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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WESTINGHOUSE ELECTRIC SUPPLY COMPANY,

Plaintiff-Appellant,

vs.

Case No. 14040

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

Defendants-Respondents.

-and-

PAUL W. LARSEN CONTRACTOR, INC.

Defendant.

REPLY BRIEF OF APPELLANT

Appeal from a judgment 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.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

The Statement of Facts presented by the Appellant and the Statement of Facts presented by the Respondents primarily vary in the period of time covered by the Statements. Since this appeal is concerned only with the issue of whether the trial court should have dismissed plaintiff's Complaint for failure to prosecute, plaintiff only included in its Statement of Facts the material developments from the time of the commencement of the lawsuit through the granting of defendants' Motion. Obviously, what occurred prior to 1972 when the Complaint was initiated is not significantly material to the court's decision of the

responsibilities of the respective parties in moving the case toward the trial stage. Consequently, the record on appeal does not include many facts pertaining to years 1970, 1971, and 1972, prior to the commencement of litigation as such facts would be wholly immaterial and irrelevant to the issues here involved. Nevertheless, Defendant-Respondents have spent a substantial portion of their brief discussing the actions of the plaintiff and defendants prior to the commencement of the lawsuit. Therefore, Appellant feels a necessity to respond and clarify some of the facts relied on by defendants in Respondents' Brief.

During the years 1970 and 1971 defendants Skyline and Larsen purchased large amounts of electrical products from Westinghouse Electric Supply Company which required shipments from various branches of the world-wide operations of Appellant's operations for use on a public construction job. These products were delivered from all parts of the country. Most items were shipped independently to the job from the respective plant where the product was manufactured. In the spring of 1970, Larsen became slow in some of his payments and Westinghouse required Skyline to make payments both to Larsen and the plaintiff. Thereafter, the materials purchased were approved by and ordered by Skyline's officers, agents and employees on Skyline's own account. Although the account balance varied at different times during the year 1970, as of July 14, 1971, there was a balance owing of $41,357.32, of which over half pertained to purchases directly made by defendant Skyline and the balance was purchased by defendant Larsen as a sub-contractor of Skyline. (R. 116-117) When suit was filed, it was understood by plaintiff that Respondent Skyline would settle the account

without the necessity of prolonged litigation. Unknown to plaintiff at that time was the serious financial condition of both Larsen and Skyline, which consequently resulted in both of them terminating their businesses before the end of 1972. As the result of both businesses failing, plaintiff has been required to look to the bonding company, General Insurance Company, to pay for the obligations incurred by the defunct companies Larsen and Skyline. Until that point there was not a problem of defendants having sufficient invoices and documentation to account for plaintiff's claim because copies of all invoices and monthly statements had been regularly sent to the defendants Larsen and Skyline during the course of construction and when the purchases were made. However, the defendant insurance company did not personally have its copies of the respective invoices. As of September 1973 when Respondents filed their answer in this matter, defendant General Insurance Company had been provided with lists of all payments that had been made and copies of all unpaid invoices in connection with this matter. (R. 56) In September 1973 defendants filed a request for production of additional documents. (R. 60-61)

This factual background is important because Respondents' brief weighs heavily on matters that pertained to time prior to when defendants filed their answer or before they ever filed a request for production of documents. Appellant believes that any time prior to September 1973 is wholly irrelevant and immaterial to the issues before this court. If there was any prejudice that was incurred by any of the defendants prior to September 1973, it was solely as the result of respondent General Insurance Company's own failure to act, knowing

that Skyline and Larsen were going out of business. The fact that defendants Skyline and Larsen went out of business was not known to plaintiff until August 14, 1973. (Record 74, 75)

The period of time relevant to the court's consideration is that time between August 1973 and January 1975. The events that occurred during that period are as follows:

August 14, 1973 - plaintiff was informed that defendants Paul Larsen Contractor, Inc. was in receivership and that Skyline Construction Company had made an assignment for the benefit of creditors. (R. 74-75)

August 20, 1973 - the court heard defendants' Motion to Dismiss and ruled that plaintiff must amend its Third Cause of Action in its Complaint to set forth the date the last material was supplied. (R. 66)

August 21, 1973 - plaintiff files amendment to Complaint.

