

APPENDIX

242112

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

D. Jeremy Whitmire
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi 39201-1082
e-mail:sctclerk@courts.ms.gov

June 2, 2022

Elise LaMartina

v.

Appellate Cause No.: 2022-TS-00282

Jason Patrick Johnson, Charles H. Johnson, Jr. and Universal Storage, Inc.

Appealed From: Hancock County Circuit Court / 23CI1:21-cv-00099

DISMISSAL NOTICE

Pursuant to M.R.A.P. 2(a)(2), this appeal is dismissed for failure to pay the \$200.00 filing fee and the costs of the appeal.



CLERK

cps

cc: Trial Court Clerk
Trial Court Judge
Counsel of Record/Parties/Pro Se

IN THE CIRCUIT COURT OF HANCOCK COUNTY, MISSISSIPPI

ELISE LaMARTINA

FILED

APPELLANT

VERSUS

MAR 07 2022

NO. 21-0099

JASON PATRICK JOHNSON,
CHARLES H. JOHNSON, JR., and
UNIVERSAL STORAGE, INC.BY  KENDRA NECAISE
CIRCUIT CLERK HANCOCK CO.
D.C.

APPELLEES

ORDER

This matter is an appeal of a civil action from an order of the county court of Hancock County, Mississippi (Cause No. CC19-0295) and is before the Court on two Motions: (1) the Motion to Proceed *in Forma Pauperis* filed by the Appellant, Elise LaMartina, [Doc. 3]; and (2) the Motion to Dismiss Appeal for Lack of Appellate Jurisdiction filed by Appellees Charles H. Johnson, Jr. and Universal Storage, Inc. [Doc. 8], in which Appellee Jason Patrick Johnson has joined. [Doc. 14]. Having considered everything in the Motions and briefs filed by the parties, the record in this case, and the oral arguments during the hearing held on December 10, 2021, the Court finds that Elise LaMartina's Motion to Proceed *in Forma Pauperis* should be denied, and that Charles H. Johnson, Jr.'s and Universal Storage, Inc.'s Motion to Dismiss Appeal for Lack of Appellate Jurisdiction and Jason Patrick Johnson Joinder should be granted.

In Forma Pauperis Status

MISS. CODE ANN. § 11-53-17 specifically provides that an indigent citizen may "commence" any civil action without being required to prepay fees or give security for costs. The case before this Court, however, is not the commencement of this case. It is an appeal of a civil action from county court. There is no *in forma pauperis* status on an appeal in a civil action.

In addition, Section 11-53-17 provides that the oath itself state: "I . . . do solemnly swear that I am a citizen of the State of Mississippi . . . I am not able to pay the costs or give security for the same in the civil action (describing it) which I am about the commence (or which I have begun, as the case may be) . . ." Ms. LaMartina is not a citizen of the State of Mississippi, has not put that she is a citizen of the State of Mississippi in her Pauper's Affidavit and Income Questionnaire [Doc. 4], and her Pauper's Affidavit does not say what Section 11-53-17 requires.

The case law is very clear that *in forma pauperis* status applies only in the trial court. The case on which Ms. LaMartina primarily relies, *Life and Cas. Ins. Co. v. Walters*, 190 Miss 761, 774, 200 So. 732 (Miss. 1941), has no bearing on the current statute or the current state of the law. The current version of Section 11-53-17 was enacted in 1991, some 50 years after *Walters*. The Mississippi Supreme Court "has stated that any right to proceed *in forma pauperis* in other than a criminal case exists only at the trial level." *Moreno v. State*, 637 So.2d 200, 202 (Miss. 1994) (citing *Nelson v. Bank of Miss.*, 498 So.2d 365 (Miss. 1986); *Walters*, 190 Miss. 761, 200 So. 732). Further, "the statute dealing with suits in forma pauperis applies only to courts of original jurisdiction, and not to courts of appeal." *Moreno*, 637 So.2d at 202 (quoting *Walters*, 190 Miss. 761, 774, 200 So. 732). See also *Ivy v. Merchant*, 666 So.2d 445, 450 (Miss. 1995); *Blake v. Estate of Clein, ex rel. Clein*, 37 So.3d 622 (Miss. 2010); *Pinson v. Grimes*, 42 So.3d 650 (Miss. Ct. App. 2010).

