RULE 41(b) DISMISSAL FOR FAILURE TO PROSECUTE

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Contents

I. The Rule.

A. Generally. A trial court is authorized by Rule 41(b) of the Rules of Civil Procedure to dismiss an action or claim (original, cross-claim, counterclaim, or third party claim) due to the failure of the claimant to prosecute its case.

B. Rule 41(b):

"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. …Unless the court in its order for dismissal otherwise specifies, a dismissal under this section…operates as an adjudication upon the merits." (emphasis added)

C. The Court May Act on Its Own Motion. Although the Rule specifies that "a defendant may move" for a Rule 41(b) dismissal, the Court of Appeals has held that a court may dismiss a claim or action on its own motion. Perkins v. Perkins, 88 N.C. App. 568, 569, 364 S.E.2d 166, 167 (1988); Blackwelder Furniture Co. of Statesville, Inc. v. Harris, 75 N.C. App. 625, 627, 331 S.E.2d 274, 275 (1985) (limiting the holding in *Simmons v. Tuttle*, 70 N.C. App. 101, 318 S.E.2d 847 (1984))

D. Certain Findings are Required. Dismissals, however, "are viewed as the harshest of remedies in a civil case and should not be imposed lightly." Page v. Mandel, 154 N.C. App. 94, 101, 571 S.E.2d 635, 639 (2002). Whether dismissing on defendant's motion or *ex mero motu*, the court must make certain findings (section II., below) and should closely examine whether the situation constitutes "failure to prosecute" as that term has been interpreted by the appellate courts (section III., below).

II. Required Findings and Considerations.

A. Consideration of "Lesser Sanctions."

1. Generally. Although Rule 41(b) does not itself contain such a requirement, North Carolina appellate cases require a trial court to examine the possibility of lesser sanctions when contemplating dismissal – "the most severe sanction available to the court in a civil case." *Page*, 154 N.C. App. at 101, 571 S.E.2d at 639 (citing Goss v. Battle, 111 N.C. App. 173, 176, 432 S.E.2d 156, 158-59 (1993)).

2. Three Part Inquiry. This consideration requires a three-part inquiry:

- Whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter;
- The amount of prejudice, if any, to the defendant; and
- The reason, if one exists, that sanctions short of dismissal would not suffice.

Wilder v. Wilder, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001).

B. The Record Must Reflect the Court's Consideration of Lesser Sanctions.

Id.

- *Page*, 154 N.C. App. at 101-02, 571 S.E.2d at 640 (2002). Vacating order dismissing claims for failure to file a second amended complaint as ordered by the court. Noting that findings regarding lesser available sanctions were required regardless of whether dismissal was pursuant to 41(b) or another underlying rule.

- *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428 (2001). Reversing and remanding a dismissal of an equitable distribution claim because the order did not sufficiently address whether less severe sanctions could properly deal with the party's delay.

- Foy v. Hunter, 106 N.C. App. 614, 619, 418 S.E.2d 299, 303 (1992). Remanding for reconsideration of lesser sanctions where trial court made a finding that plaintiffs had not cooperated with counsel in prosecuting the action, but the record showed no facts to support the finding.

- All Carolina Crane & Equip., LLC v. Dan's Relocators, Inc., 691 S.E.2d 132, 2010 WL 521032 (N.C. App. 2010) (unpub'd). Reversing a trial court's bench order dismissing a case summarily because plaintiff and his attorney were 15 minutes late returning from the lunch break, where the court made no findings and indicated no consideration of lesser sanctions.

III. What Constitutes Failure to Prosecute.

A. General Guidance.

1. "Intention to Thwart Progress" or "Delaying Tactic" Required. "Dismissal 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." In Re Will of Kersey, 176 N.C. App. 748, 751, 627 S.E.2d 309, 311 (2006); Green v. Eure, 18 N.C. App. 671, 672, 197

S.E.2d 599, 601 (1973) (citing 5 Moore's Federal Practice, para. 41.11(2)).

2. "Mere Passage of Time" Not Enough. "Provided a plaintiff has not been lacking in diligence, the mere passage of time does not justify dismissal for failure to prosecute as our courts are primarily concerned with the trial of cases on their merits." *Kersey*, 176 N.C. App. at 751, 627 S.E.2d at 311 (citing Butler Serv. Co. v. Butler Serv. Group, 66 N.C. App. 132, 136, 310 S.E.2d 406, 408 (1984) ("Expedition for its own sake is not the goal.")).

B. Cases Holding No "Failure to Prosecute" as a Matter of Law.

1. Where Actions of Attorney Could Not Be Imputed to Claimants.

- Barclays American Corp. v. Howell, 81 N.C. App. 654, 657–58, 345 S.E.2d 228, 230–31 (1986). Reversing, in a strongly-worded opinion, the dismissal of plaintiff's action where his attorney had filed a motion to withdraw a few days before trial date and did not communicate to his client that trial date had been set. Rejecting the notion that the client was required to know of the trial date as a matter of ordinary prudence. Holding that the plaintiff's failure to attend trial was "excusable as a matter of law."

- Simmons v. Tuttle, 70 N.C. App. 101, 105–06, 318 S.E.2d 847, 849 (1984). Holding that dismissal of an action for failure to prosecute because counsel failed to attend a clean-up calendar, where the plaintiff's first attorney had withdrawn and the calendar notice still reflected the first attorney as counsel of record, was improper as a matter of law. Stating that, even where plaintiff's substituted counsel was negligent in not obtaining the calendar notice, the negligence was not imputable to the plaintiff, and certainly not to "the drastic extent of dismissing his case."

