

1978

Provo City et al v. Dee C. Hansen et al : Brief of Intervenors-Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PROVO CITY, a municipal corporation, and TIMPANOGOS CANAL COMPANY, a Utah corporation,)

Plaintiffs-Appellants,)

vs.)

DEE C. HANSEN, as State Engineer of the State of Utah; and UNITED STATES OF AMERICA, Bureau of Reclamation, Department of the Interior,)

Case No. 15,772

Defendants-Respondents,)

PROVO RIVER WATER USERS ASSOCIATION, a corporation, METROPOLITAN WATER DISTRICT OF SALT LAKE CITY, UTAH LAKE DISTRIBUTING COMPANY, a corporation, KENNECOTT COPPER CORPORATION, a corporation, SALT LAKE CITY, a municipal corporation, CENTRAL UTAH WATER CONSERVANCY DISTRICT, SCOTT P. WALLACE and RUTH WALLACE, his wife, DARREL A. CONRAD, VILATE P. CONRAD, CHARLES ELMWOOD CONRAD and ALICE P. CONRAD, his wife, and UTAH POWER AND LIGHT COMPANY,)

FILED

OCT 27 1978

Intervenors-Respondents.)

Clark, Supreme Court, Utah

BRIEF OF INTERVENORS-RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH
HONORABLE GEORGE E. BALLIF, PRESIDING

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FILED

OCT 19 1978

15772
Clark, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

PROVO CITY, a municipal corporation, and TIMPANOGOS
CANAL COMPANY, a Utah corporation,

Plaintiffs-
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-vs-

DEE C. HANSEN, as State Engineer of the State of Utah; and
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Intervenors-
Respondents.

Comes now the United States of America, defendant-respondent herein, and gives notice to the Court that it will not file a brief in this matter and will rely on the arguments of the other respondents herein.

Dated this 17th day of October, 1978.

RONALD L. RENCHER
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Mailed a true and correct copy of the above and foregoing Notice to the following, postage thereon prepaid, this 18th day of October, 1978:

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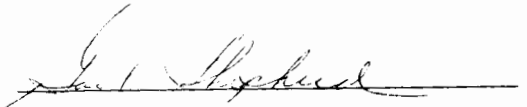
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WATER CONSERVANCY DISTRICT,)
SCOTT P. WALLACE and RUTH)
WALLACE, his wife, DARREL A.)
CONRAD, VILATE P. CONRAD,)
CHARLES ELMWOOD CONRAD and)
ALICE P. CONRAD, his wife,)
and UTAH POWER AND LIGHT)
COMPANY,)

Intervenors-Respondents.)

BRIEF OF INTERVENORS-RESPONDENTS

STATEMENT OF THE KIND OF CASE

This is an action to review the decision of the State Engineer filed pursuant to §73-3-14, U.C.A., 1953, as a trial de novo in accordance with the provisions of §73-3-15, U.C.A., 1953, with adjunct declaratory judgments that four out of the five conditions imposed by the decision of the State Engineer were without authority and contrary to law.

DISPOSITION IN LOWER COURT

This action was dismissed with prejudice on intervenors' respondents' motion to dismiss pursuant to §73-3-15, U.C.A., 1953, for failure of plaintiffs to prosecute the action to final judgment within two years after it was filed.

RELIEF SOUGHT ON APPEAL

Respondents seek to affirm the order of dismissal with prejudice.

STATEMENT OF FACTS

Respondents agree with appellants' basic statement of facts with the following exceptions and additions:

Plaintiffs' original complaint filed on October 4, 1974, (R.231-246 incl.), joined the State Engineer as the only defendant in spite of the fact that in the administrative proceedings before the State Engineer all of the intervenors except Scott P. Wallace and Ruth Wallace filed protests against the granting of Change Application No. a-5433 (App. Brief, p. 3, R.237). Thus Appellants' Brief is in error on page 5

therof wherein it states that Darrel A. Conrad, Vilate P. (Mrs. Warren) Conrad, Charles E. Conrad and Alice P. Conrad made no previous protest to the State Engineer.

