1982

Robert L. Frazier v. East Millard Recreation District : Brief of Respondent

Utah Supreme Court

Harold D. Mitchell; Strong & Mitchell; Attorneys for Appellant;
Eldon A. Eliason; Attorney for Respondent;

IN THE SUPREME COURT

STATE OF UTAH

ROBERT L. FRAZIER,	)	
Plaintiff-Appellant,	)	
vs.	)	Case No. 18201
EAST MILLARD RECREATION DISTRICT,	)	
Defendant-Respondent.	)	

RESPONDENT'S BRIEF

Appeal from Judgment of Fifth Judicial District Court of Millard County,

Honorable J. Harlan Burns, District Judge, Presiding

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CASES AND AUTHORITIES CITED

STATEMENT OF NATURE OF THE CASE

The only issue involved is whether the District Court under Rule 41 B may of its own motion dismiss the action because of the inaction of the parties to prosecute the claim and to comply with Orders of the Court, as evidenced by failure of the parties to appear at two pre-trial hearings; the first being July 14, 1981, the second September 15, 1981. And as further evidenced by the parties failure or refusal to submit brief and/or memorandum of authorities ordered by the Court on March 17, 1981 to be submitted within 10 days.

When the said parties had not complied by July 14, 1981 a scheduled pretrial, or by September 15, 1981, another seheduled pretrial with no Motion or request for continuance or relief.

DISPOSITION IN THE LOWER COURT

The case was dismissed on the Court's own motion for inaction and refusal to file brief or responsive pleading when Ordered March 17, 1981 to be submitted within 10 days and the same had not been filed six months later and the parties had ignored and failed to attend two pre-trial conferences.

RELIEF SOUGHT ON APPEAL

Affirmance of trial court's order of dismissal.

STATEMENT OF FACT

Complaint was filed by plaintiff, an archetect seeking collection of a fee against a special service district. The District had been unsuccessful in obtaining voter support for a bond to construct a swimming pool and other recreation facilities. The defeat of said bond left the pursuers of the

project financially, politically and officially insolvent. The promoters, some of whom had been designated as trustees, fled from the unpopular project, leaving a skeleton.already picked clean and no one in a position to represent the defunct project.

A complaint was filed September 2, 1980 with no one in position to receive summons for the skeleton district, and no valid or enforceable contract.

Service was attempted on one Jere Brinkerhoff who had no standing with any official body including this district, except he had sat with the architect and gave moot interest to some elaborate plans and quickly withdrew when the plans were turned down by the voters.

Motion was filed to quash service when Jere Brinkerhoff affirmed no official agency with the district (tr 6)

The Court on October 15, 1980 granted the Motion to Quash. (tr. 14)

A subsequent service was made Millard County ATtorney who entered a general denial and a defunct non existant improvement district (tr 9)

Plaintiff requested a trial setting and the Court on December 16, 1980 set the matter for pre-trial, March 17, 1981. (tr 15) at which pre-trial the County ATtorney made a motion to dismiss on the grounds that the County was statutorilly absolved from any liability and that the service was improper. (tr 17)

Counsel were allowed 10 days to file a brief or submit

memorandum of authorities.

At this point the matter died on the vine. No briefs were filed. No memorandums, motions or other proceedings were had. The matter appeared on the calander for pre-trial July 14, 1981 (tr. 18). No one appeared. The Court continued it and had it placed on the calander for September 15, 1981.

On September 15, 1981 no one appeared. No briefs or memorandums had been filed as ordered by the Court six months earlier. The Court appropriately dismissed the matter with prejudice for counsel's failure to comply with Court orders of March 14, 1981, and complete inaction in the matter. (tr.19)

Judgment was signed December 2, 1981.

ARGUMENT

POINT I: THE COURT UNDER UTAH RULES OF CIVIL PROCEEDURE 41 B IS PERMITTED AND DIRECTED TO INVOLUNTARILLY DISMISS AN ACTION FOR FAILURE OF THE PLAINTIFF TO PROSECUTE OR TO COMPLY WITH THESE RULES OR ANY ORDER OF THE COURT.

In an order to dismiss granted by the Court on its own motion for failure to prosecute, the trial Court should consider not only the amount of time elapsed since the filing of the suit, but the whole conduct of the parties; What opportunities each side had to move the case forward and what use each has made of these opportunities, what difficulty or prejudice delay may have caused the other side. Westinghouse Electric. Supply Co. vs. Paul Hansen Contractors Inc. 544 P2 76

The Utah Supreme Court has said that since Utah Rules of Proceedure 41 B was fashioned after the Federal rules, that it

is proper to examine decisions under the Federal rules to determine the meanings thereof. Winger vs. Slim Olsen, Inc. 252 Pnd 205.

Federal Rule 41 B clearly places dismissal for failure to prosecute in the Court's discretion. We quote from Federal Rule 41 B, Moors Federal Practice, Volume 5, Page 1036, "where Rule 41 B provides that a defendant may move "for dismissal for want of prosecution, it has been held that a District Court may either under this rule or rule 83, or in the exercise of its inherent power to keep its dockets clear--dismiss on its own motion for want of prosecution." Shotkin vs. Westinghouse Electric 169 Fed. 2d 825 or provide by local rule for automatic dismissal of causes in which no action has been taken within a prescribed period. On the other hand, failure to appear at the pre-trial hearing(Wisdom vs. Texas Co. 27 F Supp 992)

Dismissal of the action or claim on motion of the defendant for failure to comply with the rules requiring a party to answer designated questions, and to orders of the Court made pursuant to those rules, inter alia, authorizes the Court to dismiss the action or proceedings or any part thereof, for a failure to comply with the rules on depositions and discovery and orders made under them. (Blake vs. DeVilbiss Co. 118 Fed 2d 346)

The Utah Supreme Court in Boyd vs. Topham 152 P 1185 held in a proper case the Court could stop the proceedings and dismiss the action on its own motion.

POINT II: THE COURT IS ENTITLED TO HAVE THE SUPREME COURT TO REVIEW THE EVIDENCE AND EVERY LOGICAL INFERENCE IN THE LIGHT MOST FAVORABLE TO HIM.

In numerous cases the Supreme Court has determined that the District Court in granting a dismissal against the plaintiff is entitled to have the Supreme Court review all of the evidence together with every logical inference which may fairly be drawn therefrom in the light most favorable to him. See Martin vs. Stevens 243 P2. 747.

Such order of dismissal is not equivelent to a non suit and the Order of Dismissal by the trial judge must be allowed to stand if reasonable minds could agree with said order. Lawrence vs. Bamberger RCo. 3 Utah 2d 247 282 P2 385.

SUMMARY

Both Federal and State cases are replete in upholding involuntary dismissal for failure to comply with the rules or with the Orders of the Court. And the cases clearly place dismissal for failure to prosecute in the Court's discretion and there has been no showing of abuse of that discretion. The judgment should be affirmed.

Respectfully submitted,

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