

2009

Julian Dean Hatch v. Larry D. Davis : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

JULIAN DEAN HATCH,)	
Plaintiff/Appellant,)	BRIEF OF APPELLANT
		JULIAN DEAN HATCH
vs.)	
LARRY D. DAVIS,	)	Appellate No. 20090020-CA
Defendant/Appellee.	)	Trial Court No. 030600013

THIS IS AN APPEAL FROM THE SIXTH DISTRICT COURT
GARFIELD COUNTY, STATE OF UTAH

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FILED
UTAH APPELLATE COURTS

APR 07 2009

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STATEMENT OF JURISDICTION

The Utah Supreme Court has appellate jurisdiction in this matter pursuant to § 78A-3-102(j) Utah Code Annotated. The Utah Court of Appeals has jurisdiction in this matter upon transfer from the Utah Supreme Court, pursuant to § 78A-4-103(j) Utah Code Annotated.

STATEMENT OF ISSUES FOR REVIEW

A. **Issue:** Did the trial court error in dismissing this case with prejudice based on Hatch's own Renewed Motion to Dismiss, which was known to be misfiled in this case, was never briefed by the parties in this case, and was never submitted to the court for decision in this case?

Standard of Review: A motion to dismiss for failure to prosecute is premised on Rule 41(b) of the Utah Rules of Civil Procedure, making the standard of review one of correctness. *Patterson v. American Fork City*, 67 P.3d 466 (Utah 2003); and *C & Y Corp. v. Gen. Biometrics, Inc.*, 896 P.2d 47, 53 (Ut.App. 1995).

Preservation for Review: This issue was before the trial court when it decided to dismiss the case for failure to prosecute on December 11, 2008. (Rec. 5-7)

B. **Issue:** Did the trial court error in dismissing this case with prejudice based on Hatch's own Renewed Motion to Dismiss, known to be misfiled in this case; when the Renewed Motion is based on facts and circumstances which are not applicable in this case?

Standard of Review: A motion to dismiss for failure to prosecute is premised on Rule 41(b) of the Utah Rules of Civil Procedure, making the standard of review one of correctness. *Patterson v. American Fork City*, 67 P.3d 466 (Utah 2003); and *C & Y Corp. v. Gen. Biometrics, Inc.*, 896 P.2d 47, 53 (Ut.App. 1995).

Preservation for Review: This issue was before the trial court when it decided to dismiss the case for failure to prosecute on December 11, 2008. (Rec. 5-7).

C. **Issue:** Did the trial court error in dismissing the case with prejudice for failure to prosecute, when the court had recently asked Hatch to further brief his Motion for Change of Venue, which Hatch did; and Hatch's Motion for Change of Venue had been pending before the court?

Standard of Review: A motion to dismiss for failure to prosecute is premised on Rule 41(b) of the Utah Rules of Civil Procedure, making the standard of review one of correctness. *Patterson v. American Fork City*, 67 P.3d 466 (Utah 2003); and *C & Y Corp. v. Gen. Biometrics, Inc.*, 896 P.2d 47, 53 (Ut.App. 1995).

Preservation for Review: This issue was before the trial court when it decided on December 11, 2008, to dismiss this case, with prejudice, on the same day it denied Hatch's Motion for Change of Venue. (Rec. 5-7).

IV. **Issue:** Did the trial court error in dismissing the case with prejudice for failure to prosecute, one day after giving notice the case may be dismissed under Rule 4-103(2) of the Utah Code of Judicial Administration?

Standard of Review: The interpretation and application of a rule or statute is reviewed for correctness, with no difference given to the trial court. *Summit Water Distrib. Co. v. Mountain Reg'l Water Special Serv. Dist.*, 108 P.3d 119 (Ut.App. 2005); *Board of Educ. v. Sandy City Corp.*, 94 P.3d 234 (Utah 2004).

Preservation for Review: This issue was before the trial court when it dismissed the case, with prejudice, on December 11, 2008, one day after giving notice of its intent to dismiss the case for lack of prosecution under to Rule 4-103(2), of the Code of Judicial Administration. (See Docket, Case Number 030600013, Exhibit "C" in Addendum, pg 8).

V. **Issue:** Did the trial court error in denying Hatch's Motion for Change of Venue brought pursuant to §78-13-9(2) Utah Code Ann., based on a lack of necessary information, when Plaintiff's Affidavit gives specific facts as to why there is reason to believe that an impartial trial cannot be held in the Sixth District?

Standard of Review: The decision to grant or deny a motion to change venue is within the trial court's sound discretion and will not be disturbed, absent an abuse of that discretion. *State v. James*, 767 P.2d 549, 551 (Utah 1989).

Preservation for Review: This issue was raised in Hatch's Motion for Change of Venue (Rec. 123 - 125); Hatch's Affidavit in Support of Motion to Change Venue (Rec. 40-122); Hatch's Amended Motion to Change Venue to Include all Counties in the Sixth Judicial District (Rec. 37-39); Defendant's Response to Plaintiff's Amended

Motion to Change Venue (Rec. 34-36); Notice to Submit on Amended Motion for Change of Venue (Rec. 31-33); Memorandum in Support of Motion to Change Venue (Rec. 19-22); and Notice to Submit Change of Venue (Rec. 9-10).

VI. Issue: Did the trial court error in denying Hatch's Motion for Change of Venue, without mentioning the undisputed facts in Hatch's Affidavit and without any analysis or consideration of the *James*' factors?

Standard of Review: The decision to grant or deny a motion to change venue is within the trial court's sound discretion and will not be disturbed, absent an abuse of that discretion. *State v. James*, 767 P.2d 549, 551 (Utah 1989).

Preservation for Review: This issue was raised in Hatch's Motion for Change of Venue (Rec. 123 - 125); Hatch's Affidavit in Support of Motion to Change Venue (Rec. 40-122); Hatch's Amended Motion to Change Venue to Include all Counties in the Sixth Judicial District (Rec. 37-39); Defendant's Response to Plaintiff's Amended Motion to Change Venue (Rec. 34-36); Notice to Submit on Amended Motion for Change of Venue (Rec. 31-33); Memorandum in Support of Motion to Change Venue (Rec. 19-22); and Notice to Submit Change of Venue (Rec. 9-10).

STATUTES OF CENTRAL IMPORTANCE

The determinative statutes in this case include § 78B-3-309 regarding the grounds for a change of venue; and Rules 41(b) of the Utah Rules of Civil Procedure; and 4-103(2) of the Utah Code of Judicial Administration, regarding dismissal of an action for

failure to prosecute. See statutes and rules contained in the Addendum hereto.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceeding: Hatch was proceeding with his case by seeking a change of venue to another county, in March of 2007. He then amended his motion, seeking to move the case to a different judicial district. (Rec. 19-22, 37-122, & 123-125). On March 25, 2008, the court entered an Order on the Motion for Change of Venue, requiring a supporting memorandum. (Rec. 25). On August 6, 2008, a Memorandum in Support of the Motion to Change Venue was filed. (Rec. 19-21); and on December 8, 2008, a Notice to Submit was filed on the Motion for Change of Venue. (See Notice to Submit, Rec. 9-10).

Unfortunately, on or about August 7, 2008, a Renewed Motion to Dismiss and Memorandum in Support of Defendant's Renewed Motion to Dismiss in the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*, was inadvertently filed in this case. The forgoing motion and memorandum contained the proper caption of Larry Davis v. Julian Dean Hatch and Lynne Mitchell, but they inadvertently contained the number of this case. (Rec. 12-18).

Upon learning of this misfiling, on August 26, 2008, a letter was sent to the Clerk of the Sixth District Court by Hatch's counsel, explaining that Defendant's Renewed Motion to Dismiss and Memorandum in Support, were filed in the wrong case. The letter contained the same documents with the proper case number on them (Case No.

030600041) to be filed in *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*. (See letter, Exhibit “E” in Addendum, pgs. 15-22). This letter was received by the Clerk as two days later, on August 28, 2008, Defendant’s Renewed Motion to Dismiss and Memorandum in Support of Defendant’s Renewed Motion to Dismiss, were filed in the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*. (See Docket for Case No. 030600041,¹ Exhibit “D ” in Addendum, pg 13).

While Defendant’s Renewed Motion to Dismiss was never further briefed in this case; and neither party submitted the motion to the court for decision in this case, as it was obvious to the parties that it had been misfiled;² the trial court on December 11, 2008, the same day it denied Hatch’s Motion for Change of Venue, also entered an Order of Dismissal, dismissing this case with prejudice, based on the misfiled Renewed Motion to Dismiss. (Rec. 5 & 7).

On December 10, 2008, the day before the court entered its Order Denying Motion to Change Venue and its Order of Dismissal, the court gave Notice of Intent, that

¹In Case No. 030600041, there was a previous Motion to Dismiss for Failure to Prosecute with a Memorandum in Support, filed on January 29, 2007; and a Memorandum Decision on Motion to Dismiss for Failure to Prosecute, entered by the Court on August 1, 2007. (See Ex. “D” in Addendum, pgs. 12-13). Defendant’s Renewed Motion to Dismiss for Failure to Prosecute and Memorandum in Support of Defendant’s Renewed Motion to Dismiss, both reference these dates and filings. (Rec. 12-13 & 16).

²Davis as Plaintiff, in Case No. 030600041, realized that the Renewed Motion to Dismiss dealt with the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*, (Case No. 030600041) and he filed his Objection to Defendant’s Renewed Motion to Dismiss on August 27, 2008, in the proper case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell* (Case No. 030600041). (See Ex. “D” in Addendum, pg. 13).

due to inactivity, the matter would be dismissed for lack of prosecution pursuant to Rule 4-103(2), Code of Judicial Administration; unless a written statement is received by the court within 20 days of the notice showing good cause why the matter should not be dismissed. (See Docket for Case No. 030600013, Exhibit “C ” in Addendum, pg. 8).

The parties were never given this opportunity as the case was dismissed the next day, December 11, 2008, with prejudice, without any notice to the parties.³ The Order of Dismissal was formally entered on or about December 18, 2008, along with an entry on the docket indicating that the case was dismissed, but without prejudice. (See Exhibit “C” in Addendum, pg. 9).

Upon learning that an Order of Dismissal with prejudice, had been signed on December 11, 2008; Hatch filed his Notice of Appeal on January 2, 2009. (Rec. 3).

STATEMENT OF FACTS

1. Hatch filed his Complaint against the Defendant, Larry Davis (“Davis”) in this action, on April 7, 2003. (Rec. 135-136)
2. On September 15, 2003, Davis filed an Answer. (Rec. 126-128)
3. On March 12, 2007, Hatch filed a Motion for Change of Venue, for the grounds set forth in § 78-13-9(2) U.C.A.⁴ (Rec. 123-124)

³The court was told that the Renewed Motion to Dismiss was misfiled in this case, back in August of 2008; and neither party further briefed the motion in this case, or submitted the motion for a decision from the court, in this case.

⁴In 2008 this statute was renumbered as 78B-3-309 U.C.A.

4. On March 12, 2007, Hatch also filed the Affidavit of Julian Hatch in Support of Motion for Change of Venue. In his Affidavit Hatch sets forth specific cases and facts, as to why he believes he would be unable to have a fair trial in the county where the action was filed. (Rec. 40-122).

5. On March 19, 2007, Hatch filed an Amended Motion For Change of Venue to Include all Counties in the Sixth Judicial District. (Rec. 37-39).

6. On April 9, 2007, Davis filed Defendant's Response to Plaintiff's Amended Motion for Change of Venue. (Rec. 34-36).

7. On November 26, 2007, Hatch filed a Notice to Submit on his Amended Motion for Change of Venue to Include all Counties in the Sixth Judicial District. (Rec. 31-33).

8. On March 7, 2008, Judge David L. Mower, entered an Order of Recusal, recusing himself from considering the Motion for Change of Venue. (Rec. 29).

9. On March 20, 2008, the matter was assigned to Judge James L. Shumate of the Fifth District Court, to serve as a temporary judge to hear Hatch's Motion for Change of Venue. (Rec. 27).

10. On March 25, 2008, Judge Shumate entered an Order on Notice to Submit from the Plaintiff on his Amended Motion for Change of Venue. (Rec. 24-25). Judge Shumate requested a supporting memorandum before making a decision. (Rec. 25).

11. On August 6, 2008, Hatch filed a Memorandum in Support of his Motion to Change Venue, as requested by the court. (Rec. 19-23).

12. On August 7, 2008, the Defendant's Renewed Motion to Dismiss the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*, was misfiled in this case (Rec. 16-17), accompanied with a Memorandum in Support of Defendant's Renewed Motion to Dismiss.(Rec. 12-15). The caption was proper, but the documents inadvertently contained the number of this case. (Rec. 12-17).

13. On August 26, 2008, Hatch's counsel sent a letter to the Clerk of the Sixth District Court explaining that Defendant's Renewed Motion to Dismiss and Memorandum in Support of Defendant's Renewed Motion to Dismiss, were filed in the wrong case. The letter contained the same documents with the proper case number on them (Case No. 030600041) to be filed in the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*. (See letter and attachments, Ex. "E" in Addendum, pgs. 15-22)

14. This letter was received by the court as two days later on August 28, 2008, Defendants Renewed Motion to Dismiss and Memorandum in Support were filed in the proper case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*. (See Docket for Case No. 030600041, Ex. "D" in Addendum, pg. 13).

15. On December 8, 2008, Hatch filed a Notice to Submit for Decision on his Motion for Change of Venue. (Rec. 9-11). The misfiled Renewed Motion to Dismiss was not briefed any further by the parties in this case; and it was not submitted to

the court for decision, in this case.

16. On December 10, 2008, the court entered a Notice of Intent to dismiss for inactivity under Rule 4-103(2) of the Code of Judicial Administration. The court indicated that the matter would be dismissed under Rule 4-103(2) Code of Judicial Administration, unless a written statement is received by the court within 20 days of the notice showing good cause why the matter should not be dismissed (See Docket, Ex. “C ” in Addendum, pg 8).

17. The next day, on December 11, 2008, the court entered its Order Denying Motion to Change Venue, indicating that the motion, “is not supported by the necessary information or support to justify the court taking action at this time.” The Motion was denied without prejudice. (Rec. 7).

18. The same day, on December 11, 2008, the court also entered an Order of Dismissal, dismissing the matter with prejudice and on the merits. (Rec. 5).

19. On December 18, 2008, the Order of Dismissal was formally entered by the court with an entry that indicates that the case is dismissed without prejudice. (See the Docket, Exhibit “C” in the Addendum, pg. 9).

20. On January 2, 2009, the Notice of Appeal was filed. (Rec. 3-4).

SUMMARY OF ARGUMENT

The court should not have dismissed this case with prejudice in December of 2008, based on Hatch's Renewed Motion to Dismiss, which was filed in the wrong case.⁵ The court was given notice of such misfiling on August 28, 2008, months before the court ordered the dismissal. The court received notice of the misfiling, because these documents were refiled in the proper case on August 28, 2008. In addition, the Renewed Motion to Dismiss was never further briefed in this case, or submitted for a decision from the court in this case. The parties knew that the motion had been misfiled in this case, and further briefed it in the proper case. Furthermore, the facts cited and reasons given in Defendant's Renewed Motion to Dismiss and Memorandum in Support, *e.g.* the fact that there had been no activity in the case for the last year since the court's last Memorandum Decision regarding the previous Motion to Dismiss entered on August 1, 2008; do not apply to the facts or circumstances in this case.

This case should not have been dismissed for inactivity as Plaintiff's Motion for Change of Venue was pending, and furthermore, the court had asked for

⁵The Renewed Motion and Memorandum to Dismiss cite a previous motion and memorandum to dismiss that were filed in January 2007, and a previous decision by the court on the prior motion to dismiss entered in August of 2007, that are not part of the facts or the file in this case. In deed, in this case, Hatch had a Motion for Change of Venue pending, there had been a recusal by Judge Mower, a temporary assignment to Judge Shumate, who requested further briefing on Hatch's Motion for Change of Venue, and a Notice to Submit filed on Hatch's Motion for Change of Venue. Why would Hatch, as Plaintiff in this case, file a Renewed Motion to Dismiss his own case?

further briefing on the motion, which Hatch provided; he then filed a notice to submit the matter to the court for decision. Therefore, Hatch was proceeding in this case. The court did not rule on his Motion for Change of Venue until December 11, 2008, and then, the same day, the court dismissed his case for inactivity.

Moreover, the court on December 10, 2008, before ruling on any motions gave Notice of its Intent to dismiss the case for inactivity under Rule 4-103(2) of the Utah Code of Judicial Administration, the court then gave the parties 20 days to file a written statement as to why the matter should not be dismissed. The parties should have been given an opportunity to respond and show cause why the case should not be dismissed for inactivity under Rule 4-103(2). Furthermore, any dismissal under Rule 4-103(2) should be without prejudice, not with prejudice.

Due to the recusal of Judge Mower and reassignment of the case, there was not a decision on Hatch's Motion to Change Venue until December 11, 2008; then on this same day, the court entered an Order of Dismissal with prejudice. Therefore, Hatch was trying to move the case forward, waiting for a decision on his Motion to Change Venue, but was unable to do so after the court's ruling, since the court dismissed the case with prejudice, the same day as it denied Hatch's Motion to Change Venue, without prejudice.

Hatch's Motion to Change Venue was accompanied by his Affidavit which set forth specific reasons, including past experiences with the Sixth District Court in other cases, as to why there is reason to believe that an impartial trial cannot be held on his

behalf in the Sixth District Court. § 78B-3-309 provides that a change of venue should be granted when there is reason to believe that an impartial trial cannot be held in the county, city, or precinct designated in the complaint. Considering the factors set forth in *State v. James*, 767 P.2d 549, 51 (Utah 1989), which the trial court failed to do, Hatch's Motion to Change Venue should have been granted so as to remove any taint of prejudice, or community bias and hostility. *Id.* at 556. The trial court's statement that, "[t]he Motion for Change of Venue is not supported by the necessary information or support to justify the court taking action at this time " (Rec. 7), is insufficient to support the denial of the Motion for Change of Venue.

The dismissal with prejudice based on the misfiled Renewed Motion to Dismiss, should be reversed. The denial of the Motion for Change of Venue should also be reversed. The case should be remanded back to the trial court with instructions to transfer the case to a different judicial district, for further proceedings.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE CASE WITH PREJUDICE FOR FAILURE TO PROSECUTE, BASED ON HATCH'S OWN RENEWED MOTION TO DISMISS WHICH WAS MISFILED IN THIS CASE

The Defendant's Renewed Motion to Dismiss for Failure to Prosecute and Memorandum in Support of Defendant's Renewed Motion to Dismiss for Failure to Prosecute, where to be filed in the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*, Case No. 030600041, which was currently pending in the Sixth District Court.

There had been a previous Motion to Dismiss filed in *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*, on which the court ruled on August 1, 2007, stating that because of an appeal and bankruptcies, Davis's delay in failing to take any action in the case was justified, and there was no indication that he was abandoning his claim. (See Judge Mower's Memorandum Decision on Motion to Dismiss for Failure to Prosecute in *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*, Case No. 030600041, Exhibit "F" in the Addendum, pgs. 24-27).

For a year following this Memorandum Decision nothing happened in the case, and in August of 2008, Hatch sought to renew his Motion to Dismiss for Failure to Prosecute. Unfortunately Hatch's Renewed Motion to Dismiss and Memorandum in Support, while containing the proper caption, contained the wrong case number, Case No. 030600013, and was filed in this case. (Rec. 12-17).

Upon learning of this misfiling, on August 26, 2008, Hatch's counsel sent a letter to the Clerk of the Sixth District Court, explaining the misfiling and providing new documents with the proper case number for filing in *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*. (See Addendum, Ex. "E", pg 15). This letter was received by the court, as two days later, on August 28, 2008, these documents were properly filed in *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*. (See Addendum, Ex. "D", pg. 13).

Davis knew that Hatch's Renewed Motion to Dismiss was meant for the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell* and not this case; as he

filed his response to Hatch's Renewed Motion to Dismiss in the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*. Neither party submitted Hatch's Renewed Motion to Dismiss to the court for decision in this case, knowing that it was meant for the case of *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*.

The court, being advised that the Renewed Motion to Dismiss was misfiled in this case, and the motion never being fully briefed or submitted for a decision from this court; should not have dismissed Hatch's action in this case based upon the misfiled Renewed Motion to Dismiss.

II. THE TRIAL COURT ERRED IN DISMISSING THE CASE WITH PREJUDICE BASED ON THE MISFILED RENEWED MOTION TO DISMISS WHEN THE MOTION RELIES ON FACTS WHICH ARE NOT APPLICABLE IN THIS CASE

Unlike this case, where Hatch had filed a Motion for Change of Venue, which was currently pending before the court for decision; in *Larry Davis v. Julian Dean Hatch and Lynne Mitchell*, no activity at all had occurred by the Plaintiff, Larry Davis, so Hatch filed a Motion to Dismiss. The court issued a Memorandum Decision on August 1, 2007, denying Hatch's Motion to Dismiss, finding that the inactivity of Davis was excused based on the filing of two bankruptcy petitions and an appeal to the Utah Supreme Court of a related case between the parties. (See Memorandum Decision in Case No. 030600041, Ex."F" in Addendum, pgs. 24-27).

More than a year after the court in *Larry Davis v. Julian Dean Hatch and Lynne Mitchell* denied Hatch's Motion to Dismiss, nothing further had been filed in that

case. So in August of 2008, Hatch filed his Renewed Motion to Dismiss that case and his Memorandum in Support. If you read the Renewed Motion to Dismiss and Memorandum in Support, it is clear that they are referring to another case, as they contain facts that are not applicable, and did not occur, in this case. For example, they indicate that Hatch and Mitchell are seeking to renew their Motion to Dismiss for Failure to Prosecute, which was filed in the above matter on or about January 25, 2007. (Rec. 16). In this case, there was no previous Motion to Dismiss for Failure to Prosecute filed, and Mitchell is not a party in this case. They indicate that the case was filed on October 29, 2003 and nothing has happened in the case other than the filing of Defendants' Motion to Dismiss. (Rec. 16). This case was filed on April 7, 2003, and there was a Motion for Change of Venue filed by the Plaintiff in this case, which was pending before the court. They also reference the court's previous Memorandum Decision on Motion to Dismiss for Failure to Prosecute, dated August 1, 2007. (Rec. 16). There was no previous Memorandum Decision by the court in this case regarding Defendants' Motion to Dismiss. They indicate that more than a year has passed since the court's Memorandum Decision and no further action has taken place in the case. (Rec. 17). In this case, there has been significant action taking place over the past year, including the Amended Motion for Change of Venue, Judge Mower's Recusal Order, the Notice of Judicial Assignment, the Notice to Submit on Hatch's Amended Motion for Change of Venue, the court's Order on Notice to Submit from the Plaintiff on his Amended Motion for Change of Venue, requiring further briefing,

Plaintiff's subsequent Memorandum in Support of Motion to Dismiss for Change of Venue, and the Notice to Submit filed on Hatch's Motion for Change of Venue.

The claim made in the Renewed Motion to Dismiss for Failure to Prosecute and Memorandum in Support, *e.g.*, that there has been no activity in the case over the past year, since the court's Memorandum Decision of August 1, 2009; do not apply in this case and do not support a dismissal of this case with prejudice.

III. THE TRIAL COURT ERRED IN DISMISSING THE CASE WITH PREJUDICE FOR FAILURE TO PROSECUTE, WHEN HATCH'S MOTION FOR CHANGE OF VENUE WAS CURRENTLY PENDING BEFORE THE COURT

Utah appellate courts analyze whether a case was properly dismissed for failure to prosecute using the following five factors: (1) the conduct of the parties; (2) the opportunity each party has to move the case forward; (3) what each party has done to move the case forward; (4) the amount of difficulty or prejudice that may have been caused to the other side and (5) most important, whether injustice may result from the dismissal. *Meadow Fresh Farms, Inc. v. Utah State Univ. Dep't of Agric. & Applied Science*, 813 P.2d 1216, 1219 (Ut.App. 1991).

In this case the Plaintiff, Hatch, was proceeding with his case seeking a change of venue to have a fair trial in another county and judicial district. Furthermore, after Hatch filed his Motion for Change of Venue in this case, there was a recusal of the first judge, a judicial reassignment, and the assignment of a temporary judge, Judge Shumate, who requested further briefing on Plaintiff's Motion for Change of Venue. The

Plaintiff complied with this request and submitted a Memorandum in Support of his Motion for Change of Venue, which was responded to by the Defendant, and then Plaintiff filed a Notice to Submit his Motion for Change of Venue for decision from the court. Therefore, the Plaintiff was taking steps to move the case forward.

In fact, Plaintiff's Motion for Change of Venue remained pending before the court until December 11th of 2008, when the court finally ruled on the Motion for Change of Venue, denying it without prejudice. However, on the same day, the court then also dismissed the case, with prejudice, for a lack of prosecution.

Since Plaintiff was moving this case forward, and was waiting for a decision from the court on his Motion for Change of Venue; the court should not have dismissed his case with prejudice for inactivity, the same day it denied his Motion for Change of Venue, without prejudice.

IV. THE TRIAL COURT ERRED IN DISMISSING THE CASE WITH PREJUDICE FOR FAILURE TO PROSECUTE AFTER GIVING NOTICE UNDER RULE 4-103(2), OF THE CODE OF JUDICIAL ADMINISTRATION

Rule 4-103(2) of the Code of Judicial Administration provides that, "if a certificate of readiness for trial has not been served and filed within 330 days of the first answer the clerk shall mail written notification to the parties stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution." (See Ex."B" in Addendum, pg. 5).

On December 10, 2008, the day before the court, without notice, dismissed the case with prejudice for lack of prosecution; the court gave Notice of Intent to Dismiss the case for lack of prosecution under Rule 4-103(2) advising the parties that they would have 20 days to submit a written statement showing good cause why the matter should not be dismissed. (See Docket for Case 030600013, Ex. “C” in Addendum, pg. 8).

The court however, without giving any notice, on the next day, December 11, 2008, signed the Order of Dismissal, dismissing the case with prejudice for failure to prosecute. The court did this in violation of its own notice and in violation of the provisions of Rule 4-103(2). Furthermore, the court’s dismissal, with prejudice, in this case, is in further violation of Rule 4-103(2), which provides that any dismissal for failure to prosecute shall be without prejudice.

V. THE TRIAL COURT ERRED IN DENYING HATCH’S MOTION FOR CHANGE OF VENUE WITHOUT ANY CONSIDERATION TO HATCH’S AFFIDAVIT OR THE JAMES FACTORS

In *State v. James*, 767 P.2d 549, 551 (Utah 1989) the Utah Supreme Court reversed the trial court’s denial of a change of venue motion and set forth four factors, *i.e.*, the *James* factors, that the trial courts are to consider when determining whether a change of venue is warranted. Those factors are “(1) standing of the victim and the accused in the community, (2) the size of the community, (3) the nature and gravity of the offense, and (4) the nature and extent of publicity.” *Id.* at 552.

In *James*, the Utah Supreme Court found that the trial court failed to consider these factors and reversed the order denying change of venue in order to serve judicial economy and allowed the trial to go forward in another county where a jury [could] be selected free from any taint of prejudice, and would not be vulnerable to attack for community bias and hostility. *Id.* at 556.

Likewise in this case, the court denied Plaintiff's Motion for Change of Venue without any mention of the undisputed facts contained in Hatch's Affidavit; and without any analysis or consideration of the *James* factors. The court simply states that, "[t]he Motion for Change of Venue is not support by the necessary information or support to justify the court taking action at this time." (Rec. 7). This reasoning alone is not sufficient to deny the Motion for Change of Venue, when specific information has been provided to the court, giving reason to believe that an impartial trial cannot be held in the county or the Sixth Judicial District.

This Court in order to serve judicial economy and remove any taint of prejudice or community bias or hostility, should reverse the trial court's denial of Hatch's Motion for Change of Venue and should remand the matter back to the trial court with instructions to have it assigned to a different judicial district. *State v. James*, 767 P.2d 549, 551 (Utah 1989).

CONCLUSION

The Renewed Motion to Dismiss filed by Hatch and Mitchell, was clearly misfiled in this case. The trial court was notified of this misfiling in August of 2008, months before it dismissed the case based on the misfiled motion in December of 2008. Furthermore, the Renewed Motion to Dismiss was never fully briefed by the parties, in this case; or submitted to the court for a decision, in this case. Moreover, the facts and reasons given for dismissal in the Renewed Motion to Dismiss, *e.g.*, inactivity by the Plaintiff over the past year since the court's Memorandum Decision of August 1, 2007, are not applicable in this case.

Unlike the other case, the Plaintiff in this case was proceeding with his case. There was a significant amount of activity in this case over the past year, including Plaintiff's pending Motion for Change of Venue, which was before the court until December 11, 2008, the same day the court dismissed the case for inactivity. It was improper for the court to dismiss this case for failure to prosecute the same day it finally ruled on Plaintiff's Motion for Change of Venue.

Furthermore, the court gave notice of its intent to dismiss the case pursuant to Rule 4-103(2) of the Code of Judicial Administration, on December 10, 2008, giving the parties 20 days to indicate in writing if they had good cause as to why the case should not be dismissed. The court improperly dismissed the case the next day, December 11, 2008, with prejudice, without giving any further notice to the parties. This dismissal was

in violation of the court's own notice and Rule 4-103(2), which requires prior notice and a chance for the parties to show good cause by a designated date, why the case should not be dismissed. The dismissal further violated Rule 4-103(2) as the Rule provides that any dismissal for lack of prosecution, shall be without prejudice.

Finally, the court did not properly consider or rule on Plaintiff's Motion for Change of Venue. The court failed to mention the undisputed facts in Hatch's Affidavit and failed to analyze or consider the *James* factors. Therefore, based on judicial economy and to prevent any taint of prejudice, bias or hostility; this Court should remand the matter back to the trial court, with instructions to assign the case to a different judicial district, for further proceedings.

DATED this 7 day of April, 2009.

BOND & CALL L.C.


Budge W. Call
Attorney for Plaintiff/Appellant

MAILING CERTIFICATE

I hereby certify that on the 7th day of April 2009, I did mail, first class,
postage pre-paid, two true and correct copies of the forgoing, **BRIEF OF APPELLANT**
JULIAN DEAN HATCH, to the following:

James C. Bradshaw
10 West Broadway, Suite 210
Salt Lake City, UT 84101

Jodi Walter

ADDENDUM

EXHIBIT A

78B-3-309
Title 78B - Judicial Code
Chapter 03 - Actions and Venue

78B-3-309. Grounds.

The court may, on motion, change the place of trial in the following cases:

- (1) when the county designated in the complaint is not the proper county;
- (2) when there is reason to believe that an impartial trial cannot be had in the county, city, or precinct designated in the complaint;
- (3) when the convenience of witnesses and the ends of justice would be promoted by the change;
- (4) when all the parties to an action, by stipulation or by consent in open court entered in the minutes, agree that the place of trial may be changed to another county.

Renumbered and Amended by Chapter 3, 2008 General Session

EXHIBIT B

Rule 4-103. Civil calendar management.

Intent:

To establish a procedure which allows the trial courts to manage civil case processing.

To reduce the time between case filing and disposition.

Applicability:

This rule shall apply to the District Court.

Statement of the Rule:

(1) If a default judgment has not been entered by the plaintiff within 60 days of the availability of default, the clerk shall mail written notification to the plaintiff stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution.

(2) If a certificate of readiness for trial has not been served and filed within 330 days of the first answer, the clerk shall mail written notification to the parties stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution.

(3) Any party may, pursuant to the Utah Rules of Civil Procedure, move to vacate a dismissal entered under this rule.

EXHIBIT C

SIXTH DISTRICT COURT-PANGUITCH
GARFIELD COUNTY, STATE OF UTAH

JULIAN DEAN HATCH vs. LARRY DAVIS

SE NUMBER 030600013 Civil Rights

RENT ASSIGNED JUDGE
JAMES L SHUMATE

RTIES

Defendant - LARRY DAVIS
Represented by: JIM C BRADSHAW

Plaintiff - JULIAN DEAN HATCH
Represented by: BUDGE W CALL

COUNT SUMMARY

TOTAL REVENUE	Amount Due:	215.00
	Amount Paid:	215.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT 10K-MORE

	Amount Due:	140.00
	Amount Paid:	140.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL

	Amount Due:	75.00
	Amount Paid:	75.00
	Amount Credit:	0.00
	Balance:	0.00

SE NOTE

PROCEEDINGS

-07-03 Judge DAVID L. MOWER assigned.
-07-03 Filed: Complaint 10K-MORE
-07-03 Fee Account created Total Due: 140.00
-07-03 COMPLAINT 10K-MORE Payment Received: 140.00
 Note: Code Description: COMPLAINT 10K-MORE; Mail Payment;
-07-03 Filed: Complaint
-07-03 Filed: Complaint

SE NUMBER 030600013 Civil Rights

- 07-03 Filed: Notice Of Intent To Dismiss
- 07-03 INTENT TO DISMISS scheduled on August 28, 2003 at 10:00 AM with Judge MOWER.
- 20-03 Filed return: Sheriff's Return on Summons & Complaint
 - Party Served: DAVIS, LARRY
 - Service Type: Personal
 - Service Date: August 05, 2003
- 20-03 INTENT TO DISMISS Cancelled.
 - Reason: Plaintiff's request
- 16-03 Filed: Answer - Jury Demand
- 16-03 Fee Account created Total Due: 75.00
- 16-03 JURY DEMAND - CIVIL Payment Received: 75.00
 - Note: Code Description: JURY DEMAND - CIVIL; Mail Payment;
- 12-07 Filed: Motion For Change Of Venue
 - Filed by: CALL, BUDGE W
- 12-07 Filed: Affidavit Of Julian Hatch In Support Of Motion For Change Of Venue
- 19-07 Filed: Amended Motion For Change Of Venue To Include All Counties In The Sixth Judicial District
 - Filed by: CALL, BUDGE W
- 09-07 Filed: Defendant's Response To Plaintiff's Amended Motion For Change Of Venue
- 26-07 Filed: Notice to Submit On Amended Motion For Change Of Venue To Include All Counties In The Sixth Judicial District
- 07-08 Filed order: Order Of Recusal
 - Judge DAVID L. MOWER
 - Signed March 06, 2008
- 20-08 Filed: Notice Of Judicial Assignment Of An Active Judge To Sit In A Court Of Equal Jurisdiction In A Different Judicial District
- 26-08 Filed order: Order On Notice To Submit From The Plaintiff On His Amended Motion For Change Of Venue
 - Judge DAVID L. MOWER
 - Signed March 25, 2008
- 26-08 Judge JAMES L SHUMATE assigned.
- 06-08 Filed: Memorandum In Support Of Motion To Change Venue
- 07-08 Filed: Defendants' Renewed Motion To Dismiss
 - Filed by: CALL, BUDGE W
- 07-08 Filed: Memorandum In Support Of Defendants' Renewed Motion To Dismiss
- 08-08 Filed: Request To Submit
- 10-08 Notice - Notice of Intent for Case 030600013
 - Notice is hereby given that, due to inactivity, the above entitled matter may be dismissed for lack of prosecution pursuant to Rule 4-103(2), Code of Judicial Administration. Unless a written statement is received by the court within 20 days of this notice showing good cause why this should not be dismissed, the court will dismiss without further notice.
- 18-08 Filed order: Order Denying Motion To Change Venue

ASE NUMBER 030600013 Civil Rights

Judge JAMES L SHUMATE

Signed December 11, 2008

2-18-08 Filed order: Order Of Dismissal

Judge JAMES L SHUMATE

Signed December 11, 2008

2-18-08 Case Disposition is Dismsd w/o prejudice

Disposition Judge is JAMES L SHUMATE

EXHIBIT D

SIXTH DISTRICT COURT-PANGUITCH
GARFIELD COUNTY, STATE OF UTAH

LARRY DAVIS vs. JULIAN DEAN HATCH

SE NUMBER 030600041 Miscellaneous

RENT ASSIGNED JUDGE
DAVID L. MOWER

RTIES

Plaintiff - LARRY DAVIS
Represented by: JIM C BRADSHAW
Represented by: STEVEN BAEDER

Defendant - JULIAN DEAN HATCH
Represented by: BUDGE W CALL

Defendant - LYNNE MITCHELL
Represented by: BUDGE W CALL

OUNT SUMMARY

TOTAL REVENUE	Amount Due:	230.00
	Amount Paid:	230.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S

	Amount Due:	155.00
	Amount Paid:	155.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL

	Amount Due:	75.00
	Amount Paid:	75.00
	Amount Credit:	0.00
	Balance:	0.00

E NOTE

CEEDINGS

29-03 Case filed
29-03 Judge DAVID L. MOWER assigned.
29-03 Filed: Complaint - Jury Demand

Case NUMBER 030600041 Miscellaneous

-29-03 Filed: Demand Civil Jury
 -29-03 Fee Account created Total Due: 155.00
 -29-03 Fee Account created Total Due: 75.00
 -29-03 COMPLAINT - NO AMT S Payment Received: 155.00
 Note: Code Description: COMPLAINT - NO AMT S; Code
 Description: JURY DEMAND - CIVIL; Mail Payment;
 -29-03 JURY DEMAND - CIVIL Payment Received: 75.00
 -16-04 Filed: Motion to Dismiss
 Filed by: CALL, BUDGE W
 -16-04 Filed: Memorandum in Support of Motion to Dismiss
 -21-04 Filed return: Summons and Garfield County Sheriff's Office
 Return Of Service
 Party Served: HATCH, JULIAN DEAN
 Service Type: Personal
 Service Date: December 04, 2003
 -21-04 Filed return: Summons and Garfield County Sheriff's Office
 Return Of Service
 Party Served: MITCHELL, LYNNE
 Service Type: Personal
 Service Date: December 04, 2003
 -26-04 Filed: Amended Motion To Dismiss
 Filed by: CALL, BUDGE W
 -26-04 Filed: Amended Memorandum In Support Of Motion To Dismiss
 02-04 Filed: Reply To Motion To Dismiss
 09-04 Filed: Reply in Support of Motion to Dismiss - Request for Oral
 Argument
 29-04 Filed: Appearance of Co-Counsel
 29-04 Filed: Notice to Submit for Decision
 11-04 Filed order: Order on Motion to Dismiss
 Judge DAVID L. MOWER
 Signed May 10, 2004
 15-04 Filed: Response to Complaint
 29-05 Filed: Notice Of Intent To Dismiss
 29-05 NOTICE OF INTENT TO DISMISS scheduled on November 03, 2005 at
 10:00 AM with Judge MOWER.
 14-05 Filed: Objection to Notice of Intent to Dismiss
 14-05 NOTICE OF INTENT TO DISMISS Cancelled.
 Reason: Plaintiff's request
 29-07 Filed: Memorandum In Support Of Motion To Dismiss For Failure
 To Prosecute
 29-07 Filed: Motion To Dismiss For Failure To Prosecute
 Filed by: CALL, BUDGE W
 20-07 Filed: Objection To Defendants' Motion To Dismiss
 20-07 Filed: Notice to Submit
 03-07 Filed order: Order On Motion To Dismiss For Failure To
 Prosecute
 Judge DAVID L. MOWER
 Signed April 02, 2007
 09-07 Filed: Motion To Review Order On Motion To Dismiss

Filed by: BRADSHAW, JAMES C.

5-18-07 Filed order: Notice and Order Regarding Defendants' Proposed
Order To Dismiss For Failure To Prosecute

Judge DAVID L. MOWER

Signed May 16, 2007

6-25-07 Filed: Reply Memorandum In Support Of Motion To Dismiss For
Failure To Prosecute

6-25-07 Filed: Notice to Submit

8-01-07 Filed order: Memorandum On Motion To Dismiss For Failure To
Prosecute

Judge DAVID L. MOWER

Signed August 01, 2007

3-27-08 Filed: Objection To Defendants' Renewed Motion To Dismiss

3-28-08 Filed: Defendants' Renewed Motion To Dismiss

Filed by: CALL, BUDGE W

3-28-08 Filed: Memorandum In Support Of Defendants' Renewed Motion To
Dismiss

EXHIBIT E

F. KEVIN BOND, P.C.
kbond@bondcall-law.com

LAW OFFICES OF
BOND & CALL, L.C.
INDEPENDENT PROFESSIONAL CORPORATIONS
JUDGE BUILDING
8 EAST BROADWAY, SUITE 720
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801) 521-8900
FAX: (801) 521-9700

BUDGE W. CALL, P.C.
bcall@bondcall-law.com

August 26, 2008

Clerk of the Court
Sixth Judicial District Court
55 South Main
Panguitch, Utah 84759

RE: Larry Davis vs. Julian Dean Hatch & Lynne Mitchell
Case No: 030600041

Dear Clerk of the Court :

Please find enclosed a copy of Defendant's Renewed Motion to Dismiss and Memorandum in Support of Defendant's Renewed Motion to Dismiss in the above referenced matter. The originals were misfiled under case number 030600013.

Should you have any questions please do not hesitate to contact me.

Sincerely Yours,

BOND & CALL, L.C.


Budge W. Call

BWC:jch
cc: James C. Bradshaw, attorney for Plaintiff
cc: Julian Hatch
cc: Lynne Mitchell

Budge W. Call (5047)
BOND & CALL L.C.
8 East Broadway, Suite 720
Salt Lake City, Utah 84111
Telephone (801) 521-8900
Facsimile (801) 521-9700
Attorneys for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT
GARFIELD COUNTY, STATE OF UTAH
55 South Main, Panguitch, Utah 84759

LARRY DAVIS,)	
	)	DEFENDANTS' RENEWED
Plaintiff,	)	MOTION TO DISMISS
vs.)	
)	
JULIAN DEAN HATCH, LYNNE,)	
MITCHELL	)	Civil No. 030600041
Defendants.	)	Judge David J. Mower
)	

COMES NOW, the Plaintiffs, Julian Dean Hatch and Lynne Mitchell, and hereby renew their Motion to Dismiss for Failure to Prosecute, which was filed in the above matter on or about January 25, 2007.

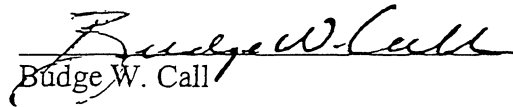
This case was filed on October 29, 2003, and nothing has happened in this case other than the filing of Defendants' Motions to Dismiss. The Court in its Memorandum Decision on Motion to Dismiss for Failure to Prosecute, dated August 1, 2007, did not dismiss the case because Plaintiff expressed an intention to prosecute the matter.

Now, more than a year has passed and there still has been no action in the case, nor has the Plaintiff or his counsel ever contacted the Defendants or their counsel about resolving any pending matters. Plaintiffs' counsel has further failed to comply with the time deadlines of Rule 26 of the Utah Rules of Civil Procedure. The above Motion is supported by Defendants' Memorandum in Support of Renewed Motion to Dismiss, filed herewith.

Therefore the above-captioned matter should be dismissed with prejudice.

DATED this 7 day of August, 2008.

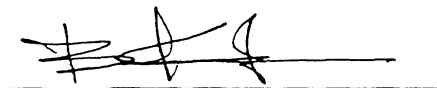
BOND & CALL, L.C.


Budge W. Call

MAILING CERTIFICATE

I hereby certify that on the 5 day of August, 2008, I did mail, U.S. First Class,
postage prepaid, a true and correct copy of the foregoing, **DEFENDANTS' RENEWED**
MOTION TO DISMISS, to the following:

James C. Bradshaw
Hutchings, Baird, Curtis & Astill
9537 South 700 East
Salt Lake City, UT 84070

A handwritten signature in black ink, appearing to read "J. Bradshaw", is written over a horizontal line.

Budge W. Call (5047)
BOND & CALL L.C.
8 East Broadway, Suite 720
Salt Lake City, Utah 84111
Telephone (801) 521-8900
Facsimile (801) 521-9700
Attorneys for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT
GARFIELD COUNTY, STATE OF UTAH
55 South Main, Panguitch, Utah 84759

LARRY DAVIS,	)	MEMORANDUM IN SUPPORT
	)	OF DEFENDANTS' RENEWED
Plaintiff,	)	MOTION TO DISMISS
vs.)	
)	
JULIAN DEAN HATCH, LYNNE,	)	Civil No. 030600041
MITCHELL	)	Judge David J. Mower
Defendants.)	

COMES NOW, the Plaintiffs, Julian Dean Hatch and Lynne Mitchell, and hereby submit the following Memorandum in Support of their Renewed Motion to Dismiss for Failure to Prosecute, which was filed in the above matter on or about January 25, 2007.

INTRODUCTION

This case was filed on October 29, 2003, and nothing has happened in this case since this time, other than the filing of Defendants' Motions to Dismiss. The Court in considering the Defendants' Motion to Dismiss (more than a year ago), in its Memorandum Decision on Motion to Dismiss for Failure to Prosecute, dated August 1, 2007, did not dismiss

the case because Plaintiff had expressed an intention to prosecute the matter.¹

Now, more than a year has passed and the Plaintiff has still failed to take any action in the case. Furthermore, neither Plaintiff nor his counsel, has ever contacted the Defendants or their counsel, about resolving any pending matters.

Plaintiffs' counsel has further failed to comply with the time deadlines of Rule 26 of the Utah Rules of Civil Procedure; and there has been no extension of these dates by stipulation of the parties or by the Court.

ARGUMENT

It is well established that under Rule 41(b) of the Utah Rules of Civil Procedure, a trial court has discretion to dismiss an action with prejudice for failure to prosecute, without justifiable excuse. *Maxfield v. Rushton*, 779 P.2d 237, 239 (Ut.App. 1989). The party challenging the dismissal bears the burden of offering a "reasonable excuse" for his [or her] lack of diligence. *Country Meadows Convalescent Ctr. v. Utah Dep't of Health*, 851 P.2d at 1215 (Ut.App. 1993).

The following factors are considered (1) the conduct of both parties, (2) the opportunity each party has had to move the case forward, (3) what each of the parties have done to move the case forward, (4) what difficulty or prejudice may have been cause to the other side, and (5) most importantly, whether injustice may result from the dismissal. *Maxfield*, 779 P.2d at 239.

¹The last bankruptcy petition was dismissed on May 13, 2005; and the Utah Supreme Court's Opinion in *Hatch v. Davis* was issued on August 11, 2006, two years ago, and a year before this Court's last ruling on the Defendants' Motion to Dismiss in August of 2007.

However, “even when a trial court finds facts indicating that ‘injustice could result from the dismissal of a case,’ it can dismiss when a plaintiff has had more than ample opportunity to prove his [or her] asserted interest and simply failed to do so.” *Country Meadows*, 851 P.2d at 1216, (quoting *Maxfield* 779 P.2d at 240).

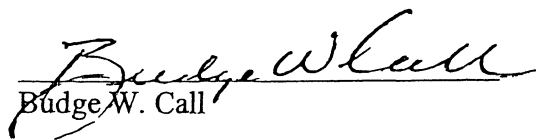
In this case, the Plaintiff has had ample opportunity to move the case forward over the last year, but has failed to do so. The case was filed nearly 5 years ago and no action has been taken in the case. This delay increases the difficulty for the Defendants to defend in the action and has caused them undue prejudice in the matter. *Rohan v. Boseman*, 46 P.3d 753 (Ut.App. 2002).

Furthermore, this Court issued a ruling on Defendants’ Motion to Dismiss for Failure to Prosecute, more than a year ago; relying on Plaintiff indication that he intended to prosecute the matter; however, since that time the Plaintiff has failed to do anything to move the case forward.

The Plaintiff can not offer any justifiable excuse for not moving the case along over the past year, and therefore, the case should be dismissed with prejudice for failure to prosecute. *Rohan v. Boseman*, 46 P.3d 753 (Ut.App. 2002).

DATED this 4 day of August, 2008.

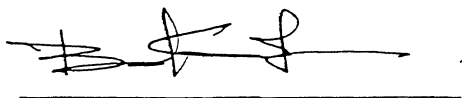
BOND & CALL, L.C.


Budge W. Call

MAILING CERTIFICATE

I hereby certify that on the 5 day of August, 2008, I did mail, U.S. First Class, postage prepaid, a true and correct copy of the foregoing, **MEMORANDUM IN SUPPORT OF DEFENDANTS' RENEWED MOTION TO DISMISS**, to the following:

James C. Bradshaw
Hutchings, Baird, Curtis & Astill
9537 South 700 East
Salt Lake City, UT 84070



A handwritten signature in black ink, appearing to read "James C. Bradshaw", is written over a horizontal line.

EXHIBIT F

AUG 01 2007

Clerk

Deputy

DISTRICT COURT, GARFIELD COUNTY, UTAH
55 SOUTH MAIN STREET
PANGUITCH, UT 84759
Telephone: (435) 676-1104 Fax: (435) 676-8239

LARRY DAVIS,

Plaintiff,

vs.

JULIAN DEAN HATCH and LYNNE
MITCHELL,

Defendants.

**MEMORANDUM DECISION ON
MOTION TO DISMISS FOR
FAILURE TO PROSECUTE**

Case No. 030600041

Assigned Judge DAVID L. MOWER

On January 29, 2007, Defendants filed a Motion to Dismiss for Failure to Prosecute. On February 20, 2007, Plaintiff filed his Objection to Defendants' Motion to Dismiss. On the same day, Defendants filed a Notice to Submit on their Motion to Dismiss. I issued an Order on Motion to Dismiss dismissing this action on April 3, 2007.

Plaintiff filed a Motion to Review Order on Motion to Dismiss on April 9, 2007. I vacated the Order because I found that I had overlooked the Objection from the Plaintiff. See Notice and Order Regarding Defendants' Proposed Order to Dismiss for Failure to Prosecute filed on May 18, 2007. Defendants were given an opportunity to file a Reply Memorandum which they did on June 25, 2007 along with a Notice to Submit.

Defendants' Motion to Dismiss for Failure to Prosecute is now ready for a decision.

DECISION

Defendants' Motion to Dismiss for Failure to Prosecute should be denied.

ANALYSIS

Defendants moved to Dismiss this action under Utah Rules of Civil Procedure, Rule 41(b). Defendants say that the last activity in the case took place on May 11, 2004. Since that time, Plaintiff has failed to advance his case. Defendants are asking me to dismiss this case with prejudice.

Plaintiff explains why he delayed the prosecution of this case. He says that this case was stayed by the United States Bankruptcy Court when the Defendants filed bankruptcy petitions in cases Nos. 03-21734 and 04-24808.

Plaintiff also says that both parties informally agreed to stay different matters and to wait for a decision by the Utah Supreme Court in the case of *Hatch v. Davis*, 147 P.3d 383 (Utah 2006). Plaintiff says that his intention is to prosecute this case if the parties are not able to reach a resolution of all pending cases.

In their Reply, Defendants point out that the two bankruptcy petitions were dismissed on October 27, 2003 and May 13, 2005 respectively. The Utah Supreme Court's decision in *Hatch v. Davis* was issued on August 11, 2006. However, Plaintiff has failed to advance this case since that time.

Defendants also argue that the ruling in *Hatch v. Davis* was in their favor; and, thus, Plaintiff has no claims left against the Defendants.

MEMORANDUM DECISION ON MOTION TO DISMISS FOR FAILURE TO PROSECUTE,
Case number 030600041, Page -3-

A Rule 41(b) Motion to Dismiss for Failure to Prosecute may be granted only when there is no “justifiable excuse” to explain the delay. *Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975). The length of time that passed from the date the case was filed is not automatically dispositive of this issue. *Id.* To determine whether a justifiable excuse exists, the following factors should be considered: (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward and what each has done about it; (3) difficulty or prejudice that may have been caused to the other side by any delay; and (4) injustice that may result from dismissal. *Id.* Factor number (4) is the most important in the analysis. *Id.*

This case was filed on October 29, 2003. However, there are good reasons why Plaintiff delayed prosecution. First, the Defendants were in bankruptcy up until May 13, 2005. Second, the parties waited for a decision from the Utah Supreme Court in the case involving the same parties. Third, Plaintiff says that there are still some unresolved matters pending. Thus, I do not see any indication that the Plaintiff has abandoned his claims.

I also do not find that the Defendants have suffered any difficulty or prejudice as a result of the delay. Defendants did not explain what difficulty or prejudice they might have suffered.

Defendants’ argument that this case should be dismissed as a result of the Utah Supreme Court decision in *Hatch v. Davis* is not adequately briefed. I do not know which particular claims in this case are precluded as a result of the Utah Supreme Court ruling.

MEMORANDUM DECISION ON MOTION TO DISMISS FOR FAILURE TO PROSECUTE,
Case number 030600041, Page -4-

Plaintiff has objected to this dismissal and expressed an intention to prosecute. It would be unjust not to allow the Plaintiff to do so.

Thus, Defendants' Motion to Dismiss for Failure to Prosecute should be denied.

CONCLUSION

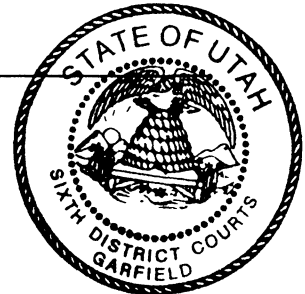
Defendants' Motion to Dismiss for Failure to Prosecute is denied.

Date _____, 2007

David L
Mower

Digitally signed by David L. Mower
DN: cn=US, o=TrustID personal certificate
ou=Utah, c=David L. Mower
email=dmower@msstar.net,
09.23421920030010011-D01E47420000011
1C3A6E6780000878C
Date: 2007.08.01 13:12:25 -0600

David L. Mower
District Court Judge



Certificate of Notification

On 8-31, 2007, a copy of the above was sent to:

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