

1989

Von K. Stocking v. First Federal Savings & Loan Association of Logan, Fred Hunsaker and Brian Chadaz, as officers and as individuals; Brad H. Bearnson, Trustee; Norman Barber and Helen Barber, successor beneficiaries; N. George Daines, and John Does 1-8 : Brief of Respondent

Utah Court of Appeals

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COURT OF APPEALS
BRIEF

UTAH C.

IN THE UTAH COURT OF APPEALS
UTAH

890345

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,
Plaintiffs and Appellants.

vs.

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, FRED
HUNSAKER and BRIAN CHADAZ, as
officers and as individuals;
BRAD H. BEARNSON, Trustee;
NORMAN BARBER and HELEN BARBER,
successor beneficiaries; N.
GEORGE DAINES, and JOHN DOES 1-8,
Defendants and Respondents.

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A10
DOCKET NO.

Case No. 890345-CA

BRIEF OF THE RESPONDENTS FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, FRED HUNSAKER AND BRIAN CHADAZ, AS
OFFICERS AND AS INDIVIDUALS, AND BRAD H. BEARNSON, TRUSTEE

APPEAL FROM AN ORDER IN THE FIRST DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR THE
COUNTY OF CACHE
THE HONORABLE VENNOY CHRISTOFFERSEN

Priority No. 14(b)

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IN THE UTAH COURT OF APPEALS

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

Plaintiffs and Appellants.

vs.

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, FRED
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officers and as individuals;
BRAD H. BEARNSON, Trustee;
NORMAN BARBER and HELEN BARBER,
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GEORGE DAINES, and JOHN DOES 1-8,

Defendants and Respondents.

Case No. 890345-CA

BRIEF OF THE RESPONDENTS FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, FRED HUNSAKER AND BRIAN CHADAZ, AS
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Priority No. 14(b)

PARTIES TO THE ACTION

Plaintiffs and Appellants:

Von K. Stocking and Donna H. Stocking, husband and wife

Defendants and Respondents:

First Federal Savings & Loan Association of Logan, Fred Hunsaker and Brian Chadaz, as officers and as individuals; Brad H. Bearnson, Trustee; Norman Barber and Helen Barber, successor beneficiaries; N. George Daines, and John Does 1-8

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PRELIMINARY STATEMENT

In this Brief, the Appellants will be referred to as "Plaintiffs". The Defendants can be classified into two (2) groups. The Defendants Fred Hunsaker and Brian Chadaz are employees of Defendant First Federal Savings & Loan Association of Logan ("First Federal"), and the Defendant Brad H. Bearnson is the Trustee in the Trust Deed out of which this litigation arises. These four (4) Defendants, First Federal Savings & Loan Association of Logan, Fred Hunsaker, Brian Chadaz and Brad H. Bearnson, will be referred to collectively as the "First Federal Defendants". N. George Daines was legal counsel for Defendants Norman Barber and Helen Barber who acquired from First Federal Savings & Loan Association of Logan the beneficial interest in the Trust Deed above referenced. These three (3) Defendants, N. George Daines, Norman Barber and Helen Barber, will be referred to collectively as the "Barber Defendants". This matter was before the Trial Court on a Motion by the First Federal Defendants, joined in by the Barber Defendants, to dismiss Plaintiffs' Complaint for failure to prosecute their claim. The Trial Court ruled upon said Motion based upon the briefs submitted by counsel. For this reason, there was no hearing or evidence and hence no transcript of any proceedings. The record on appeal consists entirely of the records in the office of the Court Clerk and this record will be referred to in this Brief by the designation "R" followed by the appropriate page reference. Attached as addenda to this Brief are copies of the Trial Court's Memorandum Decision dated January 19, 1989

granting Defendants' Motion to Dismiss, the Trial Court's Findings of Fact and Order dated January 27, 1989 dismissing Plaintiffs' Complaint, the Trial Court's Memorandum Decision dated February 27, 1989, denying Plaintiffs' Motion For a New Trial, and the Trial Court's formal Order Denying New Trial dated March 14, 1989. The Utah Rules of Civil Procedure will be referred to as "URCP". All emphasis is added.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal under U.C.A. §78-2a-3(2)(j), being a case transferred to the Court of Appeals from the Utah Supreme Court.

NATURE OF PROCEEDINGS

This case is an appeal from a Decision and Order of the Honorable VeNoy Christoffersen in the District Court of Cache County, Utah entered January 27, 1989, dismissing Plaintiffs' Complaint under Rule 41(b) of the URCP for failure to prosecute. Following the entry of Judge Christoffersen's Order of Dismissal with Prejudice of January 27, 1989, Plaintiffs filed a Motion For a New Trial. This Motion was denied by the Trial Court by Memorandum Decision dated February 27, 1989 and by a formal Order Denying New Trial dated March 14, 1989. This appeal is taken by the Plaintiffs from the Order of Dismissal and the Order Denying a New Trial.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFFS' COMPLAINT FOR FAILURE TO PROSECUTE?

2. WAS THE TRIAL COURT'S FAILURE TO GRANT PLAINTIFFS A HEARING ON THE MOTION OF THE FIRST FEDERAL DEFENDANTS TO DISMISS FOR FAILURE TO PROSECUTE REVERSIBLE ERROR?

DETERMINATIVE CONSTITUTIONAL, STATUTORY RULES

The following are determinative Rules that support the relief the First Federal Defendants seek:

1. Rule 41(b) URCP:

For failure of the plaintiff to prosecute ... a defendant may move for dismissal of an action or any claims against him. ... Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

2. Rule 4-501(9), Code of Judicial Administration:

In cases where the granting of a motion would dispose of the action or any issues thereon on the merits with prejudice, the party resisting the motion may request a hearing and such request shall be granted.

