMV and ProDev) and two Virginia residents (Duncan and Gonzales), but did not attempt to serve a Wake County resident (Bostic), a Wake County business (Labrador Financial), a Wake County law firm (the Shoaf Law Firm), or a Wake County lawyer (Gold). In addition, rather than keeping their action alive as to these latter defendants, plaintiffs allowed their summonses to expire. Further, although plaintiffs served Richardson (also of Wake County), they took no action to obtain any judgment against her.

Plaintiffs' complaint also supported the inference that plaintiffs only intended to collaterally attack the foreclosure action. The complaint contained 12 claims for relief. The first three claims for relief were asserted against three defendants, only one of whom was served, Richardson. Even though those first three claims sought substantial damages, plaintiffs essentially ignored them. The fourth through seventh claims for relief were against FMV and only sought damages. They did not relate to the title of the property. The eighth claim for relief against ProDev was the sole claim for relief that sought rescission of the deed, the basis for seeking the TRO and filing the *lis pendens*. The ninth and tenth claims for relief were for damages against two individuals affiliated with ProDev. The eleventh claim for relief was a claim against Richardson for damages unrelated to title to the property. Plaintiffs did not serve any of the defendants against whom the twelfth claim was asserted; this claim was also for damages. Thus, plaintiffs essentially proceeded only against FMV and ProDev, the parties to the foreclosure action.

Lastly, plaintiffs argue that the evidence does not support the portions of finding of fact 11 stating that plaintiffs were not real parties in interest in the judicial foreclosure action and that plaintiffs brought this action for the sole purpose of frustrating the foreclosure action. In paragraph 39 of plaintiffs' complaint, however, plaintiffs admitted that "they no longer owned their property" and that "title was solely in the name of" ProDev. Plaintiffs also admitted in paragraph 104 of their complaint that

on 21 September 2006, plaintiffs signed a general warranty deed that transferred ownership of the real property at issue in the foreclosure action to ProDev. In the order dissolving the TRO, the trial court found the FMV foreclosure action was brought against ProDev to foreclose on the property at issue in this case and against Norris Dillahunt, Sr. and Helen Dillahunt to foreclose on property given as security for the loan made on the ProDev-owned property.

In addition, plaintiffs did not challenge the trial court's finding in the Rule 41(b) order that "they are not, and have never been, obligated to Defendant FMV under the Note and Deed of Trust in foreclosure in 08 CVS 797" Plaintiffs also do not specifically challenge the finding that "Defendant ProDev XXII, LLC is the record owner of the Subject Property having received and recorded a warranty deed for the Subject Property executed by Plaintiffs in September 2006 *in exchange for the repayment of Plaintiffs' debt and other obligations encumbering the Subject Property.*" (Emphasis added.)

The allegations of plaintiffs' complaint and the trial court's findings not challenged on appeal provide sufficient support for the finding that plaintiffs were not the real parties in interest in the pending foreclosure action. As for the finding that plaintiffs brought the action for the sole purpose of frustrating the foreclosure action, that determination is a reasonable inference drawn from prior findings of fact that we have already upheld, including that this action was brought "purely as a

collateral attack" upon the foreclosure action; that the filing of this action was a vehicle for the bad faith filing of a *lis pendens* on the property subject to foreclosure; that plaintiffs obtained a TRO "on a fraudulent basis"; that plaintiffs were sanctioned, as a result, "for their misuse of the Court"; that "[o]ther than improperly moving for the Temporary Restraining Order and filing their bad faith *lis pendens*, Plaintiffs have done nothing to prosecute this case"; that plaintiffs have taken no action to proceed against any of the defendants other than FMV, ProDev, and the individuals associated with ProDev; and plaintiffs had no intention of serving five of the defendants, but rather included them only to aid in obtaining the TRO in Wake County and to promote their collateral attack on the foreclosure proceeding. In addition, plaintiffs do not dispute the portion of finding of fact 11 stating that a delay in the foreclosure action meant that plaintiffs could continue to live on the property without payment of the mortgage and that no mortgage payment had been made in the prior two years.

Plaintiffs contend that the finding of fact regarding an improper purpose "is refuted by" the fact that their claims against FMV and ProDev survived the motions to dismiss brought under Rule 12(b)(6), "leaving all claims asserted against both Defendants alive and pending at the time of the Trial Court's finding of fact 11." Plaintiffs further argue that their actions regarding the TRO and the *lis pendens* were "prudent attempts to safeguard their claims for damages." These arguments, however, miss the point. As

the trial court found, after plaintiffs obtained the TRO and filed the *lis pendens* – which the trial court found were not prudent acts, but rather were in bad faith – they did nothing to pursue their pending claims for damages. That was the basis for the trial court's ruling.

