THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2013-1629
Circuit Court Case No. 2011-CP-27-11

Jeffrey H. Anders and Maureen Anders, Michael K. Callahan and Amy Callahan, Melinda A. Cavicchia, Michael B. Ciulis, Stephen Kipa and Kimberly A.K. Kipa, Chad Kurtz, Spencer L. Morgan, Richard O'Reilly and Alicia F. O'Reilly, Daniel Ryan and Susan Ryan, Gennady Shmukler, Michael Schmuff and Joanne Schmuff, and Matthew Terry, Kathryn M. Tillman, Valerie A. Lowe, TACG Properties, LLC, Mackay Marsh, LLC, Plaintiffs,

of whom

Spencer L. Morgan is the ..... Appellant,

v.

The Settings of Mackay Point, LLC, The Settings Development Companies, LLC, Branch Banking & Trust Co., Wachovia Bank, N.A., Bond Safeguard Insurance Company, and Jasper County, Defendants,

of which

Wachovia Bank, N.A. is the ..... Respondent.

FINAL BRIEF OF RESPONDENT

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March 12, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ISSUE PRESENTED

In January 2013, the circuit court established a date certain for the trial of this case for May 28, 2013. Less than a week before trial, after the Clerk of Court had summoned a jury pool and Wachovia Bank had marshaled resources to defend itself against the Appellant's claims and prove its counterclaims, the Appellant requested a continuance and sought to defer trial to a later term of court. Judge Mullen denied that motion, and when the Appellant did not show up for trial, she dismissed his claims for failure to prosecute. Did Judge Mullen abuse her discretion with either of these rulings?

STATEMENT OF THE CASE

This case involves a prospective residential development in which the Appellant, who is a resident of Tennessee, became a dissatisfied purchaser. In February 2007, he purchased a lot in the Settings at Mackay Point, which was a not-yet-developed subdivision in Jasper County. (R. p. 21, Compl. ¶ 67.) The Appellant financed his purchase through a loan with Wachovia Bank in the amount of $130,279.30. (R. p. 101, Wachovia Bank's Ans. and Countercl. ¶ 257.) The Appellant ultimately defaulted on this note and admitted over the course of discovery that he had "promised to pay Wachovia Bank" the principal owed, plus interest, but that he "failed to make payments" on the note. (R. p. 236, Resps. to Wells Fargo's First Set of Requests for Admission at 2.)

Despite conceding that he did not meet his own contractual obligations, the Appellant, along with others who purchased lots in the development, alleged that the community's developers did not uphold their promises and obligations with respect to building out and establishing the subdivision. On January 7, 2011, they filed suit against the developers, as well as against Wachovia Bank and BB&T—the development's

"preferred lenders"—insurance providers, and Jasper County itself. (R. p. 14, Compl.) With respect to the developer and the lenders, the plaintiffs' claims included breach of contract, breach of the covenant of good faith and fair dealing, piercing the corporate veil, fraud in the inducement, negligent misrepresentation, negligence, civil conspiracy, and alleged violations of various statutes. (R. pp. 25–31, Compl. ¶¶ 94–161.)

On December 28, 2011, Wachovia Bank answered the complaint and filed counterclaims to enforce the terms of its loan with the Appellant. (R. p. 62, Wachovia Bank's Ans. and Countercl.) The Appellant filed his reply on January 20, 2012. (R. p. 202, Pls.' Reply to Wachovia Bank's Ans. and Countercl.)

After a period of discovery, all of the plaintiffs resolved their various claims except for the Appellant. The parties initially had a date certain for trial of November 5, 2012. (R. p. 2, Consent Scheduling Order at 2.) That date was rescheduled to the following February to permit the parties additional time for mediation, and then was rescheduled once more to May 28, 2013, by order entered on January 23, 2013. (R. p. 5, Form 4 Order (Jan. 23, 2013).)

Despite having over four months' notice of this third date certain for trial, the Appellant waited until May 22nd—less than a week before the final trial date—to request yet another continuance of the trial. (R. p. 239, Mot. for Continuance.) The Appellant blamed his eleventh-hour request on his job as a professional pilot and claimed that his employer was making him fly to St. Bart's for a multiple-week stay, though he disclaimed any suggestion that this was a personal vacation. (R. p. 218, Hr'g Tr. 6:14–15 (May 28, 2013).) Judge Mullen denied the motion by email that same day, citing the fact that the parties had been on notice of a date certain for trial for several months. (R. p. 6,

Email of Allison C. Coppage, Law Clerk to the Honorable Carmen T. Mullen (May 22, 2013).)

On May 28, 2013, counsel and a witness for Wachovia Bank appeared in Jasper County for trial; the Appellant did not. Instead, the Appellant chose to orally renew the same continuance motion that Judge Mullen had denied six days earlier. (R. p. 216, Hr'g Tr. 4:15–:23 (May 28, 2013).) He did not offer any new evidence or explanations, but only re-presented the same materials that accompanied his May 22nd filing. (*Id.*)

Judge Mullen again denied the request for a continuance, explaining:

> It was a little bit unusual for me to actually give you a day certain in a case like this for the simple fact that I know it was only going to take about two or two and a half days. And we did it for the simple fact that we were going to make sure that your client could be here.
>
> Again, he's the plaintiff in this case. I might be more sympathetic if he was the defendant being sued, but again we have summoned a jury panel here in Jasper. We only have terms of court here about every other month. In about another thirty minutes, I'm going to have about eighty people showing up that the county of Jasper is going to have to pay for, and we have no other cases for trial.

(R. p. 220, Hr'g Tr. 8:13–25 (May 28, 2013).)

Wachovia Bank then presented arguments and evidence on its counterclaims to enforce the parties' loan agreement. (R. pp. 222–227, Hr'g Tr. 10:12–15:10 (May 28, 2013).) The Appellant's counsel was able to cross-examine the Wachovia Bank witness. (R. p. 226, Hr'g Tr. 14:5–11 (May 28, 2013).) The circuit court subsequently dismissed the Appellant's claims for failure to prosecute and granted judgment in Wachovia Bank's favor on its counterclaims in the amount of $139,228.68. (R. pp. 7–12, Form 4 Order and Order for Final Judgment (June 18, 2013).)

On July 3, 2013, the Appellant filed another motion for Judge Mullen to reconsider the denial of a continuance of trial, though he cited no new facts or any legal authorities to support his motion. (R. p. 243, Motion for Recons.) The circuit court denied that motion. (R. p. 13, Form 4 Order (July 18, 2013).) On July 24, 2013, the Appellant filed a notice of appeal with this Court. (R. p. 245, Notice of Intent to Appeal.)

STANDARD OF REVIEW

Whether to grant a continuance of trial is committed to a trial court's sound discretion. *See Jackson v. Speed*, 326 S.C. 289, 309, 486 S.E.2d 750, 760 (1997) ("A motion for continuance is within the sound discretion of the trial court and the ruling will not be reversed without a clear showing of abuse."). Likewise, whether to dismiss a claim for failure to prosecute is also left to the discretion of the trial court, and a dismissal "shall not be disturbed except upon a clear showing of an abuse of such discretion." *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

ARGUMENTS AND AUTHORITIES

I. The circuit court did not abuse its discretion in denying the Appellant's motion to continue trial to yet another term of court.

The first issue presented for the Court's review involves the circuit court's denial of the Appellant's last-minute request to continue trial to another term of court. The Appellant's attack on the circuit court's authority to manage its own docket is misguided, as the law is clear that the bar for reversing such a discretionary decision is extremely high. Nothing in the record suggests that Judge Mullen abused her discretion when she enforced an order setting a date certain for trial of this case.

A. The circuit court rightly ordered this matter to proceed because the Appellant had four months' notice of his trial date, a jury pool had been summoned at taxpayer expense, and Wachovia Bank appeared and was prepared to defend against the Appellant's claims and present its own counterclaims.

The Supreme Court recently reminded that "a continuance is not a matter of right, but of discretion," and warned that parties "assume[] the risk" that their requests for a continuance may be denied. *Trotter v. Trane Coil Facility*, 393 S.C. 637, 649, 714 S.E.2d 289, 295 (2011). Moreover, where a circuit court denies a continuance request, an appellate court will make "[e]very reasonably presumption in favor of a proper exercise of the trial court's discretion" to manage its docket. *Id.* at 650, 714 S.E.2d at 295 (quoting 17 C.J.S. *Continuances* § 5 (2011)). Accordingly, "reversals of refusal of continuance are about as rare as the proverbial hens' teeth." *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

Nothing in the record demonstrates that Judge Mullen abused her discretion in denying the Appellant's belated attempt to continue trial from the date certain that had been on the calendar for over four months. The parties had already rescheduled trial twice before, and the May 28, 2013 trial date was established via a court order entered in January 2013 to ensure the out-of-state Appellant's attendance. (R. p. 5, Form 4 Order (Jan. 23, 2013).) The Appellant's case was the only one on the trial roster for that term of court, and the circuit court expended significant public resources summoning a pool of eighty citizens to serve as jurors to hear his case. (R. p. 220, Hr'g Tr. 8:22–25 (May 28, 2013).) Meanwhile, Wachovia Bank was forced to expend its own resources preparing to defend itself against the Appellant's claims, preparing its own affirmative case to enforce the parties' contract, and organizing a trial team to present the case in Ridgeland.

Against this background, there cannot be any legitimate dispute that Judge Mullen was well within her discretion to deny the Appellant's continuance request. She previously entered an order that established a date for trial that gave the parties—especially the Appellant, who lives in Tennessee and works in Texas—ample notice to make all necessary preparations to be in court and ready to proceed, including notifying his employer of the trial date.[1] Her decision to enforce that scheduling order reflects sound stewardship of public resources; protection of the parties' expectancy interests; and the efficient, predictable administration of justice. This hardly amounts to an abuse of discretion, especially in light of the fact that the Appellant failed to comply with the rules governing requests for a continuance, as explained below.

B. The Appellant did not comply with the rules that govern when a party may obtain a continuance due to the absence of an essential witness.

Not only does this case not meet the high "abuse of discretion" standard, the Appellant did not even carry his burden of following the applicable rules when requesting a continuance.[2] Rule 40(i), SCRCP, vests the circuit court with discretion to grant a continuance of trial "for good and sufficient cause." In particular, the circuit court can continue a trial due to the absence of necessary witnesses when a sworn statement is submitted containing the following information:

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[1] As South Carolina's federal courts often reinforce, "[a] scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Bryant v. Food Lion, Inc.*, 100 F. Supp. 2d 346, 373 (D.S.C. 2000) (quoting *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987)), *aff'd* 8 F. App'x 194 (4th Cir. 2001).

[2] Though the Appellant's failure to comply with Rule 40, SCRCP, was not cited as a basis for the circuit court's ruling, it is an additional basis for affirming the lower court's decision that appears in the record. Accordingly, the Court may properly consider this issue. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

- An affirmation that "the testimony of the witness is material to the support of the action or defense of the party moving";
- An affirmation that "the motion is not intended for delay," but that it is made "solely because the party cannot go safely to trial without such testimony";
- An affirmation that "there has been due diligence to procure the testimony of the witness"; and
- A complete explanation as to "what fact or facts [the affiant] believes the witness if present would testify to, and the grounds for such belief."

Id. Rule 40(i)(2).

The fact that the Appellant is a party to this litigation does not exempt him from meeting these basic requirements in order to seek a continuance. *See, e.g.*, *Wayne Smith Constr. Co. v. Wolman, Duberstein & Thompson*, 294 S.C. 140, 143, 363 S.E.2d 115, 117 (Ct. App. 1987) (holding that the trial court did not abuse its discretion when it denied a party's request for a continuance because of his own absence from trial when the moving party did not make any showing that he "had some particular contribution to make to the trial, as a material witness or otherwise" (quoting 17 Am. Jur. 2d *Continuance* § 18, at 137 (1964))).

Here, the Appellant submitted two affidavits in support of his motion for a continuance. (R. pp. 241–242, Exhibits Accompanying Mot. for Continuance.) Neither of these affidavits—nor the motion itself, for that matter—indicated that the Appellant's testimony was material to this case. Neither indicated that the Appellant had undertaken due diligence to avoid the need for a continuance. And neither explained what facts the Appellant would have testified to, and the basis for that testimony, if he had been present in court for trial.

The absence of this information in the Appellant's affidavits is telling, as he did not actually oppose Wachovia Bank's efforts to enforce the parties' loan agreement. In response to requests to admit, the Appellant conceded that he had entered into the parties' contract and had "promised to pay Wachovia Bank" on the note, but that he had "failed to make payments" as provided in the agreement. (R. p. 236, Resps. to Wells Fargo's First Set of Requests for Admission at 2.) The Appellant even conceded at a pretrial hearing that Wachovia Bank was entitled to judgment and that he could not, "in good faith, present a defense to the note." (R. p. 212, Hr'g Tr. 15:15–20 (May 7, 2013).)

In light of these dispositive concessions and the Appellant's failure to follow the rules governing continuances, Judge Mullen properly exercised her discretion when she denied the Appellant's request to delay trial. Wachovia Bank respectfully submits that her decision on this issue should be affirmed.

II. When the Appellant failed to show up for trial or present any evidence in support of his claims, the circuit court properly dismissed his case.

Just as with granting or denying continuances, the circuit court has wide latitude with respect to dismissing a case for failure to prosecute. And just as with her decision not to grant the Appellant's request for a continuance, Judge Mullen did not abuse her discretion when she dismissed his claims for failing to prosecute them.

In South Carolina, a circuit court can dismiss a case for failure to prosecute pursuant to Rule 41(b), SCRCP, or pursuant to its inherent authority to manage the docket. *See Crestwood Golf Club v. Potter*, 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997) ("[T]his 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.").

