

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

ROBERT K. GREGORY, JR.)	
)	
Plaintiff,)	
)	C.A. No. 05C-03-288 PLA
v.)	
)	
HYUNDAI MOTOR AMERICA,)	
)	
Defendant.)	

**ON DEFENDANT’S MOTION TO DISMISS
DENIED**

Submitted: May 6, 2008
Decided: July 2, 2008

This 2nd day of July, 2008, upon consideration of the Motion to Dismiss filed by Defendant Hyundai Motor America (“Hyundai”), it appears to the Court that:

1. Robert K. Gregory, Jr. (“Gregory”) filed a “Lemon Law”¹ Complaint against Hyundai on March 29, 2005. Gregory claims that Hyundai breached its contractual warranties and Delaware’s Lemon Laws when it sold him an inoperable vehicle that was unable to be repaired, even after a number of unsuccessful attempts.² On July 7, 2005, the Court

¹ See 6 Del. C. §§ 5001-5009.

² Docket 1 (Complaint).

appointed Mr. David J.J. Facciolo as arbitrator. Four months later, the Court sent a letter to counsel, dated November 30, 2005, requesting that a report on the status of the arbitration be returned within ten days.³ Gregory responded on December 13, 2005 and indicated that he was still attempting to schedule the arbitration.⁴ The Court then directed that arbitration take place no later than February 2006.⁵

2. After a number of unsuccessful scheduling attempts throughout December and January,⁶ the arbitration was finally scheduled for February 16, 2006.⁷ On February 24, 2006, Gregory moved to stay the matter pending his participation in the Better Business Bureau Auto Line Program pursuant to the terms of the automobile warranty.⁸ The motion went unopposed by Hyundai and was granted by the Court on March 27, 2006.⁹

³ Docket 5.

⁴ Docket 7.

⁵ Docket 8.

⁶ Docket 27 (Pl.'s Resp. to Def.'s Mot. to Dismiss), Ex. A.

⁷ Docket 9.

⁸ Docket 11. Before the February 16, 2006 arbitration, the parties agreed to dismiss Counts II and III of the Complaint without prejudice in order to permit Gregory to participate in the Better Business Bureau Auto Line Program.

⁹ Docket 13.

Nearly five months later, in August 2006, the stay was lifted and this matter was restored to the Court's trial docket with Counts II and III reinstated.¹⁰

3. Following the case's restoration to the docket, the Court sent a letter on September 18, 2006 wherein it reminded the parties that Mr. Facciolo was still appointed as the arbitrator for the matter and that arbitration was to take place within sixty days of the letter's date. Hyundai contends that, despite the Court's order, Gregory made no real effort to schedule the arbitration.¹¹ In fact, Gregory's own response to the instant motion indicates that his first email to Mr. Facciolo attempting to schedule the arbitration was sent on October 31, 2007, more than one year after the Court's September 2006 letter.¹²

4. As a result of the parties' failure to comply with the order, the Court issued a Rule 41(e) notice acknowledging that no proceedings had taken place in this matter for more than six months. The Court ordered counsel to take proceedings within thirty days or the Court would dismiss the action for want of prosecution.¹³ By letter of November 16, 2007

¹⁰ Docket 19.

¹¹ Docket 25 (Def.'s Mot. To Dismiss), ¶ 3.

¹² Docket 27, Ex. B.

¹³ Docket 23; Super. Ct. Civ. R. 41(e).

Gregory responded to the notice indicating that, since he had made several unsuccessful attempts to contact Mr. Facciolo, he was requesting that the Court appoint a new arbitrator.¹⁴

5. Despite this request, Gregory continued to contact Mr. Facciolo in an effort to schedule arbitration. Arbitration was finally scheduled to take place on January 14, 2008.¹⁵ Nevertheless, on January 10, 2008 Gregory requested a continuance of the arbitration.¹⁶ Hyundai did not oppose the request and the arbitration was rescheduled for February 18, 2008. On February 15, 2008, Gregory requested a second continuance. Again, Hyundai did not oppose the request and the second continuance was granted. At that time, Mr. Facciolo requested that the parties provide new available hearing dates within one week of granting the second continuance.¹⁷

6. Because Gregory had not withdrawn his request for a new arbitrator, the Court appointed Mr. David G. Culley as arbitrator on March 7, 2008.¹⁸ Hyundai continued to attempt to reschedule the February 2008

¹⁴ Docket 24; Docket 27, Ex. B.

¹⁵ Docket 27, ¶ 4; Docket 25, ¶ 4.

¹⁶ *Id.*; Docket 25, Ex. D.

¹⁷ Docket 25, ¶ 5; Docket 25, Ex. F.

¹⁸ *Id.*, ¶ 6; Docket 27, ¶ 6.

arbitration date with Mr. Facciolo without success.¹⁹ Despite its attempts, Hyundai has received only one response from Gregory's counsel attempting to reschedule the arbitration with either Mr. Facciolo or Mr. Culley.²⁰

7. On May 6, 2008 Hyundai filed the instant motion to dismiss pursuant to Rule 41(b).²¹ In the motion, Hyundai argues that dismissal is appropriate because Gregory is guilty of gross neglect. Hyundai notes that this litigation has been ongoing for more than three years despite its attempts to proceed with Court-ordered arbitration.²² Moreover, Hyundai points out that more than one and a half years have passed since the Court restored this case to the trial docket. Yet, arbitration has still not taken place.²³

8. Gregory recognizes that this case has been pending for more than three years. He argues, however, that the delay is attributed in part to the "forced" stay, his difficulties in scheduling the arbitration with the arbitrator, and his current absence due to work-related travel.²⁴ Gregory

¹⁹ Docket 27, ¶ 5.

