2001

Tom Polk and Ron Shultz v. Mike T. Ivers : Brief of Appellant

Utah Supreme Court

Brian M. Barnard; Attorney for Appellants.
J. Harold Call; Attorney for Respondents.

IN THE SUPREME COURT

OF THE

STATE OF UTAH

TOM POLK and RON SHULTZ,

Plaintiffs and Appellants,

vs

MIKE T. IVERS and
MRS. MIKE T. IVERS, his wife,

Defendants and Respondents.

Case No. 14682

BRIEF OF APPELLANTS

AN APPEAL FROM THE ORDER OF DISMISSAL ENTERED
IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SUMMIT COUNTY, STATE OF UTAH,
THE HONORABLE STEWART M. HANSON, JUDGE PRESIDING

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O F T H E

S T A T E O F U T A H

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TOM POLK and RON SHULTZ, Plaintiffs and Appellants, vs MIKE T. IVERS and MRS. MIKE T. IVERS, his wife, Defendants and Respondents.	Case No. 14682

BRIEF OF APPELLANTS

I

NATURE OF THE CASE

This action, brought by Appellants, seeks damages for forcible entry and forcible detainer and for damage caused to the Plaintiffs' personal property by actions of the Defendants.

II

DISPOSITION IN LOWER COURT

The lower court granted the Defendants' Motion to Dismiss the Plaintiffs' Complaint and the Defendants' Counterclaim for lack of prosecution.

III

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek reversal of the lower court's dismissal of the Plaintiffs' Complaint and a remand of the action to the lower court for trial.

IV

STATEMENT OF FACTS

This case arose from a landlord-tenant dispute between Plaintiffs and Defendants. The Plaintiff lessees filed a complaint in forcible entry against the Defendant landlords on January 22, 1974 in Third District Court in Salt Lake City, Utah.(R.1) Service was made upon both Defendants the following day.(R.7) Defendants through counsel, Wendell R. Jones, answered on February 6, 1974.(R.11) Plaintiffs submitted a first set of interrogatories on

February 11, 1974 (R.8) followed by requests for admissions two days later.(R.12) On March 1, 1974 Defendants through new counsel, J. Harold Call, moved for a change of venue from Salt Lake County to Summit County, (R.19) which motion was granted March 15, 1974.(R.28) On June 7, 1974, Defendants filed a second answer with counterclaim (R.32) and answers to the February 11, 1974 interrogatories (R.40) and replies to the Februrary 13th requests for admissions.(R.35) On June 18, 1974 Defendants filed notice of readiness for trial, (R.50) five days after the Plaintiffs had answered Defendants' counterclaim.(R.49) On July 5th, 1974, Plaintiffs submitted a second set of interrogatories (R.52) which were answered August 2, 1974.(R.55) On July 31, 1974 Defendants made request for a trial setting, (R.59) and the action was set for pre-trial on February 14, 1975 in Provo, Utah.(R.60) At the pre-trial, counsel were ordered to prepare a pre-trial order which was to be submitted to the Court for approval by April 1, 1975; jury instructions were to be submitted by July 28, 1975; and a trial date of July 30, 1975 was set.(R.63) Plaintiffs' counsel submitted the requested jury instructions by July 28, 1975 in accordance with the February 14, 1975 order;(R.71) Defendants did not. Due to failure of counsel to agree on a pre-trial order, the July 30, 1975 trial date was vacated.(R.64) On December 15, 1975 a hearing was to have been held to set a new trial date. Plaintiffs' counsel was unable to be present but

informed the Court by letter filed December 9, 1975 that he would not be able to attend and that he would be amenable for trial anytime during February or March, 1976.(R.90) Defendants' counsel did not appear in court or otherwise notify the court of a convenient date. The minute entry reflects that the court would contact counsel and set a trial date.(R.91) No further action was taken until Defendants moved for dismissal for failure to prosecute on June 1, 1976.(R.94) No notice of hearing on the motion was made at that time. Nevertheless, the court without a hearing, and with no counsel present granted the motion on June 7, 1976 and requested Defendants' counsel to prepare an order of dismissal.(R.96) Plaintiffs' counsel received a copy of the proposed order on June 9, 1976 (R.96) and requested Defendants' counsel for a hearing before the order was signed, which hearing was set for June 21, 1976.(R.97) On June 14, 1976 Plaintiffs' counsel filed a motion for partial summary judgment on the liability issue.(R.98) At the June 21, 1976 hearing, Plaintiffs' counsel was not present but informed the court by telephone he would not appear and that he would submit the matter on the record. Despite the motion for partial summary judgment filed a week earlier, the extensive discovery completed by Plaintiffs and the irregularity of the June 7, 1976 proceeding, the court, Judge Stewart M. Hanson, presiding, dismissed Plaintiffs' complaint with prejudice for want of prosecution.(R.101) Timely appeal was

taken. (R.104)

V

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PLAINTIFFS' CAUSE OF ACTION FOR FAILURE TO PROSECUTE.

The court below had the power under Rule 41(b) of the Utah Rules of Civil Procedure to dismiss Plaintiffs' action for want of prosecution. The issue is whether the court abused its discretion in doing so in this case. When faced with a motion to dismiss for want of prosecution a court must weigh three separate and often conflicting interests:

1) the interest of the Plaintiff in having his claim heard on its merits

2) the interest of the Defendant in being protected from vexatious delays and possible impairment of his defenses by the passage of time, and

3) the interest of the court in eliminating "deadweight" cases from its docket.

Plaintiffs' position is that the court below arbitrarily sacrificed their fundamental right to a judicial hearing to less compelling interests which could have been adequately protected by far less stringent sanctions than dismissal.

