THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2016-001194

Allenwood Owners Association, Inc., Stephen Seefeld, John Kovitch, Yvette Smith, Everett Butler, and Amanda Johansson, Plaintiffs,

Of Whom Allenwood Owners Association, Inc. is Appellant,

Appellant,

v.

Mike Prince, Stacy Keller, Jeff Miller, Debra Reed, Fran Stevens, Meredith Florencio, and Jacques Talbot,

Respondents.

INITIAL BRIEF OF APPELLANT

Bonum S. Wilson III
Brandon T. Reeser
Wilson & Heyward, LLC
P.O. Box 13177
Charleston, SC 29412
Telephone (843)762-4567

Harvey W. McCormick, III
McCormick Law Firm
95 Sam's Point Road
Post Office Box 1126
Beaufort, South Carolina 29901
(843) 525-0004

Attorneys for Appellant

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STATEMENT OF THE CASE

This matter arises from the lower court's filed Order of February 11, 2016 in which the court dismissed Appellant's cause of action on the basis that its representative, Mr. Stephen Seefeld, had "failed to comply with the rules and Orders of the Court . . . ." (Ord. filed Feb. 11, 2016, p. 6). The underlying case arises from a dispute over the validity of elections and the proper controlling leadership of the Appellant, the Allenwood Owners Association, Inc. (hereinafter "Association" or "Appellant"). Mr. Stephen Seefeld initiated the current action, on the Association's behalf, seeking a declaratory judgment as to the propriety of actions taken by the Association in February and March of 2014 and alleging claims for conversion, injunctive relief, and conspiracy, among others. Respondents asserted counterclaims for declaratory relief as to the meetings in question in addition to seeking a court supervised meeting and election for the Association and a declaration that their elections to Association's Board of Directors were proper pursuant to a Special Meeting held on December 9, 2014.

On February 27, 2015, the parties attempted to mediate this case in Beaufort County with attorney Karl Folkens. (Ord. filed Feb. 11, 2016, p. 3.) The parties reached an impasse with Mr. Seefeld attending by phone for the Association and all insurance company representatives also attending remotely. (Id.; Proof of ADR filed March 116, 2015.) The lower court held a hearing on several discovery motions on August 4, 2015. At the hearing, a majority of the outstanding Motions were resolved by agreement of the Parties, and as such, the lower court limited its order to Respondents' Motion to Compel filed on July 9, 2015. (Ord. filed Oct. 13, 2016, p. 1-6.) The Order thereafter compelled Answers to certain Interrogatories and the production of documents, if available, within thirty (30) days of the Order. (Id. at 6.) Although the parties had mediated the matter in February of 2015, the lower court ordered an additional mediation, stating that it

"hereby orders the parties in this case to participate in a mediation as soon as practicable, with one of the following individuals serving as mediator: Colden Battey, Ned Tupper, or Mitch Griffith." (Id.)

The parties again mediated the case on November 11, 2015 with attorney Ned Tupper in Beaufort, South Carolina, and Mr. Seefeld again did not physically attend. (Ord. filed Feb. 11, 2016, p. 4). The parties and representatives, many attending by phone including Mr. Seefeld on behalf of the Association, worked with Mr. Tupper to settle the matter for over five (5) hours. (Id.; Hr'. Trans. of Jan. 15, 2016, p. 11.)

On November 23, 2015, Respondents filed a Motion to Dismiss for Failure to Prosecute against the Association based on the failure of Mr. Seefeld to attend either mediation physically. (Mot. filed Nov. 23, 2015, p. 1-2.) On the same date, Respondents' filed a Motion to Compel the Deposition of the Association as an alternative consideration should the lower court not grant their Motion to Dismiss. (Id. at 2.) The lower court did not rule on Respondents' November 23, 2015 Motion to Compel. (See Ord. filed Feb. 11, 2016).

The lower court granted Respondents' Motion to Dismiss for Failure to Prosecute by Order filed February 11, 2016. The Association filed a Motion to Alter or Amend the Judgment Pursuant to Rule 59(e), SCRCP on February 18, 2016. The lower court denied the Motion to Alter or Amend by Order filed April 26, 2016, and this appeal timely followed.

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. Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). "An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support." Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004).

ARGUMENTS

I. THE LOWER COURT ERRED IN HOLDING THAT IN ITS FINAL ORDER A REPRESENTATIVE OF THE ASSOCIATION WAS REQUIRED TO ATTEND THE SECOND MEDIATION ON NOVEMBER 11, 2015 IN PERSON.