²⁰ *Id.*, ¶ 7; Docket 25, Ex. H.

²¹ Docket 25.

²² *Id.*, ¶ 9.

²³ *Id.*

²⁴ Docket 27, ¶ 9.

submits that he is eager to see his case resolved and that he is not guilty of gross neglect.²⁵

9. Superior Court Civil Rule 41 authorizes this Court to dismiss a case for want of prosecution or for failure to comply with Court rules or orders in order to manage its affairs effectively and to “achieve the orderly and expeditious disposition of its business.”²⁶ Whether dismissal is appropriate rests within the sound judicial discretion of the Court.²⁷ The Court must 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.²⁸

10. Where a party’s failure to prosecute his case is the result of nothing more than “gross neglect” or “lack of attention,” the Court may determine that dismissal is appropriate.²⁹ However, a litigant should not be subject to dismissal of his case due to unavoidable delays or circumstances

²⁵ *Id.*, ¶ 10

²⁶ *Gebhart v. Ernest DiSabatino & Sons*, 264 A.2d 157, 159 (Del. 1970) (discussing Super. Ct. Civ. R. 41).

²⁷ *Id.* See also *Park Centre Condominium Council v. Epps*, 723 A.2d 1195, 1198 (Del. Super. Ct. 1998).

²⁸ *Park Centre*, 723 A.2d at 1199.

²⁹ *Id.*

beyond his control.³⁰ A litigant's mere inaction is not sufficient to support a motion to dismiss based upon a party's failure to prosecute.³¹ The Court will not grant a motion to dismiss for want of prosecution if a party is then diligently prosecuting his claim even if at some prior point he has been guilty of gross neglect.³²

11. This Lemon Law dispute was instituted in March 2005. The case was stayed for approximately five months in the spring and summer of 2006 pending Plaintiff's attempt to avail himself of administrative remedies. Since this case was restored to the Court's trial calendar in August 2006, the only actions taken by Gregory have been: (1) his letter in response to the Court's 41(e) notice; (2) a handful of emails scheduling, and then postponing, two attempts at arbitration; and (3) his response to the instant motion. The Court is also cognizant of a pattern of delay exhibited by Gregory, including; (1) his non-compliance with Rule 16.1;³³ (2) his failure to timely respond to the Court's November 2005 letter requesting a report on

³⁰ *Id.*

³¹ *Wilmington Trust Co. v. Barry*, 397 A.2d 135, 138 (Del. Super. Ct. 1979) (citing *Landes v. Wolf*, 96 A.2d 344, 346 (Del. 1953)).

³² *Ayers v. D.F. Quillen & Sons*, 188 A.2d 510, 512 (Del. 1963).

³³ Although Rule 16.1 has been repealed, cases filed before March 1, 2008 remain subject to the rule. See Super. Ct. Civ. R. 16.1 (*repealed* February 5, 2008, *effective* March 1, 2008).

the status of the arbitration; (3) his failure to comply with the Court's order to arbitrate by February 2006; (4) an entire year of inaction following this case's restoration to the docket; (5) his failure to comply with the Court's September 2006 letter directing that arbitration take place within sixty days; (6) failure to take "proceedings" within 30 days of the Rule 41(e) notice; (7) his multiple requests for continuances once arbitration was finally scheduled; and (8) the fact that arbitration has still not been scheduled. Such actions constitute gross neglect for which dismissal may be appropriate.³⁴

12. Despite evidence of Gregory's previous neglect, the Court declines to order dismissal at this time. Gregory has offered evidence that he pursued arbitration after receiving the 41(e) notice. Although he requested two continuances, Gregory successfully scheduled the arbitration after requesting the Court to appoint a new arbitrator. The function of a 41(e) notice is essentially to give a delinquent party a thirty-day window of opportunity in which to decide whether he is willing to have his case dismissed or whether he wishes to proceed.³⁵ After this Court issued the 41(e) notice, Gregory resumed his attempts to schedule arbitration. He has also timely responded to this motion. Gregory's renewed diligence in

³⁴ *Park Centre*, 723 A.2d at 1199.

³⁵ *Landes*, 96 A.2d at 346.

pursuing his case indicates that dismissal is inappropriate, despite his pattern of previous neglect.³⁶

13. Further, it appears to this Court that Hyundai has not been prejudiced as a result of Gregory's neglect. Because Gregory's neglect has involved only a failure to schedule arbitration proceedings, the only prejudice to Hyundai is in the form of the unnecessarily extended timeline of this case. Hyundai cannot argue that recent delays have resulted in substantial prejudice as, by its own admission, it consented to two continuances of the arbitration.³⁷ Furthermore, Hyundai has not identified any disadvantage it has suffered with respect to the proceedings or outcome of this case as a result of Gregory's inaction.

14. Because of Delaware's preference to give the litigant his day in court, the lack of prejudice to Hyundai, and Gregory's more recent diligence, the Court concludes that dismissal is inappropriate. The Court notes, however, that Gregory has a duty to ensure that his case is diligently pursued.³⁸ Should the Court find this case similarly neglected at any future stage of the litigation, it will seriously consider dismissing it *sua sponte* under Rule 41(e).

³⁶ *Ayers*, 188 A.2d at 512.

³⁷ *See* Docket 25, ¶¶ 4, 5.

³⁸ *Park Centre*, 713 A.2d at 1199.

15. For the foregoing reasons, Defendant's motion to dismiss is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Timothy S. Martin, Esq.
David L. Lieberman, Esq.