

2001

John E. Dennett v. Karl Powers : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John E. Dennett; Attorney for Plaintiff.

Robert M. McRae; Hatch, McRae and Richardson; Attorneys for Defendant.

Recommended Citation

Brief of Respondent, *Dennett v. Powers*, No. 13904.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/1074

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

RECEIVED
LAW LIBRARY

DEC 1

IN THE SUPREME COURT
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
Reuben Clark Law School

JOHN E. DENNETT,
Plaintiff and Appellant,

vs.

KARL POWERS, et ux.
Defendants and Respondants.

Case No.
13904

BRIEF OF DEFENDANT-RESPONDANT
KARL POWERS

On Appeal from the Judgment of the Third Judicial District
For Salt Lake County, State of Utah
Honorable G. Hal Taylor, Judge

ROBERT M. McRAE
HATCH, McRAE &
RICHARDSON
Attorneys for
Defendant-Respondant

Karl Powers
370 East Fifth South Street
Salt Lake City, Utah 84111

JOHN E. DENNETT
Attorney Pro Se
Attorneys for Plaintiff-
Appellant
P. O. Box 6163
Salt Lake City, Utah 84106

FILED

APR 29 1975

TABLE OF CONTENTS

	<i>Page</i>
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINT ON APPEAL:	
APPELLANT VIOLATED RULE 4(b) UTAH RULES OF CIVIL PROCEDURE AND HIS COMPLAINT WAS PROPERLY DISMISSED	3
CONCLUSION	6

CASES CITED

<i>Anderson v. Narva</i> , 143 P. 555	6
<i>Dresser v. Superior Court</i> , 41 Cal. 473	6
<i>Gonsalves v. Bank of America</i> , 105, P.2d 118	6
<i>Herr v. Salt Lake County</i> , Utah 2d, 525 P.2d 728	2
<i>Muller v. Coastside Water District</i> , 4 Cal. 832	6
<i>U.S. v. Scheurman</i> , 218 F. 916	4
<i>Werner Piano Co. v. Baker</i> , 35 Idaho 496, 207 P. 588	5

STATUTES CITED

Deering California Code Annotated, §518a	5, 6
Idaho Rules of Practice, §5-502	4
Utah Rules of Civil Procedure, Rule 4(b)	3

TEXTS CITED

Black's Law Dictionary, Fourth Edition	4
--	---

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN E. DENNETT,

Plaintiff and Appellant,

vs.

KARL POWERS, et ux.

Defendants and Respondants.

} Case No.
13904

BRIEF OF DEFENDANT-RESPONDANT KARL POWERS

NATURE OF THE CASE

This appeal by Appellant is an attempt to abort the fair intent of Rule 4(b), Utah Rules of Civil Procedure.

DISPOSITION IN LOWER COURT

Judge G. Hal Taylor dismissed Appellant's Complaint against Defendants Karl Powers and Elsie Powers for failure to file evidence of service of process on

any of the named Defendants with the Clerk of the Third Judicial District Court within the one year period contemplated by the Utah Rules of Civil Procedure thus resulting in a dismissal of the Complaint against these Defendants who sought such relief.

RELIEF SOUGHT ON APPEAL

These Defendants seek to uphold the action of Judge G. Hal Taylor in dismissing this Complaint as to them as Respondants in this appeal.

STATEMENT OF FACTS

Respondants object to the seven page narrative of undocumented and unsupported material in the Record, Statement and Argument contained in Appellant's Statement of Facts and seeks to rely solely on the record in this case.

The record in this case shows as follows:

1. Appellant filed the Complaint with the Clerk of the Third District Court on September 13, 1972 (R-174).

2. Appellant filed a "duplicate original" summons and return with the Salt Lake County Clerk's Office on October 22, 1974, purportedly evidencing service of Defendants Boudreaux (R-27, 28).

3. An Order of Judge G. Hal Taylor (R-13) from a previous hearing of September 23, 1974, which Ordered Appellant to file evidence of process by October 21, 1974, which was not complied with as is shown in paragraph 2 above.

