IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-979

Filed: 5 November 2019

Mecklenburg County, No. 11-CVD-11454

SONDRA CORNELIUS, Plaintiff,

v.

JAMES CORNELIUS, Defendant.

Appeal by Defendant from orders entered 13 November 2012, 8 July 2014, 21 March 2016, and 8 August 2017 by Judge Paige B. McThenia in Mecklenburg County District Court. Heard in the Court of Appeals 4 June 2019.

Arnold & Smith, PLLC, by Matthew R. Arnold, for Defendant-Appellant.

No brief filed for Plaintiff-Appellee.

McGEE, Chief Judge.

James Cornelius ("Defendant") appeals from the following: (1) an order denying his motion to continue and dismissing his first motion to modify post-separation support; (2) an order denying Defendant's motion pursuant to Rules 60 and 62; (3) an order granting Sondra Cornelius's ("Plaintiff") contempt motions and

Defendant's second motion to modify post-separation support; and (4) an order directing Defendant to pay alimony to Plaintiff.

Factual and Procedural History

Plaintiff and Defendant married on 14 March 2004. No children were born to the marriage. The parties separated 21 May 2011. Plaintiff filed a complaint, raising, *inter alia*, claims for post-separation support, alimony, equitable distribution, and attorney's fees on 13 June 2011. In lieu of detailing every aspect of this years-long dispute, recitation of the factual and procedural history is limited to what is pertinent to the appeal.

A hearing on Plaintiff's complaint was held on 28 November 2011. Defendant was terminated from his employment on 15 December 2011. The trial court entered an "order for post[-]separation support, interim allocation and allowing amendment to complaint" (the "PSS order") on 23 December 2011. The PSS order directed Defendant to pay Plaintiff monthly $13,000 in post-separation support, $500 in arrearage, and $500 towards attorney's fees.

Defendant filed a "motion to modify post separation support" (the "first motion to modify") on 28 December 2011, requesting the trial court amend the PSS order "based upon a substantial change of circumstances." Plaintiff filed a motion for contempt on 23 January 2012, alleging Defendant "willfully violated the terms of the [PSS o]rder" by not making the court-ordered payments in January and refusing to

maintain Plaintiff's medical and dental insurance coverage. Defendant was served with the first motion for contempt and the show cause order. Plaintiff filed a motion to compel and for sanctions on 10 May 2012, alleging Defendant failed to appear for a duly-noticed deposition on 8 and 9 May 2012 and failed to provide the documents Plaintiff had requested.

A hearing was held on the parties' respective motions on 10 May 2012 and the trial court orally granted Plaintiff's motion to compel and for sanctions. The trial court ordered that Defendant be deposed on 23 May 2012 and provide all requested documents to Plaintiff by 18 May 2012. Additionally, the trial court heard arguments regarding Plaintiff's motion for contempt, and announced from the bench it would "hold open a decision on the contempt" and reserve ruling on attorney's fees. The trial court declined to hear arguments on Defendant's first motion to modify until after Defendant was deposed and produced the ordered documents.

Defendant was deposed on 23 May 2012 and a hearing on Defendant's first motion to modify was held on 24 May 2012. Because the hearing had not concluded by the end of the day, the parties agreed to resume the hearing on 6 August 2012. Defendant took a job in Kansas City, Missouri beginning 29 May 2012.

On 6 July 2012, Defendant was served with a notice of deposition for 25 July 2012 and request for production of documents to be produced by 25 July 2012. Defendant filed a motion to continue the 6 August 2012 hearing and a motion for

protective order, objecting to the 25 July 2012 deposition date.[1] In both motions, Defendant explained he was employed in Kansas City, and would likely lose his job if he missed work on 6 August 2012 for the hearing. Defendant failed to provide Plaintiff with responsive documents and did not appear for his deposition on 25 July 2012.

The trial court initially denied Defendant's motion to continue the 6 August 2012 hearing; however, upon Defendant's request for reconsideration, the trial court continued the hearing to a date agreed upon by both parties. The parties agreed to a hearing date of 18 September 2012. On 21 August 2012, Defendant provided Plaintiff the documents that were due on 25 July 2012. Plaintiff filed a second motion for sanctions on 13 September 2012, alleging Defendant had not provided Plaintiff all requested documents.

Defendant filed a "motion for appearance by telephone; motion to continue" (the "motion to continue"), by e-mail, on 17 September 2012. Defendant requested authorization to either appear by telephone at the 18 September hearing or to continue the hearing. Attached to the motion to continue was a scanned PDF of a "certificate to return to work or school," signed by Dr. Jay Dunfield and dated 12 September 2012, that included the following restriction: "[Defendant] may not travel

[1] Defendant did not include these motions in the record on appeal and this information is from the trial court's findings of fact in a subsequent order.

outside of the KC area until further notice." Plaintiff objected to Defendant's motion to continue and the trial court denied the motion on 17 September 2012.

