THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-In-Equity

Joseph M. Strickland, Master-In-Equity Judge

Case No. 2009-CP-40-03264

Appellate Case No. 2021-000576

The unnamed Joint Venture of Craig. B. Stoneburner and Gary McLaurin with Respect to Property Located at 301 South Edisto Avenue, by and through Craig B. Stoneburner, it's managing Venturer,

Appellant,

v.

George Anthony Moluf, III, James Whittington Clement, and James Venable Revercomb, III,

Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 24, 2008, the Respondents George Moluf, James Clement, and James Revercomb entered into a rental agreement with the Appellant for a one (1) year lease of the Plaintiff's 301 South Edisto Avenue property in Columbia, South Carolina. Subsequently, the Appellant alleges the Respondents broke the terms of the lease and on May 4, 2009, the Appellant Craig Stoneburner ("Stoneburner") *pro se* filed a summons and complaint alleging damages as the result of the alleged breach of the rental agreement. The Respondents answered and counterclaimed on June 2, 2009. Stoneburner replied to the counterclaim on June 4, 2009. On September 14, 2009, the Respondents filed a motion to dismiss, arguing that the Appellant did not have standing[1]. Appellant retained, Barry Stanton, Esq., who filed a notice of appearance on February 24, 2010 and on March 29, 2010, filed a motion to amend the complaint and proposed amended complaint to change the name of the Plaintiff to the present Appellant.

A hearing was held on the motion to dismiss on March 1, 2010 before Judge Casey Manning. On April 20, 2010, the parties jointly requested a continuance from Judge Alison Lee

[1] Stoneburner believed he held the subject property outright which would allow him to proceed pro se. Discovery revealed a business partner held some interest in the subject property in the form of an LLC.

for the roster scheduled for the week of April 27, 2010, noting that Stoneburner had recently retained counsel, the parties were exchanging discovery and had a deposition scheduled. By order filed August 4, 2010, Judge Manning granted the Defendants' motion to dismiss on the basis Stoneburner lacked standing to bring the suit and dismissed the case with prejudice. On this same date, Judge Michelle Childs filed an order denying the motion to amend the complaint as moot. On August 11, 2010, Appellant Stoneburner timely filed a motion to reconsider the order of dismissal which was denied by Judge Manning by order dated March 29, 2011.

Stoneburner timely appealed Judge Manning's orders of dismissal and order denying the motion to reconsider on May 6, 2011. The parties eventually settled and dismissed their appeal and the S.C. Court of Appeals issued its remittitur to the circuit court. By consent order dated October 26, 2011, Judge Manning reconsidered and denied the motion to dismiss and granted the motion to amend the complaint.

The matter appeared on the February 16, 2012 and April 10, 2012 non-jury trial rosters but was not called or reached. The matter appeared as number 6 on the May 7, 2012 roster; however Respondent's counsel wrote Judge James R. Barber, a letter requesting a date certain. By email dated May 8, 2012, Appellant's counsel emailed Respondent's counsel confirming that Respondent would handle the paperwork to refer the matter to Judge Joseph Strickland, Master-in-Equity and seek a hearing on June 14, June 13 or ASAP after June 25. Appellant's counsel followed up with Respondent's counsel about the reference by email on May 31, 2012.

On September 05, 2012, Appellants counsel again inquired of Respondent's counsel about the order of reference pointing out that the matter was on the trial roster for next week and offered to try the matter non-jury before a circuit judge. Respondent's counsel replied "my

fault" and prepared a consent order of reference which was signed and filed by the parties on September 17, 2012.

Pursuant to the Master-in-Equity's policy, it is the responsibility of the parties to schedule their own hearings. On December 30, 2014, Plaintiff's counsel, Barry Stanton, moved in the Court of Common Pleas to withdraw as Plaintiff's counsel in this matter and to enlarge the time of any deadlines.

In January of 2015, the Plaintiff Craig Stoneburner reached out to the Master-in-Equity to inquire as to the status of the matter. He was informed by the Master-in-Equity's support staff that "landlord- tenant" matters were not heard by the Master. In response, the Plaintiff sent correspondence to the Master requesting the matter be transferred back to the Court of Common Pleas. (R.)

