2000

Reliance National Life Insurance Company v. James E. Caine : Petition for Rehearing

Utah Supreme Court

Japes P. Cowley; Watkiss and Campbell; Attorney for Defendant-appellant.
C. Richard Henriksen; C. Glenn Robertson; Attorneys for Petitioner.

IN THE SUPREME COURT

OF THE STATE OF UTAH

RELIANCE NATIONAL LIFE INSURANCE COMPANY,

Plaintiff and Respondent,

vs.

JAMES E. CAINE, dba CAINE AGENCY,

Defendant and Appellant.

Case No. ~~10940~~ 14474

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

C. RICHARD HENRIKSEN AND
C. GLENN ROBERTSON
320 South Fifth East
Salt Lake City, Utah 84102
Attorneys for Petitioner

JAMES P. COWLEY
Watkiss & Campbell
Twelfth Floor, 310 South Main Street
Post Office Box 730
Salt Lake City, Utah 84110
Attorney for Defendant-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

RELIANCE NATIONAL LIFE INSURANCE COMPANY,	)	
Plaintiff and Respondent,	)	
vs.	)	Case No. 10940
JAMES E. CAINE, dba CAINE AGENCY,	)	
Defendant and Appellant.	)	

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C. RICHARD HENRIKSEN AND
C. GLENN ROBERTSON
320 South Fifth East
Salt Lake City, Utah 84102
Attorneys for Petitioner

JAMES P. COWLEY
Watkiss & Campbell
Twelfth Floor, 310 South Main Street
Post Office Box 780
Salt Lake City, Utah 84110
Attorney for Defendant-Appellant

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APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

The Petitioner respectfully requests a rehearing in the above entitled cause and that the decision be modified as hereinafter suggested, for the reasons and upon the following grounds:

1. The decision of this Court to sustain the dismissal with prejudice by the District Court is based upon inadequate information, and in part upon erroneous information inserted in the previous trial record.

2. Dismissal with prejudice should not be used except as a last resort and it should not be used at all where its imposition would work substantial injustice. In this case, dismissal does work substantial

injustice to the Defendant, Counter Claimant, Appellant.

3. Despite the long period of time since the inception of this action and despite the fact that Appellant moved for trial in this matter after waiting for the court to set the trial date and despite the fact that Appellant has evidence that Plaintiff owes him, instead of the reverse the Defendant, Counter Claimant, Appellant has not had his day in court and has been denied the opportunity to present to the court the evidence which supports his counter claim, even though he has expended much personal effort and funds to this end.

WHEREFORE, Petitioner respectfully submits that a rehearing should be had and the decision revised, believing that a re-examination of the record will assist the court better to understand the record certified, and the pertinent facts hereto and will result in a revision and reversal of the decision rendered by the District Court in dismissing this action with prejudice.

Respectfully submitted,

C. RICHARD HENRIKSEN AND
C. GLENN ROBERTSON

By 
C. Richard Hendriksen

Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

POINT I

THE DECISION OF THIS COURT TO SUSTAIN THE DECISION OF THE LOWER COURT IN DISMISSING THIS ACTION WITH PREJUDICE IS BASED UPON INADEQUATE INFORMATION AND IN PART UPON ERRONEOUS INFORMATION.

In 1968, this court reversed a decision of the lower court awarding judgment in this matter to the Plaintiff herein. That decision, reported in 20 Ut 2d 427, 439 P. 2d 283 was based upon the fact that inadequate information existed in the records of the trial court. The decision of the trial court at that time was based upon, supposedly, an audit prepared from the records of the Reliance National Life Insurance Company, Plaintiff herein. Based upon that audit report, judgment was granted for Plaintiff and against Defendant in the amount of $6,762.00. The audit actually shows that there was a balance due Defendant from Plaintiff. The audit, using a cut off date of December 31, 1956, shows a balance due to Defendant of $7,629.27. Adjusting that audit with an ending date of August 20, 1956, the date that Mr. Caine actually left the employ of Plaintiff, the amount due Mr. Caine is $6,562.26. This indicates that Defendant does have a legitimate claim and that there is on the record evidence supporting his position.