POINT ON APPEAL

APPELLANT VIOLATED RULE 4(b), UTAH RULES OF CIVIL PROCEDURE AND HIS COMPLAINT WAS PROPERLY DISMISSED.

Rule 4(b), Utah Rules of Civil Procedure states as follows:

“(b) TIME OF ISSUANCE AND SERVICE. If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. The summons *must* be served within one year after the filing of the complaint or the action will be *deemed dismissed*, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or appear at any time before trial.” (emphasis added)

“Must” is defined as synonymous with “shall”, *Herr v. Salt Lake County*, Utah 2d, 525 P.2d 728, wherein this court stated:

“The meaning of the word *shall* is ordinarily

that of command. It is defined in the American Heritage Dictionary as follows: '2. . . . d. Compulsion, with the force of *must*, in statutes, deeds, and other legal documents.' . . ."

"Deemed" as defined in *Black's Law Dictionary*, Fourth Edition, means:

"To hold; consider, adjudge, condemn; determine; treat as if; construe, . . . which gives "deemed" the force of only a "disputable presumption," or of *prima facie* evidence. . . ."

"Dismissal" as defined in *Black's Law Dictionary*, Fourth Edition, means:

"An order of judgment finally disposing of an action, suit, motion, etc., by sending it out of court, though without a trial on the issues involved."

Two States which have similar rules of practice are Idaho and California.

Idaho Rules of Practice 5-502 "Issuance of Summons" reads as follows:

"At any time within one year after filing the complaint the plaintiff may have one or more summons issued."

A Federal District Court case upholding a dismissal of a Complaint interpreting such rule of procedure is *U.S. v. Scheurman*, 218 F. 916. In that case

a Complaint was filed June 21, 1913, summons was issued July 31, 1914. The court ruled the action must be dismissed because the summons was not served within the twelve months.

In *Werner Piano Co. v. Baker*, 35 Idaho 496, 207 P. 588, the Idaho court concluded that dismissing an action for failure to serve process within the statutory time was prima facie evidence of lack of diligence in prosecuting a case.

The only evidence contained in the record in this case supporting any of the arguments of Appellant is a purported affidavit by Mr. Dennett filed with this Court after his Notice of Appeal was filed and his brief was overdue. Under mailing date of 13 April, 1975, entitled "Affirmation Reply to Respondant's Motion to Dismiss and Motion for an Extension of Time in which to File Briefs on Appeal", which is an unnotarized document, an attempt is made to supplement the record before this Court. Other than such pleading, this record contains *no evidence* justifying or explaining Appellant's failure to comply with Rule 4(b), Utah Rules of Civil Procedure and Judge Taylor's order. Further, appellant is a disbarred lawyer and is not entitled to the benefits of Rule 11, Utah Rules of Civil Procedure.

In California Rules of Practice, Deering California Code Annotated §581 a, reads as follows:

"§581a. [Prohibited prosecution and mandated

dismissal for delay: Dismissal on Motion] (a)
No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action."

The California court has interpreted this section as being jurisdictional and mandatory in numerous cases: *Gonsalves v. Bank of America*, 105 P.2d 118; *Muller v. Coastside County Water District*, 4 Cal. 832; *Dresser v. Superior Court*, 41 Cal. 473.

If an action is deemed dismissed as defined in Black's Law Dictionary, an appearance to clear the record and dissolve any efficacy to the purported *Lis Pendens* (R-106) cannot be deemed a general appearance when an action is deemed dismissed; *Anderson v. Narva*, 143 P. 555.

CONCLUSION

This case, constituted principally by Appellant's

memoranda, motions, etc., should be viewed solely in light of evidence contained in the file, of which there is none in support of Appellant's position, and the record should be analyzed as it applies to the interpretation of Rule 4(b), Utah Rules of Civil Procedure.

Respectfully Submitted

HATCH, McRAE & RICHARDSON

by Robert M. McRae

Attorneys for Defendant-Respondant

Karl Powers

370 East Fifth South

Salt Lake City, Utah 84111

**RECEIVED
LAW LIBRARY**

DEC 17 1977

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**