Defendant did not attend the 18 September 2012 hearing and counsel for Defendant orally renewed the motion to continue. After hearing the parties' arguments, the trial court stated, "I do not find any of the evidence about the reasons to continue -- I find the evidence inadequate and I disbelieve it." As a result, the trial court orally denied the renewed motion to continue. The trial court also orally dismissed Defendant's first motion to modify as a sanction "for failure to prosecute and for destruction of evidence." Finally, the trial court found Defendant in criminal contempt.

Defendant filed a second motion for modification of post-separation support (the "second motion to modify") on 1 November 2012, alleging that although he had procured new employment, his income was "significantly less than his previous income[.]"

The trial court entered an "order for contempt and dismissal of Defendant's [first] motion to modify post[-]separation support" (the "contempt order") on 13 November 2012. The contempt order dismissed Defendant's first motion to modify and ordered Defendant be "incarcerated in the Mecklenburg County Jail for 30 days, suspended upon the probation condition that he pay the sum total of $184,741.29 (arrearages and attorney's fees) to Plaintiff/Wife on or before November 17, 2012 at

5:00 p.m. and that he place Plaintiff/Wife on his health and dental insurance plan with [his new employer] or provide comparable coverage as of the date of the entry of this Order and provide proof to Plaintiff/Wife of such coverage, as well as an insurance card."

Defendant filed a notice of appeal from the portion of the contempt order finding Defendant in criminal contempt on 16 November 2012. Defendant did not appeal the portion of the contempt order denying his first motion to modify at that time.

From December 2012 to May 2013, Plaintiff filed numerous motions, including motions for contempt, motions for attorney's fees, and a motion to continue. Defendant filed a "motion for relief from judgment, order, or proceeding" (the "motion to vacate") pursuant to Rules 60 and 62 requesting the trial court set aside the contempt order based on: (1) the trial court's failure to consider sanctions less severe than dismissal, (2) the trial court's lack of consideration regarding Defendant's medical condition, and (3) newly discovered evidence. Defendant requested a "stay on execution" of the contempt order until his motion to vacate could be heard by the trial court.

The trial court conducted hearings on 20 May, 19 August, 20 August, and 21 August 2014 regarding Defendant's motion to vacate, Plaintiff's motions for contempt (filed 23 January 2012, 6 December 2012, 24 May 2013, and 24 April 2014), and

Defendant's second motion to modify. The trial court rendered an oral judgment on 20 May 2014 denying Defendant's motion to vacate. The oral judgment was memorialized in a written "order denying defendant's motion pursuant to Rules 60 and 62" (the "Rule 60 order") on 8 July 2014. Beginning in the afternoon of 20 May and continuing on 19 August, 20 August, and 21 August 2014, the trial court heard arguments regarding Defendant's second motion to modify and Plaintiff's motions for contempt. Plaintiff filed a motion seeking post-separation support, alimony, and attorney's fees on 2 December 2014.

The trial court entered an "order granting plaintiff's contempt motions and defendant's motion to modify PSS" (the "modification order") on 21 March 2016. The modification order granted Plaintiff's contempt motions, noting "Defendant's failure to comply with the PSS [o]rder has necessitated Plaintiff's [m]otions for [c]ontempt." Additionally, the trial court granted Defendant's second motion to modify, concluding the reduction in Defendant's earnings since 1 November 2012 constituted "a substantial and material change of circumstances justifying a modification of his PSS obligation." As a result, the trial court reduced Defendant's monthly PSS obligation from $13,000 to $9,000 and terminated Defendant's obligation to provide Plaintiff with health and dental insurance coverage.

Defendant filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rules 52, 59, 60, and 62 (the "second motion to vacate") as to the modification order. A hearing

addressing Plaintiff's motion for alimony and Defendant's second motion to vacate was conducted on 17, 18, and 19 January 2017. The trial court entered an order granting Defendant's second motion to vacate on 8 August 2017. Additionally, on 8 August 2017, the trial court entered an "order on alimony" (the "alimony order"), directing Defendant to pay Plaintiff $4,000 a month for six months, beginning 1 June 2017.

Defendant filed a notice of appeal on 5 September 2017 from the contempt order (13 November 2012), the Rule 60 order (8 July 2014), the modification order (21 March 2016), and the alimony order (8 August 2017).[2]

Analysis

I. Denial of Defendant's Motion to Continue

Defendant contends the trial court erred in denying his motion to continue. We disagree.

