

[Cite as *Univ. Commons Assoc. Ltd. Partnership v. Commercial One Asset Mgt., Inc.*, 2009-Ohio-3061.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91973**

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**UNIVERSITY COMMONS ASSOCIATES,  
LIMITED PARTNERSHIP**

PLAINTIFF-APPELLANT

vs.

**COMMERCIAL ONE ASSET MANAGEMENT, INC.**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-426675

**BEFORE:** Blackmon, J., Gallagher, P.J., and Celebrezze, J.

**RELEASED:** June 25, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant University Commons Associates Limited Partnership (“University Commons”) appeals the trial court’s denial of its motion to reinstate the case to the active docket or issue a final appealable order. University Commons assigns the following errors for our review:

**“I. The trial court erred as a matter of law, in denying the appellant’s motion to reinstate this case to the trial court’s active docket.”**

**“II. The trial court erred, and abused its discretion, in denying the appellant’s motion to reinstate and dismissing the case.”**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶ 3} On November 19, 1998, University Commons, a limited liability partnership that owned an apartment building in Cleveland, originally filed its complaint against Commercial One Asset Management and its sister company, Commercial One Realty, Inc. On January 10, 2000, University Commons voluntarily dismissed its complaint. On December 29, 2000, University Commons refiled its complaint alleging breach of contract, breach of fiduciary duty, and negligence related to one of its apartment complexes.

{¶ 4} On July 3, 2001, both Commercial One Asset Management and Commercial One Realty, Inc. filed separate motions for summary judgment denying any liability. On November 21, 2001, the trial court denied Commercial One Asset Management’s motion. The trial court granted Commercial One Realty, Inc.’s motion

in part and included “no just cause for delay” language, which allowed University Commons to immediately appeal to this court.

{¶ 5} While the matter was pending in this court, the trial court stayed the remaining issues until we rendered our decision. The trial court also issued an order instructing University Commons to file a motion to reinstate the case to the active docket within 45 days after the appeal was decided.

{¶ 6} On August 8, 2002, in *Univ. Commons Assocs. L.P. v. Commer. One Asset Mgmt., Inc.*,<sup>1</sup> we affirmed the trial court’s decision to grant partial summary judgment to Commercial One Realty, Inc. Two years later, in July 2004, University Commons filed its motion to reinstate the case to the trial court’s active docket. The trial court denied the motion as untimely and University Commons appealed.

{¶ 7} On September 1, 2005, in *Univ. Commons Assoc. v. Commercial One Asset Mgmt.*,<sup>2</sup> we dismissed the appeal holding that the trial court’s ruling was not a final appealable order under R.C. 2505.02(B); we reasoned that there existed pending inactive clauses.

{¶ 8} Thereafter, University Commons sought review of our decision in the Ohio Supreme Court. In its decision dated March 6, 2006, the Ohio Supreme Court declined the appeal.<sup>3</sup> More than two years later, on June 30, 2008, University

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<sup>1</sup>Cuyahoga App. No. 80658, 2002-Ohio-4025.

<sup>2</sup>Cuyahoga App. No. 85202, 2005-Ohio-4568.

<sup>3</sup>*Univ. Commons Ass’n v. Commercial One Asset Mgmt.*, 108 Ohio St.3d 1439, 2006-Ohio-421.

Commons filed a second motion to reinstate the case to the trial court's active docket. On July 21, 2008, the trial court denied the motion and dismissed the case with prejudice, which University Commons now appeals.

### **Case Reinstatement**

{¶ 9} Because both assigned errors are related, they will be addressed together. In its two assigned errors, University Commons argues that the trial court erred when it denied its motion to reinstate this case to the court's active docket. We interpret these assignments of error as alleging generally that the trial court erred when it dismissed this case for failure to prosecute.

{¶ 10} A dismissal for failure to prosecute is actually a dismissal pursuant to Civ.R. 41(B)(1).<sup>4</sup> Civ.R. 41(B)(3) provides that a dismissal for failure to prosecute acts as a dismissal on the merits, unless the trial court in its dismissal order provides otherwise.<sup>5</sup> A trial court's dismissal of a case for failure to prosecute is reviewed for abuse of discretion.<sup>6</sup> "Abuse of discretion" as it applies to a trial court's dismissal for failure to prosecute implies an unreasonable, arbitrary, or unconscionable attitude on the part of the court in granting such motion.<sup>7</sup>

{¶ 11} In denying the motion, the trial court stated in pertinent part as follows:

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<sup>4</sup>*Brown v. Snow*, 10<sup>th</sup> Dist. No. 07AP-1007, 2008-Ohio-3286.

