

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GARY E. BROCCOLI,	:	
	:	
Plaintiff,	:	NO. 3:03CV830(MRK)
	:	
v.	:	
	:	
DOLLAR TREE STORES, INC.,	:	
	:	
Defendant.	:	

RULING ON MOTION FOR ORDER OF DISMISSAL

Defendant Dollar Tree Stores has moved for an Order dismissing the Plaintiff's Complaint pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, stemming from Plaintiff's failure to prosecute his case in accordance with the Court's order. For the reasons stated below, Defendant's Motion [doc. #25] is GRANTED.

The Court's June 15, 2004 Ruling on Motion to Withdraw [doc. #21] stated the history of the case in great detail in allowing Plaintiff's former attorneys to withdraw from the case. The Court will reprise that history here, in order to make explicit the sequence of events that have led to the dismissal of Plaintiff's claims.

By Motion To Withdraw As Counsel [doc. # 19] dated May 21, 2004, Attorneys Michael E. Satti and Holly Quackenbush Darin sought Court permission to withdraw their appearances on behalf of Plaintiff and in accordance with D. Conn. L. Civ. R. 7(e) served Plaintiff with a copy of the Motion. Pursuant to Local Rule 7(e), the Court issued a Notice to Plaintiff [doc. # 20] that the Motion to Withdraw had been filed and that the Motion would remain under advisement until June 14, 2004 to give Plaintiff an opportunity to retain replacement counsel or to file a *pro se* appearance. The

Notice further informed Plaintiff of the following: (1) that to prosecute his case, Plaintiff would have to file an appearance as set forth above no later than June 14, 2004; (2) that on June 15, 2004, the Court would grant the Motion to Withdraw Appearance [doc. #19]; (3) that if no attorney appearance or *pro se* appearance had been filed on Plaintiff's behalf by June 14, 2004, Plaintiff might be deemed to have failed to prosecute his action; and (4) Defendant might then move for dismissal of Plaintiff's action.

On June 15, 2004, the Court held an on-the-record telephonic status conference with counsel for Defendant and Mr. Satti. Mr. Satti informed the Court that so far as he was aware, Plaintiff had not filed a *pro se* appearance and no other attorney had appeared on Plaintiff's behalf in accordance with this Court's Notice, and that he and Ms. Darin wished to withdraw for the reasons recited in their Motion. Counsel for Defendant did not oppose the Motion.

Upon finding that Plaintiff has not filed either a *pro se* appearance or retained replacement counsel as requested by this Court and that Mr. Satti and Ms. Darin have demonstrated good cause for withdrawing as Plaintiff's counsel, the Court granted the Motion To Withdraw as Counsel [doc. #19] and ordered former counsel to serve a copy of the Order on Plaintiff and to file a Notice with this Court and opposing counsel attesting to service. Attorneys Satti and Darin appropriately complied with this order. [doc. #24].

The Court admonished Plaintiff in the Order:

Plaintiff is cautioned that he no longer has an attorney representing him in this action and that if he does not retain replacement counsel immediately or file his own *pro se* appearance with the Clerk of the Court, Defendant will be entitled to move to dismiss this action for failure to appear and/or prosecute under Fed. R. Civ. P. 41(b). It further appears from the pleadings that Plaintiff is also in default of his obligations to comply with discovery requests of Defendant, and any continued failure to do so may also subject Plaintiff to a dismissal of this action and other sanctions. To avoid dismissal, Plaintiff should immediately obtain

replacement counsel or file a *pro se* appearance and bring himself into compliance with the discovery rules.

On June 22, 2004, Defendant moved for an order of dismissal, noting that Plaintiff has failed to retain replacement counsel or file a *pro se* appearance, and that Plaintiff has continued not to participate in discovery. Def's Mot. for Order of Dismissal {doc. #25}, ¶¶ 6-12. Federal Rule of Civil Procedure 41(b) allows a court to dismiss a case "for failure of the plaintiff to prosecute or to comply with these rules or any order of court." Fed. R. Civ. P. 41(b). The Second Circuit has set forth five factors to consider when evaluating a motion under Rule 41(b):

[1] the duration of the plaintiff's failures, [2] whether plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard, and [5] whether the judge has adequately assessed the efficacy of lesser sanctions.

Shannon v. Gen. Elec. Co., 186 F.3d 186, 193-94 (2d Cir. 1999) (quoting *Nita v. Connecticut Dep't of Env'tl. Prot.*, 16 F.3d 482, 485 (2d Cir. 1994)). As the Second Circuit recently noted, "[n]o one factor is dispositive" and the court must examine the record as a whole. *United States ex rel. Drake v. Norden Sys.*, 2004 U.S. App. LEXIS 14393, at *15 (2d Cir. July 14, 2004).

In assessing these factors, the Court notes that Plaintiff has failed to prosecute this case since January, a span of approximately seven months, see Motion to Withdraw as Counsel [doc. #19], at 1, and that Plaintiff has received two separate notices from the Court indicating that the case could be dismissed if he failed to appear or retain new counsel. [docs. #20, 21]. The first two factors thus weigh in favor of dismissal. As to the third factor, the Second Circuit has held that the question of prejudice "turns on the degree to which the delay was lengthy and inexcusable." *Drake*, 2004 U.S. App. LEXIS 14393, at *21. Insofar as Defendant has been unable to take discovery since December

and Plaintiff has provided no excuse, the Court concludes that Defendant will be further prejudiced by continued delay. Furthermore, since the original Motion to Withdraw as Counsel, dated May 21, 2004, almost three months have elapsed and Plaintiff has failed to respond in any form, suggesting to this Court that Plaintiff has been given a fair chance to be heard and that lesser sanctions will not be efficacious. The Court can only conclude that the weight of these combined factors indicates that dismissal is the only appropriate remedy at this point.

Accordingly, the Motion for Order of Dismissal [doc. #25] is GRANTED, and the case is dismissed. The Clerk is directed to close the file.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: August 11, 2004