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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-27-00011

Jeffrey H. Anders and Maureen Anders, Michael K. Callahan and Amy Callahan, Melinda A. Cavicchia, Michael B. Ciulis, Stephen Kipa and Kimberly A.K. Kipa, Chad Kurtz, Spencer L. Morgan, Richard O'Reilly and Alicia F. O'Reilly, Daniel Ryan and Susan Ryan, Gennady Shmukler, Michael Schmuff and Joanne Schmuff, and Matthew Terry, Kathryn M. Tillman, Valerie A. Lowe, TACG Properties, LLC, Mackay Marsh, LLC, Plaintiffs,

Of Whom Spencer L. Morgan is the..... Appellant,

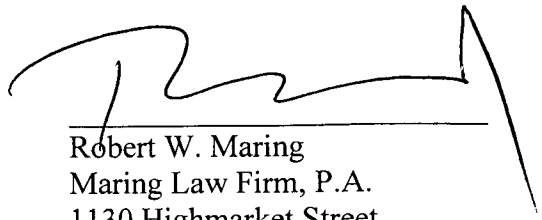
v.

The Settings of Mackay Point, LLC, The Settings Development Companies, LLC, Branch Banking & Trust Co., Wachovia Bank, N.A., Bond Safeguard Insurance Company, and Jasper County, Defendants,

Of Which Wachovia Bank, N.A. is the ..... Respondent.

Appellate Case No. 2013-001629

FINAL BRIEF OF APPELLANT



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1. DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO GRANT THE APPELLANT'S MOTION FOR CONTINUANCE?

2. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DISMISSING THE APPELLANT'S ACTION FOR FAILURE TO PROSECUTE?

STATEMENT OF THE CASE

On January 7, 2011, the Appellant, along with twenty (20) other Plaintiffs, filed this action in the Court of Common Pleas in Jasper County. The litigants were all purchasers of lots in a subdivision named the Settings at Mackay Point. The Defendants in the case included the developer, Jasper County, the company issuing the bond, and Wells Fargo among others. Due to the number of litigants and parties, a consent scheduling order was issued on December 9, 2011. The parties were provided a date certain for trial on May 28, 2013. During the course of the case, numerous Plaintiffs entered into settlements resolving all issues in the case as a result of successful mediations that took place on February 28, 2012, and November 1, 2012, leaving Spencer Morgan as the sole Plaintiff in the action and Wells Fargo as the sole Defendant. Depositions of the Plaintiff occurred on March 13, 2013, and two (2) of the Wells Fargo's employees were deposed on April 30, 2013. Wells Fargo's Motion for Summary Judgment was heard on May 8, 2013. At the request of the trial judge, the case was sent back to mediation with the parties mediating on May 9, 2013.

The Appellant filed a motion for continuance on May 22, 2013, pursuant to Rule 40(i) of the South Carolina Rules of Civil Procedure, due to his inability to attend trial. The trial judge

denied the Appellant's motion on May 24, 2013. The case was called for trial on May 28, 2013, and the Appellant renewed his motion for a continuance due to his unavailability. This motion was denied. The Court dismissed the Appellant's claims for failure to prosecute and the Defendant Wells Fargo moved forward with its counterclaims. The Appellant's motion for reconsideration of the trial Court's dismissal for failure to prosecute was timely filed and denied by the Court. This appeal ensued.

FACTS

On February 27, 2007, Appellant and the Settings of Mackay Point, LLC, entered into a Purchase and Sale Agreement for the purchase and sale of Lot 51 in the Settings at Mackay Point Subdivision in Jasper County. The lots were sold prior to any construction of infrastructure. The Appellant ultimately purchased Lot 51 and financed the transaction with Wachovia Bank. Subsequent to the purchase, the developer has failed, and no infrastructure has been constructed in the Subdivision.

The Appellant asserted numerous claims against several Defendants; however, for purposes of this appeal, the only remaining cause of action that was to be presented at trial was negligent misrepresentation against the Respondent.

On May 22, 2013, the Appellant was notified by his employer that he was required to pilot his employer's plane outside of the country. Due to the short duration of time provided, there was no ability to obtain a replacement pilot. The Appellant, upon learning of his unavailability to appear on May 28, 2013, immediately filed a written motion for a continuance on May 22, 2013, that was supported by two (2) affidavits. This motion was denied by the Court on May 24, 2013. The case was called for trial on May 28, 2013, and the Appellant's counsel

appeared and again made a motion for a continuance. (R. pp. 239-242.) In support of the motion, the Appellant offered two (2) affidavits. (R. pp. 241-242.)