September 10, 1973 - respondents file Request for Production of Documents. (R. 60-61)

September 10, 1973 - plaintiff's counsel submits to respondents' counsel 45 invoices pertaining to the Larsen account and 57 invoices pertaining to the Skyline Construction account. (R. 56)

October 1973 through April 1974 - plaintiff conducted searches through its archives, record depository, and branch, regional, and national offices to obtain the voluminous number of documents requested by defendants. (R. 36)

May 1974 - plaintiff informed Respondents' counsel's office of the availability of documents and records at plaintiff's offices. (R. 36-37)

July 15, 1974 - plaintiff again informed Respondents' counsel's office

of the availability of the requested documents. (R. 37)

October 1974 - plaintiff prepared Requests for Admissions, Interrogatories, and Motions to Produce to be served upon defendants at such times as defendants reviewed documents gathered by plaintiff. (R. 48-49)

January 6, 1975 - defendants filed Motion to Dismiss for failure of prosecution. (R. 50-51)

During the period from September 1973 to January 1975 the record is totally devoid of any effort whatsoever on the part of the defendants to take any action on the case or any efforts to follow up on the Request for Production of Documents to inquire about the production of documents or to seek a court order to compel production of documents.

ARGUMENT

PROPOSITION: UNDER ESTABLISHED PRINCIPLES OF EQUITY, THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THE PLAINTIFF'S COMPLAINT.

Respondents cite three cases upon which they rely to establish that the District Court did not abuse its discretion in dismissing the action. Each of these three cases can be clearly distinguished upon the facts from the case at bar. In the case of Brasher Motor and Finance Co. v. Brown, (1969) 23 Utah 2d 247, 461 P.2d 464, a replevin action for automobiles had been filed and the defendants filed a Counterclaim. Five and one-half years elapsed without either party taking any action. At the end of the five and one-half year period the court on its own motion dismissed the Complaint and the Counterclaim. The decision was affirmed on the basis that the trial court had acted with judicial propriety, looking to the interests of all litigants and the interest

of the court in the situation. The Supreme Court agreed that Rule 41 had no application in the case, but held that the court had the inherent authority to dismiss under the facts of the case.

The second case cited by the defendant is Food Basket, Inc. v. Albertson's, Inc. (D.C. Utah 1969), 416 F.2d 937, in which the Hon. Willis Ritter dismissed an anti-trust suit where the plaintiff had failed to file an amended complaint for almost a year after the plaintiff had been authorized to do so by the appellate court. Judge Ritter had previously granted summary judgment against the plaintiff, which decision was appealed and reversed by the appellate court, allowing the plaintiff to amend its complaint to correct technicalities. When plaintiff failed to so act for nearly a year, the matter was dismissed for failure to prosecute. Whether one agrees or disagrees with Judge Ritter's action in this matter, it cannot be denied that the fact situation is completely foreign to that before this court and is certainly not a sound precedent upon which Respondents can rely.

The third case Respondents rely on to show the District Court did not abuse its discretion is a Nevada case that is not at all in point.[1] In that case the plaintiff failed to serve the summons on the defendant doctor and the defendant hospital for over two years. Consequently, the court had the power under the Nevada Rules of Civil Procedure to dismiss plaintiff's complaint. That case is guided by the rules of procedure not applicable to this court. It involved a case in which the defendants had no duty to act because they had not been served with the pleadings requiring them to appear in their own defense.

