

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN THE MATTER OF)	
)	
HEARTLAND MEMORIAL HOSPITAL, LLC,)	CASE NO. 07-20188 HCD
)	CHAPTER 11
DEBTOR.)	
)	
)	
HEARTLAND MEMORIAL HOSPITAL, LLC,)	
PLAINTIFF,)	
vs.)	PROC. NO. 07-2060
)	
VIJAY K. GUPTA, M.D., ET AL.,)	
DEFENDANTS.)	

Appearances:

Mark E. Leipold, Esq., counsel for plaintiff, Gould & Ratner LLP, 222 North LaSalle Street, Suite 800, Chicago, Illinois 60601;

Keevan D. Morgan, Esq., counsel for Certain Defendants, Morgan & Bley, Ltd., 900 West Jackson Boulevard, Suite 4 East, Chicago, Illinois 60607; and

Michael R. Collins, Esq., counsel for Additional Defendants, Collins & Collins, 8 South Michigan Avenue, Suite 1414, Chicago, Illinois 60603.

MEMORANDUM OF DECISION

At South Bend, Indiana, on May 20, 2010.

Before the court is the debtor-plaintiff's response to the court's order to show cause issued on February 19, 2010. The court had directed the plaintiff to show cause in writing why the adversary proceeding should not be dismissed due to the lack of prosecution. *See* N.D. Ind. L.B.R. B-7041-1. The plaintiff filed a timely response; two groups of defendants then replied in opposition. For the reasons that follow, the court now dismisses this adversary proceeding for lack of prosecution.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

BACKGROUND

The adversary case was commenced on May 16, 2007, with the debtor-plaintiff's filing of a Complaint against 54 defendants. On December 10, 2007, the plaintiff filed a motion requesting an extension of time for all deadlines, conferences, and hearings, *nunc pro tunc*, and the court granted the request one day later. *See* R. 163, 165. Since then, the case has not moved forward.² On February 18, 2010, the court ordered the plaintiff to show cause why the case should not be dismissed.

The Plaintiff's Response to Rule to Show Cause stated that it seeks to recover more than \$14,000,000 from the defendants herein. *See* R. 226, ¶ 1. It explained that the court confirmed the Liquidating Plan of Reorganization on November 20, 2008. David Abrams, appointed as the Liquidating Trustee of Heartland, determined to continue this lawsuit because it was a "significant component to the success of the confirmed Plan and the ability to provide a dividend to creditors." *Id.*, ¶ 7. The plaintiff argued that the adversary should be allowed to proceed because the "Liquidating Trustee has been spending both time and money on those matters that would allow the Trustee to raise monies quickly"; however, "the recoveries from these other matters have not been as significant or as timely as the undersigned originally believed" and, "[a]s a result, the Liquidating Trustee, and his counsel, have not advanced this adversary proceeding forward as quickly as they had hoped." *Id.*, ¶¶ 9, 10. The Trustee stated that he was, at this point, "in a better position to advance this adversary proceeding" and noted that he soon would file a motion for default judgment and would serve the defendants with discovery requests. *Id.*, ¶¶ 11-13.

Two days later, on March 14, 2010, "Certain Defendants" (28 in number) filed a Reply to the Plaintiff's Response, asserting that the plaintiff failed to show cause and that the case should be dismissed.

In their Memorandum Opposing Plaintiff's Stated Cause the defendants pointed out that the plaintiff "has

² The plaintiff's only substantive activities between December 10, 2007, and February 18, 2010, according to the case docket, are these: (1) The plaintiff responded to the court's Order to Show Cause why this adversary proceeding should not be separated into lawsuits against each defendant. *See* R. 167. At the hearing on April 24, 2008, the plaintiff presented its reasons for a consolidated cause of action and the court withdrew the Order. *See* R. 180. (2) The plaintiff succeeded in having the counterclaims of eight defendants dismissed. *See* R. 177, 204.

done absolutely nothing to prosecute” this case in the almost three years since it was filed. R. 228 at 2. They argued that the Trustee made clear in his Response that his delay was intentional:

[T]he Trustee states (§ 8) that he was short [of] money; (§ 9) that he has not collected money fast enough to make up his shortfall to prosecute this case because he has used the money to finance other litigation and store and locate records; and (§ 10) that he has been spending his time and money on quicker cash-generating cases than this one. Therefore, he and his lawyers “have not advanced this adversary proceeding forward as quickly as they had hoped.”

Id. at 13 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962) (declaring reasonable the inference that plaintiff’s attorney deliberately proceeded in a dilatory fashion)). They also asserted that the Trustee’s failure to prosecute was contemptuous, particularly after more than \$350,000 were awarded to the Trustee’s lawyers two days before they became involved in this adversary proceeding. Finally, they called the Trustee’s vows to act in the future “hollow promises.” *Id.* at 15.

Nine “Additional Defendants” filed a Memorandum, as well. *See* R. 230. They adopted the arguments in the earlier Memorandum filed by the “Certain Defendants” and then argued that the “lack of funds to pay Plaintiff’s lawyer is [neither] a valid legal excuse for the Trustee’s delay” nor a credible one, since the Trustee had settled 13 preference actions for \$177,168.15 in October 2009. *Id.* at 2 (citing hearing in main case). They urged the court to recognize that the case was a waste of the court’s time and resources. Moreover, they insisted, the plaintiff’s decision not to prosecute this case until after pressing other lawsuits was an intentional delay of the case. They sought dismissal of the case with prejudice.