We review a trial court's denial of a motion to continue under the abuse of discretion standard. *See Wachovia Bank & Tr. Co., N.A. v. Templeton Olds.–Cadillac–Pontiac*, 109 N.C. App. 352, 356, 427 S.E.2d 629, 631 (1993). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386

[2] Defendant also entered notice of appeal from the order granting Defendant's second motion to vacate (entered 8 August 2017). However, Defendant does not appeal from that order in his briefs before this Court.

(1976). "[T]he trial judge must consider, in addition to the grounds for the motion, whether the moving party has acted with diligence and in good faith, and may consider facts of record as well as facts within his judicial knowledge." *May v. City of Durham*, 136 N.C. App. 578, 581, 525 S.E.2d 223, 227 (2000).

Defendant employed numerous delay tactics prior to filing his 17 September 2012 motion to continue, resulting in the trial court being unable to adequately address matters on their respective hearing dates. For example, because Defendant failed to appear for a duly-noticed deposition on 7 and 8 May 2012 and failed to produce requested documents, the trial court declined to hear arguments regarding Defendant's first motion to modify at the hearing on 10 May 2012. To ensure the case progressed, the trial court *ordered* Defendant to appear for a deposition on 23 May 2012 and provide Plaintiff with all requested documents. The trial court stated from the bench, "[w]e will hear that motion to modify as soon as you get those documents that you should have gotten a long time ago, and you have your deposition and you get there and you get there with what you need." Additionally, after announcing it would hold open a decision on Plaintiff's motion for contempt, the trial court warned Defendant, "if you do not bring those documents and you don't show up for your deposition, then I'll consider issuing an order for your arrest."

Pursuant to the trial court's instruction, Defendant was deposed on 23 May 2012. Following Defendant's deposition and subsequent hearing, the parties agreed

to resume the hearing on 6 August 2012 and Defendant was served a notice of another deposition, scheduled for 25 July 2012. Prior to the 6 August hearing, Defendant filed a motion to continue the 25 July 2012 deposition and the 6 August hearing. Defendant did not appear for his deposition on 25 July 2012. The trial court initially denied the 25 July motion to continue; however, upon Defendant's request for reconsideration, the trial court allowed the motion, and rescheduled the hearing to 18 September 2012 – a date agreed upon by both parties.

The day before the scheduled hearing, Defendant filed the motion to continue, explaining he had sought medical treatment on 12 September 2012, and

> [a]fter consulting with his physician, [] Defendant has been informed that his condition is much more serious than anticipated and he has been ordered to remain in the Kansas City area pending a further determination of the underlying cause of his ailments which appear to be neurological in nature. A copy of his doctor's directions is attached hereto as Exhibit A.

The scant "certificate to return to work or school," signed by Dr. Jay Dunfield and attached to the motion to continue, noted Defendant had been seen in the office on 12 September 2012, that he was cleared to return to work, and that he "may not travel outside of the KC area until further notice." Defendant's counsel argued the motion to continue at the 18 September 2012 hearing. The trial court denied the motion, explaining:

> [Defendant] was properly noticed to be here today. He is not here today. He has handed up -- or his counsel has

> handed up an email -- this letter from this doctor. The motion to continue is not verified. He – there's no affidavit from a doctor. I do not find any of the evidence about the reasons to continue -- I find the evidence inadequate and I disbelieve it. [Defendant] has cried wolf at least three times regarding his ability to come to court, to pay, to comply with the terms of the order. He sat on the witness [sic] and he cried and my heart went out to him at that point. And I have given up on feeling sorry for [Defendant] and the predicament he's in.

The trial court's statements demonstrate it "consider[ed] facts of record as well as facts within [her] judicial knowledge" in denying the motion to continue. *May*, 136 N.C. App. at 581, 525 S.E.2d at 227. In the course of approximately four months, Defendant failed to attend scheduled depositions on two separate occasions, citing work-related issues. However, "[i]t has been stated often that a party to a lawsuit must give it the attention a prudent man gives to his important business." *Chris v. Hill*, 45 N.C. App. 287, 290, 262 S.E.2d 716, 718 (1980).

The timing of Defendant's 23 July 2012 motion to continue—five days before a scheduled deposition and approximately two weeks before a scheduled hearing—and the timing of Defendant's 17 September 2012 motion to continue—one day before a scheduled hearing—demonstrate Defendant's disregard of the trial court's process. Notably, Defendant was seen by his doctor on 12 September 2012; however, the motion to continue was not filed until five days later. Moreover, in lieu of an affidavit from a doctor, the unsworn "certificate to return to work or school" was exiguous and wholly insufficient. Therefore, "[i]n light of the numerous and lengthy delays in

hearing this case," *McIntosh v. McIntosh*, 184 N.C. App. 697, 702, 646 S.E.2d 820, 824 (2007), coupled with the scant evidence Defendant included in his motion to continue, we hold the trial court did not abuse its discretion in denying Defendant's motion to continue.

Additionally, Defendant asserts the trial court's decision should be reversed because "the trial court failed to make any ruling at all on Defendant-Appellant's Motion for Appearance by Telephone" and "[t]here is nothing in the record that indicates that the trial court considered allowing Defendant[] to appear by telephone." Defendant fails to cite any law supporting his contention that a trial court's failure to rule on a motion for appearance by telephone constitutes reversible error. Defendant notes that Rule 13 of the 26th Judicial District Court Division General Civil Rules includes "a mechanism whereby hearings can be held by telephonic means." However, the local rule allowing for telephonic hearings requires the consent of all parties, the submission of a specific form, and the approval of the trial court. District Court Division General Civil Rules, Rule 13 (2016). Because there is no evidence that Defendant satisfied any of these requirements, we do not find the local rule relevant to Defendant's motion to continue.

II. Dismissal of Defendant's First Motion to Modify

Defendant argues that the trial court erred in dismissing his first motion to modify without considering sanctions less severe than dismissal. Defendant also

contends the trial court erred in dismissing his first motion to modify because the trial court's findings of fact were not supported by competent evidence, Defendant did not fail to prosecute as a matter of law, and there was no clear evidence of a discovery violation. We agree the trial court erred by failing to consider sanctions less severe than dismissal. However, we reject Defendant's remaining arguments.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2011) provides, *inter alia*, a plaintiff's claim or action may be involuntarily dismissed "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2011) grants trial judges the authority to impose sanctions on a party, including dismissal, for failure to comply with a discovery order.

A. *Consideration of Lesser Sanctions*

Before dismissing an action as a sanction pursuant to Rule 41(b) or Rule 37, the trial court *must* consider less severe sanctions. *Wilder v. Wilder*, 146 N.C. App. 574, 577-78, 553 S.E.2d 425, 427 (2001) (holding before the trial court dismisses a plaintiff's claim pursuant to Rule 41(b) for failure to prosecute, the trial court must determine "whether lesser sanctions were appropriate for [the] plaintiff's failure to prosecute"); *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995) ("[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions."). This Court has held "[b]ecause 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 v. Hunter*, 106 N.C. App. 614, 619, 418 S.E.2d 299, 303 (1992) (quoting *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984)). "The trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions." *Global Furn., Inc. v. Proctor*, 165 N.C. App. 229, 233, 598 S.E.2d 232, 235 (2004) (emphasis in original).

"[T]his Court will affirm an order for sanctions where it may be inferred from the record that the trial court considered all available sanctions and the sanctions imposed were appropriate in light of the party's actions in the case." *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828 (2005) (internal quotation marks, brackets, and citations omitted). For example, this Court has held an order stating the trial court had "considered the available sanctions for [] misconduct . . . [and] determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct" was sufficient to demonstrate the trial court considered lesser sanctions before ordering dismissal. *Id.* at 251, 618 S.E.2d at 829.

In the present case, the contempt order is devoid of any finding of fact or conclusion of law indicating the trial court considered less drastic sanctions. Likewise, there is no indication in the transcript that the trial court considered

sanctions less severe than dismissal. We note that in the Rule 60 order, the trial court made the following finding of fact:

> Contentions under Rule 60(b)(1) on the basis of "mistake, inadvertence, surprise or excusable neglect": There was no evidence presented as to mistake, inadvertence, surprise or excusable neglect. Defendant Husband's counsel argued that the Court should have considered and ordered alternative sanctions against Defendant Husband or relief on behalf of Plaintiff Wife (other than a dismissal of the Motion to Modify). The Court disagrees that other sanctions or relief were not considered and disagrees that the Court's decision to order such other sanctions or relief constitute a "mistake" under the meaning of Rule 60.

We do not consider the trial court's assertion in the subsequent Rule 60 order that it "disagrees that other sanctions or relief were not considered" sufficient to demonstrate the trial court considered less severe sanctions *prior* to dismissing the action. Therefore, because we hold there is no indication in the record that the trial court considered lesser sanctions prior to dismissing Defendant's first motion to modify under Rule 41 and Rule 37, we vacate the contempt order and remand to the trial court for consideration of whether lesser sanctions are appropriate in this case.

B. *Failure to Prosecute*

Defendant argues the trial court erred in dismissing his first motion to modify because the dismissal was not supported by competent evidence and, "as a matter of law," Defendant did not fail to prosecute.