In contrast to the three cases relied upon by Respondents, the case at bar involves a situation in which the appellant was taking affirmative action in

(1) Hassett v. St. Mary's Hospital Assoc. (Nev. 1970), 478 P.2d 154

the case while respondents were holding back any efforts to proceed. During the time between the filing of defendants' Answer and filing of the Motion to Dismiss, plaintiff had taken several positive steps as more specifically outlined in the Statement of Facts, which included providing certain documents to the defendants and making available a substantial number of documents for review and copying.

The applicable law seems to be most correctly stated in Crystal Lime and Cement Company v. Robbins, 8 Ut 2d 380, 335 P. 2d 624 (1959) which places some affirmative responsibilities on both plaintiff and defendant to bring a case to a conclusion. In Howard v. Howard, 11 Ut 2d 149, 356, (1960) the Supreme Court cited with approval the Crystal Lime case (infra), placing a mutual responsibility on both plaintiff and defendant to notice up motions and take appropriate actions within a case.

The heart of the case seems to be centered in the fact that defendant Skyline Construction Company and defendant Larsen went out of business, thus leaving the burden and responsibility of the case in the hands of the General Insurance Company. For some reason General Insurance Company did not seek to obtain from its insured or its insured's subcontractors copies of the invoices. The insurance company instead sought to place the burden and responsibility of providing said voluminous documentation upon the plaintiff. During this period of time, General Insurance Company was aware of the financial failure of its insured. Equity will not allow General Insurance Company to stand by without taking any action as its insured terminates its business and

then claim that because their insured's business has folded it does not now have access to the information necessary to put on a proper defense of the suit. The insurance company claims that since the employees are now employed by other entities that they have been unduly prejudiced. The facts are that Skyline and Larsen went out of business in October 1972 and the insurance company knew this and could have taken depositions or obtained documents from their insured or invoked the remedies of Rule 37 to speed the discovery process. Nevertheless, they chose not to even inform plaintiff of said business failure until August 1973 and made no effort to expedite the attempts of plaintiff to acquire duplicate documentation from its various offices. Not once after filing the Request for Production did the Respondents make any inquiry of plaintiff's counsel concerning said documents. Not once did they make a telephone call. Not once did they file a motion with the court asking for court sanctions in accordance with the Utah Rules of Civil Procedure. Not once did they make any effort to obtain those documents. If they had made any effort they would have been aware of the existence of those documents as of May 1974. They would have been aware of the telephone calls made to their office to advise them of the existence of the documents.

The respondents further claim that appellant was responsible for the delay in the case as the result of its not being more specific in its Answers to Interrogatories submitted by defendant Larsen. It is interesting to note that the Interrogatories were not submitted by either of the Respondents in this case, but by the other party who is not part of this appeal. At no time did the defendant

insurance company of the defendant Skyline submit any Interrogatories nor did any party object to the specificity of the Answers to Interrogatories given by Westinghouse. The facts are that said information requested was specifically and fully answered and defendants were provided the statement of charges and credits which was inadvertently left off the court's file copy. In any case, Respondents never objected to the inadequacy of said Answers until the Respondents' brief in this appeal.

Innuendos throughout Respondents' brief infer facts that are completely inconsistent with the record. Respondents claim that Larsen purchased the goods from plaintiff, not the respondents. (Respondents' Brief P. 12). It is true that respondent General Insurance Company did not make the purchase, but $22,000.00 of the unpaid amount was purchased by the respondent Skyline. On page 13 of Respondents' brief, they charge plaintiff with scattering its records throughout its branch, regional, and national offices when respondents knew very well that goods were received from various branch, regional, and national offices of plaintiff corporation. The Salt Lake City office of Westinghouse is only a distribution center and the various items were ordered from plants all over the country specializing in the manufacturing of the parts requested. Each individual plant maintained its own invoices and records. Westinghouse personnel had to spend the time to go through its records and invoices and gather the relevant documentation and transmit it to the Salt Lake City office. (R. 36-39). The respondent raises a smokescreen by inferring that documents were requested for many years, when, in fact, the documents requested prior to September 1973 were provided in September 1973. (R. 56) It was the documents that were not requested until September 1973 that were delayed for several months

because of the problem of gathering said documents. The suggested delay prior to September 1973 when defendants first answered plaintiff's Complaint are not material to the issues of this appeal. The broad scope of materials purchased required extensive work in gathering such records from the various branch, regional, and national archives for the benefit of the respondent insurance company.