DISCUSSION

The court’s order to show cause stated that no action had been taken by the plaintiff during the past sixty days. Requiring the plaintiff to present reasons for the lack of prosecution, the court relied on Local Rule B-7041-1 of the Local Rules of the United States Bankruptcy Court for the Northern District of Indiana, which provides:

Any contested matter or adversary proceeding in which no action has been taken for a period of sixty (60) days may be dismissed due to the lack of prosecution, with judgment for costs, if any,

following twenty-one (21) days notice given by the court to counsel of record or, in the case of a *pro se* party, to the party unless, for good cause shown, the court orders otherwise.

N.D. Ind. L.B.R. B-7041-1.

Dismissal of a case for failure to prosecute is governed by Federal Rule of Civil Procedure 41(b), which is incorporated into bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7041. Rule 41(b) authorizes a defendant to move to dismiss an action that the plaintiff has failed to prosecute or to comply with court rules or a court order. A court also may dismiss a claim *sua sponte* for failure to prosecute under Rule 41(b) or under the court's inherent powers. *See Link*, 370 U.S. at 630, 82 S. Ct. at 1389 (affirming a court's ability "to dismiss *sua sponte* for lack of prosecution"); *Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998). The Seventh Circuit Court of Appeals has long held that "[a] dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing." *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058, 1061 (7th Cir. 1989) (quoting *Webber v. Eye Corp.*, 721 F.2d 1067, 1069 (7th Cir. 1983)). When deciding whether to dismiss a case for want of prosecution, the court should take into account the particular circumstances of the case, including "the frequency and magnitude of the plaintiff's failure to comply with court deadlines, the effect of these failures on the court's time and schedules, the prejudice to the other litigants, and the possible merits of the plaintiff's suit." *Williams*, 155 F.3d at 857 (citing *Ball v. City of Chicago*, 2 F.3d 752, 759-60 (7th Cir. 1993)).

The court finds a clear record of delay. Once the court granted the plaintiff's request in December 2007 for a continuance of all the deadlines, conferences and hearings scheduled in the case, activity in this case almost completely halted. *See* R. 165 (Order of December 11, 2007). Although Answers were filed, no discovery was initiated and no progress was demonstrated by the plaintiff. The court finds that this case exhibits a long-term pattern of inactivity. *See Link*, 370 U.S. at 630 (3-year delay warranted

dismissal); *see also Cohen v. Hoyer*, 32 Fed. Appx. 755 (7th Cir. 2002) (dismissed after 21 months of inactivity).

The plaintiff explained that this adversary proceeding was not prosecuted because there were insufficient funds to pay the initial legal fees and costs associated with its prosecution. The plaintiff's attempts to recover finances from other legal sources were less successful than contemplated. In short, this case deliberately was not advanced because the Liquidating Trustee thought he could raise more funds quickly in more lucrative cases. This is clearly an admission that, by prioritizing other cases, this adversary case remained dormant. The decision not to act in this case was intentional. The Additional Defendants insisted that the claimed lack of funds was neither a valid nor a credible excuse, since the Trustee reported to Judge Klingeberger that his settlements of preference actions brought in more than \$177,000.

This decision left the defendants, medical professionals, vulnerable. They claimed they were “held hostage to Plaintiff’s ill-founded allegations of multi-million dollar fraud and forced to incur huge attorneys’ fees.” R. 228 at 2. The court notes that its continuance of the plaintiff’s deadlines in this case, granted on December 11, 2007, was never meant to be an open-ended reason to stop prosecution of the case. “Total inactivity is a sufficient basis for dismissal; a plaintiff need not overtly disobey a court order or miss court dates before denial is justified, *Washington v. Walker*, 734 F.2d 1237, 1238 (7th Cir. 1984), and a defendant need not show actual prejudice resulting from the plaintiff’s dilatory conduct. *Id.* at 1238-39.” *Shields v. Shearson Loeb Rhoades, Inc.*, 983 F.2d 1073, *2 (7th Cir. 1993) (unpub’d).

Dilatory tactics warrant dismissal, and the court need not warn a plaintiff that the case may be dismissed. *See Fischer v. Cingular Wireless, LLC*, 446 F.3d 663 (7th Cir. 2006) (stating that warning litigants before dismissing a case for failure to prosecute was within the discretion of the court). The Seventh Circuit has also found that a litigant has received “‘due warning’ via the district court’s show cause order that failing to advance her case could be fatal.” *Swarm v. Siemens Business Communications Systems*, 9 Fed. Appx. 512, 515 (7th Cir. 2001) (delay of 64 months warranted dismissal); *see also Schoenbrun v. Flynt*

Distributing Co., Inc., 842 F.2d 1294 at *2 (9th Cir. 1988) (“The order to show cause gave sufficient notice.”).

In this case, the court concludes that there is good cause to dismiss this case because of the excessive, intentional delay in prosecution, the prejudice to the 54 defendants, and the lack of any demonstration of potential merit to the plaintiff’s claim. With the inherent power “necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases,” *Link*, 370 U.S. at 631, 82 S. Ct. at 1389, the court dismisses this adversary proceeding for lack of prosecution.

CONCLUSION

The court having considered this matter under Federal Rule of Bankruptcy Procedure 7041, Federal Rule of Civil Procedure 41(b), and the corresponding local rule, and having found good cause for dismissal of this adversary proceeding due to the lack of prosecution, it is ordered that the Complaint of the Plaintiff is hereby dismissed with prejudice.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT