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NO. COA11-1236
NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2012

MICHAEL and DOROTHY MANUEL, for
themselves and all others
similarly situated,
Plaintiffs,

v.

Bladen County
No. 11 CVS 41

JOSEPH A. GEMBALA, III, ESQ.,
Defendant.

Appeal by plaintiffs from order entered 7 June 2011 by
Judge Thomas Lock in Bladen County Superior Court. Heard in the
Court of Appeals 21 February 2012.

Christopher W. Livingston for plaintiff appellants.

*Teague Campbell Dennis & Gorham LLP, by George W. Dennis,
III, and Carrie E. Meigs, for defendant appellee.*

McCULLOUGH, Judge.

Plaintiffs Michael and Dorothy Manuel ("plaintiffs") appeal
from an order entered by the trial court granting defendant
Joseph A. Gembala, III's ("defendant") motion to stay pursuant
to N.C. Gen. Stat. § 1-75.12(a) (2011). We affirm.

I. Factual and Procedural Background

Plaintiffs are husband and wife and are citizens of North Carolina. Defendant is an attorney admitted to the practice of law in Pennsylvania and New Jersey. In May 2009, plaintiffs began to experience financial difficulty and were concerned about their ability to stay current on their mortgage payments and avoid foreclosure on their home. Plaintiffs ultimately decided to seek assistance from a debt consolidation company. Plaintiffs allege, and defendant denies, that defendant and another entity not party to the present state court action, Secure Property Solutions, LLC ("SPS"), entered into a conspiracy to defraud homeowners, including plaintiffs, by means of a "mortgage modification" scam.

On 14 January 2010, plaintiffs filed a civil complaint against defendant, SPS, and two other defendants in the federal district court for the Eastern District of North Carolina. On 8 February 2010, plaintiffs filed an amended complaint, adding two additional counts, thirteen additional pages, and two additional defendants. Count VI of plaintiffs' amended complaint alleged a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), a federal law. Plaintiffs' remaining counts recited various state law claims.

On 26 February 2010, defendant moved to dismiss plaintiffs' amended complaint under the Federal Rules of Civil Procedure, citing as grounds for dismissal Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. On 14 March 2010, plaintiffs filed a memorandum in opposition to defendant's motion to dismiss the federal action. On 30 September 2010, the federal district court issued an order granting defendant's motion to dismiss under Rule 12(b)(6). In its order, the federal district court noted that because plaintiffs' federal RICO claim "is not so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy, dismissal for lack of federal jurisdiction is unwarranted in this case." (alteration in original) (internal quotation marks and citation omitted). Nonetheless, the federal district court dismissed plaintiffs' federal RICO claim without prejudice, stating that it would "not embark on an excursion to interpret plaintiffs' verbose, tortured amended complaint to extract a RICO claim that might, but might not, lie hidden or buried somewhere within it[,] and accordingly declined to exercise supplemental jurisdiction over plaintiffs' remaining state law claims,

thereby dismissing the federal action without prejudice as against defendant.

Shortly thereafter, on 19 October 2010, plaintiffs filed a motion for leave to file a second amended complaint with the federal district court for the Eastern District of North Carolina. Plaintiffs' proposed second amended complaint again includes a federal RICO claim, as well as various state law claims, including common law fraud, negligence, civil conspiracy, and alleged violations of New Jersey's Consumer Fraud Act ("NJCFA"), Pennsylvania's Unfair Trade Practices Act ("PAUTPA"), North Carolina's Unfair and Deceptive Trade Practices Act ("NCUDTPA"), and both New Jersey's and North Carolina's RICO statutes. Additionally, plaintiffs requested the "appointment of operating receivers for [defendant]."

Prior to a ruling by the federal district court on plaintiffs' pending motion and proposed second amended complaint, plaintiffs filed the present action against defendant in Bladen County Superior Court on 19 January 2011. Plaintiffs' civil complaint in the present action includes substantially similar allegations to their proposed second amended complaint filed in federal district court, including claims of common law fraud, negligence, and alleged violations

of NCUOTPA and both New Jersey's and North Carolina's RICO statutes.