The Plaintiff received no objections to this request and assumed it was transferred. On September 17, 2017, the Master-in-Equity dismissed the matter under an omnibus order dismissing numerous cases due to the Court's transition to an electronic case management system. The order was an attempt to "close" older cases that were showing as pending. The Plaintiff was not informed of this order until December of 2018, when he inquired in person at the Richland County Clerk of Court's office as to why the matter had not been called in the Court of Common Pleas. He immediately notified the Master-in-Equity court that the matter was not resolved. The Master-in-Equity restored the case on December 19, 2018.

On February 4, 2019, this matter appeared on the non-jury roster of the Richland County Court of Common Pleas. Plaintiff hired new counsel, J. Clarke Newton, Esq., to represent him in the matter. Mr. Newton filed a notice of appearance on March 1, 2019. On this same day, Mr. Newton emailed the scheduling clerk for the Court of Common Pleas, Paul Gunter, inquiring as

to the status of the roster meeting. Mr. Gunter informed him at that time that the matter should not have been transferred to the court of Common Pleas, and said the matter was pending in the Master-in-Equity court. (R.) Once new counsel was brought up to speed on the matter, a demand was sent in an attempt to resolve the matter. (R.) On August 29, 2019, the matter was again dismissed under an omnibus dismissal order for multiple cases. Plaintiff's counsel reached out to the Court and requested it be restored, which the court did on August 30, 2019. Plaintiff's counsel communicated with defense counsel to schedule a hearing on the merits. Defendants responded with a motion to dismiss, claiming a lack of prosecution. (R.) Although it was the Defendants' motion, Plaintiff's counsel coordinated with the Court to schedule the motion hearing. A hearing was held on the motion on March 5, 2020. (R.) During the hearing, the Court raised the doctrine of laches, which the Defendant had never raised in any prior pleadings including the motion to dismiss that was before the Court. Based on this doctrine, the Court dismissed the Plaintiff's case by order filed March 19, 2020.

Appellant timely filed a motion to reconsider this order on March 30, 2020. A hearing on this motion was held by Judge Strickland on November 16, 2020. After that hearing, Judge Strickland asked Respondents' counsel to file a response to the motion to reconsider which Respondents did on January 25, 2021. Appellant filed a Reply to this response on February 17, 2021. On March 9, 2021 Judge Strickland held a status conference to consider the matter further after briefing by the Respondent. On April 19, 2021, Judge Strickland filed his order denying Appellant's motion to reconsider. This appeal followed.

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. McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App 2006)

ARGUMENTS

1. THE MASTER ABUSED HIS DISCRETION BY DISMISSING THE APPELLANT'S CASE FOR LACHES AND LACK OF PROSECUTION BASED MERELY ON THE AGE OF THE CASE WITHOUT CONSIDERING OR FINDING (1) APPELLANT'S LACK OF PERSONAL RESPONSIBILITY FOR THE DELAY, (2) THE LACK OF PREJUDICE TO THE DEFENDANTS, (3) THE ABSENCE OF A REPEATED HISTORY OF DELIBERATELY PROCEEDING IN A DILATORY FASHION AND (4) THE EFFECTIVENESS OF SANCTIONS LESS DRASTIC THAN A DISMISSAL.

In those cases where our supreme court has affirmed dismissal of actions based on a 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. McComas v. Ross, 626 S.E.2d 902, 368 S.C. 59 (S.C. App. 2006) (emphasis added.)

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).

In McComas, the South Carolina Court of Appeals cited McCargo for the factors to be addressed by the court before dismissing a case for failure to prosecute. As discussed below,

none of these factors favor dismissal in this case, and it was error for the court to fail to address them.

(1) APPELLANT'S LACK OF PERSONAL RESPONSIBILITY

The record in this case shows that Appellant was not personally responsible for delaying this case from being heard on its merits. In fact, the opposite is true. The Respondent requested that this case be continued at least three times when it appeared on the roster for trial (letter to Judge Lee (joint continuance request); letter to Judge Barber, and Stanton email re: referral of case). It was the Respondent who asked to refer the case to the master and agreed to schedule the matter for a hearing.

