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K.L.C. Inc. v. Ron McLean et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

K.L.C. INCORPORATED,
Plaintiff-Respondent
and Counter Defendant

vs.

RON McLEAN,
Defendant-Appellant
and Counter Plaintiff

vs.

KEARN'S LIQUIDATION CENTER, INC.
A corporation, and JOHN PARAS,
Counter Defendants—
Respondents

Appeal No. 18103

APPELLANT'S BRIEF

Appeal from the Judgment of the Third

District Court for Salt Lake County

Hon. G. Hal Taylor, Judge

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This Appeal is taken from an Order entered by the Honorable G. Hal Taylor, Third District Court for Salt Lake County, dismissing this case with prejudice for lack of prosecution.

STATEMENT OF THE KIND OF CASE

This case is an action to recover money allegedly misappropriated from a corporation. The counterclaim asks for an accounting of corporation assets.

DISPOSITION IN THE LOWER COURT

On October 15, 1981, the Court entered an Order dismissing this case with prejudice for lack of prosecution. The Order was based on a Motion filed September 4, 1981 and arguments before the Court on October 5, 1981.

Defendant-appellant seeks reversal of the Order dismissing the case so that the case may be remanded and a trial held in the matter.

STATEMENT OF FACTS

This matter was initiated with the filing of a Complaint by plaintiff-respondent K.L.C. Incorporated in 1967, asking for \$9,696.00 allegedly appropriated from plaintiff by defendant (R. 2-3). Defendant-appellant answered the Complaint and filed a counterclaim against plaintiff-respondent K.L.C. Incorporated and against counter defendants-respondents Kern's Liquidation Center, Inc. and John Paras alleging a half ownership in the plaintiff corporation jointly with counter defendant John Paras, and asking for an accounting of corporation assets alleged to be worth at least \$155,346.91 (R.6-11).

Defendant-appellant's original attorney withdrew from the matter in the fall of 1968 (R.47), and defendant-appellant obtained new counsel (R.48).

In July of 1976, the parties entered into a stipulation agreeing to an accounting by defendant-appellant of counter defendants-respondents' books and to either dismissal of the action following the accounting or to further consideration of the matter by the court using the results of the accounting as a basis for judgment (R.53).

In March of 1980, defendant-appellant again obtained new counsel, a notice of substitution of counsel being dated March 13, 1980 (R.54).

On March 27, 1980, a Notice of Taking Deposition was served on plaintiff-respondent and counter defendants-respondents (R.55). The deposition of counter defendant-respondent John Paras was actually taken on July 18, 1980.

On September 10, 1980, interrogatories were served by defendant on counter defendant-respondent John Paras (R. 58-60).

On December 18, 1980, defendant-appellant filed its Request for Trial Setting (R.61).

On May 5, 1981, counter defendant-respondent John Paras served answers to defendant's interrogatories (R. 62-65).

On May 18, 1981, trial in this matter was set for October 22, 1981 by the Third District Court for Salt Lake County (R.66).

On August 28, 1981, defendant-appellant requested a jury trial and tendered the \$50.00 jury fee (R.67).

On September 4, 1981, plaintiff-respondent K.L.C. Incorporated and counter defendant-respondent John Paras filed a motion to dismiss for lack of prosecution (R.68).

On October 15, 1981, the Honorable G. Hal Taylor dismissed the action for lack of prosecution.

ARGUMENT

POINT ONE

The trial court erred and abused its discretion in dismissing this Action for lack of prosecution inasmuch as the case had been diligently prosecuted for a full year and one-half prior to the time that the Motion to Dismiss for Lack of Prosecution was filed, trial had been set, and defendant-appellant had expended time, effort, and money in prosecuting the case and in preparing for trial.

Although there are many Utah Supreme Court decisions dealing with dismissal of a case for lack of prosecution, none of these cases appear to treat factual issue similar to those raised here.

In the present case, although there appear to be substantial periods during which no action was taken by either side, there was diligent prosecution of the case

for a period of one and one-half years immediately from the date of dismissal to the date of the motion to dismiss for lack of prosecution. Thus, defendant-appellant retained new counsel after a period of time during which the case apparently lay dormant. New counsel immediately noticed the deposition of counter defendant John Paras. The deposition was taken, interrogatories were served and answered, and the case was set for trial. It was not until September 4, 1981, just a month and a half prior to the date scheduled for trial that plaintiff filed its motion to dismiss for lack of prosecution. The motion was not made until over three months had passed from the time trial was scheduled and followed defendant's request for a jury trial and payment of the required fee.

Defendant-appellant had gone to significant expense and effort to move the matter along by taking a deposition, serving interrogatories, and preparing for trial. Plaintiff-respondent and counter defendants-respondents had also expended time and effort in connection with the deposition and in answering interrogatories, and proceeded toward trial for a year and one-half before filing their motion for dismissal.

Although it may have been proper to dismiss this case for lack of prosecution on a motion made in March or April of 1980 immediately after action by defendant-appellant to move it forward, it is submitted that such dismissal is improper and a clear abuse of discretion after defendant-appellant's substantial efforts to move the case ahead and after the case had been set for trial.

While this Court has not previously addressed this issue, courts in several other states have. Thus, in a case before the Colorado Court of Appeals, Farber v. Green Shoe Mfg. Company, 596 P.2d 398 (1979), in which no action had been taken for over five years until a notice to set trial was filed and trial was set, and in which just prior to trial a motion to dismiss was filed and granted, the court said:

Here the motion to dismiss was made after the plaintiff had resumed his efforts to prosecute, had set the case for trial, and indeed, was ready for trial on the very day the motion was heard. Under the circumstances, the policy underlying the dismissal rule to prevent unreasonable delays is less compel-

ing than the policy favoring resolution of disputes on the merits. Denham v. Superior Court, 2 Cal. 3d 557, 86 Cal. Rpts. 65, 468 P.2d 193(1970). Consequently, we hold that the court erred in dismissing the action.

We adopt the rule stated in State v. McClaine, 261 Ind. 60, 300 N.E.2d 342 (1973):

'A motion to dismiss for want of prosecution should not be granted if the plaintiff resumes diligent prosecution of his claim, even though, at some prior period of time, he has been guilty of gross negligence.'

Similarly, the Supreme Court of Alabama in reviewing a lower court's dismissal for lack of prosecution said in Smith v. Wilcox County Board of Education, 365 So.2d 659 (1978):

Although there appeared to be a long period of inactivity from 1966 to 1973, nevertheless within the eleven months before the dismissal the defendants filed interrogatories, the parties reconstructed the record, and the plaintiff's attorney had tried to have a hearing set on the case.

and further on said:

...even where there has been a period of inactivity, present diligence has barred dismissal.

The Missouri Court of Appeals, in reversing a lower court's dismissal for lack of prosecution in Laurie v. Ezard, 595 S.W.2d 336 (1980), said:

A dismissal for failure to prosecute should not be based on remote, even if extended, periods of inactivity. Vonder Haar Concrete Company v. Edwards-Parker, Inc. supra, 561 S.W.2d at 139. In determining whether to dismiss a dormant case, we believe that the time a case has been on file and its prior inactivity may be considered. However, to dismiss a case for prior inactivity while it was being

pursued could cause many cases to be dismissed which should not be. Human nature being what it is, attorneys and parties may not always act in a diligent manner. Our examination of the cases cited by the parties and other cases leads us to believe that only in an unusual situation should a case be dismissed for prior inactivity, on a party's motion, at a time when it appeared to be prosecuted toward trial.

The Supreme Court of New Mexico in Dollison v. Fireman's Fund Insurance Company, 423 P.2d 426 (1966) held that, once a case had been set for trial, it was too late for a motion to dismiss for lack of prosecution.

Several states have formal rules which specify that a case can be dismissed for lack of prosecution if no action is taken in the case for more than a year. Even in these jurisdictions, if prosecution of the case is resumed prior to the time a motion to dismiss is made, motion is regarded as too late. Thus, the Supreme Court of Alaska in First National Bank of Fairbanks v. Taylor, 488 P.2d 1026 (1971) said:

In our view, the rule applies only where the motion to dismiss is filed before the period of the lapse is terminated by some affirmative action, that is where the last act in the record occurred more than one year prior to the motion to dismiss. Here the Bank's motion for pre-trial terminated the lapse, and the Motion for Summary Judgment and motion to set for trial were filed subsequent to the lapse and prior to Taylor's motion to dismiss.

and the District Court of Appeal of Florida, in Equity Capital Company v. 602 West 26 Corp. 223 So.2d 762 (1969), said:

The moving party must seek dismissal prior to resumption of affirmative action toward prosecution of the case (citations omitted).

Since defendants did not move for dismissal prior to July 29, 1968, the date plaintiff filed its motion for deficiency decree, and the court did not dismiss this suit on its own motion prior to that date, dismissal for failure to prosecute was improper.

Defendant-appellant submits that dismissal for failure to prosecute in this case was improper and that the order should be reversed. Since defendant-appellant

~~the defendant~~ prosecuted the case for over a year prior to the motion to dismiss, defendant-appellant should be allowed his day in court.

POINT TWO

The trial court erred and abused its discretion in dismissing this action for lack of prosecution, where during the period of time that it is alleged the lack of prosecution occurred, the party moving for dismissal could have taken action to move the litigation ahead to a final conclusion but did not do so.

In the present case, either plaintiff-respondent or counter defendants-respondents could have taken action to move the case to trial or to have the case dismissed, but neither did so.

This Court, in upholding the lower court in its refusal to dismiss a case for lack of prosecution in Department of Social Services v. Romero, 609 P.2d 1323 (1980), said:

The important fact is that the defendant himself did nothing to move the case forward, but appears to have been quite contented to let it lie dormant until it was reactivated by the plaintiff.

In Johnson v. Firebrand, 571 P.2d 1368 (1977), this Court reversed the lower court's dismissal for lack of prosecution and said:

As to the lack of prosecution, it seems that neither party had any active interest in the matter for nearly four years....Since either party could have brought the matter to a conclusion it is difficult to see why the plaintiff should be denied his claim to more than \$38,000 simply because counsel for plaintiff did not take a default judgment.

In Utah Oil Co. v. Harris, 565 P.2d 1135, (1977), this court said:

Turning now to the issue as to whether or not a lapse of 16 months in prosecuting a claim for relief is sufficient to support a dismissal with prejudice, this court has been active in that area and has held that where all of the litigants had power to

obtain relief and failed to do so, it is error to dismiss with prejudice.

and in Westinghouse Electric Supply Co. v. Paul W. Larsen Contractors, Inc., 544 P.2d 876 (1975), this court said:

Whether there is such justifiable excuse is to be determined by considering more factors than merely the length of time since the suit was filed. Some consideration should be given to the conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it...

Further in that case, this Court said:

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.

Here, plaintiff-respondent, the party who initiated the lawsuit, had the same opportunity that defendant-respondent did to move it along. It did not do so. Counter defendants-respondents also had such opportunity. They did not do so. Defendant-appellant submits that dismissal for lack of prosecution was improper.

CONCLUSION

Defendant-respondent had actively pursued prosecution of this case from March of 1980. It was not until September, 1981, that plaintiff-respondent and counter defendant-respondent moved to dismiss for lack of prosecution. This was long after trial had been scheduled and only a month and a half prior to trial. Where a party has taken action to pursue prosecution of a case, it is submitted that the case should not be dismissed for lack of prosecution even though there have been prior periods as to which such dismissal might have been proper. Further, where any party could have moved the action ahead, but none of them did so, it is believed improper to dismiss for lack of prosecution when one party actively moves forward.

The order dismissing this case for lack of prosecution should be reversed and the case remanded for trial.

Respectfully submitted,



Robert R. Mallinckrodt
Mallinckrodt & Mallinckrodt

CERTIFICATE OF SERVICE

The foregoing Appellant's Brief was served on plaintiff-respondent and counter defendants-respondents by mailing two copies thereof, first class mail, postage prepaid, to Earl S. Spafford, Esq., Spafford, Dibb, Duffin & Jensen, 311 South State, Suite 380, Salt Lake City, Utah 84111, their attorneys, this 22nd day of January, 1982.



Robert R. Mallinckrodt