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, its managing Venturer,

Appellant,

v.

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

Respondents,

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court abuse its discretion in granting the Respondent's Motion to Dismiss the case for Appellant's failure to prosecute its lawsuit?

2. Did the Trial Court abuse its discretion in dismissing the Appellant's case by, sua sponte, including a ground for dismissal on the basis of laches?

3. Did the Trial Court abuse its discretion by finding that it would be prejudice to the Respondents to have a trial after a ten-year delay caused by the Appellant's lack of diligence?

STATEMENT OF THE CASE

This case concerns a residential lease between a landlord (the "Appellant") and three friends (the "Respondents"), who were, at the time, University of South Carolina students. The lease was signed in August 2008. The lease is not a part of this record, but when the property was supposedly ready for occupancy, the students contested its habitability and did not take occupancy. In May of 2009, nine months after the lease was signed, the Appellant brought a breach of contract lawsuit in his own name. However, he didn't own the property; an LLC owned it. (See Respondent's Motion to Dismiss and Memo of 9/14/2009). The circuit court found that the Appellant lacked standing to bring the suit and dismissed the case. When the case was dismissed for lack of standing, the Appellant realized he could not prosecute the case without an attorney and hired counsel in the spring of 2010. (See Notice of Appearance of 2/26/2010).

Appellant is not a novice at filing lawsuits. The Appellant has filed at least one-hundred and twenty-three lawsuits, typically as a *pro se* litigant. (See affidavit of Sara Printz and Exhibits filed 1/25/2021) .

The Appellant filed an appeal. (See Notice of Appeal dated 5/6/2011). During the time of the appeal, the Respondents agreed to allow the Appellant to amend his caption to name the proper plaintiff and re-open the action. (See Order of Court of Appeals on 9/14/2011). A year after that, on September 17, 2012, a consent order was signed for the case to be sent to the Master-in-Equity. (See consent Order of Reference dated 9/17/2012).

The Appellant, according to the public index, did nothing to prosecute his case for the next two years. For reasons unknown, the Appellant and his lawyer parted company on December 30, 2014. (See Motion to Withdraw Appearance as counsel filed 12/30/2014). That Motion was never heard, but again, the Appellant began handling his case on his own.

From January 2015 after the Appellant parted ways with his lawyer until September of 2017, the Appellant did nothing to move his case forward. There were five years of inactivity between the date that the case was referred to the Master-In-Equity until the case was dismissed by an Omnibus Order of Dismissal filed by the Master-in-Equity in September of 2017. (See Omnibus Order of Dismissal filed 9/12/17). Again, the Appellant did nothing and another fifteen months passed. For reasons not revealed in the public index, the Master-in-Equity restored the case to the docket on December 19, 2018. From late December of 2018 until March of 2019, once again, no action came from the Appellant, but he hired new counsel in March 2019. (See Notice of Appearance of 3/1/2019).

After some letters were written between new counsel for the Appellant and counsel for the Respondents, the Respondents filed a Motion to Dismiss the case for lack of prosecution on September 3, 2019. (See Motion To Dismiss filed 3/1/2019). That Motion was heard on March 5, 2020 by the Master-in-Equity. On March 17, 2020, the court granted the Respondents' Motion to

Dismiss with prejudice on two grounds: Appellant's failure to prosecute his claim and the doctrine of laches. (See Order of Dismissal, dated 3/17/2020).

A Motion for Reconsideration was heard on November 16, 2020. The Order denying relief to the Appellant was filed on 4/19/2021. This appeal followed.

STANDARD OF REVIEW

The trial court's ruling of March 17, 2020 was in response to the motion brought by the Respondents to dismiss the case for failure to prosecute. The court granted the Respondents' motion pursuant to Rule 41, and added, sua sponte, that the case should be dismissed on the grounds of laches.

Rule 41 allows the lower court to properly dismiss an action for plaintiff's unreasonable neglect in proceeding with the case. See *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d, 902 (Ct. App. 2006).

