

BOONE COUNTY
IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

BOONE MOTOR SALES, INC., D/B/A
STEPHENS AUTO CENTER,

PLAINTIFF,

v.

THORNHILL GROUP, INC., D/B/A
THORNHILL FORD LINCOLN and
FORD MOTOR COMPANY,

DEFENDANTS.

2015 SEP 30 P 0:17
RECEIVED
Civil Action No. 14-C-98
Judge James H. Young, Jr.

**ORDER DENYING PLAINTIFF
BOONE MOTOR SALES, INC.'S POST-SUMMARY JUDGMENT MOTIONS**

On September 2, 2015, at 1:30 p.m., this Court convened a hearing to consider Plaintiff Boone Motor Sales, Inc.'s (hereinafter "Boone") Motion for Relief from Judgment or Order, Motion to Expand Scheduling Order, and Motion for Leave to File Amended Complaint. Appearing on behalf of Boone was attorney William T. Forester. Appearing on behalf of Ford Motor Company (hereinafter "Ford") were attorneys Timothy S. Millman and William J. Hanna. Appearing on behalf of Thornhill Group, Inc. (hereinafter "Thornhill") were Andrew G. Fusco and Dylan C. Lewis. After oral argument and consideration of those papers filed with the Court, the Court hereby DENIES each of Boone's motions as more fully set forth below.

Procedural Background

1. On May 22, 2015, after the close of discovery, Thornhill filed and served its Motion for Summary Judgment and Memorandum of Law in Support of Motion for Summary Judgment.

2. On June 2, 2015, after the close of discovery, Ford filed its Motion for Summary Judgment and Memorandum in Support of Its Motion for Summary Judgment.

3. On June 12, 2015, Ford filed its Notice of Hearing for the above mentioned Motion for Summary Judgment and set such hearing for Wednesday, July 22, 2015 at 1:30 p.m., at a time and date agreed to by all parties. Said notice was served on counsel for Boone and counsel for Boone received the same.

4. On June 15, 2015, Thornhill filed its Notice of Hearing for the above mentioned Motion for Summary Judgment and set such hearing for Wednesday, July 22, 2015 at 1:30 p.m., at a time and date agreed to by all parties. Said notice was served on counsel for Boone and counsel for Boone received the same.

5. On June 23, 2015, the Court issued an Order amending the scheduling order. Said Order moved the pre-trial conference to August 6, 2015, set pre-trial conference memoranda due on July 29, 2015, and set trial for August 31, 2015.

6. On July 22, 2015, Thornhill and Ford attended the hearing set for argument on the pending motions for summary judgment.

7. Counsel for Boone did not appear at the July 22, 2015 hearing and Boone was otherwise unrepresented at this hearing.

8. On July 24, 2015, Bradley J. Schmalzer, also counsel for Ford, sent an e-mail to the Court and to all counsel attaching a cover letter and Proposed Order Granting

Summary Judgment.¹ The cover letter read in its entirety, "[e]nclosed please find an 'Order Granting Summary Judgment in Favor of Defendants' in the above-referenced matter. If the Order meets with your approval, please sign the same and have it entered with the Clerk." The e-mail which attached the cover letter and proposed order read in its entirety, "[e]nclosed for Judge Young's review, please find a courtesy copy of the proposed order granting summary judgment on behalf of defendants in this matter. A copy was faxed to the Judge, and a hard copy is forthcoming via US mail. Also attached, please find a MS Word version of the proposed order. Please do not hesitate to let me know if you have any question."

9. On July 29, 2015, the Court entered the Order Granting Summary Judgment in Favor of Defendants for all the reasons set forth therein. Said Order is incorporated herein by reference.

10. Boone did not file any objection prior to entry of the proposed order.

11. Boone did not file a pre-trial conference memorandum by July 29, 2015.

12. On August 3, 2015, Boone filed its Motion for Leave to File Amended Complaint.

13. On August 4, 2015, Boone filed its Motion to Expand Scheduling Order.

14. On August 21, 2015, Boone filed its Motion for Relief from Judgment or Order.

¹ The Court specifically notes that the e-mail sent to counsel for Boone was sent to his new law firm's e-mail address at tforester@mnmlk.com.

15. Also on August 21, 2015, Boone filed three notices of hearing setting the Motion for Leave to File Amended Complaint, Motion to Expand Scheduling Order, and Motion for Relief from Judgment or Order for hearing on September 2, 2015, at 1:30 p.m.

16. On August 28, 2015, Thornhill timely filed its Omnibus Response to Plaintiff's Motion for Leave to File Amended Complaint and Motion to Expand Scheduling Order, as well as its Response to Plaintiff Boone Motor Sales, Inc., D/B/A Stephens Auto Center's Motion for Relief from Judgment or Order.