"[D]ismissal for failure to prosecute is proper only where 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." *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 347, 634 S.E.2d 548, 556 (2006). Before a case may be dismissed under Rule 41(b) for failure to prosecute, the trial court must address the following three factors (the "*Wilder* factors"): "(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."[3] *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428. "The standard of review for an involuntary dismissal under Rule 41(b) 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.' " *Ray v. Greer*, 212 N.C. App. 358, 362, 713 S.E.2d 93, 96 (2011) (quoting *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005)).

The order for contempt contains the following conclusion of law: "Defendant/Husband's Motion to Modify filed December 28, 2012 should be dismissed

[3] We do not address whether the trial court properly considered the *Wilder* factors because Defendant does not argue that issue on appeal. However, we note that the trial court "must address the three [*Wilder*] factors . . . before deciding whether to dismiss the plaintiff's claim with prejudice under Rule 41(b), for failure to prosecute." *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428.

for his failure to appear and to prosecute and destruction of evidence." Defendant contends this conclusion was not supported by the trial court's findings of fact.

In his brief, Defendant identifies two findings of the trial court which, according to him, are "[t]he only two findings in relation to the conclusion that the [first motion to modify] should be dismissed for failure to appear and prosecute." As a result, we interpret Defendant's argument that "[t]here is no competent evidence in the record or that was before the trial court that supported the findings made by the trial court" to refer to those findings identified by Defendant:

> 32. Defendant/Husband failed to appear on September 18, 2012 to prosecute his Motion to Modify, despite having proper notice of the hearing. Counsel for Defendant/Husband orally renewed the request for a continuance at the hearing.
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> . . . .
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> 34. Defendant/Husband's Motion to Modify, filed December 28, 2011, should be dismissed for failure to appear and failure to prosecute.

Finding of Fact # 32 was supported by ample evidence in the record. The transcript of the 18 September 2012 hearing reveals precisely what the trial court found: despite knowledge of the hearing date, Defendant was not present at the hearing and, as a result, his counsel made an oral motion to continue. In fact, Defendant acknowledges in his brief that "[t]he evidence before the court was that although Defendant-Appellant did not appear personally, trial counsel for Defendant-

Appellant did appear on his behalf and Defendant-Appellant offered to appear by telephone." Therefore, Finding of Fact # 32 is supported by competent evidence.

Defendant contends the above listed findings – "[t]he only findings in relation to the conclusion" – were "not sufficient to support Conclusion of Law #2." However, the findings of fact regarding Defendant's failure to prosecute were not limited to the two findings asserted by Defendant. Indeed, the trial court made the following other pertinent findings of fact:

> 13. On May 10, 2012, Plaintiff/Wife filed a *Motion to Compel and for Sanctions* against Defendant/Husband for his failure to appear for his deposition and failure to provide documents to Plaintiff/Wife.
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> 14. Only Plaintiff/Wife's Motion for Contempt was addressed on May 10, 2012 because Defendant/Husband failed to appear for a duly noticed deposition on May 8 and 9, 2012 and failed to provide adequate documents pursuant to a valid request for production of documents. As a result, an *Order to Compel and for Sanctions* was entered, in which Defendant/Husband was sanctioned, ordered to appear to be deposed on May 23, 2012 and ordered to provide all requested documents to Plaintiff/Wife by May 18, 2012. The hearing on Defendant/Husband's Motion to Modify was rescheduled for May 24, 2012 pending Defendant/Husband's deposition. The Court reserved ruling on Plaintiff/Wife's Motion for Contempt as well as the issue of attorney's fees relating to Plaintiff/Wife's Motion to Compel and for Sanctions and Motion for Contempt until the hearing relating to modification of postseparation support.
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> 17. At the May 24 2012 hearing, Defendant/Husband

proceeded with his Motion to Modify. Among other things, he testified that he had been offered a job with UMB in Kansas City, Missouri pending a criminal background check, would be making $225,000 annually and that he would have to relocate to Kansas City, Missouri. Defendant/Husband's own exhibit revealed that, by May 24, 2012, Defendant/Husband had already accepted the job. Defendant/Husband failed to provide documentation of his job acceptance with UMB with his May 18, 2012 document production and failed to divulge that he had accepted the job at his May 23, 2012 deposition.

. . . .

19. By the end of the day on May 24, 2012, the hearing had not concluded. As such, the undersigned ordered that the hearing be concluded at a later date. The parties consented to resume the hearing on August 6, 2012.

. . . .

21. On July 6, 2012, Plaintiff/Wife served Defendant/Husband with a *Notice of Deposition and Request for Production of Documents to Defendant*, setting his deposition and the deadline to produce documents for July 25, 2012.