The Mississippi Supreme Court has also determined there is no constitutional right to appeal *in forma pauperis* in a civil action. See *Nelson*, 498 So.2d at 366 ("We have considered the question of whether there is a constitutionally-based right to appeal *in forma pauperis* in a civil action. We do not find that the Supreme Court of the United States has ever expressly recognized any such right."). And Section 11-53-17 has been found to satisfy both the Due

Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Nickens v. Melton*, 38 F.3d 183, 185-86 (5th Cir. 1994).

There is no authority that supports an *in forma pauperis* appeal in a civil action. Thus, Ms. LaMartina's Motion to Proceed *in Forma Pauperis* is denied.

Cost Bond

The cost bond required by MISS. CODE ANN. § 11-51-79 has not been paid in this case, and Ms. LaMartina agrees she has not paid the cost bond. UCCCR 5.09 provides that “[i]n all appeals, unless the court allows an appeal *in forma pauperis*, the appellant or appellants shall pay all court costs incurred below and likely to be incurred on appeal as estimated by the circuit court clerk. Should a dispute arise, a party may apply to the court for relief.” The Court has already ruled there cannot be an appeal *in forma pauperis* in this case. But Rule 5.09 goes back to Rule 5.01, which applies to all appeals that come to circuit court, including those from justice court or municipal court. UCCCR 5.01. “Direct appeals to the circuit court from justice court or municipal court shall be by trial de novo.” *Id.* Here, this Court^{15(a)} is not sitting as a trial court for a trial de novo; rather, this Court is sitting as an appellate court. Cases appealed from forums other than justice or municipal court, including county court, are appeals on the record and not for a trial de novo.

The Mississippi Supreme Court has made it clear there is no exception to the 30-day requirement in Section 11-51-79. Ms. LaMartina filed her Notice of Appeal in this case on July 6, 2021. The Clerk's Estimate of Costs for Appeal in the amount of \$443.00 was filed on July 27, 2021. According to the record in this case, that money has never been tendered by Ms. LaMartina. But even if the Clerk's estimate of costs had not been filed, MISS. R. APP. P. 11(b)(1) provides the procedure for an appellant to estimate the costs at the statutory rate per page for the

approximate number of pages of clerk's papers. Ms. LaMartina did not estimate the costs herself and make a deposit to pay the estimated costs. The clock was ticking from the time she filed her Notice of Appeal on July 6, 2021. And Ms. LaMartina's argument concerning MISS. CODE ANN. § 11-3-5 is inapposite, because that statute only applies to appeals to the Mississippi Supreme Court, not the circuit court.

In *Morningstar v. Perkins Law Firm*, the Mississippi Court of Appeals explained "that section 11-51-79 provides, in relevant part, that '[a]ppeals from the county court shall be taken and bond given within thirty (30) days from the date of the entry of the final judgment or decree on the minutes of the court[.]'" No. 2020-CP-01203-COA (Miss. Ct. App. 2021). "The Mississippi Supreme Court has held that '[a] cost bond is jurisdictional because it is a statutory requirement for an appeal.'" *Id.* (quoting *T. Jackson Lyons & Assocs., P.A. v. Precious T. Martin Sr. & Assocs., PLLC*, 87 So.3d 444, 451 (Miss. 2012)). Additionally, UCCCR 5.04 "requires that the costs of the appeal be paid within thirty days of the judgment or order being appealed in order for the appealing party to perfect the appeal." *Id.* (quoting *Belmont Holding, LLC v. Davis Monuments LLC*, 253 So.3d 323, 331 (Miss. 2018)); see UCCCR 5.04 ("[T]he notice of appeal and payment of costs must be simultaneously filed and paid with the circuit court clerk within thirty (30) days of the entry of the order or judgment being appealed. The timely filing of this written notice and payment of costs will perfect the appeal.").