In its February 11, 2016 Order, the lower court concluded that the Association violated its October 13, 2015 Order because Mr. Seefeld did not physically attend the court-ordered mediation in November. In doing so, the court committed an error of law that should be reversed by this Court.

It is well established that "a written order constitutes a final order and final judgment of the lower court." Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 433-34 (2014) (citing Ford v. State Ethics Comm'n, 344 S.C. 642, 645-46, 545 S.E.2d 821, 823 (2001) (stating "the written order is the trial judge's final order and as such constitutes the final judgment of the court."). In light of this standard, any alleged bench ruling by the circuit court is irrelevant once a final written order is signed and issued. See Woodson, 406 S.C. at 528, 753 S.E.2d at 433. "Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly." Ford, 344 S.C. at 646, 545 S.E.2d at 823 (citation omitted). "The final written order contains the binding instructions which are to be followed by the parties." Id.

The lower court held that the Association violated its October 13, 2015 Order by failing to physically attend the mediation. (Ord. filed Feb 11, 2016, p. 6.) However, the plain reading of the lower court's order makes no mention of physical attendance on the part of any party to the litigation:

> In addition to the foregoing, I hereby Order the parties in this case to participate in a mediation as soon as practicable, with one of the following individuals serving as mediator: Colden Battey, Ned Tupper or Mitch Griffith.
>
> (Ord. filed Oct. 13, 2015, p. 6).

In its February 11, 2016 Order, the lower court explains that it stated that Mr. Seefeld needed to attend the mediation physically. (Ord. filed Feb. 11, 2016, p. 3.) However, at no time did the Court distinguish whether Mr. Seefeld was to attend the mediation as a representative of the Appellant or in his individual capacity as he had been named as an individual Plaintiff in this matter. Further, as stated above, a bench ruling that is subsumed by a subsequently issued and entered final order is irrelevant, as the written order controls the conduct of the parties at the time of issuance under established South Carolina law. Therefore, basing a dismissal of the Association's claims on the failure of Mr. Seefeld to physically attend the mediation is improper, as the lower court failed to include physical attendance by the Association or any party in its October 13, 2015 Order.

The lower court's February 11, 2016 Order also asserts that the Association, through Mr. Seefeld, violated Rule 6, SCRADR, by not attending the November 11, 2015 mediation in person. (Ord. filed Feb. 11, 2016, p. 6.) However, there is no dispute that the parties were thoroughly able to mediation this matter and did so pursuant to the South Carolina Rules of Alternative Dispute Resolution in February of 2015 with Mr. Seefeld and representatives for the various insurance carriers attending remotely. Indeed, the mediator filed, as required by Rule 7(f), SCRADR, proof of mediation with the Beaufort County Clerk of Court declaring that the parties so participated and were at an impasse. (See Proof of ADR filed March 16, 2015.) At no time did respondents object to mediating the matter and, in fact, actively participated in the process. As such, the Association fully complied with all SCRADR responsibilities.

Additionally, at the November 11, 2015 mediation, the Association was evidently informed that insurance adjusters for the various Respondents would also be attending the mediation by phone though their physical presence was also required by the terms of Rule 6(b)(4), SCRADR. (Hr'g Trans. of Jan. 15, 2016, p. 11.) Pursuant to Rule 6(b), SCRADR, the parties have the option to agree to telephonic participation in any mediation proceedings. As the Respondents had informed the Association that no adjuster would be present, telephonic attendance was accepted by the parties and the mediator. Indeed, the basis of the lower court's February 11, 2016 Order is only that Mr. Seefeld failed to attend the mediation physically, not that he was not available or that he was unresponsive such that mediation would not be productive. The lower court was made fully aware that other required parties attended telephonically, and it made no finding of fact that an agreement for telephonic attendance was improper or agreed to, nor did counsel for Respondents ever contend that such an arrangement had not been reached. (See Hr'g Trans. of Jan. 15, 2016 ; Ord. filed Feb. 11, 2016). In fact, counsel for Respondents admitted before the court that all counsel had agreed that telephonic presence for parties specifically required to be physically present at the mediation pursuant to Rule 6(b), SCRADR was sufficient for the November 11, 2015 mediation. (Hr'g Trans. of Jan 15, 2016, p. 14.) While Respondents claim mediation did not go forward on November 11, 2015, all parties, whether attending remotely or physically, attempted to settle the matter for over five (5) hours. Hr'. Trans. of Jan. 15, 2016, p. 11.)

