

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JENNIFER L. CARUSO,

Plaintiff,

v.

CIVIL ACTION NO. 04-C-2728

BRIAN N. PEARCE and
P&T TRUCKING, INCORPORATED.

Defendants and Third-Party Plaintiffs,

v.

QUALITY MACHINE CO., INC.
GARY K. KNOTTS and JOYCE K. HALL,

Third-Party Defendants.

FILED
2007 OCT 15 PM 9:03
CLERK OF COURT
KANAWHA COUNTY
WEST VIRGINIA

ORDER

The Court has reviewed the Plaintiff's Motion and Amended Motion Requesting Stay of Dismissal, together with the court file and oral arguments of counsel, and considers the matter ripe for ruling.

The Complaint in this matter was filed on October 12, 2004. Subsequent to the filing of the Complaint, the Defendants filed Third-Party Complaints in October 2005. Cross claims were also filed and discovery was conducted by these parties. No discovery was initiated by the Plaintiff. There has been no "order or proceeding" as contemplated by Rule 41(b) of the Rules of Civil Procedure, indicative of the Plaintiff's prosecution of the case, since its filing in October 2004. Specifically, a Notice of Dismissal was filed and mailed to counsel of record on July 31, 2007, by the Clerk of the Circuit Court of Kanawha County. The last filings, immediately prior to said Notice, were on July 11th, 12th and 13th, 2006. These filings were certificates

of service indicating the service of discovery and discovery responses between the Third-Party Plaintiff and the Third-Party Defendants.

On August 3, 2007, counsel for the Plaintiff timely filed a Motion Requesting Stay of Dismissal, and on August 11, 2007, served an Amended Motion Requesting Stay of Dismissal on opposing counsel. On August 30, 2007, and September 4, 2007, counsel for the Plaintiff filed several Notices of Deposition. This Court stayed all discovery by Order entered on September 5, 2007, pending hearing on the Motion and Amended Motion Requesting Stay of Dismissal scheduled for October 4, 2007.

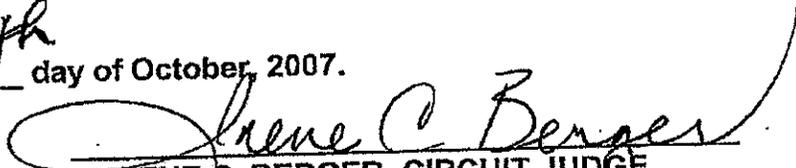
On October 4, 2007, counsel for the Plaintiff appeared for hearing, previously noticed, and counsel for the Defendant and counsel for the Third-Party Defendants appeared in opposition to the Amended Motion Requesting Stay of Dismissal. Although counsel for the Plaintiff argued that dismissal was a harsh sanction, that the Plaintiff had been in contact with her counsel, that counsel had contacted the Circuit Clerk's Office to inquire as to whether a scheduling order had been entered by the Court (as it was her experience in other circuits that courts entered scheduling orders sua sponte), this Court finds that counsel failed to establish good cause as to why the case had not been prosecuted by the Plaintiff during its pendency and, specifically, failed to establish good cause why the case had not been prosecuted during the one year immediately preceding the filing of the Notice of Dismissal. In other words, the Court finds that the Plaintiff has failed to move the case in a reasonable manner.

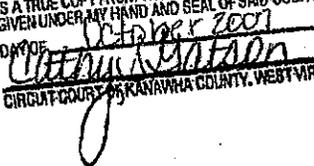
Specifically, this Court finds that no motion for entry of a scheduling order was filed by the Plaintiff, no discovery was initiated by the Plaintiff since the

Complaint was filed in October 2004, and no other "order or proceeding" was entered or conducted at the instance of the Plaintiff. Having found that no good cause for the dormancy or delay exists, this Court does not address the issue of the Defendant's prejudice, if any. The Court does note that although counsel for the Defendants appeared at the hearing and argued in opposition to the Amended Motion Requesting Stay of Dismissal, none of the Defendants in this case filed a written response to the Motion or Amended Motion Requesting Stay of Dismissal. This Court finds that given that Rule 41(b) of the West Virginia Rules of Civil Procedure and the opinion of Dimon v. Mansy impose on a plaintiff the "continuing duty to monitor a case from the filing until the final judgment," and given that the Court has the duty to control and administer its docket, the Defendants' failure to file written responses is not a bar to dismissal. In its consideration of the law and arguments, the Court is mindful that dismissal pursuant to Rule 41(b) cuts against the law's preference for deciding issues on the merits, but finds dismissal is warranted in this case.

WHEREFORE, after careful and impartial consideration of all of the above, the Court ORDERS that the above-styled matter be dismissed and stricken from the docket of this Court. The Court preserves the objection and exception of the Plaintiff and ORDERS the Clerk of this Court to mail a certified copy of this Order to all counsel of record.

ENTERED this 12th day of October, 2007.


 IRENE C. BERGER, CIRCUIT JUDGE
 Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
 COUNTY OF KANAWHA, SS
 I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
 AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
 IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
 GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 15
 DAY OF October 2007

 CATHY S. GATSON, CLERK
 CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA ci