Intervenors' motion to dismiss filed January 24, 1975, (R.136, 137) referred to on page 5 of Appellants' Brief was based on plaintiffs' failure to join indispensable parties. Intervenors' motion was granted in part (R.128) and the lower court entered its order that plaintiffs amend their complaint and join the United States of America and Utah Power & Light Company or suffer dismissal (R.102).

Plaintiffs' Second, Third and Fourth Causes of Action are separate causes to review the decision of the State Engineer pursuant to §73-3-14, U.C.A., 1953, as a trial de novo in accordance with the provisions of §73-3-15, U.C.A., 1953, by incorporating separately therein, the allegations of plaintiffs' First Cause of Action (R.233-235 incl.; 105-107 incl.). As adjunct thereto, plaintiffs sought declaratory judgments that four out of the five conditions imposed by the decision of the State Engineer were without authority and contrary to law.

On December 29, 1977, intervenors jointly filed their motion to dismiss the action pursuant to §73-3-15, U.C.A., 1953, for failure of plaintiffs to prosecute the action to final judgment within two years after it was filed (R.39, 40). Intervenors filed their Statement of Points and Authorities

in support of their motion to dismiss (R.41-43 incl.). Plaintiffs filed their Answering Statement of Points (R.35-38) incl.) to which intervenors filed their Reply Points and Authorities (R.22-32 incl.). After a full hearing the lower court granted intervenors' motion to dismiss with prejudice (R.15) and on March 27, 1978, made and entered its order of dismissal with prejudice (R.16, 17).

ARGUMENT

Introduction

§73-3-15, U.C.A., 1953, mandates the dismissal of any suit to review a decision of the State Engineer which is not prosecuted to final judgment in the district court within two years after it is filed. More than three years and two months elapsed between the filing of this action and intervenors' motion to dismiss. Thus the sole issue on this appeal is whether the trial court abused its discretion in dismissing this action with prejudice. Reliance National Life Insurance Company v. Caine, Utah, 555 P.2d 276 (1976); Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, Inc., Utah, 544 P.2d 876 (1975); Thompson Ditch Co. v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973); Brasher Motor and Finance Co. v. Brown, 23 Utah 2d 247, 461 P.2d 464 (1969).

POINT I

THE TRIAL COURT PROPERLY APPLIED §73-3-15, U.C.A., 1953, IN DISMISSING THIS ACTION.

At the outset, respondents respectfully submit that the case of Dansie v. Lambert, 542 P.2d 742, Utah (1975) is dispositive of this case and mandates the dismissal of the action with prejudice under the Doctrine of Stare Decisis. 20 Am.Jur. 2d Courts, §83, pp. 519, 520. In Dansie v. Lambert, supra, the motion to dismiss was filed pursuant to §73-3-15, U.C.A., 1953, only 26 months after the complaint was filed and the judgment of the trial court in dismissing the action with prejudice was affirmed. In so doing, this Court stated on page 744 thereof:

"Some may not approve the legislation, subject of this case, but in substance and effect it is nothing more nor less than a limitations statute, which may be displeasing to one who is its victim, but which like other similar statutes is one of repose, designed to put a time barrier against litigation, in determining the precious water rights in this arid state. We are not they that may question the wisdom of the legislature on any constitutional or prejudicial basis under the circumstances here."

As to the mandatory nature of the statute, this Court then stated:

"If plaintiff should contend that the statute is not mandatory, then in addition to other authorities unnecessary to cite here, this court, in a very recent case, Herr v. Salt Lake County, 525 P.2d 728 (Utah), 1974, and cases therein mentioned, seem to be quite dispositive as to any interpretation of the words "shall" and "must" used in the statute here (73-3-15), as being anything but mandatory, and not discretionary."

Dansie v. Lambert, supra, was cited with approval in Provo City v. Lambert, Utah, 545 P.2d 185 (1976). Likewise, in Daniels

Irrigation Company v. Daniel Summit Co., Utah, (1977), 571 P.2d 1323, this court affirmed the dismissal of the appeal from the State Engineer's decision as not being timely prosecuted noting that §73-3-15, U.C.A. 1953 provides for a dismissal for failure to prosecute a suit to final judgment within two years.

