IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-452

Filed 7 November 2023

Buncombe County, No. 21CVS4057

PHILIP RICHARD BULLIARD, PHILIP RICHARD BULLIARD, TRUSTEE FOR THE PRB LIVING TRUST, Plaintiff-Appellant,

v.

HIGHLAND GATE HOMEOWNERS ASSOCIATION, INC., THE FOLLOWING MEMBERS OF HIGHLAND GATE HOMEOWNERS ASSOCIATION, INC.: JONATHAN ARONSON, ILENE ARONSON, WILLIAM C. BETKE, JR., JANET V. BETKE, GEORGE J. D'ANGELOW, II, LAURA ST. CLAIR, ROBERT E. DUNGAN, AIDA V. DUNGAN, ROBERT F. GEISLER, MARY C. SCHOONOVER, JOSEPH K. KIELY, KELLIE A. PRUITT, MORGAN D. KING, JR., TRUSTEE UNDER THE KING TRUST AGREEMENT, MIRIAM SUAREZ KING, TRUSTEE UNDER THE KING TRUST AGREEMENT, LAURA MILLER, TRUSTEE OF THE LAURA ELIZABETH MILLER REVOCABLE TRUST; HERMAN E. MITCHELL, SHARYN M. DONFIELD, PHILIP F. STAHEL, AIMEE E. STAHEL, WILLIAM B. THOMPSON, WILLIAM B. THOMPSON LIVING TRUST; NANCY R. THOMPSON, WAYNE CABLE WHEELER, SALLY ANN WHEELER, DENNIS MCKENZIE WHITE, AND DONNA C. BILLINGS, Defendants.

Appeal by defendant from order entered 27 January 2023 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 18 October 2023.

Philip Richard Bulliard, for the plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by Jeffrey B. Kuykendal, and Zephyr Jost Sullivan, for defendant-appellee Highland Gate Homeowners Association, Inc.

TYSON, Judge.

Philip Richard Bulliard, trustee of the PRB Living Trust ("Plaintiff") appeals from order allowing Highland Gate Homeowners Association, Inc's; along with Jonathan Aronson's; Ilene Aronson's; William C. Betke, Jr's.; Janet V. Betke's; George J. D'Angelow, II's; Laura St. Clair's; Robert E. Duncan's; Aida V. Duncan's; Robert F. Geisler's; Mary C. Schoonover's; Joseph K. Keily's; Kellie A. Pruitt's; Morgan D. King, Jr.'s, trustee under the King Trust Agreement; Mirian Suarez King's, trustee under the King Trust Agreement; Laura Miller's, trustee of the Laura Elizabeth Miller Revocable Trust; Herman E. Mitchell's; Sharyn M. Donfield's; Philip P. Stahel's; Aimee E. Stahel's; William B. Thompson's, trustee of the William B. Thompson living trust; Nancy R. Thompson's; Wayne Cable Wheeler's; Sally Ann Wheeler's; Dennis McKenzie White's; and, Donna C. Billings' (collectively "Defendants") motion to dismiss for failure to join a necessary party.

I. Background

Highland Gate subdivision is located in Asheville and was created by Sunset Investments, Inc. in July of 1987 to contain fifteen lots ("Sunset"). On 15 December 1987, Sunset recorded a Restrictive Covenants Agreement ("Restrictive Agreement") in Deed Book 1505, Page 607 of the Buncombe County Registry. Each lot owner within Highland Gate is a member of the Highland Gate Homeowners Association,

Inc. (the "Association") and is entitled to one vote per lot owned. There are fourteen members of the Association. Paragraph 14 of the original Restrictive Agreement stated:

> The Architectural Committee shall have the right and responsibility to preserve the views from each lot within Highland Gate, and in order to carry out such responsibility, shall have the right to top or trim trees and shrubbery which obstruct the natural view of the surroundings within Highland Gate.

Paragraph 19 of the original Restrictive Agreement stated:

> The covenants are to run with the land and shall be binding on all parties and all persons claiming under them until the 1st day of January, 2016, at which time said covenants shall be automatically extended for successive periods of ten (10) years, unless by vote of those persons then owning a majority of said lots, it is agreed to change said covenants in whole or in part.