In Westinghouse Electric Supply v Larsen 544 P.2d

876(1975) this Court emphasized the primacy of a party's right to be heard:

> It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them . . . It is our conclusion that the trial court failed to give proper weight to the higher priority; and that under the circumstances described herein, the order of dismissal was an abuse of discretion.

The Westinghouse case stands for the proposition that a dismissal for want of prosecution is not to be granted unless there are interests substantially outweighing the Plaintiffs' right to be heard. What are the interests in the case at bar.

No significant harm to the Defendants appears from the record. Any neglect by Plaintiffs' counsel could not possibly have harmed the Defendants more than the Defendants' failure to conduct any form of discovery recognized under the Rules of Civil Procedure. Further, any other interests the Defendants might have had clearly were not significant factors in Judge Hanson's decision, since the court originally granted Defendants' motion without a hearing.

Justification for the lower court's ruling must be found, if at all, in its power to weed out "deadweight" cases from its calendar. Was this case "deadweight"? Several facts point to a negative answer. First, Plaintiffs had filed a motion for summary judgment on June 14, 1976

(R.98) - one week before Judge Hanson signed the order of dismissal. Second, the letter dated December 9, 1975 and filed December 12, 1975 from Plaintiffs' counsel to the court clearly indicated he was ready for trial "anytime during the months of February or March, 1976".(R.90) Third, Plaintiff had completed extensive discovery (two sets of interrogatories and one set of requests for admission). (R.8,12,52) Fourth, a proposed pre-trial order by Plaintiffs was on file (R.65-70) as well as Plaintiffs' requests for jury instructions.(R.71-89) Fifth, the court had indicated on December 15, 1975 that the court would contact the counsel to set a trial date (R.91) which was never done. Sixth, the case was simply not that old. The complaint was filed January 22, 1974, and because of a change in venue, the answer was not filed until six months later. The cases in which this Court have affirmed dismissals for want of prosecution have generally involved much longer delays. See for example: Brasher Motor v Brown, 23 Utah 2d 247, 461 P.2d 464 (1969) five and one-half years, Thompson Ditch Company v Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973) five years. Maxfield v Fishler, 538 P.2d 1323 (1975) was only a two year case, but therein the Plaintiff had conducted either minimal or no discovery of his own, was dilatory in responding to Defendants' interrogatories and showed up for trial without an essential expert witness.

In the case at bar there are no factors showing

excessive dilatory conduct by Plaintiffs' counsel. During the ten months between the vacating of the July 30, 1975 trial date and the filing of Defendants' motion to dismiss, the case was basically dormant. There is no compelling excuse for such a delay other than Plaintiffs' counsel was awaiting action by Defendants' counsel and the court toward resolving the question of the pre-trial order and a trial setting. Plaintiffs' counsel did not appear at the June 21, 1976 hearing immediately before the court signed its order of dismissal (counsel did, however, inform the court he would submit the matter on the pleadings). Other than the foregoing, all delays were the fault of the Defendants or the court.

Even so, Plaintiffs maintain there was sufficient activity in the file to avoid a motion to dismiss. Granting such a motion, especially with prejudice, is a harsh sanction to be used sparingly. The court below could have adequately protected its interests by ordering Plaintiffs to bring the case to trial by some day certain. Such orders are commonly used and are an attractive method of clearing up clogged calendars without denying a party his day in court.

The Plaintiffs had, on June 29, 1975, submitted a proposed pre-trial order and proposed a meeting to resolve any questions within the order.(R.64) That meeting was never held.

The court had indicated to counsel by its minute

entry on December 15, 1975 (R.91) that they would be contacted regarding a new trial date. That was never done.

Plaintiffs' counsel had attempted to move the matter to trial with dispatch and resolve the apparent dispute regarding the pre-trial order. Neither Defendants' counsel nor the court moved in that direction. The Plaintiffs should not be penalized for the failure to act of the court or Defendants' counsel.

In sum, the lower court abused its discretion in granting Defendants' motion to dismiss for lack of prosecution under the circumstances of this case.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PLAINTIFFS' CLAIM WITH PREJUDICE.

The trial court abused its discretion in dismissing Plaintiffs' claim with prejudice because such action excessively penalized the Plaintiffs. The Statute of Limitations has not run on Plaintiffs' claim whether it be viewed as a forcible entry action (four years - U.C.A. §78-12-25), an action to recover possession of real property (seven years - U.C.A. §78-12-5) or an action for injuring personal property (three years - U.C.A. §78-12-26). Proper respect for the Plaintiffs' constitutional right to a judicial resolution of their claim (Utah Constitution, Article I, §11) would mandate that a court dismissing for lack of prosecution do so without

prejudice when the statute of limitations has not run on the claim.

VI

CONCLUSION

The lower court abused its discretion in dismissing Plaintiffs' claim for want of prosecution. The lack of prosecution was on the part of Defendants' counsel and the court rather than Plaintiffs. The decision of the lower court should be reversed and the matter remanded for trial.

Respectfully submitted,

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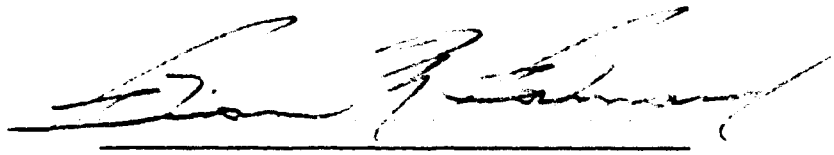
CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Appellants to J Harold Call, Esq., Attorney for Respondents, 30 North Main Street, Number Three, Heber City, Utah, 84032, postage prepaid in the United States Postal Service, this 23rd day of August, 1976.



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