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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Courtney Clyburn Pope, Circuit Judge

Appellate Case No. 2025-001812

SP of Augusta, LLC, ...Respondent,

v.

Marilyn Kille, ...Appellant,

AND

Marilyn Kille, ...Appellant,

v.

Bradley Plumbing and Heating, Inc., Duraclean Systems Incorporated of North Augusta and John Does 1 through 10, ...Respondents.

JOINT FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant, Marilyn Kille ("Appellant"), appeals from the trial court's decision to dismiss her case due to her failure to prosecute her case. Appellant does not argue the trial court's decision was improper, let alone, an abuse of discretion. Rather, despite having, and availing herself of, an opportunity to oppose Respondents' motion to dismiss for failure to prosecute, her sole argument on appeal is that her due process rights were violated because the trial court did not hold a hearing on Respondents' motion to dismiss. However, a hearing is not required to dismiss a case for a party's failure to prosecute its claims and Appellant cites no case that has held otherwise.

STATEMENT OF THE FACTS

On June 8, 2022, Respondent, SP of Augusta, LLC ("SP of Augusta"), filed a lawsuit against Appellant arising from allegations that she had failed to fully pay for mold remediation services. (R. pp. 39-49).

On July 11, 2022, in response, Appellant asserted counterclaims against SP of Augusta and third-party claims against Respondent, Bradley Plumbing and Heating, Inc. ("Bradley Plumbing"), and Respondent, Duraclean Systems Incorporated of North Augusta ("Duraclean") (SP of Augusta, Bradley Plumbing and Duraclean are collectively referred to as "Respondents"). (R. pp. 50-70). Appellant asserted claims for negligence and breach of warranty against Respondents and breach of contract against SP of Augusta. (R. pp. 50-70 at ¶¶ 79-89 & 96-104).

As to Bradley Plumbing, Appellant alleged its employee negligently broke the main water line serving Appellant's home during a repair. (R. pp. 50-70 at ¶¶ 50-53). As to Duraclean, Appellant alleged that Duraclean was negligent, *inter alia*, in failing to clean and remediate Appellant's home and personal property and that Duraclean breached implied

warranties it owed Appellant. (R. pp. 50-70 at ¶¶ 86-87 & 99). As to SP of Augusta, Appellant alleged that it was negligent in failing to clean and remediate Appellant's home and personal property and breached implied warranties it owed to Appellant and the contract it had with Appellant. (R. pp. 50-70 at ¶¶ 86-87, 99, & 102-104).

Appellant successfully transferred the case from the magistrate's court to the circuit court due to her damage allegations. (R. pp. 106-107 & 166).

On August 29, 2022, SP of Augusta answered Appellant's counterclaims and denied Appellant's allegations of negligence, breach of warranty, and breach of contract. (R. pp. 71-84). On October 12, 2022, Duraclean denied any negligence or breach of warranty and asserted it had only limited involvement with the home consisting of retrieving, cleaning and returning a select number of rugs located at the residents. (R. pp. 85-94 at ¶¶ 12 & 14). On October 20, 2022, Bradley Plumbing answered Appellant's third-party complaint and denied Appellant's allegations of negligence and breach of warranty. (R. pp. 95-105).

On February 24, 2023, the circuit court issued a notice of ADR, which required the parties to conduct a mediation on or before May 9, 2023. (R. pp. 167-168). The notice warned sanctions may be issued for failure to file a proof of ADR if the deadline was not met. (R. pp. 167-168).

On February 28, 2023 and March 2, 2023, the Court entered a consent scheduling order providing for mediation to be held before December 4, 2023 and trial to occur not before January 29, 2024. (R. pp. 6-11).

On August 16, 2023, the court entered an amended scheduling order providing for mediation to be held before February 1, 2024 and trial to occur not before April 15, 2024. (R. pp. 12-14).

On April 12, 2024, the court entered a second amended scheduling order providing for mediation to be held before November 16, 2024 and trial to occur not before March 16, 2025. (R. pp. 30-32).

On April 29, 2024, Appellant's counsel filed a motion to withdraw as counsel. (R. pp. 110-112). On April 30, 2024, the Court granted the motion to withdraw. (R. pp. 33-35). The order included a 30-day stay of the case. (R. pp. 33-35).

