

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

IN THE PROBATE COURT
DOCKET NO.: 2014ES1100192

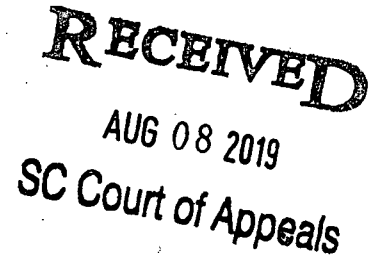
Charles Deal., Jr.,)
)
Petitioner,)

v.)

Angela Godfrey,)
)
Respondent.)

ORDER OF DISMISSAL

In the Matter of:)
)
Estate of Charles E. Deal, Sr.)



Date of Hearing: September 5, 2018
Trial Judge: Joshua L. Queen
Attorney for Petitioner: James G. Carpenter
Attorney for Respondent: William G. Rhoden
Guardian ad Litem for Charles Deal, Jr.: No Appearance

This matter came before the Court on September 5, 2018 pursuant to Respondent's Motion to Dismiss. The Petitioner was represented by James G. Carpenter of the Greenville County Bar. The Respondent appeared and was represented by William G. Rhoden of the Cherokee County Bar. Joshua H. Henderson, Guardian *ad Litem* for Charles Deal, Jr., did not appear. His presence was waived by all parties.

PROCEDURAL HISTORY

Charles E. Deal, Sr. died testate in Cherokee County on May 16, 2013. A petition for informal probate was filed on May 22, 2013 and Angela Godfrey was appointed Personal Representative of the estate per the Last Will and Testament of Decedent.

On January 9, 2014, Charles Deal, Jr. filed his action contesting the Last Will and

Testament of Decedent. Angela Godfrey filed her Answer denying the allegations of the Petition contesting Decedent's will.

On May 1, 2014, Charles Deal, Jr. filed a Petition to remove Angela Godfrey as Personal Representative and sought the appointment of a Special Administrator. Angela Godfrey filed her Answer denying the relief sought.

On February 6, 2014, the Court appointed Kimberly Thomason as Guardian *ad Litem* for Charles Deal, Jr.

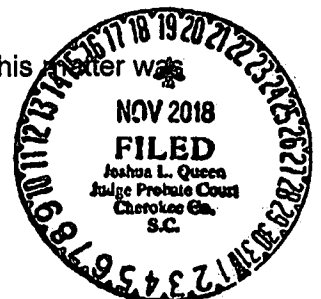
On June 18, 2014, a hearing was held on Petitioner's action to remove Angela Godfrey as Personal Representative. Testimony was taken from several witnesses, after which the Court made inquiries of the attorney for the Petitioner and the Guardian *ad Litem* concerning possible conflicts of interest. Thereafter, Kimberly Thomason withdrew as Guardian *ad Litem*. The Court recessed the hearing and appointed Joshua M. Henderson as Guardian *ad Litem* for Charles Deal, Jr. The hearing was never re-convened and on August 15, 2014, Petitioner's counsel filed a Motion to dismiss the action to remove Angela Godfrey as Personal Representative. On September 3, 2014, the Court granted the Motion and the action was dismissed.

On September 10, 2014, Petitioner made a Motion to remove the action contesting the Last Will and Testament of Decedent to the Circuit Court. By Order dated September 10, 2014, this matter was removed to the Circuit Court.

On July 22, 2015, the parties participated in mediation and reached a mediated agreement. The agreement provides that a hearing would be held in the Probate Court for the Court to approve the agreement.

By Order of the Honorable R. Keith Kelly dated August 28, 2015, this matter was

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returned to the jurisdiction of the Probate Court for approval of the settlement. However, no hearing was ever held or scheduled for the approval of the settlement.

The matter now comes before the Court on Respondent's Motion to Dismiss. A hearing was held on September 5, 2018, at which time counsel for both the Petitioner and Respondent made arguments in support of their position. Respondent submitted a Memorandum of Law which contained letters and emails of communication between counsel concerning the status of the case. Also submitted were various documents which had been filed in the Probate file. The Petitioner submitted a Return to Respondent's Motion to Dismiss which contained a copy of the mediated agreement and the mediator's report. Petitioner also submitted an affidavit from a local realtor. The Petitioner submits in his Return that that Settlement Agreement should be enforced in its entirety. The Petitioner also submitted that all terms of the settlement agreement, except the sale of the real property, have been implemented and that Respondent had effectively prevented the sale. The Petitioner also submitted that Petitioner's counsel had asked for a hearing in 2016, but no hearing was scheduled.

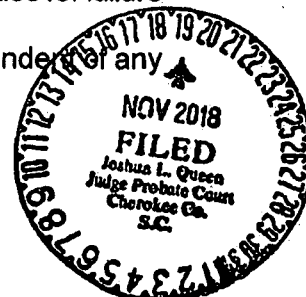
LEGAL ANALYSIS

Rule 41(b), SCRPC, provides as follows:

For failure of the Plaintiff (Petitioner) to prosecute or to comply with these rules of any order of the Court, a Defendant (Respondent) may move for dismissal of an action or of any claim against him.