On 21 March 2011, defendant filed a motion to dismiss or, in the alternative, a motion to stay the present action in state court pursuant to N.C. Gen. Stat. § 1-75.12(a), citing as grounds the fact that "[p]laintiffs have filed a substantially similar suit against this and other [d]efendants which is currently pending in the Federal Court for the Eastern District of North Carolina" and stating that "it would work a substantial injustice to force [d]efendant to litigate the same action in two jurisdictions simultaneously." In his brief in support of his motion to dismiss or stay, defendant stated "[t]he multi-state nature of the allegations involved in this action, as well as the repeated references to federal law in the state RICO actions, make the federal forum both more convenient, and more comprehensive than a state action." In addition, defendant stated that "[a] stay of this action pending the outcome of the current Eastern District case is therefore appropriate under N.C. Gen. Stat. § 1-75.12(a)." On 23 May 2011, plaintiffs filed a brief in opposition to defendant's motion to dismiss or stay.

A hearing was held by the trial court on defendant's alternative motions on 23 May 2011. On 7 June 2011, the trial

court entered its order granting defendant's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12, stating that "denial of Defendant's Motion to Stay would work a substantial injustice on Defendant, that the interest of justice and judicial economy would be best satisfied by granting said Motion, and that the Motion to Stay should be allowed in the Court's discretion." In addition, the trial court's order expressly "defers ruling on Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." Plaintiffs timely appealed from the trial court's order to this Court on 23 June 2011.

II. Motion to Stay

Plaintiffs' first argument on appeal is that the trial court erred in staying their action under N.C. Gen. Stat. § 1-75.12. Plaintiffs contend the trial court abused its discretion by misapplying the statute, having failed to find that defendant has stipulated his consent to suit in another jurisdiction and that another jurisdiction would provide a convenient, reasonable and fair place of trial, as required by the statute. Plaintiffs further contend that defendant failed to meet his burden of showing substantial injustice, that the trial court failed to consider the proper factors in making its determination, and

that the remedy they are seeking from this defendant can be provided only under North Carolina law. For these reasons, plaintiffs argue the trial court's order granting defendant's motion to stay the action cannot stand.

A. Standard of Review

"Entry of an order under G.S. 1-75.12 is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion." *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325, 393 S.E.2d 118, 120 (1990) [hereinafter *Home Indemnity I*]. "A trial court may be reversed for abuse of discretion only if the trial court made 'a patently arbitrary decision, manifestly unsupported by reason.'" *Home Indemnity Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 118, 493 S.E.2d 806, 809 (1997) [hereinafter *Home Indemnity II*] (quoting *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994)). "[A]ppellate review is limited to 'insur[ing] that the decision could, in light of the factual context in which it was made, be the product of reason.'" *Id.* (second alteration in original) (quoting *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986)).

B. Discussion

N.C. Gen. Stat. § 1-75.12(a) empowers a trial court with the discretion to enter a stay in any civil action:

If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State.

Id. The statute further provides that "[a] moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial." *Id.*

In making a determination whether to grant a stay under this section, the trial court may consider the following factors: (1) the nature of the case involved, (2) the relief sought, (3) the applicable law, (4) convenience and access to another forum, (5) the convenience of witnesses, (6) the availability of compulsory process to produce witnesses, (7) the relative ease of access to sources of proof, (8) the burden of litigating matters not of local concern, (9) the desirability of litigating matters of local concern in local courts, (10) the choice of forum by the plaintiff, and (11) all other practical considerations which would make the trial easy, expeditious and inexpensive. *Management, Inc. v. Development Co.*, 46 N.C. App.

707, 713, 266 S.E.2d 368, 371 (1980); see also *Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) [hereinafter *Nexsen Pruet*]. "A court will not have abused its discretion in failing to consider each enumerated factor. . . . A court will have abused its discretion, however, if it abandons any consideration of these factors which this Court has deemed relevant in determining whether a stay is warranted." *Nexsen Pruet*, 112 N.C. App. at 357, 435 S.E.2d at 574.

Further, in determining whether to grant a stay, it is not necessary that the trial court find that all factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair.

Id.

In the present case, a review of the record reveals the trial court properly considered the relevant factors in making its determination to grant defendant's motion to stay the state court action pending the resolution of the federal court action. First, on the face of the trial court's order granting the stay, the trial court specifically concluded that "the interest of justice and judicial economy would be best satisfied by granting

[Defendant's] Motion [to Stay.]" In addition, questions asked by the trial court of the parties at the hearing indicate the trial court was concerned with whether the federal district court had previously declined to exercise jurisdiction over the state law claims, whether the state law claims would be left unresolved if the federal district court dismisses plaintiffs' proposed second amended complaint, and whether the federal district court action was, in fact, presently pending given the previous federal order of dismissal. This combined evidence demonstrates the trial court considered plaintiffs' access to the federal court to hear their state law claims, the nature of the case, the choice of forum by plaintiffs, and the practical consideration of judicial economy. These factors positively support the trial court's conclusion to grant defendant's motion to stay.