On page 22 of their brief, respondents try to infer a lack of diligence on the part of the plaintiff for the failure to take discovery from defendant Larsen or take judgment against defendant Larsen. Such a point is obviously irrelevant because all parties know that the issues here are between appellant and the respondent's insurance company because the other defendants are out of business and unable to answer for the debts of the company. It is the respondent insurance company that is trying to ignore its responsibility as an insurer under the cloak of being uninformed, while disregarding the facts that the requested information is fully within the knowledge and understanding of its own insured or its insured's subcontractor.

The very reason that state law requires bonding companies be involved in cases like this is to protect the interests of businesses in the status of appellant from the business failures of contractors. For the insurance company now to try to get out of its insurance responsibilities under the theory that the defunct company's employees will not cooperate with it, begs the entire issue of the case and should not be an escape mechanism which allows insurance companies out of their duties to injured parties. To rule for the insurer in this case would merely encourage insurance companies in cases of clear liability to

refuse to take discovery procedures, take depositions, or prepare cases in the hope that they might prevail under the technicality of lack of cooperation due to delays in getting a case to trial.

The obvious basis of any power of the court to dismiss for lack of prosecution lies in a balance of the equitable principles between the parties. Without need for citation, legal maxims establish that one who seeks equity must do equity and that one seeking equitable relief by the court submits himself to the imposition of such terms as equitable principles require. In this case the respondent had sought the equitable relief of the court in seeking the court's exercise of discretion to prevent the plaintiff from prosecuting their claims against the respondents. They base their claim upon the premise that they were placed in an unfair position as the result of a delay in determining the exact amount of money owing to plaintiff. Respondents have never denied that there is some money owing to appellants, but have only claimed that they were unable to account for the precise amount of money as a result of not being able to get the records from their own insured or the theoretical cooperation of their own insured's employees or their insured's subcontractor. The insurance company seeks equitable relief without accounting for their own total failure to take any action to help the case progress or get necessary information from the other defendants between the time they filed the Request for Production of Documents and the time they filed their Motion to Dismiss. The record is entirely devoid of any effort whatsoever on the part of respondents to inquire concerning the status of the availability of the requested documents, which inquiry would have resolved this problem months before the time of the Motion

to Dismiss. The record is totally devoid of any effort on the part of the defendant to seek any other court assistance. The record is totally devoid of any effort on the part of the respondents to take depositions of employees or to gather documents already in the hands of their employees and their employees' subcontractor. The heart of this case is summed up in one sentence in respondents' brief when they indicate that more important than the months that elapsed from the Complaint to the Motion are the opportunities each side had to move the case forward. Specifically, Respondents' brief states: "Much more important factors are the opportunity each side has to move the case forward, the conduct of each side in attempting to do so, the reasons and justification given for the delay, and most important, the prejudice resulting therefrom." (Brief of Respondents, p. 24-25). (Emphasis is added). Plaintiff agrees that this is the important factor.

It is plaintiff's contention that while plaintiff was making reasonable efforts to gather information and provide such information to the defendant, the defendant did absolutely nothing after September 1973 until January 1975. Respondents took no action, despite the fact that during said period plaintiff had provided the 102 most relevant documents and was in the process of obtaining the others. There was a total failure of respondents to inquire, write a letter, make a phone call, or seek court assistance during the relevant period of time. The respondent insurance company took no action, knowing full well the status of their own insured and the degree if any of prejudice which they would suffer if they failed to adequately prepare for the case. Equitable principles will not allow them to sit back and do nothing and then complain because of the delay that

has resulted. It is well established basic law that one who seeks to invoke equitable principles of the nature before this court must not claim relief on inequities that have resulted through their own inaction.

While respondents were sitting back without action, plaintiff was going through extensive work in individual offices and plants throughout the country gathering necessary records which should not have been necessary to produce because they had previously been in the hands of the defendants other than the insurance company. During this period of time appellant was affirmatively acting in the matter while respondents were totally inactive.

CONCLUSION

The issue before this court narrows down to the simple question of whether the trial court abused its discretion in applying principles of equity and law in dismissing the plaintiff's case with prejudice. The positions of the parties are very clear. Appellant, because of the size of its operation, took an extended period of time to gather pertinent documentation which was beyond the time normally expected in a litigation proceeding. The period of time from the production of documents request in September 1973 until the availability of documents in May 1974 was not so extensive that it justified such a harsh remedy as total dismissal. The position of defendants Larsen and Skyline as defunct businesses is primarily one of cooperating with the insurance carrier who is responsible for the financial loss in this matter. The position of General Insurance Company of America is that of making up the financial loss of the businesses which failed to pay for over $40,000.00 of equipment which they received, used, and were paid for but for which they failed to pay the materialmen.

Obviously, the interests of Larsen and Skyline are considerably less than the insurance company's since their business failures in 1972. This lack of interest does not release the insurance carrier of the responsibilities of the risk it assumed. General Insurance Company certainly understood when they contracted to take the insurance risk that if the businesses failed it would have to appear in their behalf to protect against loss. They had the responsibility to invoke such controls for documentation or to insure employee cooperation as they deemed necessary in order to justify their assuming the risks involved. Mine & Smelter Supply Co. v. General Insurance Co. of America, et al, 24 Ut 2d 330, 471 P. 2d 154 (1974). For them to now try to escape this duty because they or their counsel failed to make any inquiry or any effort between September 1973 and January 1975 to get such information which they deemed necessary does not constitute the affirmative action that is required when someone seeks to invoke principles of equity by the court. If the time taken by plaintiff was longer than respondents desired, the options before them were many:

1. They could have obtained copies of the documents sought from their own insured or their insured subcontractor.

2. They could have taken necessary depositions.

3. They could have sought the court's sanctions under Rule 37, Utah Rules of Civil Procedure, to either encourage a deadline for the documents or to have financial or other sanctions imposed on the plaintiff.

4. They could have written a letter to the plaintiff asking for a time definite wherein said documents would be made available.

5. They could have placed a phone call to plaintiff's counsel as early as Ma 1974 and found that the documents sought were readily available for examination.

6. They could have answered the telephone messages left for them by plaintiff's counsel.

Ignoring all of the less stringent remedies, respondents sought the harshest remedy against the appellant, that of total summary adjudication of plaintiff's claim in the hope that respondents would be relieved of the obligation for which they had insured against the default. Naturally, the latter choice had the greatest long-range benefits for the defendant insurance company, but strikes at the face of equity, justice, and fairness between the parties. Respondent insurance company cannot palm off the responsibility for its failure to act under the guise that the appellant was taking longer to act than normally required. The purpose of an insurance company involvement in a project of this nature is to protect the interest of those in similar positions to plaintiff against business failures such as Skyline and Larsen. For the insurance company now to come along and try to get out of their insurance responsibility under the technicalities before this Court avoids the very heart of this matter and their responsibility both in equity and law as an insurer.

The very documents that respondent wants remain available for examination and respondents' principal witnesses remain available for testimony. The only permanent injury that would result should this court reverse the trial court's position is the expense of these appellate proceedings. It would be fair, just, and equitable for this court to reverse the trial court and allow a quick trial of the matter, require the documents in plaintiff's possession to be made immediately available for respondents' examination and for an early trial to be

set with the trial court empowered to assess such costs as equity determines to be reasonable in light of the delays in this matter. Appellant respectfully requests the court to take such action and order the case to be set for trial upon the merits.

Respectfully submitted,

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