

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas for the Thirteenth Circuit

Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2019-000601

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SC Court of Appeals

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 APPELLANTS

Jacob Michael Hughes
S.C. Bar No. 100646
HUGHES LAW FIRM, L.L.C.
1616A Paris Avenue West
Port Royal, South Carolina 29935
(864) 569-2498

*Attorney for Appellants Stone
International, LLC, and Eugene E. Stone, IV*

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in dismissing Stone's action for failure to prosecute pursuant to Rule 41(b), SCRCP?
- II. Did the circuit court err in granting Respondents' Motion to Modify or Amend the Order of Dismissal, pursuant to Rules 55 and 60, SCRCP, when the rules specifically cited by Respondents were immaterial to their Motion and to the facts of this case?

STATEMENT OF THE CASE

Appellants Stone International, LLC, and Eugene E. Stone, IV (collectively, “Stone”), appeal the circuit court’s dismissal of its action against Byte Software, LLC (“Byte”), Byte Software Services, LLC (“Byte Services”), Benjamin Gause (“Gause”), and Janice Gause (collectively, “Respondents”).¹

On June 12, 2009, Stone filed its original Complaint against Byte, seeking to foreclose a security interest. Three days later, the Complaint was amended to correct a clerical error. Byte filed an answer and counterclaim on July 7, 2009. The circuit court entered a consent order substituting Stone’s counsel on September 2, 2009. Stone substituted its second counsel on April 8, 2010. On June 6, 2010, Stone served Byte with interrogatories and requests for production. (R. p. 117). The case was assigned to the Business Court on June 14, 2010. On July 15, 2010, the circuit court “ordered the parties to engage in mediation and directed Defendant to produce financial information and documentation necessary for conducting . . . mediation in a meaningful” way. (R. p. 118). Mediation took place on August 18, 2010.

On November 18, 2010, the circuit court granted Stone’s Motion to Amend. The Second Amended Complaint added Gause as a defendant and four additional causes of action against Byte and Gause: (1) breach of contract; (2) quantum meruit; (3) promissory estoppel; and (4) interference with a prospective contractual relationship.

In its November 18, 2010 Order, the circuit court granted Stone’s Motion to Compel Production. Stone served interrogatories and requests for production on June 6, 2010. (R. p. 117). Byte failed to respond to the discovery requests. On account of Byte’s “refusal to provide [Stone with] . . . information necessary to perform due diligence, the [August 18] mediation

¹ As secondary lienholders, Defendants 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 are not parties to this appeal.

reached an impasse.” (R. p. 119). The circuit court ordered Byte “to produce to Plaintiff’s counsel any and all documents requested in Plaintiff’s First Requests for Production” and “to fully respond to all [i]nterrogatories contained in Plaintiff’s First Set of Interrogatories.” (R. p. 7). Byte “has yet to produce any documents or otherwise respond to [the] . . . discovery requests” served on June 6, 2010. (R. p. 119). Almost nine years later, Byte and its counsel have never complied with the November 18, 2010 Order compelling production.

On December 2, 2010, Byte and Gause filed an answer and counterclaim to the Second Amended Complaint, as well as a third-party complaint against Eugene E. Stone, IV (“Jack Stone”). Stone deposed Gause in December 2010. Stone deposed Janice Gause in March 2011. On October 11, 2011, the circuit court granted Stone’s Second Motion to Amend. The Third Amended Complaint added Janice Gause as a defendant and two additional causes of action: (1) pierce the corporate veil, as to Byte Services, and (2) civil conspiracy, as to Respondents. (R. pp. 41–42, 43–44). Byte’s counsel consented to adding Byte Services as a defendant. On July 13, 2012, Respondents answered the Third Amended Complaint.

Stone’s counsel filed a motion to be relieved on April 6, 2017. (R. p. 121). At the hearing on this motion, Respondents moved to dismiss the case. (R. pp. 11, 12). The circuit court granted Plaintiff counsel’s Motion to be Relieved and required Stone to obtain new counsel within thirty days (R. p. 12), a deadline that was once extended. Stone complied with the Order and obtained new counsel on July 7, 2017. The circuit court did not grant Respondents’ Motion to Dismiss.

A status conference was held on September 6, 2017. Respondents took Jack Stone’s deposition in December 2017. A second status conference was held on May 31, 2018. The circuit court gave both parties thirty days to file any motions. Respondents filed a motion for partial summary judgment on June 6, 2018. Stone filed a motion for summary judgment on

June 11, 2018. Stone and Respondents submitted briefs, and the circuit court heard oral argument on February 19, 2019. At the hearing, Respondents moved to dismiss the case.

On March 7, 2019, the circuit court dismissed the entire action for failure to prosecute. The circuit court did not rule on summary judgment: “After careful consideration . . . the Court finds it unnecessary to address the specific issues raised by either party under their motions for partial summary judgment . . . given that the Court decides to dismiss the entire action pursuant to Rule 41, SCRCF.” (R. pp. 15–16).

On March 8, 2019, Respondents filed a motion to modify or amend the Order dismissing Stone’s case. (R. p. 249). Stone objected to the proposed changes, namely, removing “reference to Plaintiffs’ Motion to Compel, to . . . [the] November 18, 2010 Order to Compel Production, and to defense counsel’s failure and refusal to comply with said Order.” (R. p. 250). Stone also supplemented its Response with a one-sentence objection, pointing out that Respondents’ Motion to Modify or Amend “is explicitly based on Rules 55 and 60, SCRCF, neither of which appear to have any relevance to . . . [their] motion or to this case.” (R. p. 293).

On April 5, 2019, the circuit court amended the Order dismissing Stone’s case. (R. p. 19).

The following language had been removed:

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 . . . Gause “retook physical control of the company [Byte].” 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.” . . . Despite the November 18, 2010 Order, Defendants’ counsel never provided the information sought by Stone.

(R. pp. 16, 20). Stone timely filed a notice of appeal on April 5, 2019. Stone filed its Amended Notice of Appeal on April 8, 2019.

STATEMENT OF FACTS

Beginning in 2010, Byte refused to respond to Stone’s discovery requests. Stone served interrogatories and requests for production on June 6, 2010. Byte’s counsel claimed that the

information and documents requested were irrelevant and not reasonably calculated to lead to the discovery of relevant evidence. (R. p. 7). On July 15, 2010, the circuit court “ordered the parties to engage in mediation and directed . . . Byte to produce financial information and documentation necessary for conducting such mediation in a meaningful” way. (R. p. 118). Stone required certain information about Byte in order to determine the current value of the company. “Due to . . . Byte’s failure to provide this vital information, the mediation was postponed until August 18, 2010.” (R. p. 118). At the mediation, Stone and Byte “agreed to provide one another with certain information and documentation necessary to facilitate settlement.” (R. p. 119). Afterwards, Byte reneged on its commitments, and “the mediation reached an impasse.” (R. p. 119).

On October 4, 2010, Stone filed a motion to compel discovery. On November 18, 2010, the circuit court granted Stone’s Motion to Compel. The circuit court specifically found that the information and documents requested “are relevant and germane to the issues involved in this case.” (R. p. 7). The circuit court ordered Byte to “produce any and all information and documentation sought by Plaintiff in their discovery requests” (R. p. 7).

Byte ignored the Order compelling production. In December of 2010, Stone’s counsel wrote a letter to Byte’s counsel. In pertinent part, the letter reads as follows:

[T]he production was incomplete and failed to contain what we have consistently maintained is the most important information for our client to obtain—information and documentation regarding the financial condition of the business [Byte] since the Defendants locked Stone International out of the Byte facilities on April 9, 2009. Notwithstanding all the protections for the production of this information already in place, your client appears to refuse to provide this vital information. *We have unfortunately encountered an on-going series of delays during the past seven months regarding this issue.*

(emphasis added) (R. p. 288). Byte continued to ignore Stone’s discovery requests. Stone’s counsel wrote a second letter on January 24, 2011. Byte’s “continuous failure to provide the documents requested by Plaintiff is a violation of . . . [the] Order of November 18, 2010. . . .

We have been consistently disappointed by your client's failure to provide the documents requested even under the Order of the Court." (R. p. 292). Though willing, Stone could make no progress towards settlement: Byte has "provided virtually no documentation concerning the financial condition of the business since Defendants locked Plaintiff out on April 9, 2009." (R. p. 290).