Conclusion

In sum, there is no right to appeal *in forma pauperis* from county court to circuit court in a civil action. There is also no exception to requirement in Section 11-51-79 that the cost bond be paid within 30 days from the entry of the judgment or order being appealed. Further, an *in forma pauperis* motion has never been found to stay a proceeding or alleviate what parties must do in a

particular case. The fact that Ms. LaMartina's Motion to Proceed *in Forma Pauperis* was pending does not change the fact that cost bond was not paid within 30 days of the entry of the county court's order from which Ms. LaMartina appealed. It is, therefore,

ORDERED and ADJUDGED that Elise LaMartina's Motion to Proceed *in Forma Pauperis* is denied. It is further,

ORDERED and ADJUDGED that Charles H. Johnson, Jr.'s and Universal Storage, Inc.'s Motion to Dismiss Appeal for Lack of Appellate Jurisdiction and Jason Patrick Johnson's Joinder in the same is granted, and that this appeal is hereby dismissed in its entirety.

SO ORDERED and ADJUDGED, this the 28th day of December, 2021.
Entered this the 28th day of January, 2022.

Lisa P. Dodson
HONORABLE LISA P. DODSON
CIRCUIT COURT JUDGE

Agreed as to Form:

Elise LaMartina, Appellant

*Not signed
when received
in communication
is objection
to form
in this Order
2/28/22*

Clement S. Benvenutti, Esq.
Attorney for Appellee Jason Patrick Johnson

Prepared by:

Christopher Smith (MSB# 104366)
SMITH & HOLDER, PLLC
1720 22nd Avenue (39501)
Post Office Box 1149
Gulfport, MS 39502-1149
Telephone: (228) 206-7076
Facsimile: (228) 284-1870
Email: chris@smithholder.com
Attorney for Appellees Charles H. Johnson, Jr. and
Universal Storage, Inc.

IN THE COUNTY COURT OF HANCOCK COUNTY, MISSISSIPPI

ELISE LAMARTINA

VERSUS

JASON PATRICK JOHNSON,
CHARLES H. JOHNSON, JR.
And UNIVERSAL STORAGE, INC.

FILED

PLAINTIFF

CAUSE NO.: CC19-0295

JUN 18 2021

KENDRA NECAISE
CIRCUIT CLERK, HANCOCK CO.
BY *[Signature]* D.C.

DEFENDANTS

ORDER DENYING MOTION TO COMPEL AND OF DISMISSAL

THIS CAUSE came before the Court on June 14, 2021, on the Court's Motion to Show Cause (why this matter should not be dismissed) in accordance with Miss. R. Civ. P. 41(d) and Plaintiff's Motion to Compel, and the Court having considered the record, arguments of the parties and the Mississippi Rules of Civil Procedure, finds that Plaintiff's Motion to Compel is denied and this matter should be dismissed with prejudice for want of prosecution.

A. Factual Background

The Court based its decision on many factors which include, but are not limited to:

1. This matter was originally filed on December 20, 2019. [Doc. 2];
2. On January 13, 2020, a hearing was conducted to determine whether Plaintiff would be allowed to proceed *in forma pauperis*. The Court reluctantly granted Plaintiff's motion to proceed *in forma pauperis* as a pro se litigant. [Doc. 10]. The Court advised Plaintiff at that time that she would be required to follow the same rules of civil procedure as a practicing attorney;
3. Plaintiff was licensed to practice law in another state;
4. On May 22, 2020, Plaintiff filed a Motion to Compel [Doc. 38], but never set it for a hearing;
5. Plaintiff did not take any other steps to prosecute her case after May 22, 2020.
6. The next activity in the case occurred on April 15, 2021, when the Court set this matter for hearing on May 10, 2021, to determine why this matter should not be dismissed. [Doc. 39];
7. On April 26, 2021, Plaintiff filed an Opposition to Dismissal, Motion to Resct Hearing and a

Motion to Compel. [Doc. 40]. The Court granted reset the hearing for June 14, 2021, at 1:30 p.m. [Doc. 42], to allow Plaintiff time to attend the hearing because she would be traveling from out of state;

8. On May 6, 2021, counsel for Charles Johnson, Jr. and Universal Storage, Inc. filed a Response to the Motion to Compel and Opposition to Dismissal [Doc. 41] arguing that:

- a. He has never received discovery from the Plaintiff, the requests are not attached to the Motion to Compel and no notice of service is located in the Court's docket in accordance with Miss. R. Civ. P. 5(a);
- b. Plaintiff's Motion to Compel lacks any good faith certificate that she tried to confer with defense counsel about the failure to respond in accordance with UCRC 4.03(C); and
- c. In accordance with UCRC 4.03(C), Plaintiff's Motion to Compel failed to quote verbatim each contested request.