By email dated May 8, 2012, Appellant's counsel emailed Respondent's counsel confirming that Respondent would handle the paperwork to refer the matter to Judge Joseph Strickland, Master-in-Equity and seek a hearing on June 14, June 13 or ASAP after June 25. (R.) Appellant's counsel followed up with Respondent's counsel about the reference by email on May 31, 2012. (R.) On September 05, 2012, Appellants counsel again inquired of Respondent's counsel about the order of reference pointing out that the matter was on the trial roster for next week and offered to try the matter non-jury before a circuit judge. (R.) Respondent's counsel replied, "my fault" and prepared a consent order of reference which was signed and filed by the parties on September 17, 2012.

After his counsel, Barry Stanton, filed a motion to withdraw on December 30, 2014, Appellant Stoneburner sent correspondence dated January 9, 2015, to the master requesting this matter be remanded to the circuit court upon learning that the master did not hear landlord tenant cases. (R.) His letter and testimony in the record indicates that the master's office had agreed to transfer it. *Id.* Of course cases in circuit court are usually scheduled in due course by the

respective clerks of court in compliance with rules of civil procedure and court administration. Therefore, the Appellant expected the court would schedule the case for a hearing in due course.

When Appellant first learned in December 2018 that the case was dismissed by the master's omnibus order, the Appellant immediately notified the Master-in-Equity court that the matter was not resolved. The Master-in-Equity restored the case on December 19, 2018. On February 4, 2019, this matter appeared on the non-jury trial roster in circuit court for the week of March 4, 2019. Plaintiff hired new counsel, J. Clarke Newton, Esq., to represent him in the matter. Mr. Newton filed a notice of appearance on March 1, 2019. On this same day, Mr. Newton emailed the scheduling clerk for the Court of Common Pleas, Paul Gunter, inquiring as to the status of the roster meeting. Mr. Gunter informed him at that time that the matter shouldn't have been transferred to the court of Common Pleas, and said the matter was pending in the Master-in-Equity court. (R.)

After becoming familiar with the case, Mr. Newton sent demand correspondence in July 2019. The case was again dismissed by omnibus order of multiple cases on August 29, 2019 and again restored by request of Plaintiff's counsel on August 30, 2019. (R.) Shortly thereafter, the Defendants filed the motion to dismiss for lack of prosecution on September 3, 2019. Even though this was a defense motion, Plaintiff's counsel took the initiative to get it scheduled. (R.)

In short, Appellant has steadfastly prosecuted this case despite numerous procedural and practical obstacles: an early dismissal and appeal, a referral to a master who "generally does not hear landlord tenant cases", the failure of Respondent scheduling the case as agreed despite reminders and follow-ups by the Plaintiff, the withdrawal of Plaintiff's counsel, the perceived transfer to circuit court, and two omnibus dismissals of multiple cases and restorations.

This court should find this factor (lack of personal responsibility) favors the Appellant and allow this case to be scheduled on the merits.

(2) THE LACK OF PREJUDICE TO THE DEFENDANTS

To prevail on either laches or lack of prosecution, prejudice must be shown by the moving party. (See Brown v. Butler, 347 S.C. 259, 554 S.E.2d 431 (Ct. App. 2001) and McComas v. Ross, 368 S.C. 59, 626 S.E. 2d 902 (Ct. App. 2006)) Undue length of time is not enough; Defendants must show that this length of time has caused a prejudice. Prejudice is a lack of notice and opportunity to prepare and be heard on an issue. Pool v. Pool, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998) (discussing prejudice in Rule 15 context as lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.) In this case, the Respondents have been aware of all the issues for a long time. The parties engaged in discovery. The case is not overly complex focused on the alleged breach of a lease by abandonment of the prospective student tenants. Respondent's counsel candidly admitted in the hearing in November 2020, that "In terms of dealing with prejudice to the parties, I have now found my people, and, you know, they're happy to respond."

This court should find that the Defendants have failed to show any prejudice and therefore, the master abused his discretion by dismissing the action.

