

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JOHN VOE #1,)	
)	
)	
Plaintiff,)	
)	
)	
v.)	
)	
)	C.A. No. 09C-06-254 CLS
)	
ARCHDIOCESE OF)	
MILWAUKEE, a Wisconsin)	
corporation, et al.)	
)	
)	
Defendants.)	
)	

On this 5th day of March, 2013, upon consideration of Defendant Nickerson’s Motion to Dismiss for failure to prosecute, it appears to the Court that:

1. This case arises from the alleged sexual abuse by Defendant David Nickerson (“Nickerson”) against Plaintiff John Voe #1 (“Plaintiff”) when Plaintiff was twelve years old. Plaintiff brought suit pursuant to the Child Victim’s

Act,¹ asserting claims against Nickerson and certain institutional defendants, including the Archdiocese of Milwaukee (the “Archdiocese”).

2. This case originated in this Court, but was removed to the District Court. On October 30, 2009, the case was remanded to this Court based on the District Court’s finding of a lack of diversity jurisdiction between the parties. On July 23, 2010, this Court dismissed claims against the institutional defendants, including the Archdiocese, for lack of personal jurisdiction, leaving Nickerson as the sole-remaining defendant.
3. On December 6, 2010, the Court granted Plaintiff’s Motion to Revise the Scheduling Order. There was no further activity in this case until September 19, 2012, when the Court sent a Rule 41(e) Notice to counsel to inform the parties that, if no action was taken in 30 days, the case would be dismissed for want of prosecution.
4. On September 21, 2012, Plaintiff’s counsel informed the Court that the case involved the Archdiocese of Milwaukee, which was in bankruptcy. Plaintiff’s counsel stated that a Proof of Claim was filed and that Plaintiff’s counsel considered the action to be stayed until the resolution of the bankruptcy.²

¹ 10 *Del. C.* § 8145.

² D.I. 41.

5. Nickerson’s counsel responded that he knew of no Proof of Claim or application for stay filed in connection with this case in Delaware. He stated that the bankruptcy action related to the Archdiocese, a party that has had all claims against it dismissed.³ Nickerson’s counsel also stated that “pursuant to Section 362 of the Bankruptcy Code, actions against nondebtors (i.e., the sole remaining defendant in this case, David Nickerson) would not automatically be stayed.”⁴
6. In response, Plaintiff’s counsel described a telephone conversation between Plaintiff’s and Nickerson’s counsel in which Plaintiff’s counsel informed Nickerson’s counsel that “if he did to want the case on hold, we would go ahead and vigorously prosecute the case and bring it to trial against his client, David Nickerson.”⁵ Plaintiff’s counsel stated that he understood that Nickerson was in prison in Wisconsin and that he “thought the expense and logistic of this might cause [Nickerson] to decide to have the case on hold while the bankruptcy action in Wisconsin was resolved against the Diocese of Milwaukee.”⁶ Plaintiff’s counsel also noted that there was no final appealable order regarding the dismissal of the institutional defendants and that there was “still a valid claim on the merits, and that the claim would be

³ Counsel for the Archdiocese also sent a letter explaining that claims against the Archdiocese had been dismissed and arguing that the time for appeal had passed. D.I. 43.

⁴ D.I. 42.

⁵ D.I. 44.

⁶ *Id.*

pursued at the appropriate time in the bankruptcy in Wisconsin.”⁷ Plaintiff’s counsel stated that “[i]n summary, unless [Nickerson’s counsel] has not gotten back to me by November 1, 2012, stating that he is agreeable to a stipulation to stay, I will be noticing his client’s deposition and then contact the Court about the trial date.”⁸

7. On November 6, 2012, Defendant Nickerson moved to dismiss Plaintiff’s claims against him, pursuant to Rule 41(b) and (e). Nickerson argued that Plaintiff had not taken any steps to diligently prosecute the case since August 2010. Nickerson asserts that, since that time, Plaintiff’s counsel did not communicate with the Court or seek a stay or revised scheduling order.
8. Plaintiff responded to the motion asserting that, after Nickerson filed the motion to dismiss, Plaintiff contacted Nickerson’s counsel to advise him that they wanted to take Nickerson’s deposition and requested a date. In addition, Plaintiff argued that Nickerson had not been prejudiced in anyway and that there was no unreasonable delay.
9. Superior Court Civil Rule 41(b) allows a defendant to move to dismiss an action for a plaintiff’s failure to prosecute or to comply with the Rules or any order of the Court.⁹ Rule 41(e) permits the Court, *sua sponte*, to dismiss

⁷ *Id.*

⁸ *Id.*

⁹ Del. Super. Civ. R. 41(b).

an action so long as the Court provides notice and follows the procedure set forth in 41(e).¹⁰ Dismissal is within the sound discretion of the Court and the Court's duty is to "analyze the circumstances of each case separately and balance the need for judicial economy against Delaware's preference for affording the litigant her day in court."¹¹ The Court will not dismiss an action based on mere inaction; however, where there is gross neglect or lack of attention, dismissal may be proper.¹²

10. "When the Court is advised that party has filed a bankruptcy petition, the action shall be stayed."¹³ Section 362 of the U.S. Bankruptcy Code provides for an automatic stay of judicial proceedings against a debtor involved in bankruptcy actions which have been filed under sections 301, 303 or 303 of the Bankruptcy Code.¹⁴

11. The Court will allow the Plaintiff to continue to pursue his case. Plaintiff is incorrect that the bankruptcy action stayed this action, since the bankruptcy action concerns the Archdiocese and all claims against the Archdiocese have been dismissed. Moreover, the Court was not advised of the bankruptcy action, in accordance with Rule 41(g), until after the 41(e) Notice was sent.

Despite Plaintiff's incorrect assertions, the Court finds that the

¹⁰ Del. Super. Civ. R. 41(e).

¹¹ *Gregory v. Hyundai Motor America*, 2008 WL 2601388, at *2 (Del. Super. Jul. 2, 2008).

¹² *Id.*

¹³ Del. Super. Civ. R. 41(g).

¹⁴ 11 U.S.C. § 362(a)(1).

correspondence between counsel demonstrates that there was a misunderstanding as to the effect of the bankruptcy action. Therefore, the Court will not dismiss the case for failure to prosecute at this time.

12. Based on the foregoing reasons, Nickerson's Motion to Dismiss for Failure to Prosecute is **DENIED**.

IT IS SO ORDERED

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.