2000

Westinghouse Electric Supply Co v. Skyline Construction Co, a Utah corporation, and General Insurance Company of America, a corporation : Brief of Appellant

Utah Supreme Court

C. R. Henriksen; Henriksen, Fairbourn & Tate; Attorneys for Appellant.
Joseph J Palmer; Moyle & Draper; Attorneys for Respondents.

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTINGHOUSE ELECTRIC SUPPLY COMPANY,

Plaintiff-Appellant,

vs.

SKYLINE CONSTRUCTION COMPANY, a Utah corporation, and GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Defendants-Respondents,

-and-

PAUL W. LARSEN CONTRACTOR, INC.,

Defendant.

Case No. 14040

APPELLANT'S BRIEF

Appeal from an order of the Honorable Stewart M. Hanson, Judge in the Third Judicial District Court for Salt Lake County, granting respondents' Motion to Dismiss for failure to prosecute and dismissing plaintiff's Complaint with prejudice.

C. R. Henriksen
HENRIKSEN, FAIRBOURN & TATE
320 South 500 East
Salt Lake City, Utah 84102

ATTORNEYS FOR APPELLANT

Joseph J. Palmer
MOYLE & DRAPER
Deseret Plaza Building
Salt Lake City, Utah 84111

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

WESTINGHOUSE ELECTRIC SUPPLY COMPANY,	)	
Plaintiff-Appellant,	)	
vs.	)	Case No. 14040
PAUL W. LARSEN CONTRACTOR, INC., a Utah corporation; SKYLINE CONSTRUCTION COMPANY, a Utah corporation, and GENERAL INSURANCE COMPANY OF AMERICA, a corporation,	)	
Defendant-Respondent.	)	

APPELLANT'S BRIEF

STATEMENT OF FACTS

On February 10, 1972, appellant filed a Complaint in the District Court of Salt Lake County, State of Utah. The Complaint alleged that defendant Paul W. Larsen Contractor, Inc. was a subcontractor of defendant Skyline Construction Company which was the general contractor of a Utah State construction project located at the University of Utah. The Complaint stated that the plaintiff furnished certain goods, wares, and merchandise consisting of electrical materials and supplies to defendants Larsen and Skyline, but that defendants Larsen and Skyline failed to pay for said electrical materials and supplies. Defendant Skyline was paid by the State of Utah for the contract but has failed to pay plaintiff for either the goods received directly by Skyline or the goods received indirectly by Skyline through the subcontractor Larsen, all to appellant's loss in a sum in excess of $41,000.00. Defendant General Insurance Company of America

was included as a defendant in the action as the result of furnishing a bond insuring the payments to materialmen pursuant to provisions of Title 14-1-5, Utah Code Annotated. (R. 110-112) The specific allegations of fact in the Complaint are not at issue in this appeal.

After appellant's Complaint was filed, respondents filed motions to dismiss the Complaint for failure to state claims upon which relief could be granted. (R. 106, 108) Respondents, through their attorney, had various telephone conversations and correspondence with appellant's counsel wherein counsel discussed the possibilities of reviewing certain pertinent records in preparation for resolving the issues by settlement. Other than these informal approaches, counsel for defendant Skyline and General Insurance Company took no affirmative action until August 1973. Counsel for defendant Larsen, who is not a party to this appeal, did submit Interrogatories which were answered by the plaintiff. When it appeared to plaintiff's counsel that the matter would not be resolved on an informal basis, plaintiff noticed for hearing defendants' Motion to Dismiss. (R. 84) The Notice of Hearing was filed with the court by plaintiff on July 20, 1973. Defendants thereafter filed a Motion to Dismiss for failure to prosecute, which was filed on August 15, 1973. (R. 85) The court denied defendants' Motion to Dismiss, and allowed plaintiff to amend its Complaint to specifically allege the date the last material was furnished which was the subject matter of the suit. (R. 66)

In September 1973 respondents requested production of certain documents of the appellant. (R. 60-61) Appellant furnished copies of 112 invoices but because of the voluminous number of documents, letters, notes, and memoranda, contracts, purchase orders, signed delivery receipts, invoices,

record payments, notices, and correspondence involved, it was necessary for the appellant to obtain said information from various sources throughout its nationwide operation. (R. 36-39) In May 1974 and again in July 1974 appellant's counsel informed respondent's counsel's office that said records were available for inspection, but no effort was made by respondents to arrange time to see the documents. (R. 36-37)

Plaintiff had prepared a Motion to Produce, Requests for Admissions, and Interrogatories to defendants, but had not formally filed the same with the court based upon courtesy to the defendants that they should not be filed until the defendants had examined the documents requested by defendants from the plaintiff. (R. 37, 30) In January 1975, defendants filed a Motion to Dismiss for failure to prosecute, supported by a Memorandum but without supporting affidavits. The Memorandum alleged respondents had been prejudiced in the matter because defendants Paul Larsen Contracting Company and Skyline Construction had gone out of business and their employees were disbursed, making it awkward for defendants to defend the action. (R. 50, 54) Plaintiff's counsel thereafter filed with the court their Request for Production of Documents and Interrogatories that had been previously prepared. (R. 46-49) Appellant filed affidavits which were not countered which set forth facts in opposition to defendants' allegation that they had been prejudiced. (R. 38-39)

The Motion to Dismiss was argued before the Honorable Stewart M. Hanson, Sr., who ruled in favor of respondents and granted the respondents' Motion to Dismiss with prejudice. In a rehearing on a Motion to Amend the Judgment to eliminate the qualification "with prejudice," the court denied the motion and let the ruling stand with prejudice, barring plaintiff's right of relief

against respondents. It is from the court's ruling dismissing plaintiff's Complaint with prejudice with costs to the defendants that this appeal is taken.

> PROPOSITION: THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE PLAINTIFF'S COMPLAINT AND FURTHER ABUSED ITS DISCRETION BY DISMISSING SAID COMPLAINT WITH PREJUDICE

It is generally recognized that the dismissal with prejudice of a cause of action by the court is an extremely harsh sanction which should be resorted to only in extreme cases. In Canada vs. Mathews, 449 F.2d 253, 255 (5th Cir. 1971) the court ruled:

> ...(D)ismissal with prejudice is warranted only in extreme circumstances and only after the Trial Court, in the exercise of its unquestionable authority to control its own docket, has resorted to "the wide range of lesser sanctions which it may impose upon the litigant or the derelict attorney, or both."

The Utah Supreme Court has had only limited occasion to rule on this issue, but has generally followed the majority of cases that hold that a dismissal should be permitted only in the face of a clear record of willful default or delay on the part of one party where other sanctions and remedies are insufficient.

The Utah Supreme Court case of Crystal Lime and Cement Co. v. Robbins, 8 Utah 2d 389, 335 P.2d 624 (1959) heard a similar argument when the Utah Supreme Court reversed a lower court's dismissal of plaintiff's Complaint for failure to prosecute. In that case, after a lapse of almost nine years, the court said:

> Since any party to this action could have obtained the relief to which it was entitled at any time it wanted, but both parties chose to dally for a number of years, it was an abuse of discretion for the court to grant a respondent's motion to dismiss with prejudice.

In another Utah Supreme Court case, Howard v. Howard, 11 Utah 2d 149, 356 P.2d 275, (1960), the Utah Supreme Court cited with approval the Crystal Lime (infra) case in a matter where a motion for a new trial by the defendant lay dormant for fifteen months before it was called up for hearing. In the case of Vonjonora v. Draper, 30 Utah 2d 364, 517 P.2d 1322 (1974) the Utah Supreme Court also reversed as an abuse of discretion a court order dismissing plaintiff's Complaint for failure to prosecute. In that case, although it involved a change of counsel, nearly three and one-half years had elapsed after the filing of the Complaint and defendant's motion to dismiss.

In the case before the court the pertinent time element was a fifteen month period after defendants filed a Request for Production of Documents and January 1975 when defendants filed a Motion to Dismiss for failure to prosecute. Because of the voluminous amount of documents requested by the defendants, it took longer than usual for plaintiff to acquire the documents. One hundred twelve invoices had been furnished to the defense counsel in September 1973. (R. 56) However, additional supporting documents needed to be gathered from various sources throughout the country. Phone messages were left with the defendants approximately eight months prior to respondent's motion being filed, informing respondent's office of the availability of the requested documents. (R. 36-37)

Respondents allege by memorandum, but without refuting affidavits, that they did not receive the messages left at the defense counsel's office. However, there is no question that respondents made no effort to attempt

to contact plaintiff's counsel to inquire concerning said documents.

Respondents allege by memorandum but without supporting evidence or affidavit that as a result of defendants Larsen and Skyline going out of business in the fall of 1972 respondents were prejudiced in defending this action because of unavailability or difficulty in getting their employees to testify. Appellant's local management has provided by affidavit the names and present addresses of the employees of defendant Skyline who would have knowledge of the relevant facts pertinent to respondents' case. (R. 38-39) Respondents have never indicated by name any other unavailable witness, but they did admit in oral argument before the court that witnesses T. F. Beddingfield and Charlie Sparks were the people that have the knowledge of the detail concerning purchases from Westinghouse. (R. 131, lines 14-17) The Salt Lake County addresses for these two key witnesses were provided for respondents by plaintiff's affidavit. (R. 39) Also, counsel for respondents has admitted that the president and secretary respectively of defendant Skyline have a personal interest in cooperating with the defendant insurance company as the result of their being personal guarantors on the bond. (R. 131, lines 1-3) The financial status of defendants' business and employees was known only to respondents and not to appellant, but nevertheless respondents made no attempt, even knowing the limitations of their evidence, to take any depositions or begin any discovery proceedings for over a year after commencement of the case and did not communicate with plaintiff about any necessity to bring the matter to an early conclusion.

Although relatively few Utah Supreme Court decisions have faced

this issue, there have been numerous federal decisions interpreted under the identical federal rule.

In Independent Productions Corporation v. Loew's, Inc., 283 F.2d 730 (2nd Cir. 1960) the court commented:

> Dismissal of action with prejudice or entry of judgment by default are drastic remedies and should be applied only in extreme circumstances.
>
> * * *
>
> In final analysis, a court has the responsibility to do justice between man and man, and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default.

See also De Cuba v. PRC Pictures, (2nd Cir. 1949) 176 F.2d 93 (dismissal with prejudice set aside).

In Hassenflu v. Pyke, 491 F.2d 1094 (5th Cir. 1974) the court found that the dismissal of plaintiff's Complaint with prejudice was essentially punishing the plaintiff and despite flagrant misconduct by plaintiff's counsel reversed the lower court dismissal. Thus the courts have continually held a dismissal with prejudice as a drastic and an extreme measure that should be taken only as a last resort when all other efforts have failed. See also, Mann v. Merrill, Lynch, Pierce, Fenner, and Smith, 488 F.2d 75 (5th Cir. 1973) and Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1973).

In the case of Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963), in reversing the district court's dismissal pursuant to Rule 41(b), the court stated:

> The law favors the disposition of litigation on its merits. Dismissal is a harsh thing and should be resorted to only in extreme cases.

See also, Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910 (2nd Cir. 1959).

In the present case the wide range of lesser sanctions available to the court were not used before the extreme measure of dismissal was invoked. In fact, the defense counsel made no effort to bring the matter of the time taken by plaintiff in the production of documents before the court prior to its Motion to Dismiss or to seek any order compelling production or invoking sanctions upon the plaintiff. Certainly if any effort had been made by respondents' counsel, the communication gaps that existed between counsel on the availability of said documents for the eight months prior to the filing of the Motion to Dismiss would have come to light and the documents would have been inspected. There is nothing contumacious, willful, flagrant, or intentional about plaintiff's actions which would justify dismissal with prejudice.

To guard against delays in responding to discovery, rules have been established providing sanctions less severe than total dismissal. Rule 37, Utah Rules of Civil Procedure has been especially adopted to provide sanctions for delays or failure to produce documents or make other discovery. Nevertheless, respondent's counsel failed to make any effort to even inquire of plaintiff's counsel, let alone invoke the provisions of this rule. Certainly if there was any unjustified delay in producing documents, the lesser sanctions of Rule 37 would have been the more appropriate and equitable remedy for the trial court to have applied in the circumstances. The question of the justification for the time necessary for the production of documents is an equitable element that should have been considered by the trial court.

If there was any prejudice at all to the defendants it is the

result of respondents' own failure to act or proceed in the case. Respondents and their counsel were aware for over a year prior to notifying plaintiff that defendant Larsen was in receivorship and defendant Skyline had made an assignment for the benefit of creditors. (R. 74, 75, 89) During that year counsel for defendants made no attempt to file a Request for Production of Documents with the court or to seek answers to Interrogatories or to even notice up their own Motion to Dismiss. Such facts were not even discussed between the counsel during their telephone conversations. If there was prejudice that developed to the defendants' position in this matter as the result of deteriorating conditions of defendants Larsen and Skyline, it was the defendants who chose it to be that way and chose not to pursue the matter towards a quick disposition.

The fact that defendant General Insurance Company has been inconvenienced in the preparation of its defense is a risk inherent in writing construction bonds to which they routinely must submit. In a 1970 Utah Supreme Court case, this same General Insurance Company of America was informed by this court of such a responsibility when it said in Mine and Smelter Supply Co. v. General Insurance Company of America, et al., 24 Utah 2d 330, 471 P.2d 154 (1974):

> It goes without saying that Brazina (general contractor) having employed four subcontractors could have provided by the contract such controls as it deemed necessary to insure the payment for materials used in the construction and it could have provided for such supervision of the work so as to protect itself against the claims of suppliers of materials for delinquency in payment of the subcontractor. General Insurance Company, in supplying the bond, could have likewise contracted for a system of controls and supervision which would have protected against the loss it is here concerned with. The appellant General Insurance Company, having failed to take necessary steps to protect itself against loss, cannot shift the burden to the plaintiff to provide that protection.

Under the circumstances of this case, if there has been any prejudice to the defendants it is clearly the result of their own failure to

proceed or to inform the plaintiff of the necessity of a rapid disposition of the matter.

CONCLUSION

Since September 1973, when respondents' Answer was filed after the court's denial of defendants' initial Motion to Dismiss, the following significant steps have been taken by the plaintiff to move the case along:

(1) filed amendments to the Complaint;

(2) delivered copies of all plaintiff's invoices for materials to counsel for defendants;

(3) searched plaintiff's archives, record depository, and branch regional and national offices for requested discovery documents;

(4) informed defendants' counsel's office of the availability of documents and records, May 1974;

(5) placed a second telephone message about availability of documents and records, July 1974;

(6) prepared Requests for Admissions, Interrogatories, Motion to Produce, which were held from being served upon defendants until defendants had actually reviewed the documents available;

(7) delivered to counsel for defendants additional discovery documents.

In the same interim period defense counsel had failed to take any further proceedings in filing any motions before the court or seeking an expediting of the time for appellant to provide the requested documents, nor did respondents' counsel make any telephone calls or write any letters or in any other way seek to resolve this matter or inquire of plaintiff's counsel concerning the requested documents. The uncontradicted affidavits of appellant's district manager and appellant's attorney established the

reasonable efforts that were necessary to retrieve the requested documents and the notification of defense counsel of their availability.

For the respondents to benefit by their failure to make any inquiry concerning discovery or to answer phone calls or otherwise to benefit by their failure to take any action in the case would be an unconscionable and unjust sanction against the plaintiff. This case certainly does not constitute the extreme circumstance in which such a drastic remedy as dismissal with prejudice might be considered justifiable. Certainly there is no evidence in the record of flagrant misconduct or willful default on the part of plaintiff. The record does show a complete failure of the respondent to take any action or make any inquiry that could amend the apparent communication gap that developed between counsel in this matter.

The dismissal of plaintiff's action was harsh and unjustified, and constitutes an abuse of judicial discretion against the plaintiff. If not reversed, said decision would be a final summary adjudication of plaintiff's claim permanently barring plaintiff's recovery and would be an unjust enrichment to defendant Skyline who has been paid for $41,357.32 in materials furnished by appellant.

WHEREFORE, appellant respectfully requests that this court reverse the trial court, reinstate appellant's action against the respondents, and order the case to be set for trial upon the merits.

Respectfully submitted,

C. R. HENRIKSEN
Attorney for Plaintiff and Appellant