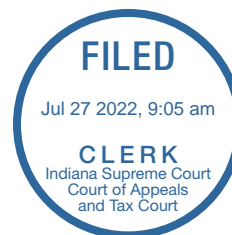


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Murphy Enterprises, Inc.,
Appellant-Petitioner,

v.

The Board of Zoning Appeals for
Floyd County, Indiana,
Appellee-Respondent.

July 27, 2022

Court of Appeals Case No.
22A-PL-584

Appeal from the Floyd Circuit
Court

The Honorable Bradley B. Jacobs,
Special Judge

Trial Court Cause No.
22C01-2001-PL-27

Najam, Judge.

Statement of the Case

- [1] Murphy Enterprises, Inc. (“Murphy”) appeals the trial court’s grant of a Trial Rule 41(E) motion to dismiss filed by the Board of Zoning Appeals for Floyd

County, Indiana (“BZA”). Murphy raises two issues, which we consolidate and restate as whether the trial court erred when it granted the BZA’s motion to dismiss.

[2] We affirm.

Facts and Procedural History

[3] Murphy owned property on Whispering Wind Drive in Floyd County (the “property”). In January 2019, the Floyd County Building and Development Services (“BDS”) issued a building permit to Murphy. Thereafter, in October, the BDS conducted a final inspection of the property, but it did not pass the inspection, and the BDS did not issue a “Certificate of Occupancy.” Appellant’s App. Vol. 2 at 17. Then, on May 23, Murphy conveyed the property to Paul F. Davenport. *See id.* at 15.

[4] On October 24, Kelley Lang, the BDS Building Commissioner, sent a letter to Murphy. In that letter, Lang stated that, “[s]ince the beginning of construction at this property, site drainage has been altered and runoff has passed into” the neighboring property. *Id.* at 17. Lang then requested that Murphy provide “a plan for mitigation of the drainage issue from a professional engineer or land surveyor no later than Friday 11/1/19.” *Id.* (emphasis removed). And Lang informed Murphy that, if a plan is not timely submitted, the “situation” would be presented to the BZA, and Murphy could incur a fine. *Id.*

[5] On November 15, Lang sent Murphy a second letter. In that letter, Lang informed Murphy that the issue had been presented to the BZA at a meeting

and that the BZA had passed a motion requiring Murphy to correct “[a]ll building code violations noted in [a] previous inspection” within one week and to correct the “[d]rainage issues” at the property within two weeks. *Id.* at 18. Lang then sent Murphy a third letter on December 16. In that letter, Lang stated that “no visible work ha[d] been performed to alleviate the drainage issue.” *Id.* at 19. As such, Lang informed Murphy that the issue had again been presented to the BZA, which passed a motion to assess fines against Murphy in the amount of \$100 per day. *See id.*

[6] On January 9, 2020, Murphy filed a petition for judicial review of the BZA’s decision. In its petition, Murphy alleged that the “issues of the building code violations were corrected in a timely manner.” *Id.* at 11. In addition, Murphy alleged that it “was never given notice of an opportunity to appear at any of the BZA meetings to present evidence” related to the alleged violations. *Id.* at 12. Thus, Murphy maintained that it was “denied due process.” *Id.* at 13.

[7] On January 24, the BZA filed a motion for a “change of venue from Judge,” which was granted on January 28. *Id.* at 24. Judge Andrew Adams was appointed to hear the case on February 3. Murphy then filed the record of the BZA on March 27. Thereafter, on February 10, 2021, Judge Adams recused himself, and Special Judge Bradley Jacobs accepted jurisdiction on March 18.

[8] On September 27, the BZA filed a motion to dismiss Murphy’s petition for judicial review pursuant to Indiana Trial Rule 41(E). In its motion, the BZA asserted that Murphy had “wholly failed to prosecute this cause of action” as it

had “not filed, communicated, or prosecuted any matters herein” since it filed the BZA record on March 27, 2020. *Id.* at 110. On October 22, Murphy filed a motion for judgment on the evidence in which it again claimed that it had been denied due process. Murphy then filed a motion for the court to enter specific findings of fact and conclusions thereon.

[9] The trial court held a hearing on January 24, 2022, during which the parties presented oral argument on the motion to dismiss. The BZA again stated that Murphy had “failed to prosecute” its petition for judicial review and that Trial Rule 41(E) allows a court to dismiss a cause of action “when no action has been taken in the case for a period of 60 days.” *Tr.* at 11. Murphy stated that the delay was caused by the Covid-19 pandemic and because there was a “fourteen-month gap” between the BZA’s motion for a change of judge and Judge Jacob’s assumption of jurisdiction. *Id.* at 14. Murphy then argued that, other than the “passage of time,” the BZA failed to meet its burden under Trial Rule 41 because the BZA had not shown any “inherent prejudice” as a result of the delay. *Id.* at 16. The BZA responded that the county had to continue to defend and litigate the action, which took both time and money. And it asserted that there were “continuing zoning violations on the property,” which were a “public nuisance.” *Id.* at 24.

