THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2019-000601

Stone International, LLC and Eugene E. Stone, IV.....Appellants,

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,

Of Which Byte Software, LLC, Byte Software Services, LLC, Benjamin Gause, and Janice Gause are the.....Respondents.

FINAL BRIEF OF RESPONDENTS

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April 24, 2020

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STATEMENT OF THE CASE

On June 12, 2009 Appellant filed its original complaint against Respondent seeking specific performance and other relief pursuant to a management contract. Respondent filed an answer and counterclaim on July 7, 2009. The circuit court entered a consent order substituting Stone's counsel on September 2, 2009 and Stone again substituted counsel on April 8, 2010. On December 2, 2010 Respondents filed an answer and counterclaim to the second amended complaint as well as a third party complaint against Eugene E. Stone, IV. On October 11, 2011, the circuit court granted Stone's third motion to amend. The amended complaint added Janice Gause as a Defendant and two additional causes of action. On July 13, 2012 Respondents answered the third amended complaint. Between July 13, 2012 and the filing of a motion to be relieved as counsel by Appellant's counsel on April 6, 2017 no filings were made, no discovery was undertaken and no action whatsoever to prosecute the case by the Appellants occurred until Respondent's motion to dismiss or for partial summary judgment was filed on June 6, 2018.

Appellants filed their motion for summary judgment on June 11, 2018 and a hearing was held on both motions on February 19, 2019. On March 7, 2019 the Court entered an order dismissing the entire case. Respondent filed a motion to alter or amend the contents of the order and an amended order of dismissal was entered on April 5, 2019. This appeal timely followed.

STATEMENT OF FACTS

On February 16, 2004 Byte Software, LLC, ("Byte") a company solely owned by Defendant Ben Gause, entered into a management agreement with option to purchase with Stone International, LLC, ("Stone") a company solely owned by Eugene Stone.

The agreement required Stone to make a capital contribution to Byte in the amount of $200,000.00 within the first twelve months. The contract was for a six month term. The contract further prohibited Stone from binding or attempting to bind Byte in any manner during the term of the agreement and provided Stone an option to extend the term of the agreement. (Exhibit 1 to Memoranda in Support of Motion for Partial Summary Judgment) (R. Pg. 180)

Stone took over management of the company and over the course of 2004 completed the $200,000.00 capital infusion. However, Stone never exercised the option to purchase and instead purportedly executed and delivered to himself twelve consecutive six month extensions of the agreement.

In or around January and February of 2006, Stone represented to Gause that Byte was indebted to Stone for advances made in the amount of $269,450.00 and induced Gause to agree to have Byte execute a line of credit note and security agreement with Stone. Stone then executed the agreements to itself. In fact, at the time the note was executed the amount due to Stone from Byte was $164,250.00 and within ten months of the execution of the note, Stone caused Byte to transfer over $551,200.00 from its account to Stone's account resulting in a negative note balance as of December 31, 2006 of $231,850.00 (Ex. 2 to Memoranda in Support of Partial Summary Judgment) (R. Pgs. 192-194). Stone continued to transfer funds back and forth between Stone and Byte and as of the maturity date of the note, January 1, 2009, Stone had been repaid $22,033.00 in excess of what had been loaned to Byte. (Exhibit to Defendant's Memorandum in Support of Partial Summary Judgement) (R. Pgs. 194-202)

Also during this time Stone International had effectively ceased operations and had transferred all of its remaining employees into the Byte office. Gause had become concerned very early in 2009 due to the fact that the health insurance for the employees was cancelled for nonpayment, employee payroll checks were bouncing and employees were not being paid, including Gause. At the same time Gause was being prevented access to the financial information necessary to confirm the status of the company and in early 2009 Gause retook physical control of the company. (Exhibit to Defendant's Memorandum in Support of Partial Summary Judgement) (R. Pgs. 217-218; 235)