In sum, the lower court committed errors of law in its February 11, 2016 Order by holding that the Association violated an order of the court by not having a representative physically attend a second mediation in the matter on November 11, 2015 when its previous October 13, 2015 Order did not require such physical attendance, and the lower court failed to

consider the agreement of counsel prior to such mediation that parties were permitted to attend on November 11, 2015 telephonically.

2. THE LOWER COURT ABUSED ITS DISCRETION BY DISMISSING THE ASSOCIATION'S CAUSE OF ACTION FOR FAILURE TO PROSECUTE BASED ON A FAILURE TO COMPLY WITH THE COURT'S OCTOBER 13, 2015 ORDER COMPELLING THE ANSWERS TO CERTAIN INTERROGATORIES AND PRODUCTION OF CERTAIN DOCUMENTS PURSUANT TO RESPONDENTS' DISCOVERY REQUESTS.

In its February 11, 2016 Order, the lower court held that the Association's cause of action should be dismissed with prejudice because it had failed to comply with the court's October 13, 2015 Order compelling Answers to a limited number of Interrogatories propounded by Respondents and compelling the production of a limited number of documents requested by Respondents. However, our Supreme Court and this Court have made clear that dismissal of a claim with prejudice necessitates a showing of intentional misconduct or willful disobedience.

The Association concedes that, by the time its claim was dismissed, it had failed to fully comply with the lower court's October 13, 2015 Order regarding outstanding discovery. By its terms, the Order provided that the Association had until November 11, 2015. (Ord. filed Oct. 13, 2015, p. 6). Mediation was scheduled for the same day, and counsel for the Association was hopeful the matter would settle. (Hr'g. Trans. of Jan. 15, 2016, p. 11). Respondents filed their Motion to Dismiss a mere seven (7) business days later.

It is undisputed that the trial court may dismiss a plaintiff's action for unreasonable neglect in proceeding with his or her cause. Don Shevey & Spires, Inc. v. Am. Motors Realty Corp., 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). However, "[a] sanction of dismissal is too severe if there is no evidence of any intentional misconduct." Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (citation omitted). "The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 358, 543,

489 S.E.2d 679, 682 (Ct. App. 1997) (citation omitted). "Furthermore, whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules of Civil Procedure. Id. (citation omitted).

In this case, the lower court's February 11, 2016 Order fails to make any finding that the Association, in failing to respond to Respondents' remaining Interrogatories and Requests for Production before its cause was dismissed, intentionally or willfully violated its October 13, 2015 Order. The court found that "Plaintiff has continually exhibited indifference to the rulings of this Court ...," but it fails to identify any instance in which the Association has intentionally or willfully disobeyed any of its other rulings or Orders. Indeed, there is no evidence in the record from which the court could conclude such intentional or willful action.

Even had the lower court made such a finding, this Court has held that dismissing a Plaintiff's cause of action in the face of intentional and willful non-compliance remains an abuse of discretion when the sanction is not limited in scope to the alleged violation. Karppi, 327 S.C. at 543, 489 S.E.2d at 682. In Karppi, the plaintiff in the underlying suit served discovery on one of the organizational defendants on February 27, 1996. Id. at 540. The same date, plaintiff noticed the deposition of the same organizational defendant, requesting a specific representative to be produced. Id. at 541. The defendant's counsel declined to make the specified representative available and proposed alternatives. Id. Plaintiff, unsatisfied with answers to discovery and the response to his deposition request, filed Motions to Compel as to discovery and deposition. Id. On June 29, the court gave defendant thirty (30) days to comply with plaintiff's discovery requests. Id.

At a status conference on July 11, the court again ordered the defendant to comply with the court's discovery order. Id. Plaintiff filed a second Motion to Compel on August 9, three

days before the case was to be tried. Id. The court found that defendant had specifically "intentionally and willfully violated" multiple orders of the court and its pleading was stricken. Id.

On appeal however, the lower court was reversed. Id. at 542. In its opinion, this Court determined that the "trial court failed to aim its sanction at the specific misconduct of [defendant], and in doing so, ran afoul of the requirement that the sanction imposed be reasonable – comprehensive, yet not overly broad." Id. at 544 (citation omitted).