It was argued by Plaintiff and Respondent herein in the lower court that the period of time since the original filing of this action was so prolonged that they would be handicapped incollecting the records necessary to support their position. There was no evidence presented that a search for records had been made and that such records did not exist. All we have is the bare statement of counsel for Plaintiff and Respondent that a handicap would exist. It seems strange that the Plaintiff and Respondent, who has the prime responsibility in going forward in this matter, and also has the responsibility under law of maintaining adequate life insurance records of their insureds and financial transactions, should be heard to complain that the records don't exist or that they cannot be found or that it would be difficult to find them. The record herein contains the audit and that information is available to the court. A copy of the pertinent pages showing comparision between the commissions allowed and the commissions earned upon examination is attached hereto as Exhibit I and Exhibit II.

POINT II

DISMISSAL WITH PREJUDICE SHOULD NOT BE USED EXCEPT AS A LAST RESORT AND IT SHOULD NOT BE USED AT ALL WHERE ITS IMPOSITION WOULD WORK SUBSTANTIAL INJUSTICE. IN THIS CASE, DISMISSAL DOES WORK SUBSTANTIAL INJUSTICE TO THE DEFENDANT, COUNTER CLAIMANT, APPELLANT.

Dismissal with prejudice is an extreme remedy and should not be lightly used by the court and not at all when it will work substantial injustice.

It is generally recognized that 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 v. Mathews, 499 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 fact 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 Ut 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. (Emphasis added)

In another Utah Supreme Court case, Howard v. Howard, 11 Ut 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 Ut 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 Utah Supreme Court case of Westinghouse Electric Supply Company v. Paul W. Larson Contractor Inc., et al., 544 P. 2d 876, the court had this to say:

> It is not to be doubted that in order to handle the business of the court with efficiency and expedition the Trial Court should have a reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the directions of the court without justifiable excuse, but that prerogative falls short of unreasonable and arbitary action which will result in injustice. Whether there is such justifiable excuse is to be determined by considering more factors than merely the length of time since the suit was filed. Some consideration should be given to the conduct of both parties and to the opportunity each has had to move the case forward and what they have done about it; and also what difficulty or prejudice may have been caused to the other side; and most important whether injustice may result from the dismissal.

The court commented on the obligation of both sides to move forward in the following language:

> Further, we are not impressed that Defendants themselves were overly diligent or manifest any particular haste in getting the pre-trial discovery procedures completed and on with the trial. They did not do so in responsive action to Westinghouse's having assembled records, nor did they seek any assistance from the court.

> It is indeed commendable to handle cases with dispatch and move the calendars with expedition in order to keep them up to date but it is even more important to keep in mind the very reason for the existance of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle, the courts generally tend to favor granting relief from default judgment where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.
>
> It is our conclusion that the Trial Court failed to give proper weight to the higher priority; and that under the circumstances described herein, the order of dismissal was an abuse of discretion. (Emphasis added)

In the Crystal Lime case, supra, the court made the same point in the following language:

> It can, therefore, hardly be reasonably argued that they were harrassed and annoyed by Appellant's action in failing to draw and present to the court Findings of Fact, Conclusions of Law and Decree embodying the decision of the court granting them the amount they claimed when they had it in their power at all times to obtain relief by themselves presenting such findings and decree to the court for its signing.