Plaintiff purchased Lot 13 on 3 January 2014. The Restrictive Agreement was in effect. Plaintiff quitclaimed title of the lot by deed to the PRB Living Trust. Plaintiff is the trustee and sole beneficiary of the PRB Living Trust.

The Association recorded a First Amendment to the Restrictive Agreement ("First Amendment") on 31 March 2016 in the Buncombe County Registry at Deed Book 5410, Page 347. The First Amendment replaced Paragraph 14 of the original Restrictive Agreement with the following provision:

> It was the intent of the developer of Highland Gate that all lots enjoy and retain views of the city and the mountains to the west, which views contribute to the retention of property values on all lots in the subdivision. All lots,

> therefore, shall have the right to such views, and no owner shall be allowed to cultivate, grow, or maintain plants, trees or shrubbery that obstructs views from any lot. In the event that any owner ("Complaining Owner") believes that the view from his/her lot is obstructed, then that Complaining Owner must so inform the owner of the lot that is causing the obstructed-view condition ("Obstructing Owner") and also inform the Association. Obstructing Owner will immediately remove the plants, trees, and/or shrubbery causing the obstructed view, unless removal of the obstruction by topping, cutting or otherwise would not be allowed by any City of Asheville ordinance. If so, then the Complaining Owner must engage an arborist to provide a plan for trimming and/or cutting to remove the obstruction and any such plan must comply with the City ordinances. Upon receipt of a plan, the Obstructing Owner must carry it out. If the Obstructing Owner fails or refuses to remove the obstruction according to the plan, then such failure or refusal is deemed a violation of this covenant. The Association shall then have the right to take any and all legal action against the Obstructing Owner to effect compliance.

The First Amendment also replaced Paragraph 19 of the original Restrictive Agreement with the following language:

> The covenants are to run with the land and shall be binding on all parties and all persons claiming under them until the 1st day of January, 2046 at which time said covenants shall be automatically extended for successive periods of ten (10) years. At any time, the owners may amend or revise the covenants by a majority vote of all lot owners. Any such amendment or revision shall become effective upon recordation in the Office of the Register of Deeds.

Beginning in 2019, disputes arose among Highland Gate owners and the Association concerning their rights to views. A special meeting of the Association was held in August 2021, with multiple motions to change the language of Paragraph 14

of the First Amendment. This motion was approved by a majority vote and recorded in the Buncombe County Registry in August 2021 as the Third Amendment to the Restrictive Agreement ("Third Amendment"). The Third Amendment replaced Paragraph 14 with the following language:

> Views contribute to the retention of property values on all lots in the subdivision: therefore, the Highland Gate Homeowners agree to help each other preserve existing views under the current Asheville City rules and regulations concerning tree trimming while balancing an owner's privacy and property aesthetics. Owners shall take care to not cultivate, grow or maintain plants, trees or shrubbery that could obstruct views. If any owner (Requesting Owner) feels that his/her view is beginning to be obstructed then he/she should contact the Obstructing Owner and the HOA Board by email with his/her specific concerns. In Asheville, an arborist plan may be required. In that case the Requesting Owner and the Obstructing Owner will agree to an arborist and a plan. The Requesting Owner will pay for all expenses of his/her view benefit. The Obstructing Owner will execute the plan with the arborist.

Plaintiff filed a declaratory judgment action to invalidate the Third Amendment on 6 October 2021. The complaint was only filed against the Association and four current or former board members (the "Board Members"). On 22 November 2021, the Board Members filed a motion on behalf of the Association to dismiss instead of an answer. The Association filed an answer and motion to join necessary parties, asserting Plaintiff's complaint affected all members of the Association and all members were necessary parties. On 7 December 2021, Plaintiff moved for leave to file an amended complaint "to add every member of the [HOA] as a defendant [.]"

On 10 January 2022, the trial court heard arguments on the pending motions and issued an order, filed 14 February 2022, allowing the Association's motion to join necessary parties. Counsel for the Association sent Plaintiff an email reminder on 21 March 2022 to join the other members of the Association as parties to the lawsuit. On 21 April 2022, after receiving no response or the amended complaint, counsel for the Association filed a motion to show cause. On the same day, Plaintiff filed a motion to dismiss the motion to show cause and motion to compel Defendants to join the necessary parties, arguing the Association had the obligation to add the necessary parties and amend the complaint, not him.