Throughout the major course of this litigation, from filing of the Complaint in 2009 until April 2017, Stone was at all times represented by prominent counsel. (R. p. 284, lines 12–13, lines 15–17). Stone hired well-respected local counsel for the management and prosecution of its case. Given the obstacles to discovery created by Byte, however, "[a]fter some time, Stone was no longer able to pay its legal fees." (R. p. 171). "Per the terms of engagement . . . [Stone's counsel] withdrew from representation in April 2017." (R. p. 171). Stone had become "unable personally and financially to pursue his claims against [D]efendants." (R. p. 284). Stone's "delay" was not intentional.

Byte, on the other hand, has shown deliberate indifference to Stone's rights—and to the rights of discovery provided by the rules. Stone served interrogatories and requests for production on June 6, 2010. (R. p. 117). Byte repeatedly failed to respond. Byte even ignored the November 18, 2010 Order of the circuit court requiring it "to produce to Plaintiff's counsel any and all documents requested in Plaintiff's First Requests for Production" and "to fully respond to all Interrogatories contained in Plaintiff's First Set of Interrogatories." (R. p. 7). As early as December 2010, Stone had "encountered an on-going series of delays during the past seven months regarding this issue." (R. p. 288). If prosecution of this case is an important factor, Byte's predominant role in the delay should be considered.

STANDARD OF REVIEW

"When reviewing a motion to dismiss for failure to prosecute pursuant to Rule 41(b), SCRCF, an appellate court may reverse the trial court's decision upon an abuse of discretion."

In re Care & Treatment of Miller, 393 S.C. 348, 713 S.E.2d 253, 257-58 (2011); *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 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 Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 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 key language from the March 7, 2019 Order of Dismissal, pursuant to Respondents’ Motion to Modify or Amend, citing Rules 55 and 60, SCRPC. *See, e.g., Raby Constr., LLP v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478 (2004) (“Our standard of review . . . is limited to determining if there was an abuse of discretion.”).

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DISMISSING STONE’S ACTION FOR FAILURE TO PROSECUTE PURSUANT TO RULE 41(B), SCRPC.

Summary of Argument

Stone filed this action on June 12, 2009. At all times, until May 2017, Stone was represented by well-respected local counsel. Stone served Byte with interrogatories and requests for production on June 6, 2010. Byte refused to respond to Stone’s discovery requests. On July 15, 2010, the circuit court “ordered the parties to engage in mediation and directed . . . Byte to produce financial information and documentation necessary for conducting . . . mediation in a meaningful manner.” (R. p. 118). Still Byte failed “to provide [Stone with] . . . information necessary to perform due diligence . . . [and] the mediation reached an impasse.” (R. p. 119). On November 18, 2010, the circuit court granted Stone’s Motion to Compel Production.

Notwithstanding the November 18, 2010 Order of the circuit court, Byte persisted in its refusal to respond to Stone’s discovery requests. “After some time, Stone was no longer able

to pay its legal fees.” (R. p. 171). Stone was not personally responsible for the ensuing “delay” from 2012 until April 2017. Rather, Stone had become “unable . . . financially to pursue . . . [its] claims against” Respondents. (R. p. 284, lines 13–15). The delay was not deliberate, on the part of Stone or of its counsel.

“Per the terms of engagement . . . [Stone’s counsel eventually] withdrew from representation . . .” (R. p. 171). Counsel filed a motion to be relieved on April 6, 2017. (R. p. 121). At the hearing on this motion, Respondents moved to dismiss the case. (R. pp. 11, 12). The circuit court granted Plaintiff counsel’s Motion to be Relieved and allowed Stone to obtain new counsel. (R. p. 12). Stone obtained new counsel on July 7, 2017. The circuit court did not grant Respondents’ Motion to Dismiss.

During the hearing leading to dismissal, the circuit court acknowledged that Stone’s new counsel had “pursued this matter zealously.” (R. p. 284, lines 17–19).

For these reasons and the others discussed below, dismissal was improper. Stone asks this Court to reverse.

- 1. The circuit court effectively “ruled” on failure to prosecute in May 2017, when it allowed Stone to obtain new counsel and did not grant Respondents’ Motion to Dismiss.**

Stone’s counsel filed a motion to be relieved on April 6, 2017. (R. p. 121). At the hearing on this motion, Respondents moved to dismiss the case. The circuit court granted Plaintiff counsel’s Motion to be Relieved and allowed Stone to obtain new counsel. Stone obtained new counsel on July 7, 2017. The circuit court did not grant Respondents’ Motion to Dismiss. Thus, the case in effect began anew, with no failure to prosecute. At minimum, the reality was that the case continued.

It seems inconsistent that the circuit court would give Stone the opportunity to obtain new counsel and later dismiss the case for failure to prosecute, when Stone’s new counsel proceeded “zealously.” This fact is reflected in the record. 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 2017. That same month, Respondents' counsel stated that he would like to depose five additional witnesses. Stone hand-delivered the witness contact information in January 2018. (R. p. 167). "Despite multiple inquiries regarding [the scheduling] progress, Stone received no response . . . until April [2018]." (R. p. 167). At the second status conference on May 31, 2018, Respondents' counsel "advised the Court that he never intended to take these individuals' depositions: He only wanted to see 'if they were alive.'" (R. p. 167).

At the summary judgment hearing on February 19, 2019, Stone's current counsel stated that "I have pursued this matter zealously . . ." (R. p. 284, lines 17–18). The circuit court agreed: "Yes, you have." (R. p. 284, line 19). Furthermore, the determinative evidence in this case—revealing illegal and dishonest conduct of Respondents—had never been fully presented to the circuit court until the February 19, 2019 hearing that led to dismissal.

2. Applying the Court's holding in *McComas v. Ross* and Fourth Circuit precedent, Stone was not "personally responsible" for the delay in this case, nor was the delay "deliberate."

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Rule 41(b), SCRPC. This Court addressed the issue of failure to prosecute in *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006). Dismissal of actions based on Rule 41(b) should be affirmed where 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." *McComas*, 368 S.C. at 62, 626 S.E.2d at 904. "A sanction of dismissal is too severe if there is no evidence of intentional misconduct." *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1995).

According to the Fourth Circuit Court of Appeals, four factors must be considered by the trial judge before dismissing an action for failure to prosecute. *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976). “[D]ismissal is . . . a harsh sanction . . . [and] should be resorted to only in extreme cases.” *Id.* at 396 (internal quotation marks omitted); *Dyotherm Corp. v. Turbo Machine Co.*, 392 F.2d 146, 149 (3d Cir. 1968). The factors are: (i) the plaintiff’s degree of personal responsibility; (ii) the amount of prejudice caused the defendant; (iii) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (iv) the effectiveness of sanctions less drastic than dismissal. *McComas*, 368 S.C. at 63, 626 S.E.2d at 904; *Hillig v. Comm’r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990).

i. The plaintiff’s degree of personal responsibility

Stone was not personally responsible for the delay in this case. The November 18, 2010 Order required Byte “to produce . . . any and all documents requested in Plaintiff’s First Requests for Production” and “to fully respond to all [i]nterrogatories contained in Plaintiff’s First Set of Interrogatories.” (R. p. 7). Byte’s counsel blatantly ignored the Order and continued to deny Stone “vital information” concerning the financial condition of the business. (R. p. 288). “After some time, Stone was no longer able to pay its legal fees.” (R. p. 171). “Dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff.” *McComas*, 368 S.C. at 68, 626 S.E.2d at 904; *see also Hillig*, 916 F.2d at 174 (“A dismissal sanction is usually inappropriate when it unjustly penalizes a blameless client for . . . attorney’s behavior.”).

ii. The amount of prejudice caused the defendant

Respondents’ counsel claims that “there is a significant prejudice . . . associated with sitting on your hands for ten years.” (R. p. 275, lines 13–14). Apparently, Gause “didn’t have any choice” but to run the Byte business in the interim. “Stone wants to come in and exercise

an option to purchase [Byte] . . . and gain all the benefit of that ten years['] additional work and effort by my client.” (R. p. 275, lines 16–22).

The truth is that Stone exercised its option to purchase Byte before this litigation even began, “in early 2009.” (R. pp. 38, 39, 112). Gause civilly conspired with Janice Gause to remove Stone from Byte and misappropriate the company for himself. (R. pp. 41–42, 43–44). Respondents have unclean hands. The mere passage of time cannot wipe away their illegal conversion of Byte.