2. Where Another Court Action Prevented Attorney's Attendance.

- Butler Serv. Co. v. Butler Serv. Group, 66 N.C. App. 132, 136, 310 S.E.2d 406, 408 (1984). Reversing dismissal of plaintiff's superior court action where the plaintiff's attorney (sole practitioner) had been called to trial in both plaintiff's matter and in two district court matters in the same courthouse at the same hour and had timely attempted to reconcile the issue with the respective judges, both of whom apparently rejected the idea that the attorney could not physically be in two places at the same time and ordering him to try the three cases as calendared. Reflecting obvious distaste for the trial judges' management of the situation and its effect on the innocent plaintiff and holding that the "harshness of a Rule 41(b) dismissal with prejudice is seldom more apparent than on the facts of this case."

3. Where Party's Attorney/Trustee Was Prepared to Proceed.

- Terry v. Bob Dunn Ford, Inc., 77 N.C. App. 457, 458, 335 S.E.2d 227, 228 (1985). Reversing dismissal based on failure of plaintiff to be in court when case was called for trial, where plaintiff's attorney was

present and ready to proceed and there was no legal requirement that a party be present.

- Blackwelder Furniture Co. of Statesville, Inc. v. Harris, 75 N.C. App. 625, 627, 331 S.E.2d 274, 275 (1985). Reversing dismissal where plaintiff's trustee in bankruptcy was present when case was called and had moved to be made a party, even where plaintiff and his attorney were not present and had repeatedly failed to appear for administrative calendars.

4. Where There Was No Improper Intent Behind Delay in Service or Calendaring.

- In Re Will of Kersey, 176 N.C. App. 748, 751, 627 S.E.2d 309, 311 (2006). Reversing the trial court's dismissal of action for caveator's failure to notify interested persons of transfer to superior court within the limitations period for filing a caveat action, as there was no such legal requirement for the notification, and the facts showed no intent to thwart the progress of the matter.

- Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207 (1992). Reversing the trial court's dismissal of plaintiff's complaint where the plaintiff's delay in service upon some of the defendants was not in technical violation of Rules 3 and 4 and did not "rise to the level of demonstrating an intent to thwart progress or to implement a delaying tactic." Also noting that "there appears to be no demonstrable intent here, but only arguable inadvertence or neglect of counsel."

- Green v. Eure, 18 N.C. App. 671, 672-3, 197 S.E.2d 599, 601 (1973). Reversing dismissal where pro se plaintiff took no action on his declaratory judgment action for two years after serving the complaint because he believed the court would calendar the action for hearing in due course. Holding that he was not "lacking in diligence" and that his failure arose out of a misunderstanding rather than deliberate attempt at delay.

C. Cases Affirming Dismissal For Failure to Prosecute.

1. Intentional, Prejudicial Delay in Serving Complaint.

- Smith v. Quinn, 324 N.C. 316, 318, 378 S.E.2d 28, 30 (1989). Affirming a dismissal based on an eight-month delay in service of the complaint where the record reflected an intentional delay "in order to gain an unfair advantage."

- Sellers v. High Point Memorial Hosp., Inc., 97 N.C. App. 299, 303, 388 S.E.2d 197, 199 (1990). Affirming the dismissal of an action against a hospital where the plaintiff filed the complaint in May, but intentionally did not take steps to serve the hospital a summons for more than six months, and the hospital did not know of the case until it received an administrative calendar from the court.

2. Failure to Attend a Clean-Up Calendar or Trial Calendar.

- Perkins v. Perkins, 88 N.C. App. 568, 569, 364 S.E.2d 166, 167 (1988). Affirming a trial court's ex mero motu dismissal without prejudice of a divorce action based on the parties' failure to appear at a clean-up calendar because no pleading had been filed in almost two years, and the case had been placed on two prior clean-up calendars. Also holding that the trial court was not required to reopen the matter under Rule 60(b), even though there was a valid argument for the attorney's excusable neglect. *But see* Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984) (reversing dismissal for failure to appear at a clean-up calendar because the attorney's actions were not imputable to plaintiff).

- Barbee v. Walton's Jewelers, Inc., 40 N.C. App. 760, 762, 253 S.E.2d 596, 598 (1979). Affirming dismissal where plaintiff and her attorney failed to appear when case was called for trial and where there was no apparent excuse for the failure.

IV. Standards of Review.

A. Abuse of Discretion.

1. Denial of Motion to Dismiss. A decision to deny a Rule 41(b) motion is within the sound discretion of the trial court, and "will be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.'" Eakes v. Eakes, 194 N.C. App. 303, 309, 669 S.E.2d 891, 896 (2008) (affirming trial court's refusal to dismiss claims where the movant showed no prejudice from the claimant's delays); *see also* James River Equip., Inc. v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 347, 634 S.E.2d 548, 556 (2006) (affirming trial court's denial of motion to dismiss); Melton v. Stamm, 138 N.C. App. 314, 317, 530 S.E.2d 622, 624 (2000) (making clear that the trial court is not required to grant motion); Jones v. Stone, 52 N.C. App. 502, 506, 279 S.E.2d 13, 15 (1981) (same); Deutsch v. Fisher, 39 N.C. App. 304, 250 S.E.2d 304, 308 (1979) (holding that court's refusal to dismiss was appropriate under the facts).

2. Findings of Fact to Support Dismissal. Where the trial court makes the required findings of fact regarding lesser sanctions, the appellate courts will not disturb those findings where there is evidence in the record to support them. Lee v. Roses, 162 N.C. App. 129, 132, 590 S.E.2d 404, 407 (2004); Foy v. Hunter, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992).

B. *De Novo*.

Where the appeal of a Rule 41(b) dismissal alleges an error of law, the Court of Appeals reviews the matter *de novo*. Appeals in this context have proceeded on grounds that (1) the trial court did not make the required findings of fact to support the dismissal; or (2) that there was, as a matter of law, no "failure to prosecute". See Sections II. and III. above.