

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Oct 22 2024

S.C. SUPREME COURT

In Re: John W. Gardner, The Gardner Law Firm, P.A.

Appellate Case No. 2024-001130

**MOTION TO DISMISS
and
MEMORANDUM IN SUPPORT OF MOTION**

Respondents John W. Gardner and The Gardner Law Firm, P.A. (hereinafter “Gardner”) hereby move for dismissal of this action¹ pursuant to Rule 240, SCACR and Rule 41(b), SCRPC in light of Petitioner’s persistent failure to comply with procedural requirements and failure to prosecute this action after lengthy notice of such issues. In support of such motion, Gardner provides the following:

FACTS

Petitioner sought invocation of this Court’s original jurisdiction via petition filed on July 8, 2024. As noted by Gardner in his August 5, 2024 return to that petition, Petitioner had failed to comply with Rule 245(c), insofar as Petitioner had failed to serve “a complaint setting forth the claim for relief in the manner specified by Rule 8, SCRPC” along with its petition. Gardner also pointed out the lack of a clear factual record upon which this Court could act in its “primary

¹ This motion is directed to this Court, as it granted the petition for original jurisdiction, and the order appointing a special referee did not appear to vest authority in the Special Referee to consider or rule on dispositive motions of this kind.

function” as an “appellate court to review appeals from the trial courts.” *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356, 357 (1991).

This Court nevertheless subsequently granted the petition by order dated September 17, 2024, which erroneously referenced the filing of a complaint by Petitioner as part of its petition for original jurisdiction. Gardner did not seek correction of that portion of the order because in addition to granting the petition, the Court simultaneously appointed the Honorable Edgar W. Dickson “as a special referee to take evidence and issue a report containing proposed findings of fact and recommendations to this Court.”

Instead, counsel for Gardner sent an email to counsel for Petitioner two days later, on September 19, 2024, stating “Before we contact Judge Dickson, I thought I would request a complaint” because “we have to start somewhere.” In response, counsel for both parties spoke by phone and petitioner’s counsel suggested the potential for stipulations as to facts. This suggestion was relayed to Judge Dickson via email from counsel for Gardner on September 26, 2024. In that email, however, Gardner’s counsel repeated previously expressed reservations as to the suitability of such stipulations under the circumstances, given that “at this point we do not know the scope of what [the Special Referee is] being asked to hear and/or make findings of fact for.”

To date, however, no such proposed stipulations, nor any complaint, have been filed or exchanged between counsel, despite recent claims the same are forthcoming, and despite the fact that a near identical dispute remains pending between Petitioner and third parties involved in the same facts and circumstances that may be relevant to Gardner’s conduct for purposes of this action. That action was initiated in June 2024, and remains pending in the United States Federal District Court for South Carolina (Case No. 5:24-cv-4312-SAL) after its removal from the Orangeburg Count Circuit Court (Case No. 2024-CP-38-00826).

ARGUMENT

More than three months have elapsed since the filing of the petition without a complaint, more than two months since that defect was noted in the return to the petition, and more than one month since the grant of original jurisdiction and renewed request for a complaint communicated by counsel for Gardner. Likewise, more than a month has elapsed since Petitioner's counsel suggested stipulations, which were immediately questioned as to their viability by Gardner's counsel. And yet no complaint, or even proposed stipulations, have been delivered by Petitioner.

Meanwhile, the companion litigation currently pending in the federal district court has not been ignored as this matter has, and it remains capable of more than adequately addressing the underlying factual and legal circumstances without need or benefit of potentially parallel (if prosecuted) proceedings before Judge Dickson as special referee.

“It is within the inherent power of the court to dismiss an action for failure to prosecute.” *Small v. Mungo*, 175 S.E.2d 802, 254 S.C. 438 (1970). Doing so “Ordinarily... does not put an end to the cause of action, but merely terminates the suit itself.” *Id.* at 804. As such, dismissal of this neglected matter as requested would not be with prejudice as to any issues (whatever they may be factually or legally as could have been specified via a complaint), would allow Petitioner to carry on with the federal action, and spare both Gardner and specially appointed referee unnecessary and burdensome neglect and delay in these proceedings.

Therefore, Gardner respectfully requests that this matter be dismissed, either for failure to prosecute or upon another basis, such as the continued related proceedings in federal court.

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Respectfully submitted,

s/ Desa Ballard

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October 22, 2024