1979

Bryan Jay Stephens v. Safeway Stores et al : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BRYAN JAY STEPHENS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
SAFEWAY STORES, INC., et al.,	)	
	)	
Defendants-Respondents.	)	Case No. 16203

RESPONDENT'S BRIEF

Appeal from the Judgment
of the Third Judicial District Court
of the State of Utah
in and for Salt Lake County
Honorable G. Hal Taylor, Judge

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RESPONDENTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This case is an appeal by plaintiff Stephens from an Order of Dismissal With Prejudice for Failure to Prosecute pursuant to Rule 41 (b) of the Rules of Civil Procedure.

DISPOSITION IN LOWER COURT

Defendants' Motion to Dismiss for Failure to Prosecute was heard before the Honorable G. Hal Taylor, Judge, of the Third Judicial District of Salt Lake County, State of Utah, on the 17th day of November, 1978. The court considered defendants' motion based on the file and record in the case, affidavits of the parties, memoranda of law, and oral argument. The court granted defendants' Motion for Dismissal for Failure to Prosecute and entered its Order of Dismissal With Prejudice on November 24, 1978.

RELIEF SOUGHT ON APPEAL

Appellant Stephens seeks reversal of the judgment of the lower court and an order remanding the case to the Third Judicial District Court for trial on the merits, while Respondent seeks to have the lower court's Dismissal With Prejudice affirmed.

STATEMENT OF FACTS

On the 25th day of June, 1971, an incident occurred at a Safeway Store located at 1690 South Ninth East, out of which plaintiff's allegations spring. Plaintiff served its complain on defendants on July 28, 1971, in Case No. 200474, alleging claims in assault and battery, false arrest and false imprisonment and alleging $200.00 in medical bills as special damages. (R. 18) Defendants proceeded with discovery by taking plaintiff's deposition and interviewing thirteen witnesses to the incident. (R. 33) Trial was set for the 13th day of June, 1972. (R. 33) By the 12th of June, 1972, defendants had subpoenaed five witnesses to appear at trial, had contacted another eight witnesses to suggest that they may be used at trial, had prepared proposed jury instructions and were, in all respects, prepared for trial. (R.33) On the 12th day of June, 1972, the day before trial, plaintiff's counsel submitted to the court a Motion and Order for Dismissa Without Prejudice. Contrary to Appellant's assertion in Appellant's Statement of Facts, there is no indication that

either the Motion or the Order was stipulated to by defendants' counsel. Plaintiff's motion was granted.

Six months later on the 13th of November, 1972, plaintiff again served an essentially identical complaint on defendants stating the same causes of action and again alleging $200.00 in medical bills as special damages. (R. 3) On the 4th of December, 1972, defendants submitted their Answer and First Set of Interrogatories. (R. 5-10) Nine days later, defendants received a notice that plaintiff had discharged his attorney, Richard M. Day. After giving plaintiff two months to answer defendants' Interrogatories, defendants filed a Motion to Compel Answers to Interrogatories on February 5, 1973. (R. 14,15) On the 15th of February, 1973, the court heard defendants' Motion to Compel and ordered plaintiff to answer within ten days. (R. 17) On February 20, 1973, plaintiff filed his Answers to Defendants' Interrogatories admitting that to date the only doctor which he had seen since June of 1971 was dentist Richard D. Christiansen and that his medical bills to that date were $200.00, the entire amount of which was paid to Dr. Christiansen. (R. 18) On June 28, 1973, John D. Russell filed his appearance as counsel. In the intervening five and one-half years, between Mr. Russell's appearance and defendant's Motion to Dismiss for Failure to Prosecute, the record reflects no discovery efforts on the part of the plaintiff; no request for trial setting; no

supplemental answers to interrogatories; no substitution of John Doe defendant; and no attempt to settle the case.

On the first day of November, 1978, defendants prepared and filed a Motion to Dismiss for Failure to Prosecute, mailing the appropriate copy to counsel. (R. 24-25) On or about the 14th day of November, 1978, plaintiff served on defendants, Plaintiff's Memorandum of Law Opposing Motion to Dismiss. (R. 26-29) On the 16th of November, 1978, defendants submitted an affidavit in support of their motion and the motion was heard and granted on the 17th day of November, 1978. Judgment was entered on the 24th of November, 1978.

