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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1008

Filed: 3 May 2016

Buncombe County, No. 08 CVS 4632

ALEXANDRA CURY, Plaintiff,

v.

DAVID F. MITCHELL, Defendant.

Appeal by plaintiff from order entered 16 June 2015 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 27 January 2016.

DeVere Lentz & Associates, by John M. Olesiuk, for plaintiff-appellant.

Roberts & Stevens, P.A., by Ann-Patton Hornthal and Stephen L. Cash, for defendant-appellee.

DIETZ, Judge.

In 2008, Alexandra Cury sued David Mitchell asserting various claims concerning a home the two purchased together. The trial court dismissed the entire action and Cury appealed. This Court reversed in part and remanded for some claims to proceed.

Following remand, Cury did not do *anything* to move the case forward to judgment. The only action Cury took between 2010 and 2015 was the filing of a *lis*

pendens, which encumbered Mitchell's property during the pendency of a lawsuit Cury took no steps to resolve.

In 2015, Mitchell moved to dismiss the remaining claims for failure to prosecute under Rule 41(b). The trial court granted the motion, finding in its order that Cury's delay was unreasonable, that Mitchell was prejudiced by the delay because of the *lis pendens*, and that no lesser sanctions would appropriately remedy Cury's failure to prosecute.

As explained below, we affirm. The trial court's findings are supported by the record and those findings, in turn, support the court's decision to dismiss the action for failure to prosecute. Simply put, a litigant who seeks justice in our courts must actually pursue it. Cury provides no explanation for her nearly five-year delay in moving the case to judgment. We find no error in the trial court's conclusion that the only appropriate sanction for this prejudicial delay was dismissal.

Facts and Procedural History

On 28 August 2008, Plaintiff Alexandra Cury sued Defendant David Mitchell for various claims arising from Mitchell's purchase of a home using some funds provided by Cury.

On 4 December 2008, the trial court dismissed Cury's complaint for failure to state a claim on which relief could be granted. This Court reversed in part, holding

CURY V. MITCHELL

Opinion of the Court

that Cury sufficiently stated a claim for a constructive and resulting trust. *Cury v. Mitchell*, 202 N.C. App. 558, 562, 688 S.E.2d 825, 828 (2010).

On 7 October 2010, our Supreme Court denied Cury's petition for discretionary review. Almost three years later, on 19 July 2013, Cury filed a *lis pendens* for the disputed property, informing potentially interested parties that the property was the subject of litigation. Other than that filing, Cury took no action to obtain a judgment on her remaining claims. Eighteen more months passed after Cury filed the *lis pendens* without any action on the underlying lawsuit. Finally, on 24 April 2015, Mitchell moved to dismiss for failure to prosecute. The trial court granted the motion, dismissed Cury's claims with prejudice for failure to prosecute, and dissolved the *lis pendens* filing. Cury timely appealed.

Analysis

Cury argues that the trial court erred by dismissing her complaint for failure to prosecute because she did not cause the delay and Mitchell was not harmed by the delay. Cury also alleges that the trial court erred by failing to consider lesser sanctions before dismissing the action with prejudice. As explained below, we reject these arguments and affirm the trial court's judgment.

Rule 41(b) of the North Carolina Rules of Civil Procedure permits dismissal of a complaint for failure to prosecute. *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001). Before dismissing a claim on this ground, the trial court must

CURY V. MITCHELL

Opinion of the Court

consider the following 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.” *Id.*

When the trial court has considered these factors, we review “(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).

Here, the trial court unquestionably considered the necessary factors. It found that Cury’s “delay in prosecuting this action following remand by the appellate courts in 2010 is unreasonable,” that Mitchell “was prejudiced by the delay in that, among other ways, title to his real property was clouded by a *lis pendens*,” and that “dismissal with prejudice is the appropriate sanction and there is no lesser appropriate sanction.” We thus turn to whether the trial court’s findings are supported by competent evidence, and whether those findings, in turn, support the trial court’s conclusions.

Cury first argues that there is no evidence *she* caused the delay of the case. But Cury knew in October 2010 that this case had returned to the trial court because the remand order copied her attorney. Indeed, Cury does not dispute that she was aware the case was remanded in 2010. Nevertheless, with the exception of filing the

CURY V. MITCHELL

Opinion of the Court

lis pendens, Cury took no action to move the case forward to judgment. As the plaintiff, it is Cury's responsibility to pursue the justice she seeks in her complaint. Cury offers no explanation for why she failed to move the case forward in the years after it returned from the appellate courts. Accordingly, the trial court's finding that Cury's "delay in prosecuting this action following remand by the appellate courts in 2010 is unreasonable" is supported by the record.

Cury next argues that, even if the delay was unreasonable, there was no prejudice to Mitchell. But it is well-settled that a *lis pendens* encumbers real property and can impact marketability. *See, e.g., Burkhead v. Farlow*, 266 N.C. 595, 598, 146 S.E.2d 802, 805 (1966); *Kniep v. Templeton*, 185 N.C. App. 622, 633, 649 S.E.2d 425, 432 (2007). Accordingly, the trial court's finding that Mitchell "was prejudiced by the delay in that . . . title to his real property was clouded by a *lis pendens*," is supported by the record.

Finally, Cury argues that the trial court erred by finding that lesser sanctions would not suffice. But again, there is competent evidence in the record to support this finding. Cury began this litigation in 2008. After the case returned from this Court, nearly *five years* passed without Cury taking *any* steps to move the case to judgment. For much of that time, Cury's *lis pendens* encumbered the home, impacting Mitchell's property rights. These facts support the trial court's finding that dismissal of the action for failure to prosecute was the only appropriate sanction.

CURY V. MITCHELL

Opinion of the Court

Conclusion

We affirm the trial court's judgment.

AFFIRMED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).