The Federal Courts have looked to similar problems and have remarked upon the question of dismissal with prejudice in several cases. In Independant 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. (Emphasis added)

See also De Cuba v. PRC Pictures, 176 F. 2d 93 (2nd Cir. 1949) (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. (Emphasis added)

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

In the previous consideration of this case before this court, as reported in 439 P. 2d 283, 20 Ut 2d 427, Chief Justice Crockett, concuring specially in the decision, had this to say:

> Nevertheless, no rule should be so absolute as to apply even where it works an obvious injustice. Due to the particular fact situation in this case where there have been a number of hearings over a period of about seven years before the judgment was entered; where there are essential issues which it is impossible to review

properly because of the unsatisfactory state of the records; and where this situation appears to be largely due to the fault of the Plaintiff, I agree that the ends of justice will be best served by remanding the case for trial. (Emphasis added)

POINT III

DESPITE TH LONG PERIOD OF TIME SINCE THE INCEPTION OF THIS ACTION AND DESPITE THE FACT THAT APPELLANT MOVED FOR TRIAL IN THIS MATTER AFTER WAITING FOR THE COURT TO SET THE TRIAL DATE AND DESPITE THE FACT THAT APPELLANT HAS EVIDENCE THAT PLAINTIFF OWES HIM, INSTEAD OF THE REVERSE, THE DEFENDANT, COUNTER CLAIMANT, APPELLANT HAS NOT HAD HIS DAY IN COURT AND HAS BEEN DENIED THE OPPORTUNITY TO PRESENT TO THE COURT THE EVIDENCE WHICH SUPPORTS HIS COUNTER CLAIM, EVEN THOUGH HE HAS EXPENDED MUCH PERSONAL EFFORT AND FUNDS TO THIS END.

James E. Caine, the Defendant, Counter Claimant, Appellant, has personally expended much time, effort and money in order to move this case along as fast as possible. He has consulted with, in this matter, at least twelve attorneys prior to his present counsel. He has paid to those attorneys approximately $6,000.00. He has paid out approximately $650.00 in telephone bills for long distance calls to his attorneys. He

has made trips to Salt Lake City from out of the state, to consult with his attorneys and has paid approximately $3,600.00 for those trips. He has paid $200.00 to an accountant in this matter. This totals in excess of $10,000.00 that Mr. Caine has expended in a vain attempt to bring before the court his side of this matter and to receive an adjudication on the merits. Over the years, his activity breaks down in this manner:

1968	8 phone calls supported by records.
1969	8 phone calls supported by records.
1970	1 phone call but feels he made others for which records are lost.
1971	He has found no records but feels that he made many.
1972	10 phone calls supported by records.
1973	8 phone calls supported by records.
1974	Records incomplete but feels that he made many calls.
1975	Approximately 40 phone calls.

These calls were made to his attorneys in each instance asking for information, requesting them to move ahead, offering assistance, or anything he could do to bring this matter before the court.

Mr. Caine requested from the County Clerk information as to a trial date on two separate occasions and was told he would be notified of a trial date and was assured that there was no problem. It is normal procedure in the Salt Lake County Clerk's office, upon receiving a case upon remand for a new trial, to set a date for such new trial, in consultation with the respective attorneys, upon their own initiative. In this case, this was not done.

The Utah Rules of Civil Procedure are silent upon this point. There is no required procedure to follow upon the remand of a case

for a new trial. The rules do not place the responsibility for going forward upon any party. The rules also are silent as to what the Clerk should do in the matter. As indicated above, the Salt Lake County Clerk has initiated a procedure to follow in the absence of any rule covering this situation. In this situation, the Appellant has been penalized in a situation for which there are no rules.

As has been indicated in the cases cited above, dismissal with prejudice should not be used where injustice would result. In this case, injustice would surely result. If the dismissal is allowed to stand, the Plaintiff is rewarded because of its dilatory action and the Defendant is punished because of the non-action of his attorneys. What more can an individual do to move his cause forward than Mr. Caine has done in this matter.

ARGUMENT

In this matter, there has never been an adequate presentation of testimony and exibits and evidence before a trial court in order that a judgment might be rendered on the merits. The decision of the Utah Supreme Court previously referred to in this matter in 1968 reversed the decision of the Trial Court for that very reason. That insufficiency of evidence appeared, in the records, to sustain the judgment of the court. At this time, the court has sustained a dismissal with prejudice because insufficient evidence has been presented before the Trial Court and the claim is made that it would be difficult to obtain the evidence. No evidence was presented to indicate that the records and the facts had been

sought after and could not be found, no evidence is in the records to indicate that search was made by the Plaintiff corporation of their files and records to ascertain what information existed, no information was presented which itemized the deficiencies in the record which could not be corrected in this matter. This matter should be sent back to the Trial Court for trial. If it develops that some of the matters at issue cannot be resolved because of inadequate evidenciary material, at least at that point a decision could be made as to whether or not this case could be properly adjudicated, or not decided at all due to a lack of evidence or non-availability of evidence. No effort has been made to do this up to this time.

In this matter, the Defendant has made every personal effort to move this case along as indicated above. He has kept very close personal contact with his attorneys over the years, asking for trial dates, urging that the case be moved along, expending money in legal research, and in having the file reviewed by various attorneys with a view of hiring them to move the matter forward. At all times the Defendant was eager to go forward with this matter and was willing to do whatever was necessary in order to swiftly complete the adjudication of the matters at issue.

It is interesting to note that there is absolutely no procedure outlined in the Utah Rules of Civil Procedure governing what action should be taken by the parties and by the Clerk of the Court when a case is remanded for a new trial. There is a hiatus in the law and in the Rules of Civil Procedure. How is it possible to penalize a party for not doing what the rules do not require him to do nor instruct him to do nor indeed to

allow him to do.

After waiting for the court to act and after having been assured that a trial date would be set and that the matter would go forward, Defendant made request that a trial date be set. The Defendant was moving the matter forward as best he knew how. After requesting a trial date and attempting to move the matter forward, Plaintiff, who had made no moves at all and had performed no action to move this matter forward, then moved the court for a dismissal with prejudice because the Defendant had not moved more rapidly to do that which Plaintiff also had not done. The District Court, by granting Plaintiff's motion to dismiss with prejudice in effect rewarded the Plaintiff for their inaction and penalized the Defendant for his action.

Some of the material presented to the Trial Court in the trial which was reversed by this court in 1968, was erroneous. Information presented to the court at that time indicated that Defendant owed Plaintiff a certain sum of money. The sudit made by an independant and disinterested certified public accountant indicates that in fact money was owed by Plaintiff to Defendant. Plaintiff is aware of this audit and it is to the interest of the Plaintiff to have this matter dismissed so that this matter could not be adjudicated and the possible finding made which will obligate Plaintiff to pay to Defendant a sum of money. Plaintiff, in the words of Plaintiff's attorney before the lower court, in asking for dismissal said that both sides had slept on their rights in this matter. If we were to admit, arguendo, that that statement is accurate, then the action of the lower court in dismissing, and of the Supreme Court in sustaining

that dismissal, rewards the Plaintiff for sleeping on its rights but punishes the Defendant for personally exerting every effort to obtain his day in court.

The cases abound which indicate that dismissal with prejudice is a harsh and extreme remedy and should be used only in extreme cases and should not be used where it would work a substantial injustice against one party. The cases indicate that where both parties are equally to blame, one party should not be rewarded for that situation. The cases indicate that it is the purpose and function of the courts to hear matters and decide them and not to dismiss them except where no other recourse is reasonably available to them. In this matter, the Defendant has been eager to go forward but he has been frustrated by no action. The Plaintiff has not been eager to go forward. If there be any fault in not going forward, there should not be a reward to the one party and a punishment to the other party for identical action or the lack of it.

CONCLUSION

Appellant submits that justice will best be served by reversing the decision of the lower court and setting this matter for trial.

Such action would certainly be consistant with the prior decisions of this court in the cases cited above and with the decisions of the Federal Court also cited above.

Such action would also allow the Defendant his day in court, which he rightfully deserves, and will avoid the result of rewarding the Plaintiff

for his lack of action, and punishing the Defendant for his action.

Respectfully submitted,

C. RICHARD HENRIKSEN AND
C. GLENN ROBERTSON

By _____
C. Richard Hendriksen

Attorneys for Petitioner