The authority of a court to dismiss sua sponte is an inherent power for courts to manage their own affairs to achieve the orderly and expeditious disposition of cases. See *Collins v. Sigmon*, 299 S.C. 464, 385 S.E.2d, 835. (S.C. 1989). Both grounds for dismissal lie in the discretion of the trial court and a review of those decisions is limited to determining whether the court abused its discretion.

ARGUMENT

I. The Court below should be affirmed in its dismissal of the case for lack of prosecution.

From the very beginning, the Appellant ignored proper procedure and requirements of the law. He filed the lawsuit in his own name, but he didn't own the property. An LLC owned the

property. The Appellant didn't remember that he had a partner who was a one-third owner and that person had put the property in an LLC. After the Respondents looked at the Appellant's deed in the Register of Deeds office, they filed a Motion to Dismiss for lack of standing. (See Motion to Dismiss of 9/14/2009).

Appellant blames his partner for not informing him of the status of the title. (Hearing 3/5/2020 page 18, L 6-9).

Once the caption was corrected, an agreement between the parties was reached and the case was returned from the Court of Appeals to the Circuit Court in September of 2012.

From the spring of 2010 until December of 2014, the Appellant was represented by counsel. One would think that after knowing that the LLC owned the property, the Appellant would know that he couldn't represent himself. Instead, when he and his counsel parted company, the Appellant didn't hire new counsel for five years. (See Motion dated 12/30/2014). Although the reasons for dismissing counsel aren't in the record, Appellant states:

"...in 2014 Mr. Stanton and I quit doing business together. We're friends, but we have about ten cases..." (See Transcript of Hearing 3/5/2020, page 19 LL6-8).

Because the Appellant no longer had counsel but knowing that he needed one in this matter, the Appellant improperly chose to represent himself again. In that role, he wrote to the court on January 9, 2015, a hand-written letter asking the "Gentlemen" to send the case to "circuit court... because the Master no longer hears Landlord and Tenant Cases." The letter was not filed with the court until it was used as an exhibit to Appellant's reply to Respondents' Motion to Dismiss.

Again, the public records show that the Appellant is well-schooled in handling lawsuits (See Affidavit of Sara Printz id.) and with that experience he chose to go forward and to keep up with his own file. The Appellant told the court on March 5, 2020:

"As soon as we got through the situation with Barry Stanton getting it cleared up so we could go forward I stayed right on top of it every day." (See Hearing Transcript of 3/5/2020 Lines 1-4).

He wasn't on top of it. Years, not months, went by. As stated above, his inertia was in effect from January of 2015 to mid-2019. For four and a half years, he wasn't 'on top of it.' He didn't do anything. When confronted with a Motion to Dismiss for lack of prosecution, he plays his second blame game. He blames the Master's office for his own lack of diligence. The Appellant said he called the Master's office and spoke to someone in 2015, but the employee he mentions did not work there until 2018. He says he called others at the court, but those alleged phone calls were made in 2017 and 2018, years after he and his attorney parted ways. (See Hearing of 3/5/2020, Page 44 line 23-25; Pages 45, 46 and page 47).

Finally, when he has no one else to blame, he blames Respondents' counsel. Respondents' counsel has no duty to represent him. No more need be said. The cold truth is the Appellant sat on his rights and did nothing. He chose the least expensive route with no attorney. With the Appellant at the helm, the case never got prosecuted.

