

1982

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

Utah Supreme Court

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Robert R. Mallinckrodt; Attorney for Defendant-Appellant;

Earl S. Spafford; Attorney for Plaintiff and Counter Defendants-Respondents;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

K.L.C. INCORPORATED, :
Plaintiff-Respondent :

vs. :

RON McLEAN, :
Defendant-Appellant :
and Third-Party :
Plaintiff :

vs. :

KEARN'S LIQUIDATION CENTER, : Appeal No. 18103
Inc., a corporation, and :
JOHN PARAS, :
Third-Party :
Defendants-Respondents.

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third
District Court for Salt Lake County

Hon. G. Hal Taylor, Judge

Earl S. Spafford
Spafford, Dibb, Duffin & Jensen
311 South State, Suite 380
Salt Lake City, Utah 84111

Attorneys for Plaintiff and
Third-Party Defendants-
Respondents

Robert R. Mallinckrodt
Mallinckrodt & Mallinckrodt
10 Exchange Place, Suite 1010
Salt Lake City, Utah 84111

Attorneys for Defendant-Appellant

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Attorneys for Plaintiff and
Third-Party Defendants-
Respondents

Robert R. Mallinckrodt
Mallinckrodt & Mallinckrodt
10 Exchange Place, Suite 1010
Salt Lake City, Utah 84111

Attorneys for Defendant-Appellant

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RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This case is an action to recover money misappropriated from plaintiff-respondent. The counterclaim asks for an accounting.

DISPOSITION IN THE LOWER COURT

On October 20, 1967, plaintiff filed suit against Ron McLean who entered a counterclaim.

On October 15, 1981, the Court entered an Order dismissing this case with prejudice for lack of prosecution.

RELIEF SOUGHT ON APPEAL

The respondents submit the Order of the District Court dismissing the case with prejudice should be affirmed.

STATEMENT OF FACTS

In 1967, Kearns Liquidation Center, Inc., filed suit against Ron McLean for payment on goods received by defendant. Defendant submitted an Answer, and Third-Party Complaint against plaintiff and John Paras in November, 1967.

Plaintiff and counter-defendant submitted Notice of Readiness for Trial on December 11, 1967.

Trial settings were made for December 12, 1968, February 13, 1969, and March 19, 1969, but no trial was ever held. A new trial date was set in 1976, but litigation was avoided on a stipulation prepared by defendant. The Stipulation provided that following defendant's accounting of plaintiff's business records, "the above-entitled matter may be dismissed or the results of the examination used as a basis for judgment pursuant to further consideration by the Court." (CR 53). Plaintiff entrusted its corporate books and records to defendant's attorney, Dwight L. King, Esq., for inspection and auditing. From that point, both sides dropped the matter as unworthy of any further action. Defendant produced no formal accounting as a basis for judgment. The plaintiff and counter-defendant have no knowledge of the present location

of the original corporate records. Defendant's third attorney received no records upon his predecessor's withdrawal.

Finally, in March of 1980, defendant again obtained new counsel. M.C. Morley, plaintiff Corporation's bookkeeper and an essential witness, had by this time passed away but Mr. John Paras did his best to respond during defendant's deposition on July 18, 1980. In spite of very diligent searching, plaintiff's Corporate records could not be found and this dearth of essential information is reflected in May 5, 1981 answers to defendant's interrogatories. (CR 62-65). As it became clear that it was impossible for the respondents to effectively prepare for trial, motion to dismiss for lack of prosecution was made. Upon argument before the Court on October 5, 1981, dismissal with prejudice was granted for lack of prosecution.

ARGUMENT

POINT I:

THE APPELLANTS HAVE NO BASIS FOR A CLAIM OF ERROR ON APPEAL BECAUSE DISMISSAL FOR FAILURE TO PROSECUTE WAS PROPER UNDER UTAH CASE LAW AND RULE 41(b) OF UTAH RULES OF CIVIL PROCEDURE.

Rule 41(b) of Utah Rules of Civil Procedure requires that "for failure of the plaintiff to prosecute...a defendant may move for dismissal of an action or of any claim against him." The plaintiff, or in this case the counter-plaintiff, has the responsibility to diligently prosecute

his claim. Serious delays in the prosecution of a claim can result in unfair prejudice to one side. The reason for the rule is that memories dim, evidence deteriorates and is lost over ten years and occasionally a key witness dies.

The State of Utah has a strong line of recent authority supporting dismissal in cases where litigation has remained dormant for an extended period of time. The key case under this line of authority is Westinghouse Electric Supply Company vs. Paul W. Larson Contractors, Inc., 544 P.2d 876 (Utah 1975). The Court examined the issue of whether granting the Motion to Dismiss with prejudice was an abuse of discretion. The Court indicates that the trial Court should have reasonable latitude 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. The Court outlines four factors for determining whether there is a justifiable excuse for delay: length of time, conduct of both parties, difficulty or prejudice to the moving party, whether injustice may result from dismissal.

In this case the suit has been pending for fourteen years and has remained dormant with no action at all for five years. This is not a case of unusually complicated discovery as in Westinghouse. In fact appellant offers no excuse for his inaction before and after 1976. Respondents

sought and were prepared for trial on many occasions. In particular respondents were prepared for trial several times in 1968 and also in 1976. But appellant avoided trial in 1976 by obtaining the stipulation found in the Record at 53. Pursuant to that stipulation, appellant took control of the corporate records but then lapsed into inaction again. He did not fashion a settlement on the basis of plaintiff's records or make any accounting as agreed. Both sides again dropped the matter as unworthy of further time and effort. The third factor considered in Westinghouse is prejudice from delay upon one side. In this case, the difficulties resulting from delayed prosecution are very evident. The corporate records cannot be found. It would appear that these records were last in the hands of respondent's attorney. A key witness who might have provided evidence from memory in the absence of records has passed away. These difficulties have made counter-defendant's trial preparation nearly impossible. In considering the fourth factor, the counter-plaintiff had all the corporate records in his hands in 1976 but didn't pursue his desired remedy. Now there are no records for an accounting and appellant's failure to act obviates any injustice from a dismissal.

While appellant offers no excuses for his delays over fourteen years he seeks relief from a default judgment which

would result in substantial prejudice and injustice to the adverse party. Appellant suggests that his diligence in preparing for trial in 1981 should cure his failures over the years prior to that time. Respondents sought dismissal only after a diligent, good faith effort to marshal information for trial. Must a defendant move for dismissal immediately in a case of unreasonable delay?

Rule 41(b) sets no deadline for the moving party to act; indeed, the Court retains inherent power to dismiss an action for failure to prosecute pursuant to its own motion. It can hardly be asserted that a defendant must, on pain of implied waiver, move within a certain time limit, when the Court may issue a dismissal order without any action whatsoever on the part of the parties.

Wilson v. Lambert, 613 P.2d 765, 768
(Utah 1980).

Wilson vs. Lambert is a case where dismissal for failure to prosecute was upheld on appeal. The complaint was filed in March, 1968, and the matter was set for trial in 1973, but the plaintiff's attorney was unable to handle the trial. Plaintiff vacated another trial date in 1977. More than nine years after the original complaint was filed, the Court issued, sua sponte, an order to the parties to appear and show cause why the action would not be dismissed because of failure to prosecute. Upon a hearing, the Court referred the matter to the trial calendar. Plaintiff began discovery procedures, but nine months later defendant filed a motion to dismiss for failure to diligently prosecute, which motion

was granted.

"There can be little argument regarding the propriety of the dismissal here appealed from. Plaintiff's predecessor in interest personally delayed the consideration of the denied applications by the lower Court from 1968 until the time of his death in 1975. Thereafter, plaintiffs, even following the approval of their purchase from Baldwin's estate by the probate Court, delayed sixteen months before even inaugurating discovery in the matter. No explanation justifying such delay is offered in the arguments or in the record".

613 P.2d 765, 768.

Just as in Wilson v. Lambert, this case was set for trial and counter-plaintiff engaged in discovery procedures.

Brasher Motor and Finance Company vs. Brown, 23 U.2d 247, 461 P.2d 464 (1969), is a failure of prosecution case wherein dismissal was upheld. In Brasher Motor, suit was filed and defendants filed a counterclaim. Justice Henriod writes that "everyone treated the litigation with a silent reverence accorded that which is interred---until, lo and behold, five and one-half years later the Browns, like Abou Ben Adhem, awoke from a deep dream of peace, and attempted to exhume and reactivate what for all intents and purposes appeared to have been a litigious corpse." The Court on its own motion dismissed the complaint and counterclaim. After a delay of five and one-half years with absolutely no action on either side, the Court indicated that "We believe and hold that in the instant case the trial Court did not abuse its discretion, but on the contrary acted with judicial propriety looking to the interests of all litigants

and in promoting their causes with reasonable dispatch, certainly in preventing indiscriminate jostling and clogging of Court calendars." 461 P.2d 464,465.

The case of Johnson v. Firebrand, 571 P.2d 1368 (Utah 1977) does not apply to this case. In Johnson, the moving party had not even filed an answer until making the motion to dismiss and the Court made much of this fact. "(I)n view of the fact that new counsel caused the case to be activated, it seems that the Court abused its discretion in dismissing the case on a motion to dismiss that was filed at the same time as the answer" (571 P.2d 1368, 1370). Utah Oil Co. v. Harris, 565 P2d 1135 (Utah 1977) is also distinguishable. The delay of 16 months was reasonably excusable in light of settlement efforts between the parties.

CONCLUSION

The dismissal for lack of prosecution in this case was well within the reasonable discretion of the Court because the policy considerations of Rule 41(b) were well served. The respondent has been substantially prejudiced by the fourteen year delay. Appellant's recent diligence can not cure that prejudice and Rule 41(b) sets no deadline for the moving party to act. It is respectfully submitted that this Court should affirm the order of the District Court.

Respectfully submitted this 12 day of March, 1982.


EARL S. SPAFFORD
Attorney for Plaintiff and Counter-
Defendants-Respondents

CERTIFICATE OF SERVICE

The foregoing Respondent's Brief was served on Defendant Appellant by mailing two copies thereof, first class mail, postage prepaid, to Robert R. Mallinckrodt, Esq., Mallinckrodt & Mallinckrodt, 10 Exchange Place, Suite 1010, Salt Lake City, Utah 84111, their attorney, this 12 day of March, 1982.


EARL S. SPAFFORD