<sup>5</sup>*Id.*

<sup>6</sup>*Jones v. Hartranft*, 78 Ohio St.3d 368, 1997-Ohio-203.

<sup>7</sup>*Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91.

**“Plaintiff University Commons Associates’ motion to reinstate the case to active docket or issue a final appealable order (filed 06/0/08) is denied. Plaintiff is seeking an order from this Court reinstating this case to the Court’s active docket. However, a review of the record clearly demonstrates that the Plaintiff has completely failed to prosecute this case and has demonstrated a complete disregard for the judicial process. \*\*\* On 06/30/08, Plaintiff again sought to reinstate the case to this Court’s active docket. However, over two years have passed since the Ohio Supreme Court declined to hear its case. Plaintiff through its conduct has demonstrated a complete failure to prosecute this case, and any prejudice suffered by the Plaintiff is the result of its own actions and inaction in prosecuting.”<sup>8</sup>**

{¶ 12} After reviewing the record, we conclude the above dismissal with prejudice for failure to prosecute was borne out of the unreasonable and unexplained delay of University Commons in complying with the trial court’s order.

{¶ 13} Initially, we note the instant action commenced more than ten years ago. The record reveals that after we disposed of University Commons’ first appeal, they waited more than two years before seeking to reinstate the case to the trial court’s active docket, despite the trial court’s instructing them to file their motion within 45 days of disposition. A review of the motion reveals that University Commons offered no explanation, rationale, or excuse for the more than two-year delay.

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<sup>8</sup>Journal entry, July 23, 2008.

{¶ 14} The record also reveals that after the trial court denied the motion as untimely, University Commons mounted a second appeal, which we dismissed for lack of a final appealable order. University Commons then sought review in the Ohio Supreme Court, which declined the appeal. Again, University Commons waited almost three years to seek reinstatement to the trial court's active docket. University Commons offered no explanation, rationale, or excuse for the almost three-year delay before seeking reinstatement.

{¶ 15} Further, although University Commons claims that the trial court did not give them notice of its intention to dismiss the case with prejudice, we conclude that the trial court's order was clear. The trial court's order stated that University Commons had 45 days to seek reinstatement. University Commons had the first opportunity to seek reinstatement after we issued our decision in their first appeal. They had the second opportunity after the Ohio Supreme Court declined to hear the case. Both times, University Commons did not reinstate the case.

{¶ 16} Moreover, University Commons' unreasonable and unexplained delay is unreasonable under the doctrine of laches. "The doctrine of laches is an equitable doctrine, defined as an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party."<sup>9</sup> The purpose of the doctrine of laches is to prevent the enforcement of stale

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<sup>9</sup>*Harmon-Butts v. Zoloty*, 9<sup>th</sup> Dist. No. 02CA0075-M, 2003-Ohio-2155, quoting *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 35.

demands in those instances where a party has slept upon his rights, or acquiesced for a great length of time.<sup>10</sup>

{¶ 17} The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.<sup>11</sup>

{¶ 18} Here, University Commons clearly implicates the doctrine of laches by failing to file the motion to reinstate until more than six years had elapsed. Further, as previously noted, when University Commons filed its motion to reinstate, it offered nothing by way of an explanation or excuse for not abiding by the trial court's order.

{¶ 19} Consequently, we find no abuse of discretion in the trial court's decision to dismiss the case for want of prosecution. Accordingly, we overrule both assigned errors.

Judgment affirmed.

**It is ordered that appellee recover of appellant its costs herein taxed.**

**The court finds there were reasonable grounds for this appeal.**

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<sup>10</sup> *Junkins v. Spinnaker Bay Condo. Ass'n*, 6<sup>th</sup> Dist. Nos. OT-01-007, OT-01-006, 2002-Ohio-872, citing *State ex rel. Case v. Industrial Comm. of Ohio* (1986), 28 Ohio St.3d 383, 385, citing *Piatt v. Vattier* (1835), 34 U.S. 405, 416, 9 L.Ed.173.

<sup>11</sup> *Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Svc.*, 10<sup>th</sup> Dist. No. 05AP-662, 2006-Ohio-3810, citing *State ex rel. SuperAmerica Group v. Licking Cty. Bd. of Elections*, 80 Ohio St.3d 182, 186, 1997-Ohio-347, citing *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 1995-Ohio-269.



It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR