

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-169

Filed: 15 October 2019

Henderson County, No. 18-CVD-1234

JODI HOPKINS, Plaintiff,

v.

CHANTAL DENISE EDGERTON, Defendant.

Appeal by plaintiff from order entered 2 November 2018 by Judge Mack Brittain in Henderson County District Court. Heard in the Court of Appeals 22 August 2019.

Donald H. Barton, PC, by Donald H. Barton, for plaintiff-appellant.

Sheffron Law Firm, by Tamara M. Lee, for defendant-appellant.

BERGER, Judge.

Jodi Hopkins (“Plaintiff”) appeals the trial court’s order entered November 2, 2018, granting dismissal in favor of Chantal Denise Edgerton (“Defendant”) following Plaintiff’s failure to appear on the scheduled trial date. On appeal, Plaintiff argues that the trial court erred by failing to consider factors this Court has deemed

HOPKINS V. EDGERTON

Opinion of the Court

pertinent in resolving a motion to dismiss brought under Rule 41(b) of the North Carolina Rules of Civil Procedure.

While the trial court was required by statute to dissolve the temporary no-contact order, we agree that the court was also required to make certain factual findings prior to granting Defendant's motion to dismiss for Plaintiff's failure to prosecute. Therefore, we vacate and remand for (1) entry of an order dissolving the temporary no-contact order, and (2) additional fact finding to determine whether Plaintiff's action for a permanent no-contact order should be dismissed.

Factual and Procedural Background

On July 26, 2018, Plaintiff filed a complaint for a no-contact order pursuant to Section 50C-2 of the North Carolina General Statutes. That same day, the trial court issued an ex-parte temporary no-contact order and a notice of hearing, to determine whether a permanent no-contact order should be entered.

On September 20, 2018, Plaintiff filed a motion to continue the matter from its hearing date of September 21, 2018 because counsel for Plaintiff would be unable to attend. The trial court granted this motion on September 21, 2018. The temporary no-contact order remained in effect, and the case was continued until October 26, 2018. Then on October 3, 2018, Plaintiff filed another motion to continue the matter because counsel for Plaintiff was again unable to attend. The trial court granted this

HOPKINS V. EDGERTON

Opinion of the Court

second motion on October 26, 2018. Again, the temporary no-contact order remained in effect, and the case was continued until November 2, 2018.

Neither Plaintiff nor Plaintiff's counsel appeared on the hearing date, and there is nothing in the record that explains their absence from the proceeding. Accordingly, on November 2, 2018, the trial court granted Defendant's motion to dismiss made in open court. It is from this dismissal that Plaintiff timely appeals.

Standard of Review

"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." *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) (citation and quotation marks omitted).

Analysis

As a preliminary matter, we must determine whether the trial court was required to dissolve Plaintiff's temporary no-contact order upon Plaintiff's failure to appear and prosecute for a permanent civil no-contact order.

Under Section 50C-8(a) of the North Carolina General Statutes, "[w]hen the motion for a permanent civil no-contact order comes on for hearing, the complainant may proceed with a motion for a permanent civil no-contact order." N.C. Gen. Stat.

HOPKINS V. EDGERTON

Opinion of the Court

§ 50C-8(a) (2017). However, “if the complainant fails to do so, *the judge shall dissolve the temporary civil no-contact order.*” N.C. Gen. Stat. § 50C-8(a) (emphasis added).

Here, Plaintiff received a temporary no-contact order on July 26, 2018. Plaintiff failed to appear and prosecute her motion for a permanent no-contact order on the November 2, 2018 hearing date. Thus, the trial court was required by the plain language of Section 50C-8(a) to dissolve the temporary no-contact order.

However, the statute does not further require or command dismissal of the Plaintiff’s action for a permanent no-contact order, and is, in fact, silent on the proper course of action to take when a complainant fails to appear or otherwise prosecute his or her action. *See* N.C. Gen. Stat. § 50C-8(a). Therefore, we must turn to the Rules of Civil Procedure, under which the trial court erred by dismissing Plaintiff’s action without considering the factors required by Rule 41(b) and this Court’s precedent.

“For failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action or any claim therein against him.” N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017). However, because dismissal “is the most severe sanction available to the court in a civil case,” *Wilder v. Wilder*, 146 N.C. App. 574, 576, 553 S.E.2d 425, 427 (2001), our Court has consistently required the trial court to consider three factors before dismissing an action for failure to prosecute under Rule 41(b). *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, 245 N.C. App. 25, 33, 781 S.E.2d 840, 845 (2016).

HOPKINS V. EDGERTON

Opinion of the Court

First, the trial court must determine “whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter.” *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428. Next, the court must decide “the amount of prejudice, if any, to the defendant” that runs from the plaintiff’s delay. *Id.* at 578, 553 S.E.2d at 428. Finally, the trial court must determine “the reason, if one exists, that sanctions short of dismissal would not suffice.” *Id.* at 578, 553 S.E.2d at 428.

Upon determining that neither Plaintiff nor Plaintiff’s counsel had appeared for the hearing, the trial court dismissed the action by checking the box marked “Dismissal” on the standard AOC-G-108 form. The trial court did not make any findings of fact on the record prior to granting Defendant’s motion to dismiss for failure to appear and prosecute her action.

We are mindful that caseloads and time constraints frequently make strict compliance with the rigid formalities of the Rules of Civil Procedure difficult. We are also aware that Chapter 50C complainants frequently fail to appear and prosecute their actions. While a Chapter 50C complainant’s failure to appear would seem to warrant dismissal *per se*, our precedent requires these factors be considered. Therefore, we must remand for the trial court to consider the factors laid out in *Wilder* and determine the appropriateness of dismissal in light of our precedent.

Conclusion

HOPKINS V. EDGERTON

Opinion of the Court

For the reasons set forth herein, we vacate and remand for (1) entry of an order dissolving Plaintiff's temporary no-contact order as required by Section 50C-8(a), and (2) consideration of the factors this Court has deemed pertinent in resolving a motion to dismiss brought under Rule 41(b) of the North Carolina Rules of Civil Procedure. Should the trial court ultimately determine that dismissal is not appropriate, then a hearing on the permanent no-contact order should be held.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).