17. On August 28, 2015, Ford timely filed its Response to Plaintiff Boone Motor Sales, Inc., D/B/A Stephens Auto Center's Motion for Leave to File Amended Complaint and Motion to Expand Scheduling Order, as well as its Response to Plaintiff Boone Motor Sales, Inc., D/B/A Stephens Auto Center's Motion for Relief from Judgment or Order.

18. On September 1, 2015, at approximately 6:30 p.m., Boone filed an untimely brief in support of its Motion for Relief from Judgment or Order.

19. At no time prior to the September 2, 2015, hearing did Boone file a response, *nunc pro tunc*, to the motions for summary judgment. Boone also failed to file a response to the motions for summary judgment on or about the day such responses would have been due had the hearing been set on August 6, 2015, as Boone's counsel asserted he mistakenly believed.

Findings of Fact

20. Thornhill and Ford filed timely motions for summary judgment and memoranda in support of the same. Boone received said motions.

21. Thornhill and Ford filed timely notices of hearing for their respective motion for summary and memorandum in support of the same. Boone received said notices.

22. The parties conferred and agreed to present motions for summary judgment on July 22, 2015 at 1:30 p.m.

23. At no time did the Court or the parties set an alternative date for hearing on the motions for summary judgment. Further, no amended notices of hearing were sent rescheduling the July 22, 2015 hearing on the motions for summary judgment.

24. Counsel for Boone received the proposed order granting summary judgment but admittedly did not read it.

25. Even if counsel for Boone had believed the hearing on the motions for summary judgment to be on August 6, 2015, such belief still did not excuse him from filing pre-trial conference memorandum due on July 29, 2015.

26. Boone failed to place anything of record that the Court could consider in opposition to the motions for summary judgment filed by Thornhill and Ford.

27. At the September 2, 2015 hearing, Boone still could not state with any specificity the amount or kind of damage(s) suffered in this matter; indeed, at its corporate representative deposition Boone admitted it had no evidence of damages.

28. Boone failed to conduct any discovery against Thornhill and only conducted limited discovery against Ford.

29. Boone failed to take any depositions.

30. Boone failed to identify an expert witness(es).

31. By May 5, 2015, the end of discovery, the parties had had a full opportunity to conduct discovery, amend their pleadings and otherwise prepare for trial.

32. Boone made no motion requesting additional time for discovery or to amend its pleadings prior the close of discovery.

33. Boone made no motion requesting additional time for discovery or to amend its pleadings prior to the deadline for filing motions for summary judgment.

34. Boone only made motions requesting an extension of discovery and to amend its pleadings after summary judgment had been granted against Boone.

35. The purpose of the Business Court Division is to provide litigants with a forum that is expedient. The Business Court Division is meant to provide a more efficient form of litigation to business litigants who have encountered complex business issues. The Business Court Division allows business litigants to obtain resolutions in a timely manner so that they do not have to operate under legal uncertainties.

36. Counsel for Boone admittedly had distracting personal and professional issues occur during the pendency of the litigation.

37. Counsel for Boone did not efficiently litigate this matter. The dilatory conduct of counsel for Boone was not an isolated incident throughout this matter, but appeared to be a pattern of conduct.

38. The conduct of Counsel for Boone indicates that his "errors," "mistakes," or "inadvertences" served mainly as delay tactics, which prejudiced Defendants and would continue to prejudice Defendants if this matter was to remain open or the relief requested by Boone was granted.

Conclusions of Law

Motion for Leave to File Amend Complaint

39. "A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions." *Consolidation Coal Co. v. Boston Old Colony Inc. Co.*, 203 W.Va. 385, 393 (1998).

40. Rule 15(a) provides that leave to amend "shall be freely given when justice so requires," which generally means that leave to amend is granted where: "(1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and, (3) the adverse party can be given an ample opportunity to meet the issue." *Mauch v. City of Martinsburg*, 178 W.Va. 93, 95 (1987).

41. "[P]rejudice to the adverse party is the paramount consideration in motions to amend." *Muto v. Scott*, 224 W.Va. 350, 355 (2008).

42. Importantly, the "liberality allowed in the amendment of pleadings does not entitle a party to be dilatory in asserting claims or to neglect his case for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is

unreasonable, and places the burden on the moving party to demonstrate some valid reason for his neglect and delay." *Mauch v. City of Martinsburg*, 178 W.Va. 93, 95 (1987).

43. The issues which form the basis for Boone's Rule 15(a) motion are additional claims not arising from the original facts alleged in Boone's Complaint.

44. Even if the issues did arise from the facts alleged in Boone's Complaint, the time at which Boone filed its Rule 15(a) motion would result in extreme prejudice to the Defendants if granted.

45. Further, there is no prejudice to the Boone in denying the motion since the claims desired to be added by Boone can be brought in a separate action.

46. Because Boone was dilatory in its filing of its Rule 15(a) motion and because to grant the same would cause prejudice to the Defendants and no prejudice to Boone, Boone's Motion for Leave to File Amended Complaint is denied.