STATEMENT OF THE CASE

Plaintiffs filed this action on November 3, 1983 and amended their Complaint on November 28, 1983. As amended, the Complaint alleges four (4) causes of action seeking damages from alleged

wrongful conduct by the First Federal Defendants in foreclosing a Trust Deed given by Plaintiffs as Trustors to First Federal as Beneficiary, and from alleged wrongful conduct of the Barber Defendants in acquiring the beneficial interest of First Federal in said Trust Deed prior to the Trustee's foreclosure sale thereof and in completing the Trustee's foreclosure sale of and under said Trust Deed. The case was pending in the District Court for over five (5) years and during this time proceeded through a number of actions by the parties that will be chronicled under the "Statement of Facts" Section of this Brief. After the case had been pending for five (5) years, the First Federal Defendants, on November 25, 1988, moved to dismiss Plaintiffs' Complaint under Rule 41(b) URCP for failure to prosecute. This Motion was joined in by the Barber Defendants and was resisted by Plaintiffs who, in response to said Motion, concurrently filed (1) a Notice of Objection to Motion to Dismiss, (2) a Notice of Readiness For Trial, and (3) a Memorandum Opposing Motion to Dismiss and Request For Hearing.

While said Motion to Dismiss was under consideration by Judge Christoffersen, the Clerk of the Court placed the case on the trial calendar. Without hearing, the Trial Court, in a Memorandum Decision dated January 19, 1989, granted the Motion to Dismiss. On January 27, 1989, the Trial Court signed Findings of Fact and an Order of Dismissal and therein struck the trial setting made by the Clerk of the Court on February 6, 1989. Plaintiffs made a Motion For a New Trial, which the Trial Court denied in a Memorandum Decision dated February 27, 1989, followed by a formal

Order Denying Motion signed March 14, 1989. This appeal by Plaintiffs from the Order granting the Motion to Dismiss and Order Denying a New Trial followed.

STATEMENT OF FACTS

The procedural chronology of this case as shown from the Clerk's file and as found by the Trial Court in its Findings of Fact undergirding its Order Dismissing Plaintiffs' Complaint is as follows:

1. Plaintiffs' Complaint was filed November 3, 1983 (R-1) and a Temporary Restraining Order was issued the same day to restrain the First Federal Defendants from proceeding with a Trustee's sale of Plaintiffs' property (R-11).

2. The Trustee's sale scheduled November 3, 1983 was postponed one (1) day to November 4, 1983, and on November 4, 1983, a hearing was held before the Honorable VeNoy Christoffersen on Plaintiffs' Temporary Restraining Order. As a result of the hearing on November 4, 1983, the Court dismissed its Temporary Restraining Order of November 3, 1983 (R-10 and 12), and the Trustee's sale as rescheduled was conducted the same day.

3. On November 7, 1983, the First Federal Defendants filed an Answer to Plaintiffs' Complaint (R-14).

4. On November 28, 1983, Plaintiffs filed an Amended Complaint (R-16).

5. On December 8, 1983, the First Federal Defendants filed an Answer to Plaintiffs' Amended Complaint (R-44), and on December

15, 1983 the Barber Defendants filed their Answer to Plaintiffs' Amended Complaint (R-47).

6. On February 3, 1984, the First Federal Defendants filed a Motion For Partial Summary Judgment (R-55) which the Court denied in a Memorandum Decision dated March 19, 1984 (R-129).

7. On March 21, 1984, the First Federal Defendants filed a Notice of Readiness For Trial (R-131). Plaintiffs objected to the Notice on April 2, 1984, stating in their objection, "Plaintiffs intend to prepare and complete discovery both with interrogatories and depositions." (R-133)

8. On July 6, 1984, the First Federal Defendants filed a Second Notice of Readiness For Trial (R-137), to which Plaintiffs objected on July 11, 1984, stating "... plaintiffs are proceeding with discovery." (R-146)

9. On July 11, 1984, Plaintiffs served Interrogatories and a Request For Admissions on Defendants Chadaz and Bearnson (R-139), to which Bearnson filed Answers on July 18, 1984 (R-148) and to which Chadaz filed Answers on August 10, 1984 (R-152).

10. On January 13, 1986, the Court, on its own motion, issued an Order returnable January 27, 1986 for Plaintiffs to show cause why their Complaint should not be dismissed for failure to prosecute the same (R-157).

11. On January 23, 1986, Plaintiffs moved to dismiss the Court's Order To Show Cause and in their Motion stated, "Plaintiffs intend to bring this matter to trial after their evidence has been completed. The appraiser has not completed the work he indicated

would be done some time ago and Plaintiffs are reminding him of the commitment to complete the work." (R-159) The case was not dismissed.

12. On January 27, 1987, the Court, on its own motion, issued a second Order, returnable February 9, 1987, for Plaintiffs to show cause why their Complaint should not be dismissed for failure to prosecute the same (R-160).

13. On February 5, 1987, Plaintiffs moved to dismiss the Court's second Order To Show Cause, and in their motion stated, "Plaintiffs have not left this case unpursued, but have been preparing to go forward with it. ... They desire that this matter eventually be set for trial, and anticipate being ready to file a request within the year." (R-161) On February 7, 1987, the Order To Show Cause was dismissed (R-170).

14. On February 6, 1987, Plaintiffs served a "First Request For Admissions, First Set of Interrogatories and For Production of Documents" on the Barber Defendants (R-162). These discovery requests were answered by the Barber Defendants on March 11, 1987 (R-175).

15. On September 4, 1987, the Barber Defendants moved the Court for partial summary judgment (R-188), which motion was denied by the Court's Memorandum Decision dated October 6, 1987 (R-215) and Order dated October 26, 1987 (R-216).