STANDARD OF REVIEW

"When reviewing a motion to dismiss for failure to prosecute pursuant to Rule 41(b), SCRCP, an appellate court may reverse the trial court's decision upon an abuse of discretion." *In Re Care & Treatment of Miller,* 393 SC 348, 713 S.E.2nd 253, 257-58 (2011; *Small v. Mungo,* 254 SC 438, 442, 175 S.E. 2nd 802, 804 (1970). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. of Greenville County*, 382 SC 8, 20, 675 S.E.2nd 439, 445 (2009). The same standard of review, abuse of discretion, applies to Stone's second issue on appeal-the circuit court's decision to remove language from the March 7, 2019 Order of Dismissal, pursuant to Respondent's Motion to Modify or Amend, citing Rules 55 and 60, SCRCP. *See e.g., Raby Constr., LLP v. Orr*, 358 SC 10, 17-18, 594 S.E. 2nd 478 (2004) ("Our standard of review…is limited to determining if there was an abuse of discretion.)"

STATEMENT OF ISSUES ON APPEAL

1. The Circuit Court did not abuse its discretion in dismissing an action which was 10 years old and had laid dormant for five years pursuant to Rule 41(b) SCRCP.

Stone filed this action seeking specific performance of an option to acquire all of the stock in the business operated by Respondents, and other relief. After utilizing three different attorneys/law firms, Appellant ceased taking any action whatsoever to prosecute their claims against Respondents for a period of almost exactly eight years. The trial court properly dismissed the case based upon this egregious failure to prosecute and the substantial prejudice which would have resulted to the Respondents from the unexcused delays.

Appellant's arguments are replete with alleged statements of fact which are completely unsupported by the record. Even when Appellant cites to a record, the conclusion it draws are unsupported and often logically contrary to such conclusions.

Appellant's entire argument against the dismissal of a ten year old case is essentially that his client couldn't afford to pursue it and that the Respondents' failure to comply with discovery caused the delay.

Appellant first argues that "Stone was no longer able to pay his legal fees" is an acceptable excuse for failure to prosecute an action without citation to any opinion in support of that contention. If that were indeed the justification, then would it not apply to a statute of limitations as well? Are Plaintiffs to be granted an automatic stay of the statute of limitations until such time as they can afford to retain counsel? If not, then why should a Plaintiff be granted a stay in the prosecution of their action because they "ran out of money". Notably, that "excuse" was not the grounds stated in the original motion to be removed as counsel filed by Appellant's attorneys in April of 2017. (Motion to be removed as counsel filed 4/6/17) (R. Pg. 121) Or in the order granting the motion which states "However, approximately 2 years ago there ceased to be any activity in this case due to Plaintiff's failure to cooperate with its counsel" and that counsel attempted to address and reconcile those issues via a March 21, 2017 letter to which the Appellant did not respond. (Order filed 5/15/17)(R. Pg. 11)

Appellant then raises, for the first time, a claim that Respondent moved to dismiss the action of the Appellant at the time of the hearing on Appellant's then counsel's motion to withdraw. No such written motion is contained within the record at any place. The reference in

the order relates solely to the Respondent's counsel request that there be a deadline for the substitution of counsel or a dismissal for failure to meet that deadline. (Order filed 5/15/17) (R. Pg. 11)

The entire remainder of Appellant's argument relies upon motions to compel, orders to produce and self-serving correspondence in support thereof. All of the motions and all of the correspondence occurred in either late 2010 or early 2011. (Record) (R. Pg. 294) Appellant now claims, in direct contradiction to his earlier argument of running out of money and the Court's finding in 2017 that his then counsel may withdraw for lack of cooperation by Appellant, that somehow and in some way the contest over relevance of discovery documents occurring at least 6 years prior to present counsel's substitution and 8 years before it became an issue resulted in all of the delays associated with the completion of this litigation. (Docket) (R. Pg. 294)