The Appellant filed an affidavit setting forth the reason for his unavailability to be able to attend the trial as well as an affidavit from his employer, the president of Rio Bravo Helicopters, Corp. The affidavits submitted to the Court by the Appellant stated that he was a professional pilot by trade; was employed by Rio Bravo Helicopters through a contract through International Aviation Services Inc. since 2009; it was his primary and main means of providing for his family; that his company has spent more than $80,000.00 properly licensing him for the Hawker 900XP; he was the only authorized and approved pilot on the aircraft and only approved named pilot on the aircraft insurance policy; he was required to be present from May 27, 2013, through the first week of June 2013 and was required to be present or jeopardize his continued employment. (R. p. 241.)

The president of Rio Bravo Helicopters submitted an affidavit indicating that the Appellant: (1) was the only qualified pilot for the type of aircraft, Hawker 900XP; (2) that the Appellant was the only captain on the aircraft insurance; (3) that Rio Bravo Helicopters had spent more than $80,000.00 for the initial and recurrent training expenses; (4) there was a recently scheduled trip requiring the Hawker 900XP to be out of the country; and (5) the Appellant would be required by his employment/contract status to fly from May 27, 2013, through the first week of June, 2013. (R. p. 242.)

The Court again denied the motion for the continuance and the Respondent, Wells Fargo Bank, proceeded with its counterclaim. The Appellant's case was dismissed under Rule 41(b) of

the South Carolina Rules of Civil Procedure for failure to prosecute his claim. (R. p. 13.) Based upon the applicable statute of limitations in South Carolina, this dismissal was with prejudice.

ARGUMENTS

I. THE COURT ABUSED ITS DISCRETION BY FAILING TO GRANT THE APPELLANT'S MOTION FOR CONTINUANCE.

Rule 40(i)(1) of the South Carolina Rules of Civil Procedure states that "As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the Court. Ordinarily, such continuances shall be only until the next term of court."

Our Supreme Court has held that "It has long been the rule in the State of South Carolina that motions for a continuance are addressed to the sound discretion of the trial judge, and his ruling will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of appellant." *Williams v. Bordan's Inc.*, 274 S.C. 275, 262 S.E.2d. 881 (1980). Citing *South Carolina Public Service Authority v. Carolina Power and Light Company*, 244 S.C. 466, 137 S.E. (2d) 507; *State v. Lytchfield*, 230 S.C. 405, 95 S.E. (2d) 857.

In the present matter, the Appellant, upon discovering a conflict with the trial schedule, immediately filed a motion for a continuance, which was supported by two affidavits demonstrating the reasons for the request. In looking at the facts and circumstances of this case, the record is clear that the Appellant notified the Court prior to the call of the case by way of a filed motion for continuance. It was clear in the Appellant's affidavit that he would not be able to attend the trial and failure to grant the motion would mean a dismissal of his claims.

The Appellant's counsel appeared on the day of the trial and renewed the motion for a continuance, and in his argument stated to the Court "the Plaintiff's testimony is critical and necessary for me to bring in this case. I cannot proceed with trial without his testimony." (R. p. 218, lines 23-25.) The Court, in its reasoning for the denial of the motion, stated that the Appellant was the Plaintiff in this case and that it might be more sympathetic if he was a defendant being sued. (R. p. 220, lines 19-20.)

The Court, in its reasoning for denial of the motion for continuance, recognized that there were a number of plaintiffs in the case (actually twenty (20) other plaintiffs); the case was mediated a number of times; and that the Appellant was the last one standing that had not resolved his case with Wells Fargo. (R. p. 220, lines 1-10.) At the call of the case, the only remaining Plaintiff was the Appellant and the sole remaining Defendant was the Respondent. The original purpose of the date certain was to ensure that twenty (20) plaintiffs, who resided all over the country, would be available for trial on that particular date, certainly a need that no longer existed with the case.