[10] Following the hearing, the court found that

Murphy filed a Petition for Judicial Review on January 9, 2020. The Answer was filed by the [BZA] on March 3, 2020. Nothing further was filed on this case by either side until Senior Judge

Adams recused himself as Special Judge on February 10, 2021, almost one year after the Answer was filed by the [BZA]. Although the case was slightly thrown off course by the recusal, Judge Brad Jacobs accepted jurisdiction on March 18, 2021, less than 45 days later. Nothing further was filed on this case for an additional six months until the [BZA] filed its Motion to Dismiss.

Appellant's App. Vol. 2 at 2. The court further found that it had "conducted regular operations via Zoom since mid-2020" such that the Covid-19 pandemic did not cause a delay and that the "reassignment of the case to the new judge did not cause an appreciable delay" in the case. *Id.* Accordingly, the court concluded that Murphy "has not shown sufficient cause for the delay" and granted the BZA's motion to dismiss. *Id.* This appeal ensued.

Discussion and Decision

[11] Murphy contends that the trial court erred when it dismissed its complaint for failure to prosecute. Indiana Trial Rule 41(E) provides:

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

[12] As this Court has recently stated, “we will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before it.” *Petrovski v. Neiswinger*, 85 N.E.3d 922, 924 (Ind. Ct. App. 2018). “We will affirm if there is any evidence that supports the decision of the trial court.” *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*.

Whether Trial Rule 41(E) Applies

[13] Murphy first contends that the trial court erred when it granted the BZA’s motion to dismiss because Trial Rule 41(E) does not apply to judicial review of zoning decisions. According to Murphy, judicial review of a zoning decision does not follow the trial rules but instead “follows the specific statute as set forth under” Indiana Code Section 36-7-4-1600 through -1699 (the “1600 Series”). Appellant’s Br. at 11. And, according to Murphy, “only a handful of the Indiana Trial Rules were specifically incorporated” into the 1600 Series but that “Trial Rule 41(E) was not one of the elite few.” *Id.* at 14. Thus, Murphy asserts that Trial Rule 41(E) is not applicable to actions filed under the 1600 Series.

[14] However, we agree with the BZA that Murphy has waived this issue for failing to raise it to the trial court. Following the BZA’s motion to dismiss, which it explicitly filed pursuant to Trial Rule 41(E), Murphy did not file a response or otherwise allege that that trial rule does not apply to judicial review of zoning decisions. And, at the hearing, Murphy only argued that the Trial Rule 41(E)

motion was improper because the BZA had not demonstrated an “inherent prejudice” and because “there has been nothing shown, other than passage of time[,] to meet [the BZA’s] burden under trial rule forty-one.” Tr. at 16.

[15] Still, Murphy directs us to “eleven (11) instances” in which it “redirected” the court back to the 1600 Series and asserts that it “properly presented” the issue to the trial court. Reply Br. at 7. We acknowledge that Murphy cited to the 1600 Series several times at the beginning of the hearing. In particular, Murphy asserted that Indiana Code Section 36-7-4-1614(c) requires the court to enter findings of fact. *See* Tr. at 4-5, 7. And Murphy asserted that the 1600 Series limits the evidence that can be presented to the court on a petition for judicial review to the administrative record. *See id.* at 5, 7. However, at no time did Murphy contend that Trial Rule 41(E) does not apply to petitions for judicial review or that the 1600 Series provides the only method by which a court could dismiss a petition for judicial review. Because Murphy did not raise the issue of whether Trial Rule 41(E) applies to judicial review of zoning decisions, it has waived that issue for appellate review. *See First Chicago Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020) (“It is the general rule that an argument or issue raised for the first time on appeal is waived for appellate review.”).

Whether the Court Erred when it Dismissed Murphy’s Complaint

[16] Still, Murphy contends that the court abused its discretion when it granted the BZA’s motion to dismiss for failure to prosecute. The purpose of Trial Rule 41(E) is “to ensure that plaintiffs will diligently pursue their claims. The rule provides an enforcement mechanism whereby a defendant, or the court, can

force a recalcitrant plaintiff to push his case to resolution.” *Belcaster*, 785 N.E.3d at 1167 (quoting *Benton v. Moore*, 622 N.E.2d 1002, 1006 (Ind. Ct. App. 1993)). The plaintiff bears the burden of moving the litigation and the trial court has no duty to urge or require counsel to go to trial, even where it would be within the court’s power to do so. *Lee v. Pugh*, 811 N.E.2d 881, 885 (Ind. Ct. App. 2004).

