

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard,

Plaintiffs,

v.

Kevin Carter, Richard Davis, Joseph Tribovich, Nationwide Insurance Company, Interinsurance Exchange of the Automobile Club, John Ammendola, Trustguard Insurance Company, SC Department of Public Safety, Chevrolet, GMC, Unknown John Does,

Defendants.

ORDER

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SC Court of Appeals

This matter comes before the Court on Defendant Kevin Carter’s Motion to Compel or, in the Alternative, Motion to Dismiss for Failure to Prosecute and his Motion to Dismiss the claims of Ivanka Ayoub pursuant to Rule 25. On August 18, 2022, the Court held a hearing via WebEx on these Motions. Plaintiff Heidi Gersten appeared pro se. Ivanka Ayoub did not appear, and no one appeared on her behalf. Attorney Wesley Sawyer appeared on behalf of Defendant Kevin Carter. After reviewing the record, the Motions, and arguments of the parties, the Court will grant both of Defendant’s Motions to Dismiss.

PROCEDURAL HISTORY

This consolidated action began as two separate proceedings arising out of an automobile collision that took place on or about March 19, 2015. On or about February 21, 2018, Plaintiff Heidi Gersten filed a Summons and Claim for Property Damage under the property damage arbitration statute. Ivanka Ayoub was not listed on the Summons or the Claim.

Plaintiff Heidi Gersten filed the pending personal injury action on March 16, 2018. Ivanka Ayoub is listed as a plaintiff on the caption. Although Ayoub did not sign the Summons, the

Complaint purports to bear her signature. Daniel Hubbard was also named as a plaintiff. As to Ayoub and Hubbard, the March 16, 2018 Complaint attempted to assert a cause of action for loss of filial consortium, among numerous other claims. The March 16, 2018 Complaint named numerous additional defendants. Defendant Kevin Carter and other defendants moved to dismiss the property damage arbitration in light of the Circuit Court Complaint.

On March 27, 2018 – after the statute of limitations expired – Plaintiffs filed a First Amended Claim for Property Damage Verified, which purported to add Ivanka Ayoub as a plaintiff to the property damage arbitration claim.

On April 26, 2018, the Honorable Brian M. Gibbons entered a Form 4 Order consolidating the two cases and placing them on the Common Pleas docket. On May 8, 2018, Plaintiffs Gersten and Ayoub moved to alter or amend the April 26, 2018 Order.

Kevin Carter and various other defendants filed motions to dismiss, among other motions. After a hearing on the various motions, the Honorable John C. Hayes, III, entered a series of orders dismissing all the defendants except Kevin Carter. The orders also dismissed the claims of Daniel Hubbard in their entirety and dismissed Ayoub's loss of consortium claim against Defendant Carter. Although Kevin Carter asserted statute of limitations defenses, the Circuit Court withheld ruling on the statute of limitations issue and noted that Carter could file a separate motion on that issue in the future.

Plaintiffs Gersten and Ayoub moved to alter or amend the Circuit Court's various dismissal orders.¹ On October 16, 2018, Judge John Hayes entered a Form 4 Order, denying the motions to

¹ The Motion to Reconsider identified a September 5, 2018 order. The hearing on the various motions took place on September 5, 2018. At the end of the hearing, Judge John Hayes indicated how he intended to rule and requested proposed orders. No written order was entered on September 5, 2018.

reconsider the “September 5, 2018” order. Plaintiffs Gersten and Ayoub then appealed. Their appeal was ultimately dismissed for failure to comply with orders from the Court of Appeals. The Court of Appeals denied a motion to reinstate or to rehear, and the Supreme Court ultimately denied Plaintiffs’ Petition for Writ of Certiorari. The Supreme Court issued its Remittitur on June 23, 2020.

On June 29, 2020, Defendant Carter served written discovery on Ayoub and Gersten. When no responses were provided, Defendant Carter sent a follow-up letter dated August 13, 2020 asking for the discovery responses and also asking for deposition dates. On August 26, 2020, when Plaintiffs failed to respond to the discovery requests and failed to respond to follow up letters, Defendant Carter filed a Motion to Compel or, in the Alternative, Motion to Dismiss for Failure to Prosecute.