When assessing whether a circuit court abused its discretion in dismissing a case, this Court examines whether the dismissal was "imposed to maintain the orderly disposition of cases" and if the plaintiff demonstrated "indifference to the rights of the defendant." *McComas v. Ross*, 368 S.C. 59, 62–63, 626 S.E.2d 902, 904 (Ct. App. 2006). At bottom, the plaintiff—as the party responsible for initiating the legal process and consuming public resources to resolve a dispute—"has the burden of prosecuting her action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with her cause." *Id.* at 62, 626 S.E.2d at 904; *see Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983) ("This authority is necessary if the courts are to control and efficiently manage an ever-expanding docket.").

In this case, the Appellant filed suit during the first week of January 2011. The circuit court assigned the case two different dates certain for trial, which were ultimately extended. By court order entered in January 2013, the Appellant was given a third and final trial date of May 28, 2013, but he apparently did nothing at all to ensure his availability at his own trial.

When the trial date finally came, Wachovia Bank had its fully assembled team ready to proceed. In addition to spending time and resources preparing for trial, Wachovia Bank detailed two attorneys from Greenville and a witness from Charleston to Ridgeland. The Appellant, on the other hand, simply did not show up. He failed to appear despite being expressly told by the circuit court less than a week earlier that his trial would not be continued to a later term.

Despite having a trial date on the calendar for four months, the record does not reflect that the Appellant subpoenaed a single person to attend trial. Not one witness. The record does not reflect that he attempted to introduce any evidence at all in support of his claims. Not one document. Not one affidavit. Not one deposition transcript. Nothing.

When faced with a litigant who refused to show up for trial and refused to put up any evidence in support of his case, the circuit court was fully within its discretion to dismiss the Appellant's claims for failure to prosecute.[3] *See, e.g.*, *Small*, 254 S.C. at 443, 175 S.E.2d at 804 (affirming the dismissal of a case for failure to prosecute when the plaintiff and his counsel failed to appear at 10:00 a.m. for trial and, instead, notified the court that they could not be available for trial until after 2:00 p.m. that same day); *Bond v. Corbin*, 68 S.C. 294, 297, 47 S.E. 374, 375 (1904) ("The case was regularly reached on the docket. The plaintiff was not ready to go on. Therefore, he ought to have been dismissed."). Indeed, the *Small* Court held that "[u]nreasonable neglect is inferable" when a party does not appear for his own trial despite having notice of the trial date and time. 254 S.C. at 443, 175 S.E.2d at 804.

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[3] In his opening brief, the Appellant argues that Judge Mullen could have imposed "sanctions less drastic than dismissal," which is a factor that the *McComas* Court suggested circuit courts should consider before dismissing a case for failure to prosecute. (Br. of Appellant at 11.) But the only alternative that the Appellant actually presented to the circuit court was to strike the case from the docket pursuant to Rule 40(j), SCRCP. (R. p. 219, Hr'g Tr. 7:2–8 (May 28, 2013).) This rule authorizes a case to be stricken from the docket by agreement of the parties, and Wachovia Bank—which had already fully prepared its case for trial and had attorneys and a witness present and ready to proceed—did not consent to such relief. (R. p. 219, Hr'g Tr. 7:20–25 (May 28, 2013).) To the extent that the Appellant now argues that there were other unstated alternatives to dismissal that the circuit court did not consider, his argument is not preserved for this Court's review, as the Appellant failed to raise it below. *See Elam v. S.C. DOT*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

If the Court were to accept the Appellant's position, the circuit court's ability to manage and control its docket would be substantially weakened. Instead of being able to direct cases to proceed, judicial administration would be left to the whim of litigants who, as the Appellant now suggests, would be able to delay proceedings indefinitely as long as they were willing to pay "the costs of the jury" and an adverse party's fees "to attend the roll call." (Br. of Appellant at 11.) This position finds no support in law or logic, and the Court should reject the Appellant's arguments and affirm Judge Mullen's decision to dismiss his claims for failure to prosecute them.

CONCLUSION

Over one hundred years ago, the Supreme Court lamented that "[o]ne of the strongest criticisms of the administration of law relates to the many delays in the trial of cases. Parties in the criminal and the civil Courts should be ready to try their cases promptly." *Bond*, 68 S.C. at 296, 47 S.E. at 374 (quoting *State v. Box*, 66 S.C. 402, 404, 44 S.E. 969, 970 (1903)). Judge Mullen satisfied her responsibilities to these long-held concerns when she declined to let a plaintiff further delay trial in his two-and-a-half-year-old case after being on notice of his trial date for over four months. These rulings were well within Judge Mullen's discretion, and they should be affirmed accordingly.

SIGNATURE PAGE ATTACHED

Respectfully submitted,

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March 12, 2014

CERTIFICATE OF COUNSEL

The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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March 12, 2014

PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for the Respondent Wachovia Bank, N.A., n/k/a Wells Fargo Bank, N.A., do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

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