(3) THE ABSENCE OF A REPEATED HISTORY OF DELIBERATELY PROCEEDING IN A DILATORY FASHION

As argued under factor 1(lack of personal responsibility) *supra*, there is an absence of evidence that Appellant personally delayed this matter. Therefore, it logically follows that there is an absence of evidence that Appellant repeatedly and deliberately proceeded in a dilatory fashion. While certainly this case has been delayed for a long period of time, there is no evidence in the record that this delay was the result of the Appellant deliberately and repeatedly

proceeding in a dilatory fashion. Indeed, the records show the opposite, that time and time again when this matter was not going to be heard by appeal, or referral or dismissal that Appellant fought to have it reinstated and fought to have it transferred to a court that could hear it and get it scheduled.

This court should find that this factor favors the Appellant, and the case should be scheduled and heard on its merits.

(4) THE EFFECTIVENESS OF SANCTIONS LESS DRASTIC THAN A DISMISSAL

While Appellant believes that he did not commit any action worthy of dismissal, he was not given any warning of a less drastic alternative. To put it more plainly, there was no "if this case is not tried by a certain date your case will be dismissed." Furthermore, while the master allows the parties to schedule their own cases, when the master believes the parties are being dilatory or that a case is too old, then the master has several less drastic alternatives to a dismissal: the master could set the case for a date certain; the master could provide a deadline for trial; the master could impose a scheduling order; or the master could schedule a status conference and require the parties to submit a scheduling order. None of these less drastic alternatives were considered or provided to the Appellant before dismissal of the case.

Any one of these factors is sufficient for this court to find that the case should not have been dismissed and that the master abused his discretion. When all four collectively favor a trial on the merits as opposed to dismissal, then this court's decision to reverse the master's dismissal should be manifest.

2. THE MASTER ABUSED HIS DISCRETION BY DISMISSING THE CASE BASED ON LACHES WHEN LACHES IS AN AFFIRMATIVE DEFENSE WHICH MUST BE PLED BY THE RESPONDENT AS AN AFFIRMATIVE DEFENSE OR IS WAIVED.

The doctrine of laches is an affirmative defense that must be pled pursuant to S.C. Rule of Civil Procedure 8(c). (See Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (S.C. App. 2004), Mack v. Edens, 306 S.C. 433, 412 S.E. 2d 431 (Ct. of Appeals 1991), Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (S.C. App. 2005) Defendants have never raised the doctrine of laches. They failed to plead it in their answer, and they have failed to plead it in any subsequent filing, including in their motion to dismiss. Pursuant to SCRCP Rule 8(c), failure to plead an affirmative defense is a waiver of this defense.

The Court *sua sponte* dismissed the Plaintiff's case under the doctrine of laches. In its oral ruling on March 5th , it was the sole reason this case was dismissed. However, since the Defendants never raised the doctrine of laches in their pleadings, the Master-in-Equity erred in providing relief to the Defendants under this doctrine. As stated in Heins v. Heins, 346 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001):

> It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. While it is true that pleadings in the family court must be liberally construed, his rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due process requires that a litigant be placed on notice of the issues which the court is to consider.
>
> *Id* at 227 (quoting Loftis v. Loftis, 286 S.C. 12, 331 S.E.2d 372 (Ct. App. 1985)

This court should find that the Defendants waived any defense based on laches and it was error for the master to dismiss this case on the basis of laches.

CONCLUSION

The Appellant has prosecuted this case despite numerous practical and procedural obstacles. Each of the factors to be considered by the court in deciding a motion to dismiss for lack of prosecution supports the denial of the motion to dismiss and trial on the merits: one, Appellant was not personally responsible for the numerous delays incurred in this case; two, the

Defendants have suffered no prejudice and their counsel admitted that "he had found his people and they were happy to respond;" three, there is no evidence in the record that the Appellant deliberately and repeatedly acted in a dilatory fashion; and four, Appellant was given no warning or alternative other than a dismissal. Finally, the court ultimately decided the motion based on an affirmative defense that was never pled and this was waived by Respondents. For all these reasons, this court should reverse the master's order dismissing this case and remand it for a trial on the merits.

Respectfully Submitted,

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Dated: July 26th 2021