

CAUSE NO. 2013-05455

CARL HENRY BRUNSTING, § IN THE DISTRICT COURT OF
INDEPENDENT EXECUTOR OF THE §
ESTATES OF ELMER H. BRUNSTING §
AND NELVA E. BRUNSTING §
§
§
V. § HARRIS COUNTY, TEXAS
§
§
CANDACE L. KUNZ-FREED AND §
VACEK & FREED, PLLC f/k/a §
THE VACEK LAW FIRM, PLLC § 164TH JUDICIAL DISTRICT

DEFENDANTS' MOTION TO DISMISS FOR WANT OF PROSECUTION

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants CANDACE L. KUNZ-FREED and VACEK & FREED, PLLC f/k/a THE VACEK LAW FIRM, PLLC (collectively "V&F") file this Motion for Dismissal for Want of Prosecution, and in support thereof, V&F would respectfully show unto the Court as follows:

I.
PROCEDURAL BACKGROUND

1. This is a legal malpractice lawsuit filed against V&F which has been abandoned. Accordingly, the Court should dismiss this case for want of prosecution. Carl Brunsting as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting filed this lawsuit on January 1, 2013. On February 3, 2015, defense counsel took Carl's deposition. During the deposition, Carl could not provide any testimony to support the allegations he asserted against K&F. The next day, Carl's lawyer contacted defense counsel and said she thought Carl was acting strange during his deposition and she believed he might be incapacitated¹. On February 19, 2015, in Probate Cause 412,248, Carl filed an application to resign as executor. The

¹ See the pending Motion for Sanctions against Carl and Bobbie Bayless.

Probate Court granted the application in March 2015. Since that time, this malpractice lawsuit has been in limbo as a representative of the estate has not been assigned.

2. There are few things more disruptive to a person's life and livelihood than being sued—especially when, as here, the person is accused of engaging in very serious acts of malpractice and the litigation has been ongoing for several years. Despite holding V&F hostage and preventing them from having an opportunity to defend themselves in this malpractice lawsuit, the parties in the Probate Case recently had that judge order Candace Kunz-Freed sit for her deposition. See Exhibit "A." Not only is that unjust but truly unreasonable to a fellow member of the State Bar.

3. Until a successor executor is appointed, there is no plaintiff to pursue the action against K&F. Since March 2015 no one has made any attempt to replace Carl as the representative of the estate. Almost three years later no one has taken any action to prosecute the malpractice claims against V&F. There is no explanation for the long periods of inactivity.

II.

ARGUMENT AND AUTHORITIES

A. Dismissal of this case is appropriate under the Court's inherent power.

4. When a party files a lawsuit, he must exercise reasonable diligence in prosecuting it. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997); see also TEX. R. CIV. P. 165a. Texas courts have inherent power to dismiss cases that are not prosecuted with due diligence. *State v. Rotello*, 671 S.W.2d 507, 508-09 (Tex. 1984). Courts consider several factors in determining whether due diligence has been exercised: (1) length of time on the docket; (2) the extent of activity in the case; (3) whether a trial setting was requested; and (4) the existence of reasonable excuses for delay. *NASA I Bus. Ctr. v. Amer. Nat'l Ins. Co.*, 747 S.W.2d 36, 38 (Tex. App.—Houston [1st Dist.] 1988). In evaluating due diligence, the entire history of the case is relevant.

Rotello, 671 S.W. 2d at 509. As such, the existence of a trial setting alone does not establish diligence. *Coven v. Heatley*, 715 S.W.2d 739, 741 (Tex. App.—Austin 1986, writ ref'd n.r.e).

5. This case has been pending for 2,215 days. There has been no activity in this case since February 2015. There has been adequate time for the heirs of the two Estates to diligently prosecute the malpractice case; however they have failed to do so. Further, no one can offer any excuse for the large amounts of time between the limited events of activity in this case.

6. In addition, worth noting is that under the analysis pertaining to “diligently” effectuating service on a defendant, the onus is on the plaintiff to explain every lapse in effort or period of delay. *Plantation Production Properties, LLC v. Meeks*, 2004 WL 2005445 (Tex. App.—Waco 2004, no pet.); see *Dobroslavic v. Bexar Appraisal Dist.*, 397 S.W.3d 725, 727 (Tex. App.—San Antonio 2012, pet. denied) (case dismissed for want of prosecution due to 13 months of inactivity, where party did not attempt to prosecute case until after it had been set on dismissal docket.). In fact, the length of delay is not the critical factor. *Meeks*, 2014 WL 2005445 at *6. Instead, any unexplained extended period of time constitutes lack of diligence as a matter of law. *Id.*

7. Though this case does not involve effectuation of service, the “diligence” analysis under that line of cases is relevant to determining whether Plaintiffs exercised diligence in prosecuting this lawsuit. The length of time this case has been on file coupled with the absence of any explanation for the long periods of inactivity shows that this case has not been prosecuted with any degree of diligence. This case has been pending for 2,215 days and the brief instances of activity have been followed by years of inactivity. Consequently, this case should be dismissed pursuant to the Court’s inherent power.

B. Dismissal for want of prosecution is fair.

8. Dismissal of this case is also proper due to fairness. If this case proceeds in the usual course of litigation, i.e. undertaking written discovery and depositions, filing motions for summary judgment, etc..., it is conceivable that this case will not even reach trial until late 2020. Due to the failure to timely prosecute this case, V&F will be unable to present the same case they would have been able to if the case had been diligently pursued. Memories fade, documents are lost or destroyed, and witnesses change location. *See Jones v. Alcoa, Inc.*, 339 F.3d 359, 367 (5th Cir. 2003). Accordingly, it is not fair to V&F to retain this case on the Court's docket when there has been more than enough time and opportunity to prosecute it, but has not been done so. As a result, dismissal for want of prosecution is appropriate.

**III.
PRAYER**

Based on the foregoing, Defendants CANDACE L. KUNZ-FREED and VACEK & FREED, PLLC f/k/a THE VACEK LAW FIRM, PLLC pray that this Court grant this Motion to Dismiss for Want of Prosecution, and order that Plaintiffs take nothing by their claims against Defendants, and for such other and further relief to which Defendants may be justly entitled in law or in equity.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Texas Rules of Civil Procedure, on this the 25th day of January, 2019, a true and correct copy of this document has been forwarded by certified mail, facsimile and/or e-filing to all counsel.

Cory S. Reed

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