Therefore, under Rule 41(b), this Court has the discretion to dismiss an action or claim for failure to prosecute. However, the power of trial court to dismiss a case for failure to prosecute with due diligence is generally considered inherent and independent of any

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statute or rule of court. Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases. *Crestwood Golf Club, Inc v. Potter*, 328 SC 201, 439 SE 2d 826 (1997). Our Supreme Court has even opined that trial judges possess the inherent power to dismiss actions *sua sponte* for a party's failure to prosecute relevant claims. *Id.*

The Petitioner has the burden of prosecuting his action, and the trial court may properly dismiss an action for Petitioner's unreasonable neglect and proceeding with his cause. *Shevey & Spires, Inc. v. American Motors*, 279 SC 58, 301 SE 2d 757 (1983). (Citing *Thomas & Howard Company v. Fowler. et al.*, 238, SC 46, 119 SE 2d 97 (1961); *Small v. Mungo*, 254 SC 438, 175 SE 2d 802 (1970)).

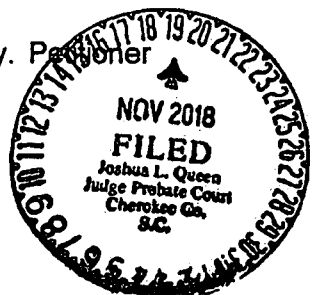
The duty to pursue an action lies with Petitioner and not the Respondent. As stated in *Fowler, id.*, and cited with approval in *American Motors, id.*, "While a Defendant may bring about an expeditious trial of a case, he has no legal obligation to do so; except to meet such actions as are taken by the Plaintiff, he may remain passive."

In the present case, the Court must determine if it a proper exercise of the Court's discretion to dismiss this action for the failure of the Petitioner to prosecute.

This case involves the estate of Charles Deal, who died testate on May 16, 2013. Mr. Deal's will was promptly submitted to probate on May 22, 2013 and Angela Godfrey was appointed Personal Representative of the estate. Over five (5) years have passed since Mr. Deal's death and his estate is still open. The only impediment to the closing of the estate is this action.

The Petitioner in opposing this motion focuses on the mediated settlement agreement and problems implementing the agreement as the reason for delay. Petitioner

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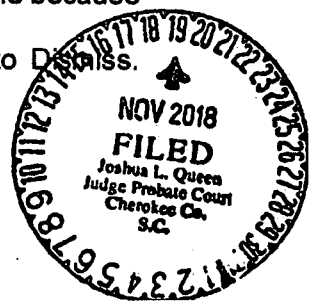


seeks to lay blame on the Respondent for the failure of implementation of the agreement. Paragraph 2 of the Settlement Agreement clearly provides that the case would be returned to the Probate Court for approval of the settlement and conclusion of the Probate estate. While jurisdiction was returned to the Probate Court, no hearing was ever held to approve the settlement. No motion to approve and or enforce the settlement agreement was ever filed.

It should be noted that the gravamen of the settlement agreement is the sale of a **remainder interest** in real estate and payment of certain funds to Angela Godfrey. The agreement does not contemplate the sale of the estate in fee simple. Also, the Decedent only owned a 75% interest in the real estate at the time of his death. The other 25% is owned by Charles Deal, Jr. (12.5%) and Patricia Petchey (12.5%). Ms. Petchey was not a party to this action and she is now deceased. Respondent argues that the agreement contemplated the sale of the remainder interest to an adjoining land owner who had expressed interest in the property and also contemplated the cooperation of Ms. Petchey. In support of this argument, Respondent has attached to the Memorandum of law correspondence in which Petitioner's former counsel expresses exasperation over the lack of cooperation of Ms. Petchey. Further, by correspondence to Petitioner's counsel dated October 7, 2015, Respondent took the position that this matter should be set for trial if the agreement could not be finalized and carried out. In correspondence dated February 26, 2016 Respondent took the position that terms of the settlement must strictly be complied with by March 31, 2016, otherwise litigation should resume.

This matter has laid dormant and only comes before the Court at this time because of a related matter not involving the Petitioner and Respondent's Motion to Dismiss.

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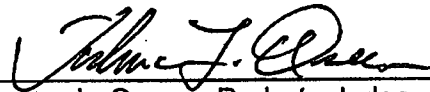


Petitioner has had ample time to proceed with this action. Such inaction constitutes unreasonable neglect.

IT IS THEREFORE ORDERED, that the motion of Respondent to dismiss this action for failing to prosecute and pursuant to Rule 41(b), SCRPC be and hereby is granted.

IT IS FURTHER ORDERED, that the action filed by Charles Deal, Jr. contesting the will of Charles Deal, Sr. be and hereby is dismissed.

AND IT IS SO ORDERED!


Joshua L. Queen, Probate Judge
Cherokee County

Gaffney, South Carolina
November 19, 2018