On 17 June 2022, after a hearing on the Association's motion to show cause and Plaintiff's motion to dismiss the motion to show cause and motion to compel, the Honorable Jacqueline Grant issued an order allowing Plaintiff thirty (30) days to file his amended complaint or his action would be subject to dismissal. On 22 June 2022, Plaintiff filed his first amendment to complaint for declaratory judgment.

Plaintiff only issued summonses to his neighbors colloquially, instead of naming each owner to reflect legal title for each lot within Highland Gate. Plaintiff issued a single summons to "Joe and Kellie Kiely", and not the owners "Joe Kiely" and "Kellie Pruitt" of Lots 3 & 4, as is listed on their title. Plaintiff issued a summons to "Laura Elizabeth Miller" and not the owner of Lot 7, "Laura Miller as Trustee of the Laura Elizabeth Miller Revocable Trust."

On 18 July 2022, Plaintiff filed a motion for leave to file a second amendment to the complaint for declaratory judgment to add the new owners of Lot 5, which had recently been sold. On 19 August 2022, the Association and Board Members, in responding to the first amendment to the complaint for declaratory judgment, again raised Plaintiff's failure to join necessary parties and filed a motion to dismiss instead of an answer.

On 4 October 2022, Judge Grant heard the pending motions for a second time. Counsel for the Association provided Plaintiff with the various deeds reflecting title for each Lot and argued Plaintiff had failed to properly issue summonses to multiple owners. At this time, Judge Grant explicitly warned Plaintiff of the importance of identifying and serving parties by their proper legal names.

On 13 October 2022, Judge Grant issued an order requiring Plaintiff to file his second amended complaint within ten (10) days or his action would face dismissal. On 14 October 2022, Plaintiff filed his second amended complaint for declaratory judgment, adding the new owners of Lot 5, correcting the name of an owner of Lots 3 & 4 from "Kellie Kiely" to "Kellie A. Pruitt" and correcting the name of the owner of Lot 7 from "Laura Elizabeth Miller" to "Laura Miller as Trustee of the Laura Elizabeth Miller Revocable Trust." Plaintiff only issued new summonses for the new owners of Lot 5, and he failed to serve Kellie Pruitt or Laura Miller as Trustee of the Laura Elizabeth Miller Revocable Trust.

On 2 December 2022, the Association brought yet another motion to dismiss and moved to join necessary parties with its answer to the second amendment to the complaint. On the same date, Kellie Pruitt and Laura Miller, as Trustee of the Laura Elizabeth Miller Revocable Trust, each filed motions to dismiss, asserting they had not been properly served with summonses as required under Rules 3 and 4 of the North Carolina Rules of Civil Procedure. The remaining lot owners also filed motions to dismiss and answers.

On 5 December 2022, Plaintiff filed a motion for summary judgment. On 12 January 2023, the Association filed a motion for summary judgment. On 13 January 2023, other lot owners filed a motion for summary judgment. On 19 January 2023, Plaintiff filed a memorandum in support of his motion for summary judgment, arguing all necessary parties had been joined to the action and served. However, Plaintiff's certified mail receipts were addressed to "Joe & Kellie Kiely" and "Laura Elizabeth Miller", not the actual legal owners and parties to the action.

Based on a delivery date of 22 June 2022, Plaintiff does not explain nor does the record show service of the second amendment to the complaint, which was not filed until 14 October 2022. The record is also devoid of evidence showing a summons was issued to or served on Kellie Pruitt or Laura Miller as Trustee of the Laura Elizabeth Miller Revocable Trust.

On 23 January 2023, the Honorable Alan Z. Thornburg heard oral arguments on the Association's motion to dismiss the lawsuit. After hearing from all parties, the

court indicated it would dismiss Plaintiff's complaint for failure to join all necessary parties. The Association argued this issue had been pending over a year, and Judge Grant had warned Plaintiff that leeway for *pro se* litigants extended only so far.

After hearing from Plaintiff, the court determined dismissal with prejudice was appropriate. On 27 January 2023, the trial court entered an order granting the Association's motion to dismiss for Plaintiff's continued failure to join necessary parties and ordered the cause and action dismissed with prejudice. On 10 February 2023, Plaintiff filed a timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Plaintiff argues the trial court erred by dismissing his complaint for failure to join necessary parties with prejudice.

