

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
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)
 Stone International, LLC, and)
 Eugene E. Stone, IV,)
)
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 Plaintiffs,)
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 v.)
)
)
 Byte Software, LLC; Byte Software)
 Services, LLC; Benjamin Gause;)
 Janice Gause, f/k/a Janice Archer,)
 f/k/a Janice Barnett; Carolina First)
 Bank; Branch Banking and Trust)
 Company; Greg Corbitt;)
 Contemporary Solutions-USA, Inc.;)
 International Modapts Association,)
 Inc.; and South Carolina Department)
 of Employment and Workforce,)
)
)
 Defendants.)
)
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IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT
BUSINESS COURT

C.A. No.: 2009-CP-23-5000

ORDER

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 SC Court of Appeals

This matter came before the Court on February 19, 2019, upon motion of both parties for partial summary judgment and upon Defendants' Motion to Dismiss pursuant to Rule 41, SCRCP. Present at the hearing were the Plaintiff, represented by his counsel, Jacob M. Hughes, Esq., and Randall S. Hiller, Esq., on behalf of Defendants Byte Software, LLC, Byte Software Services, LLC, Benjamin Gause, and Janice Gause. The parties submitted memoranda in support of their motions for summary judgment, along with accompanying discovery documents, deposition testimony, and affidavits.

After careful consideration of the memoranda, exhibits, testimony, affidavits, and history of proceedings in this action, the Court finds it unnecessary to address the specific issues raised by

either party under their motions for partial summary judgment as to each particular cause of action given that the Court decides to dismiss the entire action pursuant to Rule 41, SCRPC.

This lawsuit began by the filing of a summons and complaint on June 12, 2009, which, although stating numerous causes of action, essentially alleged a breach of contract, namely, the Management Agreement with Option to Purchase. The case proceeded along the course of business litigation for several years. Plaintiffs' original counsel was substituted on September 2, 2009. Again, on April 8, 2010, Plaintiffs' counsel was substituted, and the complaint was subsequently amended twice. On October 8, 2010, Plaintiffs filed a motion to compel production as a result of defense counsel's refusal to provide information related to events or documents created after April 9, 2009, the day Benjamin Gause "retook physical control of the company [Byte Software]." Granting Stone's motion, the Court found that the information requested and documents dated after April 9 "are relevant and germane to the issues involved in this case." (Order Granting Pl.'s Mot. to Am. and Mot. to Compel Produc. at 4.) Despite the November 18, 2010 Order, Defendants' counsel never provided the information sought by Stone. At some point, "Stone was no longer able to pay its legal fees." (Aff. of Josh Smith ¶ 2.) The answer to the Third Amended Complaint was filed on July 13, 2012. No other activity occurred from July 2012 until April 6, 2017, when Plaintiffs' counsel filed a motion to withdraw. Mr. Hughes filed a notice of appearance on July 7, 2017.

Defense counsel has moved to dismiss the case for failure to prosecute pursuant to Rule 41, SCRPC, relying upon *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006). *McComas* itself cites a decision of the Fourth Circuit Court of Appeals setting forth four factors that must be considered by the trial court before dismissing an action for failure to prosecute. See *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976) (noting "dismissal is . . . a harsh sanction . . . [and]

should be resorted to only in extreme cases”) (internal quotation marks omitted). The factors are: (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*, 368 S.C. at 63, 626 S.E.2d at 904.

Based upon these factors, the Court hereby **GRANTS** Defendants’ Motion to Dismiss for failure to prosecute pursuant to Rule 41, SCRPC.

It is so ordered.

The Honorable Edward W. Miller

March 4, 2019
Greenville, South Carolina



Greenville Common Pleas

Case Caption: Stone International LLC , plaintiff, et al vs. Byte Software LLC ,
defendant, et al
Case Number: 2009CP2305000
Type: Order/Dismissal

So Ordered

s/ Edward W. Miller

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