Plaintiffs' only argument to the contrary concerns the relief plaintiffs seek in the present state court action. Plaintiffs argue the receivership remedy they seek is only available under North Carolina law and not federal law, thereby supporting a conclusion that the stay should not have been granted. Relying on the holding of this Court's opinion in *Green v. Wilson*, 163 N.C. App. 186, 592 S.E.2d 579 (2004),

plaintiffs argue that because only state courts have jurisdiction to provide the receivership remedy they seek, the trial court erred in granting the stay. However, plaintiffs' reliance on *Green* is misplaced. In *Green*, the trial court granted defendant's motion to stay a quiet title action filed by the plaintiffs in North Carolina pending the outcome of a similar action filed by the plaintiffs in the State of Georgia. *Id.* at 187, 592 S.E.2d at 580. Notably, the subject real property was located in New Hanover County, North Carolina. *Id.* On appeal, this Court vacated the trial court's stay order, holding "the North Carolina courts alone have *in rem* jurisdiction over the subject property to determine title when it is disputed." *Id.* at 188, 592 S.E.2d at 581. However, the present matter does not involve the application of *in rem* jurisdiction. Moreover, the federal court order indicates it may properly exercise subject matter jurisdiction over the claims involved in the present case, given the central presence of plaintiffs' federal RICO claim. Plaintiffs initially chose the federal court as their venue of choice, and accordingly, they should have considered the relief available to them.

Although the trial court's order does not specify on its face that the federal district court would be a convenient,

reasonable and fair place of trial, that conclusion can logically be deduced by the fact that the stay was granted in light of both defendant's motion requesting the stay during the pendency of the simultaneous federal court action filed by plaintiffs and defendant's supporting brief explaining the reasons why the federal court is the more appropriate forum for trial of plaintiffs' action. Most notably, the claims presented by plaintiffs in both the federal and state actions center on federal RICO allegations and involve other states' laws, including those of New Jersey and Pennsylvania. Further, plaintiffs' counsel intimated to the trial court that the federal district court is indeed a convenient, reasonable and fair place of trial for plaintiffs' present claims against defendant.

Similarly, although the face of the trial court's order does not indicate that defendant has stipulated his consent to suit in federal court, the necessary inference from defendant's arguments to the trial court and his motion to stay the state court proceeding because of the pending simultaneous federal court action is that defendant consents to the case being tried in federal court. Specifically, defendant's argument to the trial court that he responded to the federal court's order after

having been dismissed from the case indicates defendant's consent to the case being tried there, especially in light of the previous federal court order finding that it had proper subject matter jurisdiction over the case. In addition, defendant's brief in support of his motion to stay states:

The federal venue is better suited to deal with the multi-state nature of the claims asserted, and the federal judge has by necessity already become familiar with both the parties and the facts at issue. It is therefore in the interest of justice that this action be stayed pending the conclusion of the active federal case.

Accordingly, the record demonstrates that defendant expressly agreed to the trial of plaintiffs' case in federal court.

In addition, the trial court's conclusion that "denial of Defendant's Motion to Stay would work a substantial injustice on Defendant" is likewise supported by evidence in the record. At the hearing on his motion to stay, defendant explained to the trial court that upon plaintiffs' filing their motion for leave to file their proposed second amended complaint, the federal district court indicated it was inclined to consider the motion and invited defendant to respond to plaintiffs' motion, with caution that doing so would bring defendant back into the proceedings although he had previously been dismissed from the case. Defendant responded to plaintiffs' motion in the federal

district court case. Accordingly, defendant potentially faces trial in federal court of substantially the same claims arising out of the same facts as those presented in the present state court action. If the federal court grants plaintiffs' motion and allows plaintiffs' proposed second amended complaint to go forward, defendant would be faced with defending substantially the same claims involving the same issues in two different forums. Indeed, this would work a substantial injustice on defendant, despite plaintiffs' emotional pleas to the contrary. *Cf. Shore v. Brown*, 324 N.C. 427, 429, 378 S.E.2d 778, 779 (1989) ("The authorities are legion in North Carolina that the pending of a prior action between the same parties for the same cause of action in a court of competent jurisdiction works an abatement of a subsequent action either in the same court or another court of the same state having jurisdiction."); *Eways v. Governor's Island*, 326 N.C. 552, 561, 391 S.E.2d 182, 187 (1990) ("[A] prior action pending in a federal court within the territorial limits of the state constitutes grounds for abatement of a subsequent state action on substantially similar grounds between the same parties.").