IV. Failure to Join Necessary Parties

A. Standard of Review

This Court reviews an involuntary dismissal under Rule 41 by determining "(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) (citation omitted).

B. All Association Members are Necessary Parties

All members of the Association are necessary parties to this action. *See Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 439-40, 527 S.E.2d 40, 44 (2000) (finding nonparty property owners were necessary parties to the action because voiding residential-use restrictive covenants would extinguish their property rights).

North Carolina Rule of Civil Procedure 19 governs the joinder of necessary parties:

> (a) Necessary joinder. - Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.
>
> (b) Joinder of parties not united in interest. - The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 19 (2021).

Joinder of a party to an action does not occur unless a validly-issued summons is served. *See Post & Front Properties v. Roanoke Construction. Co., Inc.*, 117 N.C. App. 93, 97, 449 S.E.2d 765, 768 (1994) (holding an individual who was not served with a summons was not made a party to the action); *Sink v. Easter*, 284 N.C. 555,

561, 202 S.E.2d 18, 143 (1974) (explaining "the court acquired no jurisdiction over defendant" without valid service of process); *Ryals v. Hall-Lane Moving And Storage Co.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604 (1996) (providing "process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid, even though a defendant had actual notice of the lawsuit." (citations omitted)).

Plaintiff asserts he joined all necessary parties to this action. Rule 4(b) of the North Carolina Rules of Civil Procedure requires:

> (b) Summons – Contents. – The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. *It shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service* upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff. If a request for admission is served with the summons, the summons shall so state.

N.C. Gen. Stat. § 1A-1, Rule 4 (b) (2021) (emphasis supplied).

After amending his complaint twice to purportedly add necessary parties, no evidence in the record tends to show Plaintiff ever issued and served new summonses and copies of the amended complaints on the correct parties. Plaintiff failed to obtain

or serve a summons in the names of "Kellie Pruitt" or "Laura Miller as Trustee of the Laura Elizabeth Miller Revocable Trust."

Plaintiff argues the summonses issued on 22 June 2022 to "Joe and Kellie Kiely" and "Laura Elizabeth Miller" are sufficient. In support of this argument, Plaintiff relies upon the reasoning in *Storey v. Hailey*, 114 N.C. App. 173, 441 S.E.2d 602 (1994) and *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984).

When reading the summons and complaint together, there must be "no doubt as to against whom the action was intended to be brought." *Storey*, 114 N.C. at 178, 441 S.E.2d at 605. Our Court recognizes:

> [A] suit of law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Id. (citing *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947).

In *Harris*, the summons improperly identified the law firm as a professional association and the sheriff's department provided the wrong summons to one of the law partners. *Harris*, 311 N.C. at 539, 319 S.E.2d at 915. The Court held the summons and the complaint together provided sufficient notice to bring the law firm and the law partner before the court. *Id.* at 545, 319 S.E.2d at 918.

The facts in *Storey* and *Harris* differ from the facts here. In those cases, summonses and complaints were actually served on the intended individuals, even though they had deficiencies. Here, the amended complaints and summonses reflecting the correct parties were never served on either Kellie Pruitt or Laura Miller as Trustee of the Laura Elizabeth Miller Revocable Trust. To comply under Rule 4(b), two separate summonses should have been issued for Joe Kiely and Kellie Pruitt. Here, only one summons was issued and served to a purported defendant named as "Joe & Kelly Kiely." *See Stack v. Union Reg'l Mem'l Med. Ctr., Inc.*, 171 N.C. App. 322, 327, 614 S.E.2d 378, 382 (2005) ("It would be inconsistent with such holdings to now hold that an action against multiple defendants can be commenced by issuing a summons to a single defendant, with process and service to the other defendants to come at plaintiff's leisure.").

The Association relies upon the reasoning in *Franklin v. Winn Dixie Raleigh, Inc.* in support of its argument that dismissal was proper. *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 450 S.E.2d 24 (1994), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995). In *Franklin*, the plaintiff never served a summons on the correct legal entity with the amended complaint. *Id.* at 32, 450 S.E.2d at 27. This Court affirmed the decision, finding the mistake was fatal and dismissal was appropriate. *Id.* at 35, 450 S.E.2d at 28. As in *Franklin*, Plaintiff never served a summons on either Kelly Pruitt or Laura Miller, as Trustee of the Laura Elizabeth Miller Revocable Trust, with the second amendment to the complaint. *See Dunn v.*

Cook, 204 N.C. App. 332, 337, 693 S.E.2d 752, 756 (2010) ("The general rule . . . in suits, respecting the trust property, brought either by or against the trustees, the *cestuis que trustent*, or beneficiaries as well as the trustees also, are necessary parties." (citation and quotation marks omitted)).

