

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE, MISSOURI**

SAMUEL K. LIPARI)	
(Assignee of Dissolved Medical Supply Chain, Inc.))	
)	
)	
Plaintiff,)	Case No. 0816-CY04217
)	Division 02
vs.)	
)	
NaY ATION, LLC, et al.,)	
)	
Defendants.)	
)	
)	

DEFENDANT LATHROP & GAGE LLP'S MOTION AND SUGGESTIONS FOR ORDER OF DISMISSAL OF THE UNSERVED DEFENDANT ROBERT ZOLLARS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

All of the defendants that have been served with process have been dismissed. Plaintiff has not made any efforts to serve the remaining defendant, an individual, Robert Zollars in more than ten months. The presence of the unserved defendant prevents this case from being final for the appeal that Samuel K. Lipari has sought on two separate occasions.

It appears that the case should be ripe for appeal if Mr. Zollars were dismissed. The Court could observe all the facts and circumstances attendant to the claim of Samuel K. Lipari against Robert Zollars and dismiss that claim for lack of prosecution.

WHEREFORE, Defendant Lathrop & Gage LLP moves this Court for its Order dismissing Robert Zollars so that this matter is ripe for immediate appeal by Mr. Lipari.

II. ARGUMENT

A. Procedural History.

This suit was filed a year ago, February 25,2008. Defendant Robert Zollars was named in the Petition. On April 1,2008, the summons was issued for service on Mr. Zollars. It was returned non-est on April 30, 2008. Plaintiff never requested an alias summons for Mr. Zollars. On August 13,2008, Plaintiff filed a notice of appeal in this case seeking appellate review of Judgments entered by this Court. The first appeal was dismissed by the Western District for lack of jurisdiction. Plaintiffsought (twice) transfer to the Missouri Supreme Court of the first premature appeal.

After the first premature appeal was dismissed and the case remanded, Plaintiff sought "Relief from Judgment Or Order Under Rule 74.06." In that Motion, Plaintiff stated that "Plaintiff believes it will greatly aid the parties to have this decision reviewed without delay." Motion, November 3, 2008. Lathrop & Gage filed its opposition to that Motion for Relief citing the continued existence of Lathrop & Gage as a defendant in the case and noting the case could be made ripe for appeal by the dismissal of defendants, such as Lathrop & Gage, that were not the subject of the Court's Order of August 8, 2008. Suggestions of Lathrop & Gage in Opposition to Plaintiffs Motion for Relief. November 6,2008, p.4, fn. 3. This Court denied Plaintiffs Motion for relief from judgment.

On December 29,2008, this Court dismissed Lathrop & Gage. Plaintiff filed his second Notice of Appeal on January 9,2009. The Notice of Appeal was again premature because the defendant Robert Zollars, even though never served with process, remains a defendant in the state court action. The Western District ordered the appeal dismissed for lack of subject matter jurisdiction on February 24,2009.

B. Mr. Lipari has Failed to Timely Seek Service of Mr. Zollars and therefore Failed to Adequately Prosecute his Action Against Him.

Samuel K. Lipari's fervent wish to have the case heard on appeal should be granted, but the continued presence of the unserved defendant Robert Zollars makes that impossible. One solution is to dismiss Mr. Zollars from the suit because Mr. Lipari has not diligently sought service or otherwise prosecuted the claim against him.

"Trial courts may, within sound discretion, dismiss a lawsuit for failure to prosecute a claim." *Wright v. Price*, 871 S.W.2d 12, 14 (Mo. App. 1993). The decision to dismiss a lawsuit for want of prosecution must be determined "upon all the facts and circumstances of that particular action." *Schreck v. Parker*, 388 S.W.2d 538, 541 (Mo. App. 1965). Although delay in prosecuting the action does not, of itself, justify dismissal for failure to prosecute, it is a factor to be considered by the Court. *Watkins Inv. Co. v. William B. Tanner Co., Inc.*, 684 S.W.2d 929, 936-7 (Mo. App. 1(85).¹ Here, although the suit has been on file a year, it is not merely the time that justifies dismissing the claims against Robert Zollars. If Mr. Zollars is not dismissed then Mr. Lipari---or any litigant similarly situated, has too much control over the finality of a case. Any party with a claim could identify a defendant or third party defendant, never seek service of process and potentially preclude the case from ever being final for purposes of appeal. As a matter of policy, to have control of its docket and to be able to properly use the resources of the court, it must have the power to dismiss defendants that have never been served with process.