On October 11, 2024, an email was sent to all parties seeking to schedule the mediation. (R. pp. 200-202). Having received no response from Appellant, a follow up email was sent to Appellant on October 29, 2024. (R. pp. 200-202). Appellant responded that "it's impossible for me to reliably commit to anything in the future other than my ongoing medical care." (R. pp. 200-202).

On December 4, 2024, counsel for SP of Augusta sent an email to the Court requesting the case be placed on the Court's next status conference hearing date as the parties had been unable to schedule a mediation. (R. pp. 203-204).

On January 15, 2025, the Court emailed counsel and Appellant acknowledging the request for a status conference and requesting clarification as to its purpose. (R. p. 205). On January 17, 2025, Bradley Plumbing responded that the status conference was necessary to schedule a mediation as Appellant had refused to schedule one. (R. pp. 206-207). On February 5, 2025, the Court emailed Appellant and all counsel and indicated to all the need for counsel to confer with Appellant as to whether she had retained new counsel and to schedule the mediation. (R. pp. 208-211). Counsel for Bradley Plumbing communicated with Appellant who again refused to set a mediation date. (R. pp. 208-211). After Appellant indicated she had hired an attorney, the Court informed her that it had communicated with that attorney and the attorney

had confirmed to the Court that he would not be representing her. (R. pp. 212-217). In response, Appellant indicated she did not know what to do next and had tried and failed repeatedly to retain a substitute attorney. (R. pp. 218-219).

The Court placed the case on the jury trial roster for the week of April 14, 2025. In response, counsel for SP of Augusta reiterated to the Court Appellant's refusal to schedule mediation and reiterated the request for a status conference. (R. pp. 220-221). The Court responded that it would hold a status conference on April 14, 2025. (R. pp. 220-221).

Appellant responded on March 25, 2025 that she would be physically unable to appear at the April 14, 2025 status conference and requested that it be postponed to allow her additional time to find counsel. (R. pp. 222-225). Appellant's request for postponement was not granted.

The status conference proceeded on April 14, 2025. Appellant failed to appear. (R. pp. 133-140 at 3:6-3:16). Bradley Plumbing indicated to the Court the difficulty in trying to schedule a mediation and to get Appellant to prosecute her case, which had delayed the case for all parties. (R. pp. 133-140 at 4:18-5:5). Additionally, another counsel pointed out that Appellant had been unresponsive for over a year. (R. pp. 133-140 at 5:14-5:20). The Court informed the participants that she would entertain a motion to dismiss, which would give Appellant an opportunity to respond. (R. pp. 133-140 at 6:12-7:8).

On April 24, 2025, Respondents filed a joint motion to dismiss for lack of prosecution pursuant to Rule 41(b) and, in the alternative, a motion for summary judgment pursuant to Rule 56. (R. pp. 113-119).

On July 16, 2025, Appellant provided a written submission in opposition to the joint motion to dismiss for lack of prosecution or, in the alternative, for summary judgment. (R. pp. 236-237). Appellant spent the majority of her response detailing her efforts to obtain legal

representation. (R. pp. 236-237). However, she failed to explain why she failed to schedule the required mediation and participate in the prosecution of her claims against Respondents. (R. pp. 236-237).

On July 17, 2025, Respondents submitted a joint memorandum in support of the motion to dismiss and in reply to Appellant's July 16, 2025 submission. (R. pp. 233-235). It was pointed out Appellant's submission failed to refute that she had refused to participate in mediation and prosecute her claims. (R. pp. 233-235).

On July 18, 2025, the Court entered an order granting the motion to dismiss for lack of prosecution. (R. pp. 1-5). The Court noted that Appellant had refused to participate in scheduling mediation and failed to attend the status conference (scheduled in lieu of trial). (R. pp. 1-5). Accordingly, the Court concluded that Appellant's reason for being without legal representation for over a year was not sufficient to shirk her responsibilities to prosecute her case. (R. pp. 1-5).

In the more than nine months from October 11, 2024, when Respondents' counsel sought to schedule mediation, through the order of dismissal, at no point did Appellant ever indicate a willingness to participate in a mediation or prosecute her case.

STANDARD OF REVIEW

"Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed, except upon a clear showing of an abuse of discretion." *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006) (citation omitted). "On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling." *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 44 S.E.2d

513, 514 (1994) *citing State ex. rel. McLeod v. Wilson*, 279 S.C. 562, 310 S.E.2d 818 (Ct. App. 1983).