We, therefore, hold that the findings of fact challenged on appeal are supported by competent evidence. We must next determine whether the trial court's findings, taken together, are adequate to support the trial court's conclusion as to the first *Wilder* factor. This Court has explained that an intent to delay prosecution may be inferred from the facts surrounding the delay. *Foy v. Hunter*, 106 N.C. App. 614, 618, 418 S.E.2d 299, 302 (1992).

A review of the Rule 41(b) order indicates that the trial court was inferring an intent to delay prosecution of this action from all of the circumstances of the litigation. The court's findings show that once plaintiffs fraudulently obtained a TRO and filed their bad faith *lis pendens*, thereby effectively stopping the foreclosure action, they did nothing to pursue their claims. The trial court found that, from the start, plaintiffs had no intent of proceeding against five of the defendants and effectively abandoned their claims against a sixth. The court further found that plaintiffs filed the action for the sole purpose of allowing themselves to continue to live on the property mortgage-free – even though no mortgage payments had been made by anyone for two years. Instead of pursuing a resolution of their claims, plaintiffs just

allowed the claims to remain pending, taking no positive steps to advance the lawsuit.

These findings reflect plaintiffs' self-serving behavior, their obstructive conduct as to the foreclosure action, and their satisfaction in doing nothing, knowing that so long as they did nothing, the foreclosure proceeding would remain effectively blocked. As a federal district court has stated: "'[F]ailure to prosecute' under the rule does not mean that the plaintiff must have taken any positive steps to delay the trial. . . . It is quite sufficient if he does nothing, knowing that until something is done there will be no trial." *Bendix Aviation Corp. v. Glass*, 32 F.R.D. 375, 377 (E.D. Pa. 1961), *aff'd*, 314 F.2d 944 (3rd Cir.), *cert. denied*, 375 U.S. 817, 11 L. Ed. 2d 52, 84 S. Ct. 51 (1963).

While the time that elapsed between the filing of the lawsuit and the dismissal is not an extended period of time, we hold that given the trial court's findings regarding the particular circumstances of this case, the trial court's conclusion regarding plaintiffs' deliberate scheme to delay was warranted. *See also Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 875 (3rd Cir. 1994) (explaining that in evaluating dismissal for failure to prosecute, court looks for type of "willful or contumacious" behavior which amounts to flagrant bad faith and "involves intentional or self-serving behavior"); *Davis v. Williams*, 588 F.2d 69, 70-71 (4th Cir. 1978) (affirming dismissal under federal Rule 41(b) where, *inter alia*, plaintiff engaged in "obstructive conduct" and district court found that

plaintiff's counsel "'steadfastly refused to take the initiative in this litigation'").

Plaintiffs' reliance on *Lusk v. Crawford Paint Co.*, 106 N.C. App. 292, 298, 416 S.E.2d 207, 210 (1992), *disc. review improvidently allowed*, 333 N.C. 535, 427 S.E.2d 871 (1993), is misplaced. In *Lusk*, although the plaintiff timely served summonses on the defendants, he did not serve the complaint until eight months later. This Court stated that "[t]he dispositive question before us is whether plaintiff's action was subject to dismissal for failure to 'timely' serve his complaint, and whether the delay of the service of his complaint constituted failure to 'timely' prosecute his action." *Id.* at 297, 416 S.E.2d at 210. After pointing out that the Rules of Civil Procedure do not specify a time within which a complaint must be served, the Court noted that our Supreme Court held in *Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989), that a trial court could properly dismiss an action when the plaintiff's counsel deliberately withheld delivery of a summons so that the defendant would not learn about the action for eight months. *Lusk*, 106 N.C. App. at 297, 416 S.E.2d at 210. Because the Court, in *Lusk*, could not conclude that the failure to serve the complaint was intentional, but rather the circumstances showed "only arguable inadvertence or neglect of counsel," the Court reversed the order dismissing the action for failure to prosecute. *Id.* at 298, 416 S.E.2d at 210.

Here, in contrast to *Lusk*, we are not talking about a delay in performing a single task. Instead, in this case, the trial court's

findings of fact establish that once this action was filed, along with the *lis pendens*, plaintiffs had no intention of actually prosecuting it, but rather wanted it to remain pending as long as possible. Under *Wilder*, the trial court could properly find that plaintiffs' conduct constituted "deliberately or unreasonably delay[ing] this matter." 146 N.C. App. at 578, 553 S.E.2d at 428. Accordingly, the trial court's findings are sufficient to support the court's conclusion of law regarding the first *Wilder* factor.

