The Harshest of Remedies: Dismissal for Failure to Prosecute

In civil litigation, delays can seem almost inevitable. Because litigation happens in the real world and not a perfect one, the Rules of Civil Procedure allow a little flexibility. Within limits, parties are permitted to extend the various deadlines for pleadings, discovery, responses to motions, and other requirements (as a starting point, see Rule 6(b)). But sometimes parties can simply push the delays too far. For various reasons some plaintiffs just *won't* advance the ball, and for their opponents, the light at the end of the litigation tunnel starts to fade. When a case languishes for too long without good reason, the court may take action, even to the point of dismissing the case or claim entirely for "failure to prosecute." This authority is found in Rule 41(b) of the Rules of Civil Procedure, which says:

> "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."

Although the rule specifies that "a defendant may move", our courts have made clear that a *judge* may also order the dismissal on his or her own motion. Perkins v. Perkins, 88 N.C. App. 568 (1988); Blackwelder Furn. Co. v. Harris, 75 N.C. App. 625 (1985). Unless the court specifies otherwise, a dismissal under this rule is an adjudication on the merits—that is, it's a dismissal with prejudice. Obviously this is a big deal, and the courts have classified this type of dismissal as "the harshest of remedies" not to be "imposed lightly." Page v. Mandel, 154 N.C. App. 94 (2002).

So, first question: Will a less severe sanction suffice?

Because a dismissal for failure to prosecute effectively disposes of a case (or claim), our appellate courts require a procedural layer not included in the language of Rule 41(b) itself. Before a trial court may dismiss a case or claim (original, cross-claim, counterclaim, or third party claim), the court *must* first examine the possibility that a lesser sanction will do the trick instead. *Page*, 154 N.C. App. at 101. Some of the less severe sanctions the court may consider are "assessments of fines, costs, or damages against the plaintiff or his counsel, attorney fees, disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings." McKoy v. McKoy, 214 N.C. App. 551 (2011) (citations omitted).

The examination involves a three-part inquiry:

- Whether the plaintiff acted in a manner that 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 (2001). The fact that the trial court conducted this inquiry must appear on the record. *See, e.g.*, Cohen v. McLawhorn, 208 N.C. App. 492, 504 (2010) (stating the requirement and determining that the court's findings were sufficient). In cases where the record did not show a consideration of lesser sanctions, the Court of Appeals has consistently reversed and remanded. *See McKoy*, 214 N.C. App. at 554; Spencer v. Albemarle Hosp., 156 N.C. App. 675 (2003), *Wilder*, 146 N.C. App. at 578; Foy v. Hunter, 106 N.C. App. 614 (1992). If the trial court's findings are supported by the record, the appellate courts will not disturb them; the decision will be reversed only for abuse of discretion. Dean v. Hill, 171 N.C. App. 479 (2005); Lee v. Roses, 162 N.C. App. 129 (2004); *Foy*, 106 N.C. App. at 620.

What is a "failure to prosecute"?

Long delays are certainly part of the inquiry, but the mere passage of time is not enough in and of itself to create a "failure to prosecute." *Kersey*, 176 N.C. App. at 751 (citing Butler Serv. Co. v. Butler Serv. Group, 66 N.C. App. 132 (1984) ("Expedition for its own sake is not the goal.")); *see also* Lusk v. Crawford Paint Co., 106 N.C. App. 292 (1992); Green v. Eure, 18 N.C. App. 671 (1973). Also, it typically is not enough that the plaintiff has simply missed a deadline or sought more than one extension. Instead, dismissal for failure to prosecute is only proper when 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 (2006); *see also* Lentz v. Phil's Toy Store, 228 N.C. App. 416 (2013) (noting in particular the claimant's failure to appear at several hearings); Eakes v. Eakes, 194 N.C. App. 303 (2008); Sellers v. High Point Memorial Hosp., Inc., 97 N.C. App. 299 (1990); Smith v. Quinn, 324 N.C. 316 (1989); Barbee v. Walton's Jewelers, Inc., 40 N.C. App. 760 (1979).

So, the record should support a finding of *intentional* delay or some kind of plan or maneuver to impede the case's forward momentum. In the recent case of Greenshields, Inc. v. Travelers Prop. Cas. Co. of America, 781 S.E.2d 840 (Jan. 2016), the trial court clearly recognized this requirement when stating its reasons for dismissal. The judge found that the plaintiff had intentionally allowed his claims against an insurance company to remain in limbo for several years both in state court and federal bankruptcy court. The judge's order stated that the delays were "undue and unreasonable," "deliberate and tactical" and ultimately prejudicial to defendants. The Court of Appeals affirmed.

Whether a set of facts rises to the level of "failure to prosecute" is generally a question of law, but the trial court's determination of the facts themselves, if supported by the record, will not be disturbed on appeal. *See, e.g.*, Don't Do it Empire, LLC v. Tenntex, 782 S.E.2d 903 (Mar. 2016). A trial court's decision to *deny* a motion to dismiss is reviewed for abuse of discretion, *Eakes*, 194 N.C. App. at 309, Melton v. Stamm, 138 N.C. App. 314 (2000), and the order denying the dismissal typically is not immediately appealable. North Carolina DOT v. County of Durham, 181 N.C. App. 346 (2007).

What about dismissals for reasons *other* than failure to prosecute?

Failure to prosecute is far from the only context in which the court may impose the sanction of dismissal with prejudice. As you can see from the other language of Rule 41(b) (above), this ultimate remedy is also available when a party fails to comply with the Rules of Civil Procedure or fails to comply with "any order of court." Ray v. Greer, 212 N.C. App. 358 (2011). In addition, Rule of Civil Procedure 37(b)(2) explicitly sets out dismissal of claims or defenses (or similarly, striking of portions of pleadings) as a remedy for failure to comply with prior discovery orders. *See, e.g.*, Badillo v. Cunningham, 177 N.C. App. 732 (2006) (affirming dismissal for failure to comply with discovery schedule).

In each of these contexts, our courts impose the requirement discussed above—that the trial court first consider lesser sanctions and that the record reflect that the court has done so. *See McKoy*, 214 N.C. App. at 555 (also applying the requirement when dismissing for violation of local rules). Because dismissals with prejudice are considered drastic, the record should demonstrate the court's serious deliberation of alternatives. The judge does not, however, have to engage in a comprehensive examination of all possibilities and "is not required to list and specifically reject each possible lesser sanction prior to determining that each dismissal is appropriate." *Ray*, 212 N.C. App. at 363 (quoting *Badillo*, 177 N.C. App. at 735). An useful example of some pretty straightforward "lesser sanctions" language comes to us courtesy of now-retired Superior Court Judge Spainhour who, when dismissing claims based on discovery violations, stated

[t]he Court has carefully considered each of [the party's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct....

Affirming the dismissal, the Court of Appeals found the judge's language sufficient to show that he had considered a less harsh remedy than dismissal. In re Pedestrian Walkway Failure, 173 N.C. App. 237 (2005).