ARGUMENT

Generally, a "plaintiff has the burden of prosecuting h[er] action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with h[er] cause." *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). The ability of a Court to dismiss an action for the failure to prosecute "is necessary if the courts are to control and efficiently manage an ever-expanding docket." *Id.* "There is a limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties." *Georganne Apparel, Inc. v. Todd*, 393 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990).

Appellant makes only one argument in her appeal. Appellant contends her due process rights were violated. Importantly, Appellant does not argue that the trial court's decision to dismiss Appellant's case for her failure to prosecute was unjustified, let alone, an abuse of discretion. *Fields v. Melrose P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (same); *Matthews v. City of Greenwood*, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991) (arguments not made in an appellant brief are deemed abandoned).

Appellant correctly notes that due process of law requires that Appellant have a reasonable opportunity to make her case before an order against her is entered. *See* Appellant Brief at pp 13-14. However, what Appellant fails to recognize is that the trial court did not

deprive her of due process rights by ruling on the briefs as opposed to holding a hearing on Respondents' motion to dismiss for failure to prosecute.

It must be noted from the outset that Appellant had, and availed herself of, an opportunity to be heard on Respondents' motion to dismiss. At the April 14, 2025 hearing the trial court required the Respondents to submit a motion to dismiss for the express purpose of allowing Appellant the opportunity to make her case why her claims should not be dismissed for her failure to prosecute them. Appellant filed an opposition to that motion, which the trial court considered before dismissing Appellant's claims. Put simply, Appellant was afforded her due process rights as the trial court did not dismiss her case until after it had heard from her.

What Appellant appears to be arguing is that the trial court was required to hold a hearing on Respondents' motion to dismiss before granting that motion to dismiss. However, no such requirement exists. Rule 41(b) SCRCP does not mention, let alone require, a hearing. By way of contrast, Rule 37(a)(4) SCRCP, for example, allows for sanctions if discovery must be compelled, "after opportunity for hearing." *See also U.S. Bank Trust, N.A. v. Hammond*, 2019 S.C. App. Unpub. LEXIS 250 at * 3 (Ct. App. 2019) (unpublished) (as Rule 25 SCRCP does not require a hearing on the motion, there was no error in substituting the parties without a hearing); *Sheppard v. S.C. Dep't of Prob.*, 2006 S.C. App. Unpub. LEXIS 285 at * 7 (Ct. App. 2006) (trial court is not required to hold a hearing before granting a Rule 12(b)(6) motion to dismiss).

Additionally, the Supreme Court "has held that trial judges possess the inherent power to dismiss actions *sua sponte* for a party's failure to prosecute the relevant claims." *Crestwood Golf Club v. Potter*, 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997) *citing Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 803 (1970), 24 Am. Jr. 2d *Dismissal, Discontinuances, and Nonsuit* 48 (1983) and *Collins v. Sigmon*, 299 S.C. 464, 385 S.E.2d 835 (1989). The trial court's

ability to act *sua sponte* necessarily means that a hearing is not required to dismiss a case pursuant to Rule 41(b) SCRCP.

Appellant's reliance on Rule 6(d) SCRCP is misplaced. While it is true that under Rule 6(d) SCRCP, absent a different time fixed by the rules or order of the court, a hearing cannot be held less than 10 days after a notice of hearing is served and a written motion, other than those decided ex parte, cannot be decided less than 10 days after it is served, that does not mean a hearing is always required, just as it does not mean a written motion is always required. All it means is that if the trial court were to decide to have a hearing, all parties would be required to receive at least 10 days' notice. If Appellant's interpretation that Rule 6(d) SCRCP requires a hearing for every motion were accurate, not only would it run counter to cases cited above as well as others, it would also necessarily mean a "written motion" was required in every case. As noted above, the Supreme Court has held that a motion to dismiss for failure to prosecute can be issued *sua sponte*.

Accordingly, Appellant's due process rights were honored in that she was given the opportunity, and availed herself of the opportunity, to argue why the motion to dismiss for failure to prosecute should not be granted. She lost. The absence of oral argument does not invalidate the decision of the trial court and, as Appellant makes no arguments that the decision was incorrect on the merits, let alone, an abuse of discretion, this Court must affirm the dismissal of Appellant's claims against Respondents.

CONCLUSION

For the reasons stated herein, this Court should affirm the decisions of the trial court.

Respectfully submitted,

April 2, 2026

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