

1989

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

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DOCKET NO. 890345 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
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.

Case No. 890345-CA

BRIEF OF THE RESPONDENTS NORMAN BARBER AND HELEN BARBER
SUCCESSOR BENEFICIARIES,
AND N. GEORGE DAINES

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 VENROY 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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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
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PRELIMINARY STATEMENT

The Barber Defendants (Norman Barber, Helen Barber and N. George Daines) join in the preliminary statement made in the Brief of the First Federal Defendants (First Federal Savings & Loan Association of Logan, Fred Hunsaker, Brian Chadaz and Brad H. Bearnson).

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal under U.C.A. Section 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 Christofferson 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 Christofferson'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 Barber Defendants believe the following Rules are determinative of this appeal.

1. Rule 41(b) URCP:

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

The Barber Defendants join in the Statement of the Case made by the First Federal Defendants in their Brief.

STATEMENT OF FACTS

The Barber Defendants join in the Statement of Facts made by the First Federal Defendants in their Brief. In addition the Barber Defendants note the following additional facts:

The Plaintiffs have suggested in their Brief that their delay is attributed to related proceedings in a different civil case. Plaintiffs' Brief at V, 1, 3, 5, 16, 17. In fact, the Plaintiffs in this related case have presented related arguments first to the trial court and then to the Court of Appeals. Barber v. Emporium, Cache County, Civil No.17630, 750 P2d 202 (Ct of App. Ut 1988). After the Barber Defendants renewed the judgment in Civil No. 17630, Plaintiff Von Stocking appealed virtually the same issues to the Supreme Court where that appeal is now pending. Cache County Civil No. 25616, Supreme Court No. 880410.

In the appeal of Civil No. 17630 the Court of Appeals,

found in principal part that the Plaintiff Von Stocking here, acting as a Defendant in that case, was involved in a pattern of "delay" and that the appeal was "frivolous". Penalties were assessed against Von Stocking. See Barber v. Emporium, 750 P2d 202 (Ct of App. Ut. 1988).

In the subsequent renewal of this same judgment the trial court found a new pattern of delay, contempt of legal processes and frivolous claims. Three Thousand Dollars (\$3,000.00) was awarded as and for sanctions.

SUMMARY OF ARGUMENTS

The Plaintiffs appeal is of an order discretionary with the trial judge. The test for the Court of Appeals is whether that judge abused his discretion.

There is sufficient evidence in the record to determine that Plaintiffs were involved in delay detrimental to all the Defendants without just cause. Defendants twice attempted to schedule trial and were stopped by Plaintiffs' request for time to complete discovery. Twice the court on its own motion attempted to dismiss the matter for lack of progress. Again the Plaintiffs were successful in defeating the motion with their request for more discovery time.

The Plaintiffs were on notice that the Defendants tried repeatedly for a trial date in early 1984. Second that the court itself was issuing motions for failure to prosecute. Under the

circumstances the record proves complete inaction from August 10, 1984 to February 5, 1987, from March 11, 1987 to November 25, 1987 and from December 23, 1987 to the present. The only excuse given is that a related case was involved in an appeal. This same court found that appeal was itself for the purpose of "delay", "frivolous" and "without any reasonable legal or factual basis". Id. 750 P2d at 204.

ARGUMENT

I. THE DISMISSAL WAS APPROPRIATE.

The Barber Defendants join in the arguments made by the First Federal Defendants with respect to the issues briefed. In doing so these Defendants note that Plaintiffs and their legal counsel ought to know that the mere pendency of these legal claims causes injury. Plaintiffs were engaged in a pattern of doing the very minimum required so as to avoid dismissal while simultaneously fending off efforts to set the matter for trial. Meanwhile the financial institutions, legal counsel and individuals bear the burden of a pending unresolved legal claim for a large monetary sum for nearly five (5) years.

The technicality of a hearing under Rule 4-501(a) would be given meaning had Plaintiffs indicated what additional evidence or argument would have there been presented. Plaintiffs have wholly failed to do that despite several opportunities. Plaintiffs base their argument on the right to a hearing embodied

in that Rule. Plaintiffs could but did not request a hearing on their objection to the findings and order or their subsequent "Motion for a New Trial." Since resolution of these Motion disposes yet again of the same issues, Plaintiffs could have then requested hearings. This they did not do. If a hearing was significant the Plaintiffs should have requested it. Whatever technical error the court may have made in not granting the initial hearing is waived when Plaintiffs proceeded with two further motions and made no effort on either to obtain a hearing.

The error is of no consequence and/or was waived by the Plaintiffs' failure to subsequently request a hearing.

Plaintiffs successfully fended off the court's earlier orders to show cause in a "hearing" why the matter should not be dismissed by indicating that discovery or an appraisal was in process. Record at 159, 170. The record indicates that after these requests by the court for a "hearing" as to prosecution of the case, Plaintiffs continued their dilatory tactics. After all of these efforts by Defendants and the court to prod Plaintiffs into moving the case along there is yet another year of complete non-action, December 23, 1987 to the date Defendants moved to dismiss on November 25, 1988.

CONCLUSION

Over a four year period there were four separate efforts

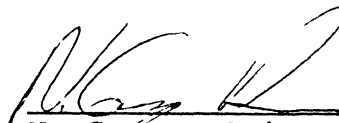
made to require Plaintiffs to set a trial date or proceed. Plaintiffs resisted each effort indicating further discovery was necessary. Then after these efforts, Plaintiffs delayed for yet another year with no explanation whatsoever documented in this record. That is sufficient basis for a dismissal. The Plaintiffs and their counsel were warned repeatedly. They ignored these warnings.

The failure to conduct a hearing is technical given Plaintiffs' failure to document or proffer even at this date any further evidence or arguments. It is not reversible error, especially when in two subsequent motions Plaintiffs made no effort to seek a hearing on the same subject matter. Plaintiffs have essentially swung three times at the same pitch. Only in the first swing was a hearing requested.

WHEREFORE the Barber Defendants request that the Court of Appeals deny Plaintiffs' appeal.

DATED this 17 day of August, 1989.

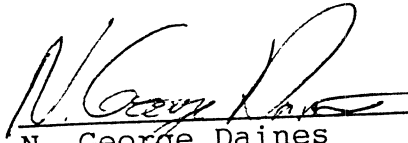
BARRETT & DAINES



N. George Daines

MAILING CERTIFICATE

I hereby certify that I mailed four (4) exact copies of the foregoing Brief of Respondents Barber and Daines, to Plaintiffs' attorney, Raymond N. Malouf, at 150 East 200 North, Suite D. Logan, UT 84321 and to L. Brent Hoggan, attorney for Defendant First Federal Savings & Loan, at 56 West Center, Logan, UT 84321, this 4th day of August, 1989.


N. George Daines

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