In the instant case, more than three years and two months elapsed between the filing of the action and intervenors' motion to dismiss. Thus plaintiffs failed to prosecute this action to a final judgment in the court below within the two-year time limitation of §73-3-15, U.C.A., 1953, and we respectfully submit that the trial court properly applied the provisions thereof in dismissing the action with prejudice.

A. The Trial Court Did Not Err in Dismissing the Action With Prejudice.

On page 6 of Appellants' Brief, selected provisions of §73-3-15, U.C.A., are there quoted and appellants then assert that the trial court misinterpreted the statute and improperly applied the same in dismissing this action. In so doing, appellants purposely ignore the key provision thereof to-wit

"All suits heretofore or hereafter commenced must be dismissed. . . unless such suits are or were prosecuted to final judgment within the time specified above; . . ." (underscoring added)

Appellants then assert that there is no language in the foregoing statute that would lend credence to the supposition that failure to prosecute to final judgment

within the specified time necessarily warrants a dismissal with prejudice. We say that the foregoing provision not only lends credence to the supposition but mandates a dismissal as was squarely decided by this court in Dansie v. Lambert, supra.

Appellants then assert that the trial court should have applied the criteria of Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., Utah, 544 P.2d 876 (1975), Polk v. Ivers, Utah, 561 P.2d 1075 (1977), and Utah Oil Company v. Harris, Utah, 565 P.2d 1135 (1977). In short, none of those cases involved a dismissal under §73-3-15, U.C.A., 1953, and are clearly distinguishable from the instant case. Likewise, none of those cases involved a limitation statute designed to put a time barrier against litigation, in determining the precious water rights in this arid state and as such are inapplicable to the instant case.

Appellants then apparently concede that the trial court has no discretion to modify the two or three year limitation period set forth in §73-3-15, U.C.A., 1953, but assert that even so the trial court was not stripped of its power to dismiss the action without prejudice by either the legislature or this court. In Dansie v. Lambert, supra, the majority of this court affirmed the dismissal with prejudice. Aside from the concurring opinion of Mr. Justice Ellett therein, a dismissal without prejudice would fly square into the face of both §73-3-14 and §73-3-15, U.C.A., 1953.

Thus, an action to review must be filed within 60 days after notice of the decision under §73-3-14, U.C.A., 1953, and under the express terms of §73-3-15, U.C.A., 1953

"An action to review a decision of the State Engineer shall be dismissed . . . if the complaint was not filed . . . within 60 days after notice of the decision." (underscoring added).

Thus, a dismissal without prejudice would be to no avail since the 60-day period for the filing of the action under §73-3-14, U.C.A., 1953, has long since expired and any new action now filed must be dismissed under §73-3-15, U.C.A., 1953.

Nor is §78-12-40, U.C.A., 1953, of any help to appellants since it applies only where an action is dismissed otherwise than upon the merits. Rule 41(b), U.R.C.P., provides that a dismissal of an action for failure of the plaintiff to prosecute or to comply with the rules operates as an adjudication upon the merits unless the court in its order for dismissal otherwise specifies.

§73-3-15, U.C.A., 1953, provides for dismissal upon the grounds provided in Rule 41, U.R.C.P., and for purposes of that section failure to prosecute a suit to final judgment within two years after it is filed. . . shall constitute lack of diligence. It is a statute of repose, designed to put a time barrier against litigation, in determining the precious water rights in this arid state. Dansie v. Lambert, supra. To say that an action which has not been prosecuted to final judgment within the two-year time limitation can be dismissed

without prejudice and thereafter plaintiff has an additional one year within which to commence the action under §78-12-40, U.C.A., 1953, and thereafter two years within which to prosecute the new action to final judgment, etc., is not only a subterfuge to the mandatory dismissal provisions of the statute but is contrary to the whole purpose thereof as above stated by this Court.

On page 10 of Appellants' Brief, complaint is made about the period of time taken by the State Engineer in issuing his Memorandum Decision. Suffice it to say there is no limitation statute within which the State Engineer must act and if appellants were so concerned they had their remedies by way of mandamus, etc.