We addressed similar arguments to those raised by plaintiffs in *Allen v. Trust Co.*, 35 N.C. App. 267, 241 S.E.2d

123 (1978). In *Allen*, the defendants challenged the trial court's granting of a stay, arguing that "the trial court abused its discretion in staying the proceedings without finding (1) that it would work substantial injustice and (2) that some other jurisdiction provides 'a convenient, reasonable and fair place of trial.'" *Id.* at 269, 241 S.E.2d at 125. This Court held that "absent a request for findings of fact to support his decision on a motion, the judge is not required to find facts, G.S. 1A-1, Rule 52(a)(2), and it is 'presumed that the Judge, upon proper evidence, found facts to support this judgment.'" *Id.* (quoting *Haiduven v. Cooper*, 23 N.C. App. 67, 69, 208 S.E.2d 223, 225 (1974)). Accordingly, this Court found no abuse of discretion in the trial court's order and upheld the stay in *Allen*. *Id.*

Here, like *Allen*, plaintiffs made no request for the trial court to make specific findings of fact supporting its decision to grant the stay. As discussed in the preceding paragraphs, although there are no specific findings of fact as to the requirements of the statute on the face of the order, a review of the record reveals that proper evidence supports the trial court's presumed findings of fact regarding the statutory requirements, which in turn support the trial court's conclusion

to grant the stay. Specifically, (1) a substantial injustice would result if the trial court denied the stay, as defendant would be forced to litigate essentially the same matter simultaneously in two forums; (2) the stay is warranted by those factors present, including the practical consideration of judicial economy, the federal and multi-state nature of the case, the ease of access to the federal court as admitted by plaintiffs, and the fact that plaintiffs' initial choice of forum was the federal court; and (3) the alternative forum is convenient, reasonable, and fair. *Nexsen Pruet*, 112 N.C. App. at 357, 435 S.E.2d at 574. Thus, we find no abuse of discretion in the trial court's order granting defendant's motion to stay.

Given plaintiffs' concern with bringing defendant "to justice," we reiterate that:

Application of G.S. 1-75.12 does not result in a dismissal of the case; it merely stays or suspends the action. Once the stay has been lifted under the terms of the Order, the [plaintiffs] may proceed with their action in North Carolina. . . . [T]he stay statute does not deny litigants access to North Carolina courts, but merely *postpones* litigation here pending the resolution of the same matter in another sovereign court.

Home Indemnity I, 99 N.C. App. at 326, 393 S.E.2d at 121. We also note plaintiffs' attorney's arguments as to the court system's non-pursuit of justice for plaintiffs in the present

case are unprofessional in light of the procedural nature of the issue before this Court. Such unprofessional diatribes do not advance plaintiffs' cause and ultimately work to divert this Court's attention from resolving the issues properly presented.

III. Motion to Dismiss

We dismiss plaintiffs' remaining arguments addressing the propriety of the trial court's grant or denial of defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. This issue is not properly before this Court, as the trial court made no ruling on defendant's motion to dismiss. The trial court's order plainly states it deferred ruling on that motion. We note that although plaintiffs' attorney appears to recognize this fact, he nonetheless devoted fourteen pages of his brief "for safety's sake" to an issue that is entirely irrelevant to this Court's review.

IV. Conclusion

We hold the record reveals competent evidence that the trial court properly considered the requisite factors in making a determination to grant defendant's motion to stay the present state court action. This evidence supports a finding by the trial court that the requisite statutory factors are met for

granting a stay under N.C. Gen. Stat. § 1-75.12(a), and therefore, the trial court did not abuse its discretion in granting the stay.

We dismiss plaintiffs' arguments addressing the propriety of the trial court's grant or denial of defendant's motion to dismiss, as the trial court made no ruling on that motion. Thus, the order granting defendant's motion to stay the present state court action pending the resolution of the federal court action is affirmed.

Affirmed in part, dismissed in part.

Judges McGEE and GEER concur.

Report per Rule 30(e).