IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

VICTOR F. DEJESUS and **LAURIE DEJESUS,** Plaintiffs,	)	
v.	)	C.A. No. 02C-12-057 PLA
HAROLD F. THOMAS, **SUSAN L. THOMAS** and **BRANDYWINE REALTY MANAGEMENT, INC.,** Defendants.	)	

Submitted: November 10, 2004
Decided: November 17, 2004

UPON DEFENDANT'S
MOTION TO DISMISS
GRANTED

Allan Wendelburg, Esquire, Hockessin, Delaware, Attorney for Plaintiff.

Natalie Wolf, Esquire, Young, Connaway, Stargatt & Taylor, LLP, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

ORDER

Defendant's Motion To Dismiss for failure to comply with this Court's discovery orders is **GRANTED**. It appears to the Court that:

1. This is a personal injury action by a tenant and his wife against their landlords and their wholly owned company. Victor DeJesus fell from a staircase on the rental property and was injured on December 9, 2000. Plaintiffs waited nearly two years, until December 7, 2002, to file a claim for the injury. Immediately thereafter, Plaintiffs moved to Ohio and refused to return their attorney's calls and messages for over a year, leaving the case in legal limbo. This behavior was especially vexing because the plaintiffs refused to begin the discovery process, meaning that the defendants were unable to begin any work upon their defense.

2. Plaintiffs failed to appear for arbitration on January 22, 2004. Plaintiffs' counsel explained this failure by claiming that he had "stipulated" to having an arbitrator's order entered against the plaintiffs. This "stipulation" was obviously meaningless --an arbitrator will always enter an order against a party who refuses to show up-- and is viewed by the Court as an unwelcome attempt to circumvent Superior Court rules.

3. This Court entered a scheduling order on May 5, 2004. It required, *inter alia*, that the plaintiffs proffer their expert medical report no later than September

30, 2004. Not surprisingly, Plaintiffs missed this deadline and, nineteen months into the case, had not even identified the physicians involved pursuant to Rule 3. This prompted the defendants' first motion to dismiss for failure to prosecute pursuant to Rule 41, which the Court heard on September 29, 2004.

4. Plaintiffs' counsel defended against the motion by throwing himself upon the mercy of the Court, claiming that the discovery delays were due solely to the plaintiffs' indigence. He informed the Court that the plaintiffs had recently returned to Delaware and were prepared to pursue the case in the proper fashion. Given these assurances, the Court denied this first motion to dismiss. Instead, the Court gave the plaintiffs an additional thirty days to procure the expert report, as well as produce a variety of medical records that should have been proffered, pursuant to Rule 3, nearly two years earlier. The Court specifically warned counsel that this order represented the plaintiffs' final chance to pursue the case, and that further discovery intransigence would result in summary dismissal. Plaintiffs' counsel readily assented to this condition.

5. Thirty days later, the plaintiffs still did not proffer an expert report, and also failed to produce the medical records identified in the September 29, 2004 Order. Defendants again moved to dismiss based upon the plaintiffs' refusal to follow the Court's orders. Plaintiffs' counsel again blamed his clients indigence and told the

Court and Defendants that an expert report would come "as soon as possible." Counsel offered no excuse for his failure to file a motion for extension of time.

6. At this point, the Court has no choice but to **GRANT** Defendants' Motion To Dismiss. This claim arose four years ago, and has inexcusably lingered on the Court's docket for the last two. For nearly two years, the plaintiffs made no attempt at all to comply with Superior Court Rules or to fulfill discovery, and even failed to attend arbitration. Plaintiffs were so disinterested in the claim that it never even occurred to them to request permission to attend arbitration telephonically, which the Court would have allowed. Instead, the plaintiffs chose to ignore arbitration and all other requirements for maintaining an action in Delaware, for over twenty months.

More importantly, the plaintiffs and their counsel have placed the credibility of this Court at risk. The Court, in denying the first motion to dismiss, endorsed counsel's representations that discovery would now properly proceed. The Court specifically warned counsel that failure to follow through on the plaintiffs' end would result in summary dismissal. Despite this, either Plaintiffs, their counsel, or both, decided that the Court's order was meaningless, and could be ignored without even the courtesy of notifying the Court that the deadlines would, yet again, be missed. It is difficult to imagine how any court could expect parties to rely upon its orders when they are treated as nothing more than empty threats.

6. Counsel's arguments against this result are uniformly unpersuasive. First, counsel argues that the delays, though inexcusable, cause the defendants no prejudice. The Court strongly disagrees; being eternally trapped in a case against a party who shows no willingness to ever bring it to conclusion is prejudice in itself. Moreover, a bald assertion that defendants suffer no prejudice is no defense to an otherwise valid motion to dismiss.[1] Counsel's other argument, that the discovery produced thus far is good enough, ignores the language of the Court's Order, and the Rules of Discovery. Not only did the plaintiffs fail to produce the discovery material specifically delineated in my prior order, they still have not made a complete Rule 3 disclosure, which should have been produced with the filing of the complaint.

7. For all of these reasons, Defendant's Motion To Dismiss is **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary – Civil
cc: Allan Wendelburg, Esquire
Natalie Wolf, Esquire

[1] *Wilson v. JOMA Inc.*, 1989 WL 68304 (Del. Supr.) at 2. (unpublished opinion).