Appellants then assert that the motions to intervene seriously impeded the tempo of the entire proceeding and complicated their burden of proof. To begin with, appellants' failure to join intervenors as parties defendant was the sole cause for any delays resulting from the motions to intervene and are wholly chargeable to appellants.

Practically all of the intervenors were protestants to appellants' change application and participated in the hearings before the State Engineer (R.109-112 incl.). When appellants filed this action to review the decision of the State Engineer they chose to ignore these intervenors and joined only the State Engineer as the sole defendant. The answer of the State Engineer raised plaintiffs' failure to

join indispensable parties as a defense. Appellants still did nothing about it and the motions to intervene were filed. After hearing, intervention was ordered. The trial court found that the United States of America and Utah Power & Light Company were indispensable parties and ordered that plaintiffs join said parties within 30 days from the date thereof and that their failure to do so would result in a dismissal of the action.

Thereupon, appellants filed their amended complaint on March 19, 1975, with the only amendments being to join the United States of America and Utah Power & Light Company as parties defendants. Answers to the amended complaint were filed by April 15, 1975 (R.77).

The sum and substance of it all is that the delays complained of in the court below resulted from the failure of plaintiffs to comply with the Utah Rules of Civil Procedure in the first instance and particularly Rule 19 thereof. Thus, any delays occasioned thereby are chargeable solely to appellants. Contrary to appellants' assertion on page 11 of their brief, the motions to intervene have not impeded the tempo or complicated appellants' burden at all. The defenses asserted in intervenors' answers are practically identical with those asserted by the State Engineer in his answer to the original complaint.

But even so, the amended complaint was filed on March 19, 1975, which is still two years and nine months (33 months) prior

to the filing of intervenors motions to dismiss. Furthermore, answers to the amended complaint were filed by April 15, 1975, some two years and eight months prior to the filing of intervenors' motions to dismiss. As such appellants can hardly complain that they were delayed or prevented from prosecuting their action to final judgment within the two-year period because of intervenors' participation in this case.

Next appellants pose questions of the res judicata effect of the dismissal with prejudice. The answer is simple, ie. the decision of the State Engineer dated August 9, 1974, in approving Change Application No. a-5433 with the conditions imposed remains intact. A decision of the State Engineer on an application to change the place of diversion or place of use of the water does not adjudicate the law of the case on the issues involved nor is it binding precedent. East Bench Irrigation Co. v. State, 5 Utah 2d 235, 300 P.2d 603 (1956). The decision of the courts on an appeal from the decision of the State Engineer has the same effect and no more on the rights of applicant to proceed with the proposed project as the same decision of the State Engineer would have been without an appeal. East Bench Irrigation Co. v. State, supra, p. 239. Such decision, the same as the decision of the State Engineer, is based only on a finding that there is reason to believe that rights may be acquired in accordance with the application and is not an adjudication of the relative rights of the parties. Likewise, such decisions are based on a

finding of reason to believe that certain facts do or may exist if the application is approved rather than a finding of such facts. East Bench Irrigation Co. v. State, supra, p. 241.

In the instant case the net effect of the dismissal with prejudice is a decision that appellants' Change Application No. a-5433 is approved upon the conditions imposed by the State Engineer. Thus appellants are authorized to proceed with the changes covered thereby but only upon the conditions imposed. That is all that the dismissal decides. To speculate on the effect of this dismissal on a new change application which might or might not be filed by appellants is premature and will remain so unless and until such a new change application is filed. Only then and in that event will there be a justiciable issue ripe for decision.

We respectfully submit that Appellants' Brief falls far short of demonstrating that the trial court committed error in dismissing this action with prejudice. What is more, the record in this case simply does not support appellants' contention. On the contrary the record is clear that the trial court correctly and properly dismissed the action with prejudice under the clear mandate of the statute and the stare decisis of Dansie v. Lambert, supra.

B. The Trial Court Did Not Err in Dismissing the Plaintiffs' Complaint in its Entirety.

Appellants assert on page 13 of their brief that only the First Cause of Action was brought pursuant to §73-3-15,

U.C.A., 1953, and the other three were brought pursuant to the declaratory judgment act. To the contrary, all four causes of action were brought pursuant to §73-3-15, U.C.A., 1953, and as an adjunct thereto the last three sought declaratory judgments that four of the five conditions imposed by the decision of the State Engineer were without authority or contrary to law. This is made abundantly clear by the very first paragraph of each of the Second, Third and Fourth Causes of Action which incorporate all of the allegations of the First Cause of Action.