The hearing on Carter’s Motion was first scheduled for January 13, 2021. Gersten moved to continue the hearing because she was litigating another matter in Florida, and she asked for a continuance of at least six months. The Circuit Court did not grant the Motion, but it did continue the hearing. The hearing was eventually rescheduled to take place on July 28, 2022. Shortly before the hearing, Gersten submitted an emergency motion to continue the hearing. On July 28, 2022, the Court held a hearing via WebEx. After hearing arguments on the emergency motion first, the Court agreed to reschedule the hearing to take place on August 18, 2022. During the July 28, 2022 hearing, Plaintiff Gersten stated that Ivanka Ayoub passed away on or about January 11, 2022. Ms. Gersten is Ivanka Ayoub’s daughter.

Shortly after it was disclosed that Plaintiff Ayoub had passed away, Defendant Carter filed a Motion to Dismiss Ayoub’s claims pursuant to Rule 25, SCRCP. At the August 18, 2022 hearing, the

Court heard arguments on the Rule 25 Motion and the previously filed Motion to Compel or, in the Alternative, Motion to Dismiss for Failure to Prosecute.²

LAW

The record in this case supports dismissal on multiple grounds. As to Gersten and Ayoub's claims, the Court finds that dismissal is proper under both Rule 41 for failure to prosecute and under Rule 37 as an appropriate discovery sanction. Furthermore, as to Ayoub, dismissal would alternatively be appropriate under Rule 25.³

A. Rule 41 Dismissal for Failure to Prosecute

"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 against him." Rule 41(b), SCRCF. The decision of whether to dismiss a case for failure to prosecute is left to the discretion of the Circuit Court. *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). "The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause." *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983).

The Fourth Circuit has established four factors when determining whether to dismiss for

² The Court also heard arguments on other motions filed by Plaintiff Gersten. However, most of those motions involve reconsideration of rulings from other Circuit Court judges. Some of those rulings were the subject of the prior appeal. Moreover, Judge John Hayes previously denied a motion to reconsider as to some of those issues. Ultimately, the Court does not need to rule on those issues because it is granting Defendant's Motions to Dismiss.

³ Gersten reported to the Court that she does not dispute that Ayoub has passed away, but she has been unable to obtain a death certificate. Counsel for Carter reported that he was unable to locate an obituary for Ayoub to confirm her death. Ultimately, this issue is immaterial. If Ayoub is still alive, dismissal is proper because she has not prosecuted her claim, she has not responded to discovery, and she has not appeared for the last two scheduled hearings. If she passed away in January as reported by Gersten, then no one has moved to substitute on her estate's behalf within a reasonable time. Either way, dismissal is proper.

failure to prosecute, which have been adopted by South Carolina State Courts: (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." *McComas v. Ross*, 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)).

In this case, each of the four factors weighs heavily in favor of dismissal:

- (1) Plaintiffs are solely responsible for their failure to respond to discovery and to provide deposition dates. Therefore, the degree of responsibility rests wholly with the Plaintiffs.
- (2) Defendant presented argument on several forms of prejudice. First, it appears Ayoub has passed away, which has deprived Defendant of the opportunity to depose her. This alone is substantially prejudicial. Plaintiff sent discovery requests and requested deposition dates in 2020 – long before Ayoub's death in 2022. Moreover, the passage of time prejudices Defendant because it will be harder to find witnesses and develop facts relating to the case and because he has been stuck in litigation for over four years without having basic discovery responses. Therefore, prejudice is plainly present.
- (3) The history of this litigation – especially in light of the appellate record – shows a drawn-out history of dilatory proceeding. Plaintiffs have requested numerous continuances at the trial level. At the appellate level, Plaintiffs requested numerous extensions. The Court of Appeals made multiple requests for Plaintiffs to provide information to the Court. Ultimately, the Court of Appeals dismissed the appeal when Plaintiffs failed to provide the information requested by the Court. Most importantly, Plaintiffs have been on notice of Defendant's Motion to Compel for almost two years. During that time, they have continued to fail to provide any discovery responses.
- (4) At this point, there is not a less drastic sanction that would afford Defendant Carter procedural due process. The Rules of Civil Procedure are designed to give both parties an opportunity to fully develop their case. By failing to participate in discovery for so long – to the point at which one claimant and witness has passed away – Plaintiffs have prevented Defendant Carter from having a full and fair opportunity to defend his case. Any less severe sanction will not give Defendant Carter the ability to depose Ayoub or to depose any other witnesses with the same recollection that they would have had two years ago.