C. A Judgment Against Mr. Zollars Individually is Unnecessary to the Adjudication of Mr. Lipari's Claims.

A judgment against Mr. Zollars as an individual is unnecessary because Mr. Lipari does not clearly state claims against Mr. Zollars in an individual capacity. Throughout his Petition,

¹ In *Watkins Inv Co.*, the court noted that "a lengthy period of delay may be enough to warrant dismissal if the party has been 'Named that he must act with more diligence.'" 684 S.W.2d at 937 (emphasis in original).

Mr. Lipari alleges that Mr. Zollars was acting on behalf of Defendant Neoforma, Inc. See Petition, paragraphs 282, 374, 376, 397, 399, 400-408, 410-413, 415-417, 419-425, 427, 431-432, 435-438, 443, 460. In paragraph (i) of his prayer for relief, Mr. Lipari alleges that Mr. Zollars has an independent stake in achieving the conspiracy, but *does* not plead any facts in support of that allegation. Defendant Neoforma Inc., with whom Mr. Zollars is repeatedly associated in the pleadings, was dismissed with prejudice on August 8, 2008. Mr. Zollars should be dismissed because he has not been served, no efforts further efforts have been made to serve him and he is not necessary to the resolution of this case.

The Court may also take notice that this is not the first time Samuel K. Lipari or his former corporation Medical Supply Chain, Inc., has sued Robert Zollars. Mr. Zollars is named as a defendant in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, In the United States District Court for the District of Kansas, No. 05-2299-CM.2 In an order dated March 7, 2006---almost two years before this suit was filed---the District Court dismissed the Plaintiffs suit including his claims against Mr. Zollars. (Exhibit A) *Medical Supply Chain, Inc. v. Neofornia, Inc.*, 419 F. Supp. 2d 1316, 1335-36 (D. Kan). In a pleading filed in that case, Mr. Lipari refers to this case as a "concurrent case." (See Exhibit B "Notice of Concurrent Missouri State Antitrust Action). What is more in an order dated August 7, 2006, the District Court described the claims against Mr. Zollars in that case in terms that would describe it almost perfectly in this case: "Plaintiffs 115 page complaint alleges sixteen counts including claims for price restraint under the Sherman Act, restraint of trade and monopolization under both federal and Missouri law, conspiracy, tortious interference with contract or business expectancy, breach of contract, breach of

² This suit was originally filed on March 9, 2005 in the Western District of Missouri and transferred to the District of Kansas.

fiduciary duty, fraud *prima facie* tort and claims under RICO and the USA Patriot Act."J

(Exhibit C).

There is no prejudice to Mr. Lipari if Mr. Zollars is dismissed from this case because Mr. Lipari has a claim pending against Mr. Zollars in a "concurrent case.,,4 If Mr. Lipari loses his appeal in that other pending case, it will result in another ground for dismissal in this case upon *resjudicata* or collateral estoppel grounds---i f he is ever served with process.

m. CONCLUSION

Good cause exists to dismiss Mr. Zollars because he has not been served with process in more than a year of litigation and his presence as a defendant is an impediment to appellate review of this case.

Respectfully submitted,

LATHROP & GAGE LLP

By:



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Kansas City, Missouri 64108-2684

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ATTORNEYS FOR DEFENDANT
LATHROP & GAGE LLP

}The Petition in this action does not plead RICO or Patriot Act claims.

-It appears the Kansas District Court case is on appeal. If the order dismissing Mr. Zollars is reversed then Mr. Lipari has his remedy there. If it is affirmed then it would be *res judicata* or collateral estoppel in this action.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *above* and foregoing was served, by First Class United States mail, postage prepaid, on the following party of record this 13th day of March, 2009:

Samuel K. Lipari
Medical Supply Chain
3520 Akin Boulevard, #918
Lee's Summit, MO 64064-7910


Appellant

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Kansas City, MO 64105

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Attorneys for Richard K. Davis, Andrew Cecere,
Jerry A. Grundhafer, Andrew Duff and
Piper Jaffray Companies


An Attorney for Defendant
Lathrop & Gage LLP

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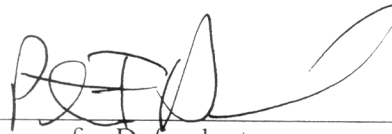
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