The very last letter Appellant relies upon is dated January 24, 2011 and is requesting additional documents. It is patently clear from the record that Appellant's counsel remained counsel for another 6 years, no further correspondence was issued complaining of failing to receive those documents nor was a motion to compel or rule to show cause filed for failure of Respondent to comply with any prior order. (Docket) (R. Pg. 294) Appellant would have this Court believe that the conclusion to be drawn from that, is that the Appellant never received the documents and was prevented from prosecuting the case to completion during those six years despite doing nothing and never complaining again. The more realistic assumption from those facts is that the documents were produced. However, even if you were to conclude that they were not, then the failure of the Appellant to pursue the remedies readily available to it, from January 24, 2011 until February 19, 2019, amounts to all of the evidence necessary to justify the trial judge's dismissal of this case.

Interestingly, Appellants' arguments, again, are inconsistent with the position they are taking with regards to their alleged inability to pursue the litigation due to failure of Respondents to provide discovery. The Appellant states "Stone hired current counsel on July 7, 2017. The Circuit Court called a status conference on September 6, 2017. Respondents took Jack Stone's deposition in December of 2017." (Appellant's brief) (R. Pg. 3, 4) Appellant then states that a subsequent status occurred. The Appellant therefore acknowledges that from July 7, 2017 until the hearing on Respondent's motion for partial summary judgment and to dismiss held February 19, 2019, at no time did Appellant raise the issue of failure to provide discovery or request any

further discovery. Seven years, two status conferences and nary a complaint until the hearing on the motion to dismiss is definitive proof that this issue is nothing more than grasping at straws.

This Court's and the Fourth Circuit's opinions fully support the trial judge properly exercising his discretion to dismiss. Contrary to the position of the Appellant, Appellant did actively and deliberately participate in the delay of prosecuting this case and the destruction of evidence during that delay.

During the course of the 10 year delay, solely resulting from the Plaintiff's dilatory practices, the most important witness, Dennis Watt, the bookkeeper during the time in question, died. Mr. Stone testified repeatedly during his deposition in 2017 that he had disposed of, destroyed, erased or otherwise no longer had available virtually any of the financial records necessary to the presentation, of not only his case, but the defense, and that the records were destroyed after the commencement of the litigation. (Defendants Memorandum in Support of Partial Summary Judgement Ex. 3 and 4) (R. Pgs. 204-246)

When asked about the accounting records on December 14, 2017 Mr. Stone replied as follows:

Q: Alright. Now let me ask you about....you said "documents somewhere". Do all of the computer accounting records that you maintain for Byte Software during the period of time that you operated the business still exist?

A: No Sir.

Q: What happened to them?

A: They just....we closed operations down and reduced the size of the operations, and we shredded just magnitudes of information.

Q: And did you also delete computer records of accounts?

A: Yes, we did.

Q: And when did that happen?

A: Before we moved. It must have been 4 or 5 years ago.

Q: It would have been after this litigation commenced, correct?

A: Yes sir it would have been after that.

The Plaintiff readily admitted to spoliation of evidence and at further points in his deposition acknowledged that it would be impossible to provide banking records or backup for any of the transactions that occurred for the only relevant period of time, between the date of the

contract and the date of the filing of this litigation. (Defendant's Memorandum in Support of Partial Summary Judgment) (R. Pgs. 240-241)

"Whether an action should be dismissed for failure to prosecute is left at the discretion of the trial court judge" and "The Plaintiff has the burden of prosecuting her action and the trial court may properly dismiss an action for Plaintiff's unreasonable neglect in proceeding with her cause." McComas v. Ross, 626 S.C. 2nd 902 (Ct. App. 2006) Rule 41(b), S.C.R.C.P., provides, "for failure of the Plaintiff to prosecute" an involuntary dismissal may be granted by the Court. The Fourth Circuit found it is appropriate to dismiss an action where there is a clear record of delay or contumacious conduct by the Plaintiff and in a case cited by McComas set forth four factors to be reviewed by the trial court before dismissing a case for failure to prosecute: (1) The Plaintiff's degree of personal responsibility; (2) The amount of prejudice caused to 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.