It should be noted that the request for the continuance was solely for the reason of the Appellant's non-availability for trial. It should also be noted that this trial judge denied Respondent Wells Fargo's motion for summary judgment on May 8, 2013, indicating that there were issues of material fact in dispute. Therefore, the failure to grant a continuance in this matter served a death sentence to the Appellant's claims, which came to fruition when the Appellant's claims were dismissed for failure to prosecute. When looking at the prejudice of the Court's failure to grant the motion for the continuance to the Appellant, knowing that the failure to grant the motion would result in the dismissal of Appellant's claims, it is apparent that the

Court abused its discretion by failing to recognize the prejudice of its ruling to the Appellant's claims.

II. THE COURT COMMITTED AN ABUSE OF DISCRETION BY DISMISSING THE APPELLANT'S CLAIMS FOR FAILURE TO PROSECUTE UNDER RULE 41(b) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

The South Carolina Supreme Court has set forth the appropriate standard of review to be applied to this appeal. In *Small v. Mungo,* 254 S.C. 438, 175 S.E. 2d. 802 (1970), the Court opined that "The question of whether an action should be dismissed for failure to prosecute is left to the discretion of circuit judge and his decision will not be disturbed except upon a clear showing of abuse of discretion." *Id. at 442; see also Bond v. Corbin,* 68 S.C. 294, 296, 47 S.E.2d 374, 375 (1904).

The South Carolina Court of Appeals has addressed the issue of the dismissal of an action for failure to prosecute in *McComas v. Ross,* 368 S.C. 59, 626 S.E.2d 902 (Ct of App 2006). In *McComas,* the Court identified the use of an ***"unreasonable neglect"*** standard in determining whether or not an action should be dismissed for failure to prosecute. Additionally, the Court adopted application to the Fourth Circuit standard for a trial court to consider dismissing a case for failure to prosecute.

In its analysis in *McComas,* the Court reviewed numerous South Carolina cases to address what factors the Court should consider prior to dismissing a case for failure to prosecute. The first case that the Court of Appeals addressed in *McComas* was the Supreme Court's decision in *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.,* 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). In this case, the Appellant served a summons, respondents timely demanded a

complaint, and Appellant requested and was granted an extension of time. Appellant then delayed fifteen (15) months in filing the summons, despite S.C. Code Ann. § 15-9-1000 (1976) and S.C. Cir. Ct. R. 26, the applicable statute and rule at the time, which then required that all pleadings be filed within ten (10) days after service. Appellant's present counsel admitted he knew of no valid excuse for previous counsel's failure to file. A complaint was finally served twenty (20) months after service of the summons and respondents removed the case to Federal Court, but it was later remanded for lack of diversity. Appellant could not reinstitute the action because the statute of limitations had run and contended that the trial court erred in dismissing the action. On appeal, the Court stated that Appellant had the burden of prosecuting its action and the trial court could dismiss the action for unreasonable neglect in proceeding with the cause. The Court, rejecting Appellant's contention, stated that it would be anomalous to require respondents to force or encourage Appellant to proceed with its suit. *Id.* at 757.

The Supreme Court in *Don Shevey* relied on the previous holdings of the Supreme Court that held "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." *Thomas & Howard Company v. Fowler, et al.*, 238 S.C. 46, 119 S.E. (2d) 97 (1961); *Small v. Mungo*, 254 S.C. 438, 175 S.E. (2d) 802 (1970).

The Court in *McComas* further held that in the cases where the Supreme Court affirmed the dismissal of cases for failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. *See Small v. Mungo*, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion

where counsel was apparently in his office and plaintiff and witnesses were at work when the case was called for trial, and counsel informed the court that he could not appear for hours); *Bond v. Corbin*, 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904). In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant. *E.g.*, *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of willful disobedience when exclusion amounted to a judgment of default or dismissal).

This Court in *McComas* also addressed the applicable Federal Court standard that has been adopted by the Fourth Circuit Court of Appeals. The Court in *McComas* held that, "Our Fourth Circuit Court of Appeals has also addressed this issue. The Court in *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976) held that dismissal is a harsh sanction, which should be resorted to only in extreme cases. Dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff. *Id.* The discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal. *Id.*; *Bush v. U.S. Postal Serv.*, 496 F.2d 42, 44 (4th Cir. 1974). The Fourth Circuit has said the trial court must consider four (4) factors before dismissing a case for failure to prosecute: (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. *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990). *See also Herbert v. Saffell,* 877 F.2d 267, 270 (4th Cir. 1989); *McCargo*, 545 F.2d at 396; *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919, 920 (4th Cir. 1982)."