Plaintiff also argues Laura Miller, as Trustee of the Laura Elizabeth Miller Revocable Trust, waived any objections to the fact no summons was issued to her as trustee, and she was properly joined in the litigation. Plaintiff's argument is misplaced. Laura Elizabeth Miller was served with the first amendment to the complaint in June of 2022, filed a motion to dismiss, answer and affirmative defenses. However, Laura Miller, as Trustee of the Laura Elizabeth Miller Revocable Trust, was never served or properly joined as a party to the action. This party was not identified as a necessary party-defendant until the second amendment to the complaint was filed on 14 October 2022.

The principal filing by Laura Miller, as Trustee of the Laura Elizabeth Miller Revocable Trust, was a specific motion to dismiss for lack of personal jurisdiction due to improper service of a summons as required under Rules 3 and 4 of the North Carolina Rules of Civil Procedure. *See Ryals*, 122 N.C. App. at 248, 468 S.E.2d at 604 (holding when defendants "promptly alerted plaintiff to the jurisdictional problems" in their answer and then "engaged in discovery[,]" "[l]aw nor equity permits such actions alone to be considered a general appearance" and plaintiff "had ample

opportunity to cure any jurisdictional defects and was not unfairly prejudiced by defendants' actions").

Failing to issue and serve summonses which gave legal notice and service to Kellie Pruitt and Laura Miller, as Trustee of the Laura Elizabeth Miller Revocable Trust, is fatal to Plaintiff's argument. Necessary parties were not properly served and joined in the action. Laura Miller, as Trustee of the Laura Elizabeth Miller Revocable Trust, did not waive any objections to improper service. The trial court correctly dismissed the action for Plaintiff's failure to join necessary parties after multiple notices, warnings, and opportunities to do so.

This Court has held a dismissal for failure to join a necessary party "is not a dismissal on the merits and may not be with prejudice." *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 453, 183 S.E.2d 834, 838 (1971) (citation omitted).

V. Dismissal with Prejudice as a Sanction

A. Standard of Review

This Court's review of a trial court's involuntary dismissal with prejudice as a sanction is for abuse of discretion. *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 911, *aff'd*, 361 N.C. 112, 637 S.E.2d 538 (2006). "[W]here the record on appeal permits the inference that the trial court considered less severe sanctions, this court may not overturn the decision of the trial court unless it appears so arbitrary that it could not be the result of a reasoned decision." *Id.*

B. Sanction

Defendants allege the trial court properly dismissed Plaintiff's complaint *with prejudice as a sanction* for his repeated failures to comply with multiple court orders requiring him to join all necessary parties. The Association attempted to have all necessary parties joined multiple times throughout the course of this litigation. It argues Plaintiff failed to join the necessary parties for over a year with knowledge from the trial court's orders that dismissal of the action was a potential consequence of his inaction.

Rule 41(b) of the North Carolina Rules of Civil Procedure states:

> (b) Involuntary dismissal; effect thereof. – For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2021).

Our Supreme Court has held the trial court is afforded great discretion in determining whether parties are to be sanctioned. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987) (explaining "[t]he power of the trial court to sanction parties for failure to comply with court orders is essential to the prompt and efficient administration of justice. Rule 41(b) of the North Carolina Rules of Civil Procedure . . . grants the trial court authority to dismiss actions with prejudice on the grounds that plaintiff failed to comply with a court order"). However, the trial court is also required to consider less severe sanctions before dismissing an action with prejudice under Rule 41. *See Badillo*, 177 N.C. App. at 734, 629 S.E.2d at 911.

Here, the record shows the trial court heard arguments from Plaintiff, counsel for the Association, and counsel for other named defendants regarding the procedural history of the case and the steps Plaintiff had taken, or failed to take, to comply with numerous prior court orders. Additionally, counsel for the Association explained to the trial court they had provided Plaintiff with copies of the deeds for each lot, listing the names of the proper parties to be served. Plaintiff had ample time and multiple opportunities to issue and serve proper summonses as required by the statutory procedural rules and the court's order.