It is difficult to imagine a more textbook example of factors 1, 2 and 3 than exist in this litigation. The Appellant has had four different attorneys, never requested a trial date and essentially did absolutely nothing to prosecute the case, preserve evidence or even acknowledge the case was pending for a period of almost 6 years. (Docket) (R. Pg. 294) Appellant refused to cooperate or respond to his counsel for over 2 years. (Order to be relived as counsel) (R. Pg. 11) Prejudice has clearly occurred as the bookkeeper who handled all of the affairs of both companies is now deceased and the Appellant has admittedly destroyed all of the records that are essential to the presentation of both parties' claims. (Defendant's Memorandum in Support of Partial Summary Judgment) (R. Pgs. 240-241) The fact that the case is 10 years old is all that needs to be said of the third factor. The record is devoid of any effort, motion or otherwise by the Defendant, to postpone, continue or otherwise seek to prevent the prompt disposition of the action. The fourth element cannot be satisfied with a lesser sanction of dismissal due to the prejudice which occurred by the destruction and spoiliation of the documents and evidence necessary for presentation of the Defendant's defense and counterclaims. No sanction, less than a dismissal, will bring those documents back, improve any of the surviving witnesses' memory or place the parties back in the position they were back in 2009.

The Defendant has further been prejudiced by the Appellant sitting on his hands in that the Appellant seeks to enforce a contract to purchase the business. The Defendant had little choice

but to continue to operate the business while the action was pending and has now done so for 10 years while the Appellant sits idly by hoping to ultimately benefit from the Defendant's efforts.

Indeed, spoiliation of evidence alone is sufficient to strike a party's pleadings when the use of adverse jury instructions would not adequately account for the prejudice created. Stokes v. Spartanburg Regional Medical Center 629 S.C.2nd 675 (Ct. App. 2006) and QZO, Inc. v. Moyer, 594 S.C.2nd 541 (Ct. App. 2004).

The three "excuses" offered by the Appellant as to why the action should not be dismissed lack support in the record, logic or fact, nor has Appellant asserted how any of those excuses would constitute an abuse of discretion. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support". State v. Black, 732 S.C.2nd 880 (2012) The uncontradicted facts in this case are that the action was ten years old, Appellant's last counsel was relieved 8 years after the commencement of the action for "failing to cooperate for over 2 years with counsel" and absolutely no activity was undertaken to prosecute the case from July 13, 2012 to April 6 of 2017. Rule 41(b) SCRCP states, in part, "for failure of the Plaintiff to prosecute...the Defendant may move for dismissal of an action or for any claim against him." The law and the facts fully justify the exercise of discretion of the trial judge in this case who, because it was a business court case, participated in every motion, status conference or proceeding from June 14, 2010 until its dismissal. Appellants have not, and could not have, shown that the exercise of the trial judge's discretion are controlled by an error of law or that there is no evidence in the record.

2. Whether the Circuit Court erred in granting Respondent's motion to modify or amend the order is irrelevant to the appeal as the relief is identical.

Whether Respondents incorrectly cited Rules 55 and 60 SCRCP for their motion to modify or amend the order of dismissal is irrelevant.

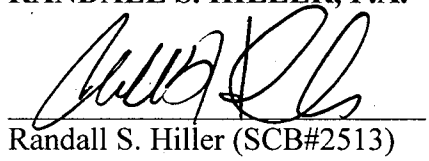
The motion to modify or amend original order and the subsequent amended order simply removed an unnecessary finding, the relief in both orders was identical.

Accordingly, it is respectfully submitted that this issue is irrelevant to the disposition of this appeal.

CONCLUSION

The trial court properly exercised discretion in ruling that the Appellant failed to prosecute its action as required by Rule 41(b) SCRCP, by taking no actions whatsoever from July 2012 until April of 2017 whereupon it found that the Appellant had failed to cooperate or communicate for a period of over two years.

RANDALL S. HILLER, P.A.



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January 17, 2020

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CERTIFICATE OF COUNSEL

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

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