The Court in *McComas* in its analysis of the facts to that particular case utilized the unreasonable neglect standard as well as the federal standard in its decision. The Court found that the Appellant had spent many months engaged in discovery and was delayed in her appearance to Court. Additionally, the Court found that *McComas* did not have a history of requesting continuances or abusing Court rules to evidence a clear record of delay and contemptuous conduct, as required by the federal cases involving dismissal. *Id. at 905.*

The facts of this case demonstrate that this Appellant had engaged in extensive discovery including depositions as well as mediating the case on multiple occasions. The Appellant had attended every Court appearance and participated in a second mediation at the request of the trial judge. The particular facts in this case demonstrate that the Appellant was a pilot and was unfortunately required to fly his employer out of the country on the date of the trial. Immediately, upon notice of this requirement from this employer, the Appellant notified the Court and immediately filed a motion for continuance of the trial date. The motion was supported by affidavits from the Appellant and his employer. Unfortunately, the Appellant was faced with the dilemma of attending the trial of his case or losing his employment.

Under the facts of this case, dismissal of the Appellant's claims were too harsh based upon the conduct of the Appellant and his counsel. This Court as well as the Supreme Court has previously held that the unreasonable neglect standard should be applied to dismissals for failure to prosecute. While it is not disputed that the Appellant did not appear for the call of the case, the totality of the circumstances do not warrant such harsh action from the Court. The record demonstrates that the Appellant, upon discovery of his contractual obligation to fly from May 27 though the first week of June, 2013, immediately informed the Court and filed a motion for

continuance the week prior to this case being called to trial. It is also clear from the record that the case had never been continued. The record is absent any findings that the Appellant had any history of stalling or conduct that would indicate that the Appellant was dilatory in taking his case to trial, much less repeated offenses.

Application of the four-pronged federal standard yields the same result when taking into consideration the totality of the facts. The first prong is the Appellant's degree of personal responsibility. The Appellant once notified of his contractual obligations to his employer immediately notified the Court of his situation and supported said motion with affidavits corroborating his request. While it is admitted that the Appellant did not appear at the call of the case, the Appellant took all reasonable steps to notify the Court of his unavailability.

Next, the Court should look at the amount of prejudice caused the Defendant. The record is also void of any findings that the Defendant would have been prejudiced in any way. The Appellant had indicated prior to the call of the case that the Respondent would be entitled to a judgment on its counterclaims due to an admission during the discovery process.

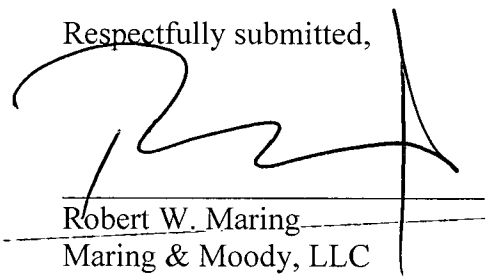
The next factor to consider is whether or not there has been the presence of a drawn out history of deliberately proceeding in a dilatory fashion. This factor is similar to the standards set forth by South Carolina case law. There is no evidence that the Appellant had delayed proceeding with the case. The record reflects that the Appellant had in fact requested and was granted a date certain. The record is absent any findings that Appellant was attempting to avoid, delay or hinder the case progression in any way. While it was indeed unfortunate that the Appellant's employment required him to miss the trial date, the record shows that this was the first time the Appellant had requested a continuance of the trial date.

The last factor to consider is the effectiveness of sanctions less drastic than dismissal. In this regard, the Court had the opportunity to assess costs to the Appellant for the costs of the jury; assess attorney fees for requiring the Respondent Well Fargo to attend the roll call; or a combination of the two, or any other reasonable sanction within the discretion of the Court.

CONCLUSION

When the facts of this case are analyzed with application of the standard for failing to grant a continuance and the unreasonable neglect standard as well as the federal standard that has been used by this Court in determining the appropriateness of dismissals of actions for failure to prosecute, it is clear that the trial court's failure to grant a continuance and its ultimate dismissal for failure to prosecute was an abuse of discretion.

Respectfully submitted,



March 26, 2014

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Wachovia Bank, N.A. is the ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief by depositing a copy of said document in the United States Mail, postage prepaid, on March 26, 2014, addressed to Respondent's attorneys of record as follows:

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The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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