Additionally, this Court has looked favorably on the Fourth Circuit Court of Appeals' analysis of dismissals for failure to prosecute. In McComas v. Ross, the Court noted that "[t]he Fourth Circuit has said the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." 368 S.C. 59, 63, 626 S.E.2d 902, 904 (Ct. App. 2006) (citing Hillig v. Comm'r of Internal Revenue, 916 F.2d 171, 174 (4th Cir.1990). Again reiterating that "[d]ismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff," the Court declined to affirm the dismissal of a plaintiff's action when the plaintiff in the underlying matter when the plaintiff failed to appear for trial. McComas, 368 at 64, 626 S.E.2d. at 905 (citation omitted).

In this case, there is no evidence in the record that the lower court engaged in any fact-finding other than declaring that the Association failed to comply with its discovery order, which the Association admits. The court found no facts establishing that the Association had a history of deliberately delaying the matter, it made no finding that the Association's failure to comply

was intentional or willful such that dismissal was warranted, it made no findings as to the Association's responsibility, and it failed to consider any alternative sanctions less drastic than dismissal that would be appropriate to correct the Association's delayed response to discovery. As a result, there is no indication that the court undertook any analysis as to whether the sanctions it was imposing were appropriate. Thus, there is no factual or legal basis to affirm dismissal in this case as the lower court has failed to make such findings and conclusions commensurate with those situations in which dismissal is appropriate.

Finally, the lower court concluded that because Respondents' filed a Motion to Compel the Deposition of Mr. Seefeld and a Motion to Compel Answers to Interrogatories that the Association, in some way, showed "utter indifference" to Respondents' rights. (Ord. filed February 11, 2016, p.6.) The court cites no standard under South Carolina law that the mere filing of a Motion to Compel demonstrates that the party against whom the Motion is filed has aggrieved the filing party in some way. Should such be the case, then the Association was equally aggrieved by Respondents, as it was forced to file its own Motion to Compel on May 29, 2015. In no instance has a court of this State held that a party against whom a Motion to Compel has been filed is therefore subject to sanction for automatically violating a discovery rule simply on the basis that such a Motion was filed.

3. THE LOWER COURT ABUSED ITS DISCRETION BY DISMISSING THE ASSOCIATION'S CLAIMS FOR FAILURE TO PROSECUTE WITH PREJUDICE IN CONTRAVENTION OF ESTABLISHED SOUTH CAROLINA LAW.

In its February 11, 2016 Order, the lower court purported to dismiss the Association's claims with prejudice based upon an alleged failure to prosecute the underlying action. (Ord. filed Feb. 11, 2016, p.6.) Under long-standing jurisprudence, a dismissal with prejudice is improper and should be revered or the order modified. "An order of dismissal for failure to proceed with the suit is in the nature of a discontinuance of the action and is not an adjudication of the merits." Small v. Mungo, 254 S.C. at 443, 175 S.E.2d at 804 (1970). As such, the dismissal "does not put an end to the cause of action," and "an order of dismissal with prejudice . . . [is] not justified." Id. at 443-44. Assuming the lower court's dismissal was otherwise proper, the order should be modified so that its effect is to dismiss the Association's claims without prejudice.

CONCLUSION

For the reasons stated in the above paragraphs, this Court should reverse the February 11, 2016 Order of the lower court, as the lower court committed an error of law by holding that the Association was in violation of its October 13, 2015 Order as such order did not require party attendance at a second mediation in the underlying case, that the court ignored representations made to it by counsel that counsel had agreed to allow parties to attend telephonically, and that the Association had complied with all applicable South Carolina Alternative Dispute Resolution Rules by mediating this matter nine months prior. Further, the lower court abused its discretion by dismissing the Association's action for failure to respond to Respondents' discovery as the court failed to find that the Association acted intentionally or willfully, the court failed to adequately tailor its sanction to properly respond to the Association's discovery errors, and the court failed to consider any other sanction other than dismissal with prejudice in its order. Finally, even if the lower court's dismissal was proper, to dismiss the Association's cause with prejudice is contrary to established law, as such a dismissal does not end the case, and the order should be modified to properly effect a dismissal without prejudice.

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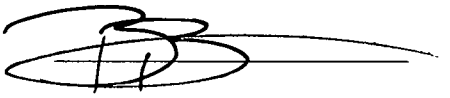
Respectfully submitted,

September 14, 2016



Bonum S. Wilson III
Brandon T. Reeser
Wilson & Heyward, LLC
P.O. Box 13177
Charleston, SC 29412
Telephone (843)762-4567

Harvey W. McCormick, III
McCormick Law Firm
95 Sam's Point Road
Post Office Box 1126
Beaufort, South Carolina 29901
(843) 525-0004

Attorneys for Appellant