16. On November 25, 1987, Plaintiffs served a "First Request For Admissions and Interrogatories" on the First Federal Defendants (R-218). Defendant Bearnson answered said Request and

Interrogatories on December 27, 1987 (R-223). Defendants Hunsaker and First Federal answered the Request and Interrogatories on December 23, 1987 (R-227), and Defendant Chadaz answered the Request and Interrogatories on December 23, 1987 (R-231).

17. On December 29, 1987, Plaintiffs propounded a Request For Production of Documents to the Barber Defendants (R-235), and these Requests were responded to by the Barber Defendants on January 4, 1988 (R-238).

18. No action was taken by Plaintiffs on the claim from December 23, 1987 until after November 25, 1988, when the First Federal Defendants filed their Rule 41(b) Motion to Dismiss Plaintiffs' Complaint for failure to prosecute.

Based upon the foregoing status of the record, the First Federal Defendants made a Motion on November 25, 1988 pursuant to Rule 41(b) URCP to Dismiss Plaintiffs' Complaint for failure to prosecute the same (R-241). The Motion was accompanied and supported by a Memorandum of Points and Authorities (R-243). On December 1, 1988, the Barber Defendants joined in said Motion (R-255). On December 6, 1988, Plaintiffs filed a "Notice of Objection to Motion to Dismiss" (R-257). Then on December 8, 1988, Plaintiffs filed a Notice of Readiness for Trial (R-259) and written "Objections and Memorandum Opposing Motion to Dismiss and Request for Hearing" (R-261). In their Memorandum, the Plaintiffs argued their resistance to said Motion on the merits and cited to the Court the same cases in support of their opposition to the Motion that they now cite to this Court in their Appellants' Brief.

The First Federal Defendants filed a Reply Memorandum on December 30, 1988 (R-265). On December 21, 1988, while the Motion of the First Federal Defendants was pending and before a decision thereon had been made by the Trial Court, the Clerk set the case for trial (R-268). On December 30, 1988, the Barber Defendants filed their Reply Memorandum (R-270).

On January 19, 1989, Judge Christoffersen issued a Memorandum Decision, noting the Plaintiffs' delay and concluding, "Even their (Plaintiffs') responses do not produce logical reasons for failing to proceed with the prosecution of their claim" and ruling, "Therefore, Defendant's Motion to Dismiss is granted, ..." (R-273).

Formal Findings of Fact and Order were presented to the Court, objected to by Plaintiffs and signed by the Court over Plaintiffs' objection on January 27, 1989 (R-286).

Plaintiffs made a Motion for a New Trial on February 6, 1989, which the Court denied in a Memorandum Decision on February 27, 1989 (R-304) and an "Order Denying New Trial" dated March 14, 1989 (R-305). This appeal followed the denial of Plaintiffs' Motion for a New Trial (R-307).

SUMMARY OF ARGUMENTS

The decision of the Trial Court to dismiss Plaintiffs' Complaint for failure to prosecute is discretionary with the Trial Court. This Court will not reverse the decision of the Trial Court unless the Trial Court has abused this discretion. In this case, Plaintiffs have made no showing that the Trial Court abused its

discretion, but rather the Defendants have shown ample evidence to justify the Trial Court's Order of Dismissal. The dismissal by the Trial Court did not violate Plaintiffs' rights to due process or access to the courts for a remedy for an alleged wrong to them. A concomitant to Plaintiffs' right of due process and access to the court is the state's right to control its calendar. This is an inherent right of the Court as well as a right granted by Rule 41(b) URCP. Plaintiffs were given reasonable opportunity to have this case heard and forfeited that right by their own inaction, delay and failure to prosecute their claims.

The failure of the Trial Court to grant Plaintiffs a hearing on Defendants' Motion to Dismiss was not reversible error where Plaintiffs have provided not one fact, argument, case or piece of evidence which was not already before the Court prior to entry of the Order of Dismissal. Plaintiffs have shown no prejudice to them at all resulting from the Trial Court's failure to grant the requested hearing.

If this Court finds the Trial Court's failure to grant Plaintiffs' hearing was reversible error, the remedy should be to remand the case to the Trial Court for a hearing on Defendant's Motion to Dismiss for failure to prosecute.

ARGUMENT

I.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFFS' COMPLAINT FOR FAILURE TO PROSECUTE?

Rule 41(b) URCP provides in part:

For failure of the plaintiff to prosecute ... a defendant may move for dismissal of an action or any claim against him ...

The question of whether a plaintiff has failed to prosecute an action lies within the discretion of the Trial Court. In the case of Charlie Brown Construction Co. Inc. v. Leisure Sports Incorporated, 740 P.2d 1368 (Utah App. 1987), this Court held:

Dismissal for failure to prosecute is a decision within the broad discretion of the trial court. This court will not interfere with that decision unless it clearly appears that the court has abused its discretion and that there is a likelihood an injustice has been wrought. (P.1370)

In this case, the Plaintiffs offered no reasonable excuse to the Trial Court for their delay in prosecuting their case, prompting Judge Christoffersen to find in his Memorandum Decision: "Even their responses do not produce logical reasons for failing to proceed with prosecution of their claim." (R-273). Nor have Plaintiffs set forth in their Brief to this Court any "logical reason for failing to proceed with prosecution of their claim."

On the other hand, the record contains ample evidence of Plaintiffs' delay, inactivity and failure to prosecute. In summary form that evidence is:

1. Defendants filed Notices of Readiness for Trial twice, once on March 21, 1984 and again on July 6, 1984 (R-131 and 137).

Plaintiffs objected to both of these Notices and never, for a period of some fifty-three (53) months until Defendants moved to dismiss for failure to prosecute, filed their own Notice of Readiness for Trial (R-257). We are left to speculate how much longer Plaintiffs would have allowed this case to languish had Defendants not moved to dismiss Plaintiffs' Complaint when they did.