22. On Friday, July 20, 2012, counsel for Defendant/Husband notified counsel for Plaintiff/Wife that Defendant/Husband would not be able to return to North Carolina for his deposition prior to August 6 and that they would be seeking a continuance of the August 6 hearing.

23. On July 20, 2012, Defendant/Husband filed a *Motion for Continuance* of the August 6, 2012 hearing and a *Motion for Protective Order* objecting to being deposed on July 25, 2012. Said motions provided that Defendant/Husband is employed in Kansas City, that he had to work on August 6, 2012 and that he would likely lose his job at UMB if he missed this day of work.

Defendant/Husband requested that the hearing be continued until November 2012.

. . . .

25. On July 25, 2012, Defendant/Husband did not appear for his deposition nor did he provide responsive documents to Plaintiff/Wife, though Defendant/Husband's attorney did attempt, thereafter, to secure other dates for him to be deposed.

26. Defendant/Husband's *Motion for Continuance* was initially denied by Family Court. However, counsel for Defendant/Husband asked for the Motion for Continuance to be reconsidered by the undersigned. On August 2, 2012, counsel for the parties appeared before the undersigned and argued their respective motions off-the-record. The undersigned ordered that the hearing be continued and that counsel for the parties work with her clerk to re-set the hearing in early September for a date that worked for the parties. The parties then agreed to a hearing date of Tuesday, September 18, 2012.

. . . .

30. On Monday, September 17, 2012, Defendant/Husband filed an unverified *Motion to Appear by Telephone; Motion to Continue*, requesting that he be permitted to appear by telephone for the September 18, 2012 hearing or, in the alternative, that the September 18, 2012 hearing be continued. Defendant/Husband alleged that he was a having medical issues and attached a scanned note purportedly from an ENT physician providing that Defendant/Husband should not travel outside of the Kansas City area, but allowing Defendant/Husband to return to work. The doctor's note was faxed to Defendant/Husband's attorney on September 13, 2012, made no statement regarding Defendant/Husband's alleged underlying medical condition and was not signed in the presence of a notary.

> 31. Counsel for Defendant/Husband emailed the *Motion to Appear by Telephone; Motion to Continue* to the undersigned in the early afternoon on September 17, 2012. Counsel for Plaintiff/Wife responded that day, objecting to Defendant/Husband's requests. The undersigned denied the motion on all counts that day.
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> 33. The evidence presented by Defendant/Husband in support of the *Motion to Continue* was inadequate and this Court disbelieves it. Defendant/Husband's Motion to Continue was again denied.

The trial court made ample findings of fact regarding Defendant's failure to prosecute. "It is well established by this Court that where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Juhnn v. Juhnn*, 242 N.C. App. 58, 63, 775 S.E.2d 310, 313 (2015) (citation omitted). Therefore, despite Defendant's assertion, the trial court's conclusion was supported by the copious findings listed above, not simply by one finding addressing Defendant's failure to appear at the 18 September 2012 hearing.

Defendant also argues the trial court "wrongfully equated a failure to appear with a failure to prosecute" and, thus, erred "as a matter of law" in dismissing Defendant's first motion to modify as a sanction for failure to prosecute. Specifically, Defendant asserts his "failure to personally appear [at the 18 September hearing], since he was not under any legal requirement to do [sic] appear, was not grounds for

a dismissal pursuant to Rule 41(b)." Defendant cites *Hamlin v. Hamlin*, 302 N.C. 478, 276 S.E.2d 381 (1981) for the proposition that "[i]f [a] plaintiff desired to call [a] defendant as a witness she should have had a subpoena issued for him or asked for an order of the court requiring him to be present." *Id.* at 482, 276 S.E.2d at 385. However, the trial court made numerous findings of fact establishing a pattern on behalf of Defendant "to thwart the progress of the action to its conclusion[.]" *James River Equip., Inc.*, 179 N.C. App. at 347, 634 S.E.2d at 556. Therefore, we reject Defendant's assertion that the trial court erred as a matter of law in dismissing Defendant's first motion to modify as a sanction for failure to prosecute.

C. *Sanction for Destruction of Evidence*

Defendant contends the trial court's findings were not supported by competent evidence and were not sufficient to support its conclusion that the first motion to modify should be dismissed as a sanction for destruction of evidence. Additionally, Defendant asserts there is no clear discovery violation in the record. We disagree.

"Rule 37 gives the trial court express authority to compel discovery and to sanction a party for abuse of the discovery process." *Cloer v. Smith*, 132 N.C. App. 569, 573, 512 S.E.2d 779, 781 (1999). "Not only is the decision to impose Rule 37(b) sanctions within the sound discretion of the trial court, but so too is the choice of Rule 37(b) sanctions to impose." *GEA, Inc. v. Luxury Auctions Mktg., Inc.*, ___ N.C. App. ___, ___, 817 S.E.2d 422, 430 (2018) (citation omitted).

Defendant appears to assert that the trial court's finding that "Defendant/Husband, by his own admission, purposefully destroyed evidence of jobs that he applied for or which he interviewed from December 2011 to May 24, 2012" was not supported by competent evidence. Defendant points to his own testimony regarding Plaintiff's access to his emails and his "standard practice" of regularly deleting his emails. However, at the 24 May 2012 hearing, Plaintiff's counsel entered into evidence the "Notice of Deposition and Request for Production of Documents"[4] "that requested documents pertaining to [Defendant's] employment, rejection of employment, efforts to find jobs, [and] interviews for job offers." Defendant was asked, "[a]nd this was served upon you, according to the certificate of service, on the 12th day of April by email to your attorney and fax and mail; correct?" Defendant responded, "[c]orrect." After acknowledging that he had been served, Defendant was then asked, "[t]here's other written communication, as you just testified, between [your current employer] and yourself from May 10th forward that you have deleted from your computer; correct?" Defendant responded, "[c]orrect."

Defendant's own testimony provides evidence that he "purposefully destroyed evidence of jobs that he applied for or which he interviewed from December 2011 to May 24, 2012." Although Defendant contends that it was his standard practice to delete his emails, he "cites no case law, and this Court has found none, supporting

[4]"The Notice of Deposition and Request for Production of Documents" is not included in the record on appeal.

the contention underlying [his] argument that sanctions are only appropriate for such omissions when they occur in bad faith." *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 300, 636 S.E.2d 829, 832 (2006).

Defendant contends "[b]ased on th[e] information in the record, there is nothing to indicate that a discovery violation did in fact occur." However, as discussed above, there was competent evidence in the record that supported the trial court's conclusion that a discovery violation did occur.

D. *Abuse of Discretion*

Defendant asserts that, assuming *arguendo* the trial court did consider lesser sanctions, it abused its discretion by dismissing his first motion to modify. This Court has held that "[i]f the trial court undertakes th[e] analysis [of considering less drastic sanctions], its resulting order will be reversed on appeal only for an abuse of discretion." *Foy,* 106 N.C. App. at 620, 418 S.E.2d at 303 (citation omitted). In the present case, the trial court failed to consider sanctions less severe than dismissal and, as a result, we must vacate the contempt order and remand to the trial court. Therefore, we need not address whether the trial court abused its discretion in dismissing the first motion to modify.

III. Motion to Vacate

Defendant contends the trial court erred in denying his motion to vacate. We disagree.

Defendant filed his motion to vacate on 18 September 2012. Defendant sought relief from the contempt order on the "basis of mistake, inadvertence, surprise or excusable neglect for which Defendant was not responsible," citing "Defendant's medical condition which prevented him from appearing on September 18, 2012 in Court," and the trial court "not considering lesser sanctions first before granting a dismissal[.]" Additionally, Defendant moved for relief on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59," and "other reason justifying relief from operation of the judgment for lack of consideration of Defendant's medical condition which prevented him from appearing on September 18, 2012 in Court." Defendant requested a "stay on execution" of the contempt order. The trial court heard arguments on Defendant's motion to vacate on 20 May 2014.

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975) (citation omitted). Defendant contends the trial court abused its discretion in finding the following:

> 11. The Court makes the following additional findings with respect to Defendant Husband's contentions set forth in the Motion to Vacate and as argued by his counsel in open court:
>
> a. Contentions under Rule 60(b)(1) on the basis of "mistake,

> inadvertence, surprise or excusable neglect": There was no evidence presented as to mistake, inadvertence, surprise or excusable neglect. Defendant Husband's counsel argued that the Court should have considered and ordered alternative sanctions against Defendant Husband or relief on behalf of Plaintiff Wife (other than a dismissal of the Motion to Modify). The Court disagrees that other sanctions or relief were not considered and disagrees that the Court's decision to order such other sanctions or relief constitute a "mistake" under the meaning of Rule 60.
>
> b. Contentions under Rule 60(b)(2) on the basis of "newly discovered evidence": Defendant Husband presented no evidence of newly discovered evidence, and the Court does not find that newly discovered evidence exists.
>
> c. Contentions under Rule 60(b)(6) on the basis of "any other reason justifying relief from operation of the judgment": The Court disagrees that Defendant Husband has shown that he is entitled to relief under this provision.

First, Defendant asserts that the trial court erred as a matter of law by failing to consider less severe sanctions prior to dismissing his first motion to modify and, therefore, his "post[-]separation support arrearage of $130,000 would not have accrued but for the error as a matter of law by the trial court." Because we vacate the contempt order and remand to the trial court for consideration of sanctions less severe than dismissal, Defendant's argument as to that issue is moot.

Defendant asserts that his testimony at the 20 May 2014 hearing "that his treatment continued following September 2012 and was still continuing at the 20 May 2014 hearing . . . is a clear example of newly discovered evidence that would not have been available at the time of the hearing on 18 September 2012, but clearly

corroborates the evidence presented by [him] in his [motion to continue]." Moreover, Defendant argues the "newly discovered evidence" proffered by Defendant at the 20 May 2014 hearing – which included Defendant's medical records and testimony regarding his medical condition – "indicate that there was a mistake" in the trial court's dismissal of Defendant's first motion to modify. However, the trial court did not dismiss Defendant's first motion to modify solely on Defendant's failure to appear at the 18 May 2012 hearing. Indeed, the findings of fact in the contempt order established a pattern on behalf of Defendant of thwarting the progression of the case. Therefore, the trial court did not abuse its discretion by finding "[t]here was no evidence presented as to mistake, inadvertence, surprise or excusable neglect" and by "find[ing] that [no] newly discovered evidence exists."

Finally, Defendant appears to indirectly challenge the trial court's finding:

> 8. Defendant waited until September 18, 2013, to file the Motion to Vacate, one year after the date the Court orally dismissed the Motion to Modify. The delay in filing the Motion to Modify is a long time after Defendant Husband acquired whatever evidence he had in support of said motion. Defendant Husband did not offer credible evidence justifying this delay. Under the circumstances of this case, and given its history, the Motion to Vacate was not filed in a reasonable time, notwithstanding that it was filed within one year from entry of the Order Dismissing the Motion to Modify.

Defendant asserts he "was within his rights and within the time limit for filing his [motion to vacate]." Defendant argues Plaintiff's "actions to cause delay and act

in bad faith resulted in a continuance of the final resolution and necessitated the filing of Defendant['s motion to vacate] since he had been denied the opportunity to have resolution of the entire case in June 2013." Thus, it appears Defendant blames Plaintiff for his own lengthy delay in filing the motion to vacate. However, the trial court found the motion to vacate was not filed in a reasonable time "[u]nder the circumstances of this case, and given its history." As discussed throughout this opinion, the trial court's dismissal of Defendant's first motion to modify was not based on one isolated instance where Defendant did not appear for a scheduled hearing but, instead, was based on Defendant's pattern of evasive techniques. Therefore, the trial court did not abuse its discretion in finding Defendant's motion to vacate was not filed in a reasonable time.

IV. Modification Order and Alimony Order

Defendant contends the trial court's error in dismissing his first motion to modify "poisoned and tainted the proceedings which followed." Specifically, Defendant asserts that, as a result of the trial court's error, he "erroneously" continued to accrue post-separation arrears, which led to a "flawed alimony ruling" and an improper finding of contempt. We disagree.

Defendant challenges approximately fourteen findings of fact in the modification order as "a direct result of the improper dismissal of his first [m]otion to [m]odify." Defendant asserts "[t]hese findings would not have been at issue had the

trial court not improperly dismissed the first [m]otion to [m]odify [which] thereby requir[ed him] to restart the entire modification process with the poison of the improper dismissal lingering over the trial court." Moreover, Defendant contends three of the findings of fact contained in the alimony order were not supported by competent evidence because they were "based on the fallout" from the improper dismissal of Defendant's first motion to modify. Specifically, Defendant contends that because his first motion to modify was improperly dismissed, "he was provided no relief from the $13,000 per month PSS obligation for the ten months between the filing of his two [m]otions to [m]odify" and, therefore, he "amassed an excessive PSS arrearage, in the amount of [$130,000.00]."

Defendant's argument assumes that the trial court would have undoubtedly granted his first motion to modify had it not dismissed it. Defendant's argument also assumes that, had the trial court considered lesser sanctions before dismissing the first motion to modify, it would not have dismissed the first motion to modify as a sanction. However, Defendant's argument does not account for the fact that, upon properly considering sanctions less severe than dismissal on remand, the trial court retains the right to dismiss the first motion to modify as a sanction. *Proctor*, 165 N.C. App. at 234, 598 S.E.2d at 235 ("[T]he trial court has the discretionary authority, on remand, to dismiss [the] defendant's counterclaim with prejudice, but must first consider less severe sanctions."). Additionally, Defendant does not cite any relevant

case law in support of his argument. As a result, because we decline to adopt Defendant's speculations as fact regarding the actions the trial court would have taken, we reject Defendant's argument.

Conclusion

In sum, we vacate the contempt order and remand to the trial court for further proceedings. We affirm the Rule 60 order, the modification order, and the alimony order.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).