[17] In Indiana, courts must balance nine factors when determining whether to dismiss a case for failure to prosecute. *Petrovski*, 85 N.E.3d at 925. Those factors include:

(1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff’s part.

Id. ““The weight any particular factor has in a particular case appears to depend upon the facts of that case.” *Id.* (quoting *Belcaster*, 785 N.E.2d at 1167). “However, a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay.” *Belcaster*, 785 N.E.2d at 1167. Although Indiana does

not require trial courts to impose lesser sanctions before applying the ultimate sanction of dismissal, we view dismissals with disfavor, and dismissals are considered extreme remedies that should be granted only under limited circumstances. *Caruthers v. State*, 58 N.E.3d 207, 211 (Ind. Ct. App. 2016).

[18] Here, Murphy contends that the trial court abused its discretion when it dismissed its complaint because it had a valid reason for the delay in prosecuting the case and because there was a “patently obvious” need to decide the case on the merits.¹ Appellant’s Br. at 19. But, contrary to Murphy’s assertions, we hold that the length of the delay and the extent to which Murphy was stirred into action by threat of dismissal support the trial court’s dismissal of Murphy’s petition for judicial review.

[19] First, the evidence shows Murphy filed this action with the trial court on January 8, 2020. And Murphy filed the BZA record with the trial court on March 27. However, Murphy did not take any additional action until it filed its motion for judgment on the evidence on October 22, 2021. But that was almost eighteen months after it had initiated the case, and it was almost one month after the BZA had filed its motion to dismiss for failure to prosecute.

¹ Murphy contends that, while Murphy “is said to be the prosecutor of this case, it should be recognized that, really, the BZA is the prosecutor of this case in that it was the initiator” because the BZA had levied fines against Murphy. Appellant’s Br. at 9. To the extent that Murphy contends that it should be treated as a defendant instead of a plaintiff, we cannot agree. Even though the BZA took action against Murphy, it is clear that Murphy is the party that placed the case on the court’s docket when it filed its petition for judicial review.

[20] Second, Murphy did not provide a compelling reason for its delay in prosecuting the case. On appeal, Murphy argues that the Covid-19 pandemic caused the delay in moving the case forward.² While Murphy is correct that the pandemic resulted in restrictions on jury trials, that does not negate the fact that Murphy did not take any action on the case for well over a year. And despite the fact that the court had been conducting “regular operations” since mid-2020, the record is devoid of any facts to demonstrate that Murphy attempted to take a single action between March 2020 and October 2021. Appellant’s App. Vol. 2 at 2. Still, Murphy contends that “[j]ust because this particular trial court began operations at some vague time since mid-2020 does not mean that Murphy itself knew about it.” Appellant’s Br. at 19. But Murphy has not directed us to any evidence to demonstrate that it could not contact the court directly or check the court’s website to inquire as to the status of the court’s operations. And while the pandemic placed restrictions on jury trials and in-person hearings, Murphy has not directed us to any evidence to show that it was not able to file a document electronically or request a remote hearing.

[21] Finally, the extent to which Murphy was stirred into action by a threat of dismissal as opposed to its own diligence is clear. Murphy did not take any action after it filed the BZA record with the court on March 27, 2020, until it filed its motion for judgment on the evidence. But it did not file that motion

² At the hearing on the motion to dismiss, Murphy also asserted that the change of judge caused its delay in prosecuting the case. However, Murphy does not make that argument on appeal.

until October 22, 2021, which was almost one month after the BZA had filed its motion to dismiss. We therefore hold that Murphy has not shown good cause for the eighteen-month delay in prosecuting the petition for judicial review.

[22] Indiana Trial Rule 41(E) requires only a sixty-day period of inaction before the trial court can dismiss a complaint. Here, Murphy did not take any action for eighteen months, and Murphy only filed its motion for judgment on the evidence after the BZA had filed its motion to dismiss. While we prefer to decide cases on their merits, we cannot say that the trial court abused its discretion when it dismissed Murphy's complaint for failure to prosecute.

Conclusion

[23] In sum, Murphy has waived its claim that Trial Rule 41(E) does not apply to judicial review of zoning decisions for failure to raise it to the trial court. And we cannot say that the trial court abused its discretion when it dismissed Murphy's petition for judicial review for failure to prosecute. We therefore affirm the trial court.

[24] Affirmed.

Bradford, C.J., and Bailey, J., concur.