2. The Trial Court twice, on its own Motion, issued Orders to Plaintiffs to show cause why their Complaint should not be dismissed (R-157 and 160). In response to the first Order to Show Cause dated January 13, 1986, Plaintiffs stated, "Plaintiffs intend to bring this matter to trial after their evidence has been completed. The appraiser has not completed the work he indicated would be done some time ago and plaintiffs are reminding him of the commitment to complete the work." (R-159) An entire year then passed within which Plaintiffs' only activity was to submit a set of Interrogatories and Request For Admissions on the Barber Defendants (R-162). The Court then issued its second Order to Show Cause on January 27, 1987, to which Plaintiffs replied, "Plaintiffs have not left this case unpursued but have been preparing to go forward with it ... They desire that this matter eventually be set for trial, and anticipate being ready to file a request within the year." (R-161) The Plaintiffs made no affidavit and gave no statement as to what they were doing to prepare nor did they file a Notice of Readiness within the year.

3. Each action taken by Plaintiffs during the entire history of this case followed some affirmative action by Defendants or the Court. Plaintiffs' first discovery efforts occurred on July 11, 1984 (R-152), five (5) days after Defendants filed a Notice of Readiness for Trial (R-146) and eight (8) months after Plaintiffs filed their Complaint. Plaintiffs' second discovery effort occurred on February 6, 1987 (R-175), ten (10) days after the Court ordered Plaintiffs to show cause why their Complaint should not be dismissed for failure to prosecute (R-160). Plaintiffs' third discovery effort occurred on November 25, 1987 (R-218), twenty-nine (29) days after the Court denied the Barber Defendants' Motion for Partial Summary Judgment (R-216). Plaintiffs' fourth discovery effort occurred on December 29, 1987 (R-235), two (2) months and three (3) days after the Court's denial of the Barber Defendants' Motion for Partial Summary Judgment. Had Defendants or the Court not prodded Plaintiffs, they may never have taken even the minimal affirmative action they did.

4. In the period from commencement of the case on November 3, 1983 until the Motion of the First Federal Defendants to dismiss on November 25, 1988 (a period in excess of five (5) years), Plaintiffs' sole affirmative acts consisted of filing an Amended Complaint and four (4) discovery requests. Each discovery request was promptly and timely responded to by Defendants. Five (5) actions in five (5) years indicates a very casual and dilatory approach by Plaintiffs to the prosecution of their claim. Absolutely nothing happened so far as Plaintiffs pursuing their

claims between their last discovery request on December 29, 1987 and their Notice of Readiness for Trial on December 8, 1988. Again, never once before the Trial Court or this Court have Plaintiffs given any explanation for their sporadic attention to this case.

5. In the five (5) years this case was pending in the Trial Court, the Plaintiffs resisted Defendants' efforts to bring the case to trial (see paragraph 2 above) and never once, until the First Federal Defendants' Motion to Dismiss, did Plaintiffs attempt to even have a trial date set.

The foregoing five (5) points show clearly that the Court had ample basis for dismissing Plaintiffs' Complaint and that in doing so the Court did not abuse its discretion.

Rule 41(b) URCP has been applied by this Court on several occasions. In Brasher Motor and Finance Company v. Richard A. Brown, 461 P.2d 464 (Utah 1969), the Court affirmed dismissal of a counterclaim that had been pending for 5-1/2 years. The Court made the following pertinent observation:

In our opinion, the trial court in urging a plague on both of the litigants' houses by its sua sponte action, made a gesture that, if employed by more judges, could aid in the elimination of backlogs, and help to restore that loss of public confidence in the judiciary engendered thereby. (P. 464)

In Maxfield v. Fishler, 538 P.2d 1323 (Utah 1975), the Utah Supreme Court affirmed the dismissal of a medical malpractice action which had been pending for just two (2) years when the plaintiff had been dilatory in responding to defendant's discovery

efforts and had resisted defendant's efforts to get the case to trial.

In the recent case of Charlie Brown, supra, the Utah Court of Appeals affirmed dismissal of the plaintiff's complaint on the following set of facts:

1. Plaintiff's Complaint was filed June 15, 1981.
2. Ten and one-half months later on May 27, 1982, plaintiffs moved to amend their Complaint and noticed up depositions. The depositions were postponed until July 9, 1982.
3. On July 9 and 16, 1982, defendants filed for a protective order.
4. Nine months later, on April 4, 1983, plaintiffs filed Interrogatories.
5. On December 5, 1983, after eight more months of inactivity, the Court sua sponte issued an Order to Show Cause returnable March 19, 1984 which was continued to April 16, 1984. The Order to Show Cause was again continued for sixty days.
6. On April 30, 1984, the Court sua sponte set the case for trial June 18, 1984. When no one appeared for trial on June 18, 1984, the Court dismissed the case with prejudice on the merits.