Respondents’ counsel also alleges that Stone has “destroyed everything” during the pendency of litigation. (R. p. 274, line 8). This is a false, blanket statement. At the motion for summary judgment hearing on February 19, 2019, Stone submitted financial and accounting records to validate its substantial claims against Byte. Respondents bear the burden of showing prejudice, with specificity.

iii. The presence of a drawn out history of deliberately proceeding in a dilatory fashion

In *McComas*, the Court found that the plaintiff “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, or unreasonable neglect, as required by the South Carolina case law.” 626 S.E.2d at 905. The same is true of Stone, who did not delay deliberately. At a certain point, Stone became “unable personally and financially to pursue his claims” (R. p. 284). “[T]here is no evidence of intentional misconduct.” *Orlando*, 320 S.C. at 511, 466 S.E.2d at 355 (1995); *see also Bush v. U.S. Postal Serv.*, 496 F.2d 42, 44 (4th Cir. 1974) (“This record does not depict a history of deliberate delay.”).

iv. The effectiveness of sanctions less drastic than dismissal

On May 15, 2017, the circuit court granted Plaintiff counsel's Motion to be Relieved and allowed Stone to obtain new counsel. Stone obtained new counsel on July 7, 2017. Stone's new counsel pursued the case "zealously," a fact acknowledged by the circuit court. (R. p. 284, lines 17–19). In light of these circumstances, Stone respectfully contends that no sanctions were appropriate.

II. RESPONDENTS INCORRECTLY CITED RULES 55 AND 60, SCRPC, AS THE SOLE BASIS FOR THEIR MOTION TO MODIFY OR AMEND THE ORDER OF DISMISSAL.

On March 7, 2019, the circuit court dismissed Stone's entire action for failure to prosecute. The Order of Dismissal referred to defense counsel's refusal to comply with the rules of discovery and with the November 18, 2010 Order compelling production. (R. p. 16). Respondents filed a motion to modify or amend the Order of Dismissal. Respondents claimed that the Order "set[] forth a factual finding . . . not contained within the record." (R. p. 249). Stone objected to the motion, arguing that Byte's non-compliance with the November 18, 2010 Order was well established. (R. p. 250). As evidence, Stone submitted letters from prior counsel to Randall S. Hiller, Esq., attorney for Respondents:

You[r] client's failure to produce the information requested is a violation of the Court's November 18th Order It is unfortunate that the good faith production of the relevant discovery information and materials we have sought since June [2010] continues to be an issue. We are disappointed that we cannot get this basic information even under an Order of the Court.

(R. p. 251). Stone also objected that Rules 55 and 60, SCRPC, the sole basis of Respondents' Motion, appear to have no relevance to the facts of this case. (R. p. 293).

On April 5, 2019, the circuit court amended the Order dismissing Stone's case. (R. p. 19).

The following language was removed:

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 . . . Gause 'retook physical control of the company [Byte].' Granting Stone's motion, the Court found that the information requested and documents dated after April 9 "are relevant and

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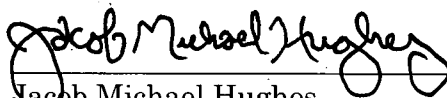
(R. p. 16).

Rule 55, SCRPC, deals with default. Likewise, Rule 60, Relief from Judgment or Order, is inapplicable. Rule 60(a) addresses clerical mistakes. Rule 60(b) may grant relief from an order based upon mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, misrepresentation, or misconduct of an adverse party. None of these factors apply.

CONCLUSION

For the reasons above, the circuit court abused its discretion in dismissing Stone’s action for failure to prosecute and in granting Respondents’ Motion to Modify or Amend. Accordingly, this Court should reverse and reinstate the case below.

Respectfully submitted,



Jacob Michael Hughes
S.C. Bar No. 100646
HUGHES LAW FIRM, L.L.C.
1616A Paris Avenue West
Port Royal, South Carolina 29935
(864) 569-2498

*Attorney for Appellants Stone
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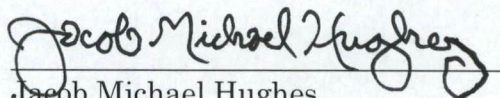
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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Final Brief of Appellants complies with Rule 211(b).



Jacob Michael Hughes
S.C. Bar No. 100646
HUGHES LAW FIRM, L.L.C.
1616A Paris Avenue West
Port Royal, South Carolina 29935
(864) 569-2498

*Attorney for Appellants Stone
International, LLC, and Eugene E. Stone, IV*

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