B. Plaintiff's Motion to Compel

Plaintiff's Motion to Compel was not properly brought before this Court and is, therefore, denied. Not only was Plaintiff's Motion to Compel procedurally defective, but also, notwithstanding those defects, was never set for hearing. For almost a year, Plaintiff took no meaningful steps to properly resolve the alleged discovery issues with the parties or to seek the Court's intervention. Plaintiff did not give any explanation for her failure to resolve the discovery issues with the exception of her argument that she was lulled into settlement discussions by Adam Harris, an attorney who allegedly is involved in this case, but has made no entry of appearance and is not before the Court.

C. Plaintiff's Failure to Prosecute

Plaintiff has failed to abide by the Mississippi Rules of Civil Procedure and in so doing has burdened Defendants by dragging this matter out for nearly a year without taking any significant litigation steps forward and also causing unnecessary expense and prejudice to Defendants. The Court previously instructed Plaintiff at the commencement of the litigation to obtain trial dates once all Defendants were served with process so that the parties could enter into a scheduling order, which this Court customarily requires once all parties are properly served and have filed responsive pleadings. To

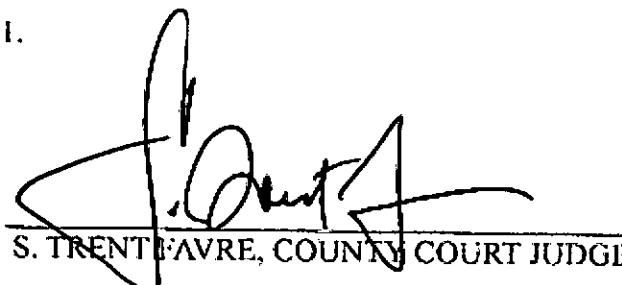
date, there is no scheduling order on file.

The Court set this matter for Plaintiff to show cause why this matter should not be dismissed for her failure to prosecute. Plaintiff claims that there has been activity, but she did not enter any evidence into the record in support. In fact, the Court's docket does reflect that Defendant, Jason Patrick Johnson, filed a motion to compel against Plaintiff for her failure to adequately respond to the discovery propounded on April 23, 2020. [Doc. 31]. On April 24, 2020, this Court entered an order granting Defendant's Motion to Compel and directing Plaintiff to supplement her responses within 10 days. [Doc. 33]. There is no evidence that Plaintiff ever complied with this Order. Her failure to follow this Court's orders and lack of attention to this case demonstrate a negligent prosecution of her case. In her argument, Plaintiff contends she stayed litigation pending settlement negotiations; however, she has not presented any evidence, through sworn testimony, affidavit, or otherwise, to support her allegations. This Court finds that Defendants would be unfairly prejudiced should Plaintiff be allowed to maintain her action.

The Mississippi Supreme Court has held that the power to dismiss for failure to prosecute is granted not only by Rule 41(b), but is part of a trial court's inherent authority and is necessary for "the orderly expedition of justice and the court's control of its own docket." *Cox v. Cox*, 976 So. 2d 869, 874 (Miss. 2008) (citing *AT&T v Days Inn of Winona*, 720 So. 2d 178,180 (Miss. 1998)). The Court finds that this matter, which was originally filed in 2019, should be dismissed with prejudice in accordance with Rule 41(d) of Miss. R. Civ. P. for want of prosecution.

ORDERED AND ADJUDGED the above captioned matter is hereby dismissed with prejudice.

SO ORDERED, this the 18th day of June, 2021.



S. TRENT FAVRE, COUNTY COURT JUDGE