The Charlie Brown, supra, case had been pending for three (3) years when it was dismissed. The Court addressed the plaintiff's argument that the dismissal was an abuse of the Court's discretion and stated:

Dismissal for failure to prosecute is a decision within the broad discretion of the trial court. This court will not interfere with that decision unless it clearly appears that the court has abused its discretion and that there is a likelihood an injustice has been wrought.
(P. 1370)

In affirming the dismissal, the Court quoted with approval the following language from Lake Meredith Reservoir Co. v. Amity Mutual Irrigation Co., 698 P.2d 1340 (Colo. 1985), "The burden is upon the plaintiff to prosecute a case in due course without unusual or unreasonable delay". The Court also quoted with approval the language from the Maxfield case, supra, that Plaintiffs are required "to prosecute their claims with due diligence, or accept the penalty of dismissal." (Maxfield at p. 1325)

The Utah Court of Appeals in Charlie Brown also addressed the propriety of the trial court's dismissal "with prejudice". The Court affirmed the dismissal with prejudice and stated:

In the instant case, the trial court provided plaintiffs an opportunity to be heard and to do justice. Plaintiffs nevertheless abused their opportunity through dilatory conduct. We therefore find no abuse of discretion and affirm the trial court's order ... (P. 1371)

Perhaps if Plaintiffs had presented any reason or justifiable basis for sixty (60) months of delay and inaction, their claims could be viewed more favorably, but a review of Plaintiffs' Motion For New Trial and Memorandum and Objection to Findings and Order of Dismissal shows no reason for such delay and inaction. There are no reasons given in Plaintiffs' Brief. The only suggested reason for Plaintiffs' actions and delays are in counsel's Affidavit dated February 6, 1989 (R-295):

Plaintiffs have moved forward with the case as quickly as their schedule and counsel's schedules would allow, in view of the limited discovery responses and the totality of events needing their attention. (Paragraph 3)

Defendants submit that Defendants should not be penalized because Plaintiffs and their counsel are, in essence, "too busy". Plaintiffs do not claim that there are ongoing negotiations causing delay, that someone is ill or unavailable, that the case is complex or difficult--just that Plaintiffs and their counsel have busy "schedules" and a "totality of events needing their attention". Defendants submit these facts are not reasons, but excuses, and support the Trial Court's Dismissal.

Plaintiffs contend that dismissal of their case is a denial of due process under the United States and Utah State Constitutions and prohibits them from having their constitutional right to a remedy in due course of law. (See p. vii of Plaintiffs' Brief.) Plaintiffs cite not one case or statute suggesting that substantive or procedural due process has ever been applied in the manner they suggest.

Admittedly, Plaintiffs had a right to the trial of their case, but the state at the same time has the right to place reasonable limitations on those rights and to cut those rights off when those reasonable limitations have been exceeded. In this case, the Court did not deny Plaintiffs their right to a trial, Plaintiffs denied themselves that right by their conduct in failing to pursue their right in an active and meaningful way over a period of more than five (5) years. Plaintiffs have not cited to this Court any case holding that dismissal of a case for failure to prosecute is denial of due process of law or of access to the Courts.

Due process of law has two (2) aspects. The first is procedural due process which is a rule that "... no one shall be personally barred until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded the opportunity to be heard." (16A Am.Jur.2d on "Constitutional Law", §813 p. 968)

The second aspect is substantive due process or the "... guaranty that no person shall be deprived of his life, liberty, or property for arbitrary reasons ..." (16A Am.Jur.2d on "Constitutional Law", §816, p. 978)

In this case, Plaintiffs have not been denied either procedural or substantive due process, nor were they unreasonably deprived of access to the Court. Plaintiffs were afforded the right to be heard and have their case brought to trial. That right extended for over five (5) years. During this time they did nothing of substance to prosecute their claims. They were dilatory in the extreme, and such action as they took was in response to pressure from the Defendants and the Court. The right and opportunity to be heard was not taken from Plaintiffs by dismissal of this action, it was forfeited by Plaintiffs by reason of their extended inactivity.

Nor have Plaintiffs been denied substantive due process. Their Complaint was not dismissed for arbitrary reasons. Indeed, as shown by the Court file, there was protracted delay by Plaintiffs even after Defendants had twice requested a trial and after the Trial Court had twice ordered Plaintiffs to show cause

why their case should not be dismissed for failure to prosecute. The action of the Trial Court was not arbitrary but was based on a solid record compiled by Plaintiffs justifying dismissal of the case.

Plaintiffs make no claim that they did not have an adequate time to prepare a meaningful response to Defendants' Motion; there is no claim by the Plaintiffs that they did not have a meaningful opportunity to be heard through the written documents which they filed with the Court on at least three (3) occasions, that being the response to Defendants' Motion to Dismiss, the Objection to Defendants' proposed Findings of Fact and Order of Dismissal, and Plaintiffs' Motion For a New Trial and supporting documentation to each of the foregoing. There is no evidence that there was any limitation placed upon the Plaintiffs as to that written documentation which they could submit to the Court. There is no evidence that Plaintiffs did not have every opportunity to present every available defense or consideration in favor of their position, and there is no evidence, other than some bare allegations and innuendo without any supporting facts whatsoever, that Plaintiffs' position did not receive a complete, fair and impartial consideration by the Trial Court.

In the exercise of its discretion, the Trial Court acted by authority of Rule 41(b) URCP. It is held that even independent of Rule or statute, the Court has inherent power to dismiss a case. The Idaho Supreme Court in the case of Hansen v. Firebaugh, 392 P.2d 202 (Idaho 1964), held:

It must be conceded that by the great weight of authority the power of courts to dismiss a case because of a failure to prosecute with due diligence is inherent and independent of any statute or rule of court. (P. 203)

And the Utah Supreme Court in Charlie Brown, supra, quoted with approval the following language from Brasher Motor, supra:

In dismissing an action for want of prosecution, the court may proceed under [Rule 41(b)], or it may, of its own motion, take action to that end. (P. 1370)

This power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases. (24 Am.Jur.2d on "Dismissal", §48, p. 38) The Trial Court acted prudently, fairly and within its discretion in dismissing the action.

II.

WAS THE TRIAL COURT'S FAILURE TO GRANT PLAINTIFFS A HEARING ON THE MOTION OF THE FIRST FEDERAL DEFENDANTS TO DISMISS FOR FAILURE TO PROSECUTE REVERSIBLE ERROR?

Plaintiffs cite Rule 4-501(9) of the Code of Judicial Administration, which provides that where the granting of a motion would dispose of the action on the merits with prejudice, the party resisting the motion may request a hearing and such request shall be granted. Plaintiffs made such a request, but the Trial Court ruled upon the Motion to Dismiss without a hearing. Plaintiffs contend this is reversible error.

The Plaintiffs have not shown by affidavit or argument before either the Trial Court or this Court how they have been prejudiced by the failure of the Trial Court to give them a hearing on

Defendants' Motion to Dismiss. Simultaneous with their request for a hearing, the Plaintiffs also filed a Memorandum opposing the Motion. The Court had this written Memorandum before it when it made its decision to dismiss Plaintiffs' case. Plaintiffs did not in their Memorandum offer any reason for their delay in prosecuting their case or any evidence they could or proposed to present at a hearing to justify their delay. The Trial Court concluded in its Memorandum Decision: "Even their (Plaintiffs') responses do not produce logical reasons for failing to proceed with prosecution of their claims."

After the Memorandum Decision, when Plaintiffs knew their case had been dismissed and they asked for a new trial, they did not come forth with any affidavits or reasons for their delay in prosecuting their case. They simply said they should have a hearing. Though they wrote Memoranda to the Court, both in opposition to the Motion to Dismiss and in support of their Motions for a New Trial, they did not, in either case, show that they had any matters to present at a hearing that they had not presented in their Memoranda.

In response to Plaintiffs' Motion for a New Trial, the Court held in its Memorandum Decision of February 27, 1989, "Plaintiffs have, in their motion (for a new trial) used the same arguments that were used on the prior motion." (R-304)

And in their Brief to this Court, Plaintiffs have failed to state any reason for their delay in prosecuting the case. Their Brief is devoted to showing why their case should not have been

dismissed on the law and the facts, but they have said nothing about what reasons they could have presented for their delay had they been given a hearing.

In short, from all arguments Plaintiffs have made to this Court and the Trial Court, there is nothing to show that they have been prejudiced by not having a hearing. All of their facts and legal arguments were considered by the Trial Court. If there were matters dehors the record that the Trial Court should have considered, they were never offered to the Trial Court either in opposition to Defendants' Motion to Dismiss or in support of Plaintiffs' Motion For a New Trial, nor have they been offered to this Court. The record gives ample justification for the Court's Order of Dismissal. A hearing would not have changed the record from which the Court made its decision.

Even if the failure to grant Plaintiffs a hearing is deemed by this Court to be reversible error, then the remedy should be to remand the case to the Trial Court for a hearing on Plaintiffs' Motion to Dismiss. Plaintiffs contend the case should be remanded for trial. Such an action would eviscerate the purpose of Rule 4-501(9) of the Code of Judicial Administration, which is to give a person a hearing on a motion which would, if granted, dispose of his case on the merits. The only right Plaintiffs were deprived of was a right to a hearing, and this Court can remedy that wrong by remanding the case for a hearing on Plaintiffs' Objection to Defendants' Motion to Dismiss. This Court should not go beyond the action necessary to remedy the Trial Court's error, if any.

Plaintiffs made a request for attorney's fees and costs under Rules 33 and 34 of the Rules of the Utah Court of Appeals. It is clear that Rule 33 is designed to deal with circumstances in which appeals are taken for the purpose of delay or without any substantial merit. It is not designed to protect the Appellant, inasmuch as it is the Appellant who makes the determination to make the appeal. As the Utah Supreme Court has stated, "We recognize the sanctions for frivolous appeals should only be applied in egregious cases, lest there be an improper showing of the right to appeal erroneous lower court decisions." Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988). There is no basis in the case before the Court to assess attorney's fees against the Defendants under Rules 33 or 34 of the Rules of the Utah Court of Appeals, and Plaintiffs argue no basis for assessment of the same.

CONCLUSION


It is clear under the facts of this case that the Trial Court did not abuse its discretion in dismissing Plaintiffs' Complaint for failure to prosecute. Rather, the action of the Trial Court in dismissing Plaintiffs' Complaint for failure to prosecute is amply justified by the facts. The law of this state, both by Rule and the decision of this Court and the Utah Supreme Court, permit and give precedence for the dismissal. The Plaintiffs have not been deprived of a right by any arbitrary action of the Trial Court or without an opportunity to press and present their claim. Rather, their right to assert their claim has been dismissed by

reason of their own neglect and inaction. Finally, the Plaintiffs have shown no prejudice to them resulting from failure of the Trial Court to grant them a hearing on their Objection to Defendants' Motion to Dismiss. Plaintiffs have presented no evidence or argument to the Court justifying their delay. There is nothing to be gained by a hearing on Defendants' Motion to Dismiss beyond what has already been presented to the Trial Court or this Court. Plaintiffs have not presented one fact, case, argument or piece of evidence that they claim needs additional consideration by the Trial Court in order to render a fair and correct decision. For these reasons, the judgment of the Trial Court should be affirmed. If, however, this Court determines that a hearing should have been granted to Plaintiffs and the failure is reversible error, this Court's decision should be to remand the case to the Trial Court for the purpose of such a hearing on Defendants' Motion to Dismiss.

DATED this 28th day of July, 1989.

Respectfully submitted,

OLSON & HOGGAN


L. Brent Hoggan
Attorneys for Defendant First
Federal, Hunsaker, Chadaz and
Bearnson

HAND-CARRY CERTIFICATE

I hereby certify that I hand-delivered ⁴an exact copy ^{yes} of the foregoing Brief of the Respondents First Federal Savings & Loan Association of Logan, Fred Hunsaker and Brian Chadaz, as Officers and as Individuals, and Brad H. Bearnson, Trustee, to Plaintiffs'

Attorney, Raymond N. Malouf, at 250 East 200 North, Suite D, Logan, Utah 84321 and to N. George Daines, Attorney for Defendants Norman Barber, Helen Barber and N. George Daines, at 108 North Main, Suite 201, Logan, Utah 84321, this 28th day of July, 1989.