ARGUMENT

POINT I

THE RULING ON A 41(b) MOTION IS PLACED IN THE SOUND DISCRETION OF THE TRIAL COURT AND WILL NOT BE OVERTURNED UNLESS IT IS SHOWN THAT THE COURT BELOW ABUSED IT'S DISCRETION.

Utah Rules of Civil Procedure, Rule 41(b) provides in part as follows:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or any claim against him..."

This court in Maxfield vs. Fishler, 538 P.2d 1323 (1975) observed that:

> If Rule 41(b), Utah Rules of Civil Procedure is to be effective in expediting and resolving

> litigation, it must require litigants to prosecute their claims with due diligence, or expect the penalty of dismissal.

The trial court in Utah has been given the responsibility of determining what is and what is not diligent prosecution of a claim. In Westinghouse Electric Supply Company vs. Paul W. Larson Contractors, Inc., 544 P.2nd 876 (1977) the Utah Supreme Court recognized the discretion of the District Court in making this decision.

> 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 lattitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and directions of the court without justifiable excuse. (emphasis added)

On appeal the highest court of this state will give considerable deference to the discretion of the lower court. Thompson Ditch Company vs. Jackson 29 Utah 2d 259, 508 P.2d 528 (1973):

> "The ruling of the court will not be disturbed on appeal unless the record plainly shows that the court below abused it's discretion."

POINT II

PLAINTIFF PROVIDED NO JUSTIFICATION OR EXCUSE FOR NOT BRINGING HIS CAUSE OF ACTION TO TRIAL WITHIN SEVEN AND ONE-HALF YEARS OF FILING HIS ACTION. THE TRIAL COURT'S DISMISSAL WITH PREJUDICE WAS PROPER.

The trial court in making its ruling in the present case had the opportunity to consider and observe the following:

UNUSUAL DELAY

In the Westinghouse Case, cited above, just under three years elapsed between the filing of the original complaint and the filing of the Motion to Dismiss for Failure to Prosecute. This court considered the passage of that amount of time to be "unusual delay". supra Page 879.

The delay between filing Stephens original case and Dismissal For Failure to Prosecute, is approximately two and one-half times that apparent in the Westinghouse Case. Ironically, the Maxfield case (1975), relied on by respondent, and the Westinghouse (1977), Utah Oil (1977), Polk (1977) and Johnson (1977) Cases, relied on by appellant, involve original claims which were filed, Dismissed for Failure to Prosecute, appealed and resolved in the Utah Supreme Court all during pendency of the instant case. Indeed, the plaintiffs in the Utah Oil and Polk Cases did not file their original actions until 1974, many months after the plaintiff's last action of record in this case.

In the case of Maxfield vs. Fishler, supra, the Supreme Court upheld a dismissal of an action where plaintiff was not prepared for trial two years after filing the complaint, had not filed the required bond, and had made no discovery. Except for the bond requirement noted in that case plaintiff here equals or surpasses the dilatory actions

of the plaintiff Maxfield. The Supreme Court in Brasher Motor and Finance Co. vs. Brown, 23 Utah 2d 247, 461 P.2d 464 (1969), upheld the trial court's dismissal of an action where the case had been pending for 5 1/2 years without significant action by plaintiff. Mr. Stephens has burdened the defendants in the instant case with this suit for 8 years, and has taken no affirmative action for over 6 1/2 years, except to answer interrogatories, and to notice the appearance of counsel.

It cannot be denied that the delay, apparent in this case, is extreme, giving the court below a right to require plaintiff to show excuse or justification of a comparable magnitude. Yet the plaintiff has provided the court with no significant excuse.