But even so, the dismissal of the appeal validates the approval of Change Application No. a-5433 by the State Engineer with all of the conditions imposed. As such, there is no justiciable controversy which can be adjudicated by way of a declaratory judgment. To say that the conditions are without authority and contrary to law becomes quite meaningless when those conditions have already been validated by the dismissal of the appeal. To seek an adjudication thereof when the issue is moot is to seek an advisory opinion which is not permissible. Crofts v. Crofts, 21 Utah 2d 332, 445 P.2d 701 (1968). Accordingly, the trial court correctly dismissed the complaint in its entirety.

POINT II

THE TRIAL COURT DID NOT ERR IN DISMISSING THE
COMPLAINT PURSUANT TO §73-3-15, U.C.A., 1953.

Appellants' argument under its Point II is but a capsule form rehash of its prior argument. The record is clear that the only thing appellants did since the filing of the amended complaint was to file answers to interrogatories on July 8, 1975 (R.49-53 incl.), file a request for production of documents on August 19, 1975 (R.46-48 incl.) and file a notice of deposition on September 17, 1975 (R.44, 45). In fact, more than two years and two months elapsed between the last activity of appellants and the filing of intervenors' motion to dismiss.

For appellants to speculate that under the statute in question adversary parties are totally free to prolong the litigation and in effect deprive the plaintiffs of their cause of action has absolutely no application here. There is nothing in the record to show that respondents delayed or prolonged the litigation. In fact any delays in placing the case at issue were solely attributable to appellants' failure to follow and comply with the Utah Rules of Civil Procedure.

The cold, hard facts are that more than three years and two months elapsed from the filing of the complaint, more than two years and nine months elapsed from the filing of the amended complaint and more than two years and two months elapsed since appellants did anything until intervenors' motion to dismiss was filed. Accordingly the trial court

correctly and properly dismissed the complaint with prejudice pursuant to §73-3-15, U.C.A., 1953.

POINT III

APPELLANTS HAVE FAILED TO DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION.

The time-honored rule of appellant review applicable here is that the ruling of the court below will not be disturbed on appeal unless the record plainly shows that the court below abused its discretion. Thompson Ditch Company v. Jackson, supra. Stated otherwise, the ruling of the court below will not be disturbed unless it is manifest from the record that the court's discretion has been abused. Brasher Motor and Finance Co. v. Brown, supra.

It is one thing to assert an abuse of discretion and quite another thing for the record to bear it out. Likewise, it is one thing for appellants to base their contention on the assumption that the court misinterpreted the statute as appellants do on page 14 of their brief, and it is quite another thing for the record to plainly or manifestly so show. The record is devoid of any showing, let alone a plain showing or a manifest showing, that the trial court abused its discretion in dismissing the action with prejudice. As such, appellants have wholly failed to meet their burden on this appeal. Accordingly the dismissal with prejudice must be affirmed.

CONCLUSION

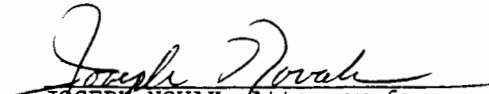
§73-3-15, U.C.A., 1953, mandates the dismissal of this action for failure to prosecute to final judgment in the court below within two years after it was filed. More than three years and two months elapsed from the filing of the complaint, more than two years and nine months elapsed from the filing of the amended complaint and more than two years and two months elapsed since appellants did anything until intervenors' motion to dismiss was filed. The trial court correctly applied the statute to this case in accordance with Dansie v. Lambert, supra, and did not commit error in dismissing the action in its entirety with prejudice.

The sole issue on this appeal is whether the trial court abused its discretion in dismissing this action with prejudice. Appellants have wholly failed to meet their burden of a plain and manifest showing in the record that the trial court abused its discretion. Accordingly, the order of dismissal with prejudice must be affirmed.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on the 27th day of October, 1978,

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