We next turn to the second *Wilder* factor, which addresses the amount of prejudice, if any. *Id.* In this case, the trial court concluded:

The continuing prejudice to Defendant FMV in the delay of the prior pending judicial foreclosure in 08 CVS 797 is immense in that no payments have been made upon the property in two (2) years, saddling Defendant FMV with a substantial non-performing asset worth several hundred thousand dollars and creating severe negative cash flow in the form of legal fees expended to silence bad faith litigation intended solely to prevent Defendant FMV from completing the prior pending judicial foreclosure in 08 CVS 797.

This conclusion of law is supported by binding findings of fact and constitutes a proper determination of prejudice arising out of plaintiffs' failure to prosecute.

Plaintiffs contend that the trial court's conclusion is inadequate because there was no finding regarding any prejudice to FMV's defenses to plaintiffs' claims. Citing *Deutsch v. Fisher*, 39 N.C. App. 304, 250 S.E.2d 304, *disc. review denied*, 296 N.C. 736, 254 S.E.2d 177 (1979), plaintiffs argue that the only prejudice recognized for purposes of Rule 41(b) is prejudice "flowing

specifically to loss of otherwise available defenses to plaintiff's claims for damages." In *Deutsch*, however, this Court simply noted the fact that no defenses had been lost as part of the basis for concluding that there had been no prejudice given the circumstances of that case. *Id.* at 310, 250 S.E.2d at 308. Nothing in the *Deutsch* opinion suggests an intent to preclude a showing of any type of prejudice other than a defendant's loss of defenses.

Because, as in this case, a defendant can suffer a variety of forms of prejudice from delays in the prosecution of a lawsuit, such a limited definition of prejudice is unwarranted. *See, e.g., Adams*, 29 F.3d at 874 (noting that prejudice under federal Rule 41(b) may include financial considerations such as excessive and possibly irreparable burdens or costs imposed on defendants or costs expended obtaining court orders to force compliance with discovery); *United States v. Merrill*, 258 F.R.D. 302, 309 (E.D.N.C. 2009) (under federal Rule 41(b), considering "time and energy" expended by defendants in attempt to advance their interests in litigation). Here, the trial court's observation regarding the financial prejudice to FMV – tied directly to the delay of this proceeding – sufficed to show that the court adequately considered "the amount of prejudice, if any, to the defendant." *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428.

Finally, we turn to the third *Wilder* factor, which requires the trial court to state "the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.* This Court has explained: "Because the drastic sanction of dismissal 'is not

always the best sanction available to the trial court and is certainly not the only sanction available,' dismissal 'is to be applied only when the trial court determines that less drastic sanctions will not suffice.'" *Foy*, 106 N.C. App. at 619, 418 S.E.2d at 303 (quoting *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984)). The trial court must, before dismissing an action with prejudice, make findings of fact and conclusions of law that indicate it has considered less drastic sanctions. *Id.* at 620, 418 S.E.2d at 303.

In *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 829 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006), the trial court's order dismissing the plaintiff's claims under Rule 41(b) for failure to comply with a discovery order recited that "[t]he Court has carefully considered each of [the plaintiff's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct" This Court, in affirming the trial court's order, held that this language "sufficiently demonstrate[d] that [the trial court] considered lesser sanctions before ordering a dismissal." *Id.*

In this case, the trial court concluded: "Sanctions short of the involuntary dismissal of this action and the removal of the bad faith *lis pendens* upon the property will be ineffective in that Plaintiffs, having already been held in contempt once by this

Court, having refused to participate in discovery or otherwise in the litigation of their own case and having done nothing whatsoever to move this action forward to a conclusion of any kind, have clearly illustrated their willful disregard of and contempt for this Court and its authority." Under *In re Pedestrian Walkway Failure*, this conclusion of law was sufficient to show that the trial court fulfilled the requirement that the court consider lesser sanctions before ordering a dismissal with prejudice. See also *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 301, 636 S.E.2d 829, 833 (2006) (holding trial court properly indicated it considered lesser sanctions where court stated that after careful consideration, court determined that sanctions less severe than dismissal would not be adequate given seriousness and repetition of misconduct), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 204 (2007).

Since we have concluded that the trial court properly considered the third *Wilder* factor, the trial court's order may be reversed only for an abuse of discretion. *Foy*, 106 N.C. App. at 620, 418 S.E.2d at 303. Given the trial court's findings and conclusions regarding the deliberate delay in prosecuting this action, the resulting prejudice to FMV, and the inadequacy of any lesser sanctions, we hold that the trial court's decision to dismiss the action under Rule 41(b) for failure to prosecute was not unreasonable and, therefore, not an abuse of discretion. Accordingly, we, therefore, affirm the Rule 41(b) dismissal of the action.

Affirmed.

Judges JACKSON and BEASLEY concur.

Report per Rule 30(e).