L. Brent Hoggan

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IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

VON K. STOCKING and DONNA
H. STOCKING, husband and
wife,

Plaintiff

v.

FIRST FEDERAL SAVINGS and
LOAN ASSOCIATION of Logan,
et al,

Defendants

MEMORANDUM DECISION

Civil No. 22183

Defendants have filed a Motion to Dismiss on the basis of
Plaintiff's failing to prosecute their claim in a timely manner.

It was filed November 3, 1982 and a temporary order issued.
Plaintiff's Temporary Order was dismissed and a trustee sale
re-scheduled and conducted the same day. On October 28, 1983,
Plaintiff filed an amended complaint to which an answer was filed.
Defendant filed a Motion for Notice of Readiness for Trial for
March 21, 1984. Plaintiff has objected to these Notices of
Readiness they have been delaying this for some six years now. It
seems that it could have proceeded in a much more timely fashion.
Even their responses do not produce logical reasons for failing
to proceed with the prosecution of their claim.

Therefore, Defendant's Motion to Dismiss is granted, and
counsel for Defendants to prepare the appropriate order.

Dated this 19 day of January, 1989.

COPY OF THE ABOVE MAILED TO

BY THE COURT:

100 E. 200 N. Logan... AND
PO Box 525, Logan... Venoy Christoffersen
District Judge

1 DAY OF January 1989

By Westbrook

L. Brent Hoggan (#1512)
OLSON & HOGGAN
Attorneys at Law
56 West Center
P.O. Box 525
Logan, Utah 84321-0525
Telephone: 752-1551

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, FRED
HUNSAKER and BRIAN CHADAZ as
officers and as individuals;
BRAD H. BEARNSON, Trustee;
NORMAN BARBER and HELEN BARBER,
successor beneficiaries;
N. GEORGE DAINES, and JOHN
DOES 1-8,

Defendants.

FINDINGS OF FACT
AND ORDER OF DISMISSAL
WITH PREJUDICE

Civil No. 22183

In this matter Defendants First Federal Savings & Loan Association of Logan, Fred Hunsaker, Brian Chadaz and Brad H. Bearnson, filed a Motion pursuant to Rule 41(b) to dismiss Plaintiffs' Complaint with prejudice for failure to prosecute the same and therewith filed a Memorandum of Points and Authorities in Support of said Motion, and Defendants Norman Barber, Helen Barber, and N. George Daines joined in said Motion in writing. Plaintiffs objected to said Motion and filed their objection with a Memorandum in support thereof in writing. The Court having read

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and considered said Motions and the Memoranda in support and opposition thereto, having examined the file, and on January 19, 1989 having made its Memorandum Decision in writing, now makes the following:

FINDINGS OF FACT

From the record in the file on this matter, the Court finds:

1. Plaintiffs' Complaint was filed November 3, 1982 and a Temporary Restraining Order was issued the same day to restrain Defendants First Federal Savings & Loan Association of Logan, Fred Hunsaker, Brian Chadaz and Brad H. Bearnson from proceeding with a Trustee's sale of Plaintiffs' property.

2. The Trustee's sale scheduled November 3, 1983 was postponed one (1) day to November 4, 1983, and on November 4, 1983, a hearing was held before the Honorable VeNoy Christoffersen on Plaintiffs' Temporary Restraining Order. As a result of the hearing, Plaintiffs' Temporary Restraining Order was dismissed on November 4, 1983, and the Trustee's sale as rescheduled was conducted the same day.

3. On November 7, 1983, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed an Answer to Plaintiffs' Complaint.

4. On November 28, 1983, Plaintiffs filed an Amended Complaint.

5. On December 8, 1983, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed an Answer to Plaintiffs' Amended Complaint.

6. On February 3, 1984, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed a Motion For Partial Summary Judgment, which was denied by the Court in a Memorandum Decision dated March 19, 1984.

7. On March 21, 1984, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed a Notice of Readiness for Trial.

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Plaintiffs objected to the Notice on April 2, 1984, stating in their objection, "Plaintiffs intend to prepare and complete discovery both with interrogatories and depositions."

8. On July 6, 1984, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed a Second Notice of Readiness for Trial, to which Plaintiffs objected stating, "... plaintiffs are proceeding with discovery."

9. On July 11, 1984, Plaintiffs served Interrogatories and a Request For Admission on Defendants Chadaz and Bearnson, to which Bearnson filed Answers on July 18, 1984 and Chadaz filed Answers on August 10, 1984.

10. On January 13, 1986, the Court, on its own motion, issued an Order returnable January 27, 1986 for Plaintiffs to show cause why their Complaint should not be dismissed for failure to prosecute the same.

11. On January 23, 1986, Plaintiffs moved to dismiss the Court's Order to Show Cause and in their Motion stated, "Plaintiffs intend to bring this matter to trial after their evidence has been completed. The appraiser has not completed the work he indicated would be done sometime ago and Plaintiffs are reminding him of the commitment to complete the work."

12. On January 27, 1987, the Court, on its own motion, issued an Order, returnable February 9, 1987, for Plaintiffs to show cause why their Complaint should not be dismissed for failure to prosecute the same.

13. On February 5, 1987, Plaintiffs moved to dismiss the Court's Order to Show Cause, and in their motion stated, "Plaintiffs have not left this case unpursued, but have been preparing to go forward with it. ... They desire that this matter eventually be set for trial, and anticipate being ready to file a request within the year."

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14. On February 6, 1987, Plaintiffs served a "First Set of Request For Admissions, First Set of Interrogatories and For Production of Documents" on Defendants Barber. These discovery requests were answered by Defendants Barber on March 11, 1987.