EXCUSE FOR DELAY

Plaintiff in Appellant's Brief asserts;

> "that any delay has not been unreasonable, in view of the fact that this action involves claim for personal injuries, and respectfully points out that there has been activity in seeking out competent medical examination and treatment for plaintiff's injury." (Appellant's Brief, Page 6)

This assertion tracks word for word plaintiff's argument in his Memorandum of Law opposing Respondent's Motion to Dismiss. (R. 28)

Though plaintiff "points out" to the court that he has been actively seeking out medical examination and treatment,

Plaintiff, at the hearing on the Motion to Dismiss produced no Affidavit, information, bill or any other evidence of medical treatment, examination or activity of any sort. The court below had counsel's bare assertion that additional medical examination and treatment was being sought. The record indicates otherwise. On July 28, 1971, plaintiff's original Complaint, as served, alleged $200.00 in medical bills incurred as medical damages. Sixteen months later on the 13th of November, 1972, plaintiff's second Complaint alleged the same $200.00 in medical bills as special damages. On February 20, 1973, in plaintiff's Answers to Defendant's Interrogatories, plaintiff under oath still claimed only $200.00 in medical bills, and special damages, attributing the entire bill to Richard D. Christiansen, D.D.S.

The record shows that plaintiff within a month of the incident, on the 25th of June, 1971, sought only the medical help of a dentist and incurred dentist's bills of $200.00. In the nearly 19 months thereafter, plaintiff neither sought nor obtained any additional medical help, of any kind. Plaintiff provided no indication or proof of any specific measures whatsoever to seek additional medical examination, or treatment. The court below cannot be faulted for finding plaintiff's excuse for delay less than compelling.

ACTIONS BY THE PARTIES

The record is clear that defendants have done everything required of them to prepare to defend against plaintiff's claims. Defendants have been completely prepared for trial once, having taken the deposition of the plaintiff and having interviewed witnesses to the incident. On the other hand, the record is equally clear that the plaintiff has done nothing on this case since June of 1973. The record is totally devoid of evidence of prosecution of the case on the part of the plaintiff.

INJURY TO PARTIES

Plaintiff in Appellant's Brief makes the following statement:

> "It is fundamental to our system of justice that an injured plaintiff be given his day in court, and that he should not be, in effect defaulted, for technical procedural reasons." Appellant's Brief, (Page 5)

Plaintiff is forgetting that he had his opportunity for his day in court, and on the courthouse steps had second thoughts, and arranged dismissal of his own case. Thereafter, the plaintiff refiled the case, and sat on his claim for six and one-half years. Dismissal of Plaintiff's action can hardly be characterized as based on a technical procedural point. True enough, the court below dismissed plaintiff's claim on a procedural rule, but plaintiff's egregious inaction in the case is, on the equities, an abandonment of his claim.

Plaintiff pushed defendants into a lawsuit, required them to expend considerable amounts of time and money in preparation to defend the lawsuit, on the eve of the scheduled trial, dismissed the suit, and then six months later resurrected the same suit, dragging the defendants back into court. Defendants have had this lawsuit hanging over their heads now for nearly eight years with an alleged $150,000.00 at risk. In addition, witnesses memories have faded and some witnesses may no longer be available. The impact of eight years of delay upon defendants cannot be said to be insubstantial.

CONCLUSION

The present case constitutes a classic example of a nuisance suit being brought against a deep pocket for the purpose of squeezing a few dollars out of a defendant by simply keeping the case alive and a thorn in a defendants' side with no real intent to bring the case to trial and with no real interest in the merits of the case. This action represents precisely the type of case with which Rule 41(b) was promulgated to deal.

The defendants in this case have done everything in their power to proceed, short of forcing the case to trial by requesting a trial setting. Plaintiffs have done nothing but sit on their claim and resist defendant's discovery efforts. It is the plaintiff who chose when and where to burden defendants with a legal action. With that perogative came the responsi-

to proceed with the case, in good faith, and with due diligence. To rule in plaintiff's favor in this case would, remove that responsibility from the shoulders of plaintiff. Such a ruling would have unfortunate consequences on the already log jammed court calendar by fostering the existance of dead wood in the system. The court must allow the district courts to prune from their files those cases which are long dead. The lower court's Dismissal, With Prejudice, in this case should be affirmed.

DATED this 4th day of May, 1979.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the Respondent's Brief have been sent to Appellant, by placing said copies, postage prepaid, in the U.S. Mail, and addressed to John D. Russell, attorney, 430 Judge Building, 8 East Broadway, Salt Lake City, Utah, 84111, this 4th day of May, 1979.