Plaintiff was also given the correct information he needed to properly issue the new summonses and serve the amended complaints. Plaintiff's behavior became a

pattern over more than a year, which suggested lesser sanctions would be ineffective. *See Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995) (finding the dismissal of counterclaims with prejudice was proper when it could be inferred from the record the trial court considered all available sanctions when making its decision).

Although Plaintiff did not verbally mention an alternative for dismissal at the hearing, Plaintiff's Memorandum in Support of Motion for Summary Judgment, filed 19 January 2023, asks for costs to be assessed against Defendants. At the hearing, the court mentioned having a copy of the brief submitted by the Association.

When considering the imposition of sanctions, no mechanical test exists, but the total circumstances should be carefully considered. *See Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 420-21, 378 S.E.2d 196, 200-01 (1989) ("Rather, the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience."); *Badillo*, 177 N.C. App. at 735, 629 S.E.2d at 911 (providing "the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate"). The record shows the trial court heard arguments from counsel regarding whether the action should be dismissed with prejudice or without prejudice. In weighing the circumstances of this case, the trial court heard arguments about the length of time since the issue was raised, Plaintiff's failure to comply with multiple court orders, and the fact Plaintiff had been previously and specifically

warned by Judge Grant that his failure to issue summonses to necessary parties could result in dismissal of the action. *Id.*

In *Ray v. Greer*, this Court affirmed the dismissal of a complaint with prejudice under Rule 41(b) due to the direct violation of a court order. *Ray v. Greer*, 212 N.C. App. 358, 368, 713 S.E.2d 93, 99-100 (2011) (citation omitted). In *Ray*, the plaintiff's counsel failed to comply with the trial court's order by failing to identify co-counsel to try the case with her or appear in court with her to confirm this. *Id.* at 366, 713 S.E.2d at 99. "[A] trial court may enter sanctions when the plaintiff or his attorney violates a rule of civil procedure or a court order." *Id.* at 367, 713 S.E.2d at 99 (citing *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984); *Rivenbark*, 93 N.C. App. at 420, 378 S.E.2d at 200).

Here, as in *Ray*, the trial court was very permissive and had provided Plaintiff multiple opportunities to comply with numerous court orders. The language of Rule 41(b) itself specifically "provides for involuntary dismissal of a complaint '[f]or failure of the plaintiff . . . to comply with . . . *any* order of court.'" *Id.* at 362, 713 S.E.2d at 96 (quoting N.C. Gen. Stat. § 1A-1, Rule 41(b) (2009)) (emphasis supplied).

Here, as required by *Rivenbark*, the trial court took into consideration the past and current circumstances of the case before making its decision to impose the sanction of dismissal with prejudice. Throughout the course of this litigation, Plaintiff was given numerous opportunities to amend his complaint and join and serve the necessary parties to the action.

Plaintiff was first made aware of his failure to join all necessary parties on 21 November 2021, over 14 months before the court dismissed his case. On 17 June 2022, Plaintiff was given thirty days to join the necessary parties or have the action subject to dismissal. Again, on 13 October 2022, Plaintiff was given another opportunity to file an amended complaint or have the action subject to dismissal. Although Plaintiff filed his second amended complaint and named the proper parties, he did not issue and serve summonses to the parties as is required by law.

The court provided Plaintiff with explicit instructions to "cause summons to be issued to all necessary parties" in its 13 October 2022 order. Despite this knowledge and having numerous opportunities to do so, Plaintiff failed to comply with multiple court orders. Plaintiff has failed to show the trial court abused its discretion by entry of an order dismissing Plaintiff's complaint with prejudice. The trial court properly dismissed Plaintiff's action with prejudice under Rule 41(b) of the North Carolina Rules of Civil Procedure due to Plaintiff's failure to comply with multiple court orders. The trial court's order entered as a sanction is affirmed.

VI. Conclusion

Plaintiff was provided numerous opportunities to comply with multiple court orders, but he failed to do so for over a year. The trial court properly dismissed Plaintiff's complaint with prejudice as a sanction. *It is so ordered.*

AFFIRMED.

Judges DILLON and GRIFFIN concur.

Report per Rule 30(e).