Ultimately, Rule 41 serves as a necessary part of the power of trial courts "to manage their own affairs so as to achieve orderly and expeditious disposition of cases." *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 212, 493 S.E.2d 826, 832 (1997) (emphasis added). Dismissal at this point is the only orderly and expeditious disposition of this case. Therefore, the Court finds that dismissal

pursuant to Rule 41 is proper and well within this Court's discretion.

B. Rule 37 Dismissal as a Discovery Sanction

Alternatively, dismissal is also proper under Rule 37. "If a party . . . fails . . . to serve answers or objections to interrogatories, or to serve a written response to request . . . under Rule 34 . . . the court . . . on motion may make such orders in regard to the failure as are just . . ." Rule 37(d), SCRPC. The Rule gives the Circuit Court discretion to, among other things, strike pleadings or dismiss an action. Rule 27(b)(C), SCRPC. While the decision of appropriate sanctions is left to the sound discretion of the Court, severe sanctions such as dismissal will only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. *McNair v. Fairfield County*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008).

In *McNair*, the trial court struck Fairfield County's answer and counterclaim for failure to adequately respond to requests for production. Notably, the county in that case made an attempt to respond to discovery, producing over 800 documents. *Id.* at 464, 665 S.E.2d at 831. However, the plaintiff believed the responses were inadequate and moved to compel. The trial court agreed and entered an order compelling supplemental responses. Notably, that entire process took about five months. *Id.* When the county failed to supplement its responses within six months, the plaintiff moved for sanctions. After a hearing, the trial court struck the county's answer and its counterclaim. *Id.* The Court of Appeals affirmed, finding that the trial court properly exercised its discretion and considered the appropriate factors before imposing the sanction of dismissal. *Id.* at 467, 665 S.E.2d at 832-33.

The timeline at issue in *McNair* is telling here. When the trial court struck the county's answer and counterclaim, the case was less than a year-and-a-half old. Moreover, the county had made some effort to respond to discovery, including producing over 800 documents. Here, the case is over four years old. Defendant Carter served discovery on June 29, 2020 – well over two years ago. Defendant's

motion has been pending for nearly two years, and it has been set for a hearing three times. Thus, Plaintiffs have had notice of the issue far longer than the time that passed in *McNair*. Nonetheless, Plaintiffs have never attempted to respond to discovery. In the meantime, it appears Plaintiff Ayoub has passed away, depriving Defendant Carter of his ability to depose her or to obtain discovery from her. At a minimum, the failure to respond to discovery requests for over two years shows the very type of gross indifference to Defendant's rights that justifies dismissal. Moreover, given the fact that the hearing on this Motion has been scheduled three times with no effort by Plaintiffs to respond to the discovery requests, there is an adequate basis in the record to find willful disobedience. This willful failure to respond to discovery for such a long period of time is a complete disregard of Plaintiffs' obligations under the Rules of Civil Procedure.

Dismissal is a severe sanction. However, Defendant Carter has suffered significant prejudice both in the form of lost opportunity to obtain discoverable information and in the form of being tethered to this litigation for four years. For the reasons discussed above, the Court finds that dismissal is the only appropriate sanction for Plaintiffs' failure to participate in discovery.

C. Rule 25 Dismissal as to Ivanka Ayoub

Under Rule 25, SCRCF, when a party dies and the party's claim is not extinguished by her death, then "[i]f substitution is not made within a reasonable time, the action may be dismissed as to the deceased person." Rule 25(a)(1), SCRCF. "[R]ule [25] specifically provides for the dismissal of a deceased party where substitution of the proper parties *does not occur* within a reasonable amount of time." *Hillman v. Pinion*, 347 S.C. 253, 258, 554 S.E.2d 427, 430 (Ct. App. 2001) (emphasis in original).

The standard under the Federal Rule for a timely motion to substitute is 90 days. *See* Fed. R. Civ. P. 25. The South Carolina rules use a "reasonable time" standard. Even if a "reasonable time" is

something longer than 90 days, more than twice that amount of time has passed since Ayoub's purported death, and no one has moved to be substituted. Therefore, substitution has not occurred "within a reasonable time," and dismissal is proper.

CONCLUSION

For the above-stated reasons, Defendant Carter's Motions to Dismiss are GRANTED.

IT IS SO ORDERED.



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al

Case Number: 2018CP1200117

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132