The court correctly dismissed the case for lack of prosecution and did not abuse its discretion to do so. Pursuant to Rule 41(b) and its inherent powers to manage its own docket, it is well within the authority of a court to dismiss a case based on the failure of a plaintiff to prosecute his claims. (See Rule S.C.R.C.P. 41(b); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211-12, 493 S.E.2d 826, 832 (1997) (citing Small v. Mungo, 254 S.C. 438, 442, 172 S.E.2d

802, 803 (1970) ("[I]t is within the inherent power of the court to dismiss an action for failure to prosecute."); 24 Am. Jur.2d Dismissal, Discontinuance and Nonsuit 48 (1983) ("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.") Generally, dismissal for failure to prosecute is appropriate where there is a clear record of delay and some showing of indifference to the rights of the defendant. McComas v. Ross, 368 S.C. 59, 62-63. 626 S.E.2d 902, 904 (Ct. App. 2006). The decision of a court to dismiss a case for failure to prosecute under Rule 41(b), SCRCP is within the discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion. McComas, 368 S.C. at 62, 626 S.E.2d at 904 (citing Small v. Mingo, 254 S.C. at 442, 175 S.E.2d at 804). "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) (quoting Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)).

In this case, the Court's decision to dismiss the case due to Appellant's failure to prosecute was clearly proper. As discussed above, there is a clear record of delay. There has also been some showing of indifference to the rights of the Respondents, as Appellant allowed his claims to sit idle as the years ticked by. Accordingly, similar to laches, the Court properly dismissed the case for the Appellant's failure to prosecute.

II. The Trial Court did not abuse its discretion by dismissing case, sua sponte, on the grounds of laches.

The Trial Court properly applied the exception to the general rule that an affirmative defense must be pleaded.

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999). Three elements must be shown to establish laches: "(1) delay, (2) unreasonable delay, and (3) prejudice." Emery v. Smith, 361 S.C. 207, 216, 603 S.E.2d 598, 602 (Ct. App. 2004). "The inquiry into the applicability of laches is highly fact-specific and each case must be judged by its own merits," such that "the determination of whether laches has been established is largely within the discretion of the trial court." Id.

Here, it is hard to imagine a set of facts more worthy of the application of laches. First, delay has certainly occurred in this case, which is more than a decade old. Second, the delay has been unreasonable. In connection therewith, Appellant's actions, or the lack thereof, are well documented. As the record demonstrates, Appellant effectively abandoned his case. He was represented from September of 2012 to December 30, 2014; after five years of procrastination, he hired new counsel in March of 2019. Appellant has ample litigation experience and is knowledgeable about how to navigate the courts. In short, his attempts to blame others for not advancing his own case ring hollow.

Appellant focuses little on the merits of laches and more on the fact that the Respondents did not plead it as an affirmative defense when they answered the complaint in 2009. He blames the lower court for finding, sua sponte, laches as a second reason to dismiss the case. Appellant's focus on the technicality of laches not being pleaded by the Respondents is misplaced, as there is an exception to the general rule that affirmative defenses must be pleaded. See Garrison v. Target Corp., 429 S.C. 324, 838 S.E.2d 18 (S.C. Ct. App. 2019).

In Garrison, the South Carolina Court of Appeals held, "We acknowledge courts may overlook a defendant's failure to plead an affirmative defense when it 'is timely raised to the trial court without resulting in unfair surprise to the opposing party.'" Garrison v. Target Corp., (id. Pp. 37-38), (quoting Plyler v. Burns, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007)). To explain, the Court of Appeals cited a line of federal cases and approvingly quoted the following from the United States Court of Appeals for the Fifth Circuit:

> Although failure to raise an affirmative defense under rule 8(c) in a party's first responsive pleading generally results in a waiver . . . [when] the matter is raised in the trial court in a manner that does not result in unfair surprise . . . technical failure to comply precisely with Rule 8(c) is not fatal. Thus, *a defendant does not waive an affirmative defense if he raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond.*

Garrison, 429 S.C. 324, 838 S.E.2d at 40 (alterations and emphasis in original) (citing Giles v. Gen. Elec. Co., 425 F.3d 474, 491-92 (5th Cir. 2001).

Here, the exception to the rule that an affirmative defense must be pleaded applies. First, as alluded to above, in 2009 only perhaps Appellant could foresee that he would not request a trial date for almost a decade. Therefore, the Respondents could not, in good faith, plead the doctrine of laches at the time they answered the Complaint.