Motion for Relief from Judgment or Order

47. The relief sought by Boone is governed by West Virginia Rule of Civil Procedure 60(b).

48. While the Court recognizes that there is jurisprudence which suggests that Rule 60(b) should be "liberally construed for the purpose of accomplishing justice," the Court notes that a majority of these cases are based on underlying claims where a default judgment has been entered and the matter had not been decided on the merits. *Toler v. Shelton*, 157 W.Va.

778, 785-86 (1974). Here, the matter was decided on the merits by way of summary judgment and the parties had full opportunity to develop their respective cases and/or defenses.

49. As a threshold inquiry, the Court is obligated to evaluate whether the moving party actually has an underlying meritorious claim. *Toler v. Shelton*, 157 W.Va. 778, 786 (1974). *Toler* is clear that "where a claim is absolutely without merit, neither a reviewing court nor a trial court should engage in a fruitless venture to vacate judgment by reason of procedural defects merely to reconfront a substantive rule which mandates a denial of the movant's underlying claim." *Id.* In examining the material issues of fact and the "meritorious claims" factor considered when deciding to vacate a default judgment, courts need only to determine whether there is reason to believe that a result different from the one obtained would have followed from a full trial. *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W.Va. 309 (2008).

50. Boone has not sufficiently demonstrated to this Court, through its filings or at oral argument, that it has a meritorious claim. Boone has made no record which would adequately refute the motions for summary judgment filed by Defendants and, by extension, allow this Court to conclude that granting a Rule 60(b) motion would result in any different outcome than that which has already occurred.

51. Even if this Court were to find that Boone had a meritorious claim, which it does not, the Court would still be confronted with an additional inquiry under Rule 60(b) with regard to claims of "excusable" neglect. *Delapp v. Delapp*, which adopts the United States Supreme Court's standard, sets forth criteria for determining "excusable" neglect under a Rule 60(b) motion. 213 W. Va. 757 (2003). *Delapp* states:

[T]he determination of excusable neglect is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission and [taking into consideration] four factors These factors are the danger of prejudice to the other party, the length of the delay and its potential impact on judicial proceedings, the reasons for the delay, including whether it was within reasonable control of the movant, and whether the movant acted in good faith.

213 W. Va. 757, 762-63 (2003) (citing *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) (internal citations omitted).

52. Taking into consideration the four *Delapp* factors, this Court finds that Boone cannot satisfy any of them: (1) When weighing prejudice, Defendants are more prejudiced than Boone by the desired relief sought by Boone, primarily given the lack of any evidence of a meritorious claim; (2) The delay resulting from the relief sought by Boone would cause judicial proceedings which have been concluded on the merits to be reopened and the re-argument of motions for summary judgment. The Court would also reiterate that the purpose of the Business Court Division is to litigate expediently and efficiently; (3) The reason(s) underlying why Boone is seeking relief under Rule 60(b) is solely the fault of counsel for Boone. In fact, counsel for Boone admitted that he did not even read the proposed order circulated among counsel and the Court following the hearing on motions for summary judgment. Counsel for Boone could point to nothing either Defendant did to cause its delay; and, (4) While no bad faith was found, the Court believes that the conduct of counsel for Boone displayed an intention to delay litigation rather than move it forward.

53. There is no analysis pursuant to Rule 60(b) by which the relief requested by Boone can be granted, therefore Boone's Motion for Relief from Judgment or Order is denied.

Motion to Expand Scheduling Order

54. Because the Court denied Boone's Motion for Leave to File Amended Complaint and Motion for Relief from Judgment or Order, the Court does not need to address Boone's Motion to Expand Scheduling Order and the same is denied as moot.

Conclusion

The Court therefore **DENIES** Boone's Motion for Leave to Filed Amended Complaint, Motion for Relief from Judgment or Order, and Motion to Expand Scheduling Order. This Order is a final appealable order on Boone's motions and the parties have preserved their objections to the same. The Court directs the Clerk to send certified copies of this Order to all parties of record.

DATE: Sept 29 '15

James H. Young, Jr.
Honorable James H. Young, Jr.

Order prepared by:

FLAHERTY SENSABAUGH BONASSO PLLC

William J. Hanna (by App. permission)

William J. Hanna (WVSB # 5518)
Bradley J. Schmalzer (WVSB # 11144)
Flaherty Sensabaugh Bonasso PLLC
Post Office Box 3843
Charleston, West Virginia 25338-3843

Telephone: (304) 345-0200

Fax: (304) 345-0260

Attorneys for Defendant Ford Motor Company

BOWLES RICE LLP



Andrew G. Fusco (WVSB # 1317)

Dylan C. Lewis (WVSB # 10733)

Bowles Rice LLP

7000 Hampton Center

Morgantown, West Virginia 26505

Telephone: (304) 285-2500

Fax: (304) 285-2575