15. On September 4, 1987, Defendants Barber moved the Court for partial summary judgment, which motion was denied by the Court's Memorandum Decision dated October 6, 1987.

16. On November 25, 1987, Plaintiffs served a "First Set of Interrogatories" on Defendants First Federal, Hunsaker, Chadaz and Bearnson. Defendants First Federal and Hunsaker answered the Interrogatories on December 23, 1987; Defendant Bearnson answered the Interrogatories on December 22, 1987, and Defendant Chadaz answered the Interrogatories on December 23, 1987.

17. No action has been taken by Plaintiffs on their claim since December 23, 1987.

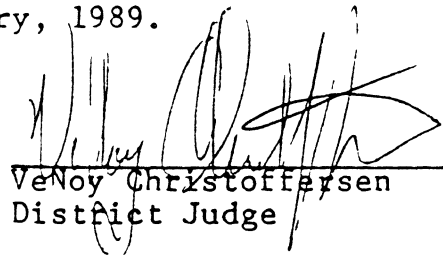
18. Based upon the foregoing Findings from the record in the file, the Court finds that Plaintiffs have failed to prosecute their claims in this case in due course and without unreasonable delay.

Based upon the foregoing Findings of Fact, the Court concludes that Plaintiffs' Complaint and all claims therein should be dismissed with prejudice.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiffs' Complaint and all claims therein as against all Defendants be and the same is hereby dismissed with prejudice.

It is further ORDERED that the trial date for this case of April 11, 1989 as a second setting and May 23, 1989 as a first setting be and are stricken.

DATED this 27 day of January, 1989.



Venoy Christoffersen
District Judge

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CERTIFICATE OF SERVICE

I certify that an exact copy of the foregoing Findings of Fact and Order of Dismissal With Prejudice was served upon Plaintiffs' counsel, Raymond N. Malouf, personally by delivering a copy to his office at 150 East 200 North in Logan, Utah this 20th day of January, 1989, and that an exact copy of the foregoing Findings of Fact and Order of Dismissal With Prejudice was served upon N. George Daines, III, Attorney for Defendants Barber, personally by delivering a copy to his office at 108 North Main, Suite 200, Logan, Utah, this 20th day of January, 1989.

Tiffany Parker
Tiffany Parker
Secretary to L. Brent Hoggan

LBH/20

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IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

VON K. STOCKING and
DONNA H. STOCKING. husband
and wife,

Plaintiff

v.

FIRST FEDERAL SAVINGS and
LOAN ASSOCIATION, et al

Defendants

MEMORANDUM DECISION

Civil No. 22183

Plaintiffs have filed a Motion for a New Trial. There was no trial in this case, the issue was put to the Court on a Motion to Dismiss for failure to prosecute and decided by the Court from the record on that basis. Plaintiffs have, in their motion, used the same arguments that were used on the prior motion.

Therefore, the Motion for a New Trial is denied and counsel for defendants to prepare the appropriate order.

Dated this 27 day of February, 1989.

BY THE COURT:

VeNoy Christoffersen
District Judge

Number 81
FILED

FEB 27 1989

By *Lin*

George Hansen, 101 7th Main Street
COPY OF THE ABOVE MAILED TO
L. Brent Hayden, P.O. Box 525, Logan, Utah AND
Ray D. Brown, P.O. Box 200, Logan, Utah
THIS 27 DAY OF FEBRUARY 1989

Lin Christoffersen
DEPUTY

FEB 27 1989

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF LOGAN, FRED
HUNSAKER AND BRIAN CHADAZ, as
officers and as individuals,
BRAD H. BEARNSON, Trustee;
NORMAN BARBER and HELEN BARBER,
successor beneficiaries; N.
GEORGE DAINES, and JOHN DOES 1-8,

Defendants.

ORDER DENYING NEW TRIAL

8300
Civil No. 22183

In this matter the Court having made and entered its Findings of Fact and Conclusions of Law and Judgment and Decree on January 27, 1989 dismissing Plaintiffs' Complaint and all claims therein with prejudice and Plaintiffs having thereafter filed with this Court a Motion For New Trial and in support thereof having filed a Memorandum of Points and Authorities and Defendants having filed responsive Memorandum to said Motion For New Trial and the Plaintiff a rebuttal to Defendants' response, and the Court having examined the Motion of Plaintiffs and the Memoranda of the parties for and against the same, now finds that the arguments of Plaintiffs in support of their Motion For New Trial were the same

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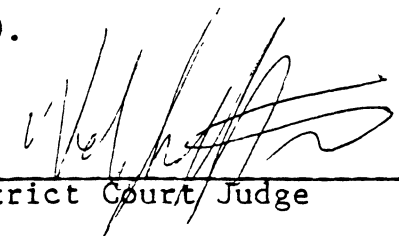
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arguments submitted by Plaintiffs in their opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint and that there are no new matters or arguments raised by Plaintiffs in said Motion For New Trial and the Court on February 27, 1989 having made and entered its Memorandum Decision, and the Court being fully advised in the premises, it is now

ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion For New Trial be and the same is hereby denied.

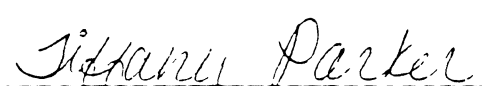
DATED this 14 day of March, 1989.



District Court Judge

CERTIFICATE OF PERSONAL SERVICE

I hereby certify that I personally served an exact copy of the foregoing Order Denying New Trial upon N. George Daines, Attorney for himself and Defendants Barber, and upon Raymond N. Malouf, Attorney for Plaintiffs, by delivering a copy to each at their law offices in Logan, Utah, this 1st day of March, 1989.



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