However, regardless of whether the Court first recognized its application, it is undisputed that the Respondents agreed with and argued laches as alternative grounds for relief upon their Motion to Dismiss for lack of prosecution (id). (Hearing Transcript dated 3/5/2020 Page 30, Lines 1-25, and Transcript of Hearing 11/16/2020 page 12, Lines 16-25; Page 16 Lines 19-25 and Page 17 Lines 1-21) Given the circumstances, the Motion to Dismiss represented a pragmatically sufficient time – and arguably even the Respondents' first opportunity – to raise the defense.

Second, Appellant failed to object then, and has not now argued or much less shown, that raising laches at the Motion to Dismiss stage prejudiced his ability to respond. Thus, not only is there an exception to the rule that affirmative defenses must be pleaded, but the Court also applied it properly in this case. Accordingly, there was no clear error of, abuse of discretion, or manifest injustice to warrant a reversal of the Court's decision to dismiss the case, sua sponte, in part due to laches.

III. There is prejudice to the Respondents if the case is reversed.

The Respondents graduated from the University of South Carolina in 2009. When the suit was filed, they were on their way to their careers and, for one, law school. The Respondents' attorney didn't keep up with them. Time and distance separated all of them. There are faded memories. Those memories, or lack thereof, are prejudice to the Respondents. The lease has been discussed but no one seems to have a copy of it. It's not even a part of this record. By definition the very document that is the centerpiece of this litigation is missing.

Appellant's argument that prejudice has not resulted is no more persuasive than his blaming others for his own inaction. Appellant neglects to mention that the Respondents and other witnesses, who hail from as far as Virginia, were never deposed and their testimonies were not preserved. The Respondents are prejudiced by the passage of time.

It is beyond genuine dispute that, as Appellant's claim collected dust over the years, Respondents' financial prejudice has resulted. Appellant's original damages were alleged to be Sixteen Thousand Dollars (See Hearing Transcript of 11/16/2020, page 26 Lines 11-12) and have now grown to Thirty Thousand Dollars (See Hearing Transcript of 11/16/2020, page 27 lines 14-15).

When the case was sent to the Master on September 17, 2012, the Respondents were still in touch with each other and counsel. By early 2015, there was little, if any, communication. By 2019, counsel had to find them. Literally ten years had passed. What the Appellant wants is to be forgiven for his laziness and rewarded with a judgment now totaling Thirty Thousand Dollars. (See Hearing Transcript of 3/5/2020, Page 27 Lines 14-15.) The Master did not abuse his discretion for finding prejudice to the Respondents because of the Appellant's own neglect.

CONCLUSION

Ultimately, Appellant's appeal is merely his latest effort to shift blame to others and avoid consequences for failing to do what he should have done. The Appellant has failed to establish any grounds upon which the Trial Court abused its discretion in the findings of failure to prosecute, laches, and prejudice to the Respondents. Accordingly, this Court should deny the Appellant's appeal.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-In-Equity

Joseph M. Strickland, Master-In-Equity Judge

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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, its managing Venturer, — Appellant,

v.

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

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PROOF OF SERVICE

I, Sara Printz, the undersigned employee of Boger Law Firm, counsel for the Respondent, do hereby certify that I have served the Respondent's Initial Brief and Designation of Case to be included on the Record on Appeal, by causing a copy of the same to be personally deposited in the United States Mail, postage prepaid, addressed as indicated below on September 24, 2021:

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September 24, 2021

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RE: The Unnamed Joint Venture of Craig M. Stoneburner, et al. v. George Anthony Moulof, et al.
CA #: 2009-CP-40-03264
Appellate CA#: 2021-000576

Dear Ms. Kitchings:

Enclosed for filing is the Respondent's Initial Brief, the Respondent's Initial Designation of Matter, and the Respondent's Proof of Service to be Included in the Record on Appeal. Should you need anything further from this office at this time, please feel free to contact me at your convenience.

Most Respectfully,

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