

1992

Jim Pratt Hansen; et al. v. George Sutton; et al. : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JIM PRATT HANSEN; et al.,	PETITION FOR REHEARING
Plaintiffs/Appellants,	
vs.	Case No. 920686-CA
GEORGE SUTTON; et al.,	Priority No. 16
Defendant.	
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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
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FILED
Utah Court of Appeals

JUL 29 1993


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IN THE UTAH COURT OF APPEALS

* * * *

JIM PRATT HANSEN; et al.,

Plaintiffs/Appellants

vs.

GEORGE SUTTON; et al.,

Defendants.

*
* PETITION FOR REHEARING
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* Case No. 920686-CA

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Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Appellants respectfully petition the Court for a rehearing.

I. THE STATE LAW CLAIMS ALLEGED IN "HARRIS" WERE DISMISSED WITHOUT PREJUDICE ON JURISDICTIONAL GROUNDS.

In its Opinion filed July 20, 1993, the Court affirmed the lower court's dismissal of Count One of the Complaint on the basis that "the final judgment, entered [in Harris on] June 6, 1989, specifically states that 'all claims in the Amended Complaint, together with the corresponding claims of the Second Amended Complaint are dismissed with prejudice.'" (July 20, 1993, Opinion at page 4).

The Court is, of course, correct that the June 6, 1989,

order entered in Harris¹ purported to dismiss all of Plaintiffs' causes of action with prejudice. However, Plaintiffs subsequently filed a motion under Rule 60(b), F.R.C.P., requesting that the Harris court amend its June 6, 1989, order to reflect its original intention to dismiss Plaintiffs' state law claims without prejudice on jurisdictional grounds. On July 20, 1990, Judge Sam issued his "Order Granting Relief Under Rule 60(b)(1)" in which he ruled as follows:

This court has already indicated in its Order dated February 27, 1990,² that it did not intend to dismiss [Plaintiffs' state law claims] with prejudice but that dismissal was only for lack of jurisdiction. Accordingly, the relief requested by plaintiffs is hereby granted.

(See Addendums To Appellants' Opening Brief, Exhibit F to Addendum 8, a copy of which is attached hereto for the Court's convenience).

Thus, Plaintiffs' state law claims were specifically dismissed without prejudice by the Harris court. Therefore, in accordance with Utah Code Ann. section 78-12-40, Plaintiffs were entitled to refile the case at bar within one year of the June 6, 1989, order of dismissal (as amended by the July 20, 1993, Order

¹It is not a coincidence that the form of that order was prepared by Defendants' counsel after the withdrawal of Plaintiffs' former counsel.

²In accordance with federal procedural law, because the Harris case was before the Tenth Circuit Court of Appeals on review at that time, Plaintiffs were first required to obtain Judge Sam's February 27, 1990, order indicating his willingness to grant Rule 60(b) relief in order to then be entitled to seek the Tenth Circuit's order partially remanding the case to the district court for entry of an order granting Rule 60(b) relief.

Granting Relief Under Rule 60(b)(1)) entered in Harris.

II. PLAINTIFFS CAN PROVE A SET OF FACTS WHICH WOULD SUPPORT THEIR CLAIMS AND WHICH WOULD NOT BE TIME-BARRED.

The Court's July 20, 1993, Opinion affirms the lower court's dismissal of Count Two of the Complaint on the ground that

"The defendants breached the [P & A Agreement] when the assets were retained longer than contractually agreed upon...The six-month period agreed upon by the plaintiffs and defendants for returning the assets ended on June 13, 1983, making the breach of the P & A Agreement a predissolution cause of action ... The savings statute does not prevent count II from being time-barred. The Nelson case, which arguably contained the same cause of action as that brought by the corporate plaintiffs in count II, was filed within the two year statutory period. The cause of action brought in Nelson failed on grounds other than the merits on November 10, 1986. However, the failure occurred before the two-year statutory limitation had expired, preventing invocation of the savings statute."

(July 20, 1993, Opinion at page 5).

Thus, the Court's ruling is premised upon its conclusion that defendants' breach of the P & A Agreement occurred at the expiration of the six month period alleged in paragraph XXX of Count Two of the Complaint, which the Court correctly identifies as taking place predissolution. Plaintiffs respectfully submit that the Court has failed to take into consideration the fact that paragraph XXXI of the Complaint alleges that

Alternatively, the P & A Agreement contained an implied promise that Sutton and the DFI would turn over the retained assets to MFT&L and terminate their role in connection therewith at the earliest possible time consistent with Sutton's statutory responsibilities.

(Emphasis added).

The reason for the alternative pleading is that there is a factual issue as to whether the November 5, 1982, letter

(Addendums to Appellants' Opening Brief, Exhibit F attached to Addendum 1) which contains the "six month" language was part of the P & A Agreement. In point of fact, it has always been Defendants' position that it was not. Accordingly, there is a question of fact as to when was "the earliest possible time consistent with Sutton's statutory responsibilities" that he could have relinquished control over the retained assets. Under the alternative construction of the P & A Agreement alleged in paragraph XXXI of the Complaint, it was only then that the defendants were required to "turn over the retained assets to MFT&L and terminate their role in connection therewith ..." It follows that it was only then, as the Court's Opinion recognizes, that "defendants breached the contract when the assets were retained longer than contractually agreed upon." (July 20, 1993, Opinion at page 5).

Following the logic of the Court's Opinion, if the "earliest possible time consistent with Sutton's statutory responsibilities" occurred post-dissolution, then section 78-12-40 would, in fact, be applicable. Therefore, because Count Two of the case at bar alleges the "same transaction or occurrence", see Foil v. Bollinger, 601 P.2d 141, 151 (Utah 1979), as was alleged in Harris, and (as demonstrated above) because Harris was dismissed otherwise than on the merits, Plaintiffs were entitled to refile the instant case within one year of the order of dismissal entered in Harris.

At page 3 of the July 20, 1993, Opinion, the Court

recognizes that

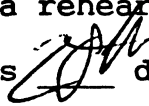
"When reviewing a motion to dismiss based upon Rule 12(b)(6), an appellate court must accept the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims."


(Citing Anderson v. Dean Witter Reynolds, Inc., 841 P.2d 194, 196 (Utah App. 1991)).

Plaintiffs respectfully submit that based upon the alternative allegation of paragraph XXXI of the Complaint, i.e., that "the P & A Agreement contained an implied promise that Sutton and the DFI would turn over the retained assets to MFT&L and terminate their role in connection therewith at the earliest possible time consistent with Sutton's statutory responsibilities, Plaintiffs could indeed "prove a set of facts in support of [their] claims" which would not be time-barred.

CONCLUSION

Based upon the foregoing, Plaintiffs respectfully petition the Court for a rehearing.

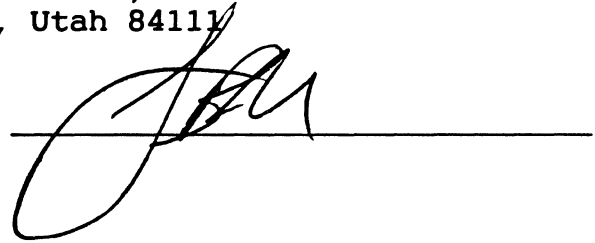
DATED this  day of July, 1993.


Scott E. Mitchell
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MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were served this *21st* day of July, 1993, via first class U.S. Mail, postage prepaid, addressed as follows:

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IN THE UTAH COURT OF APPEALS

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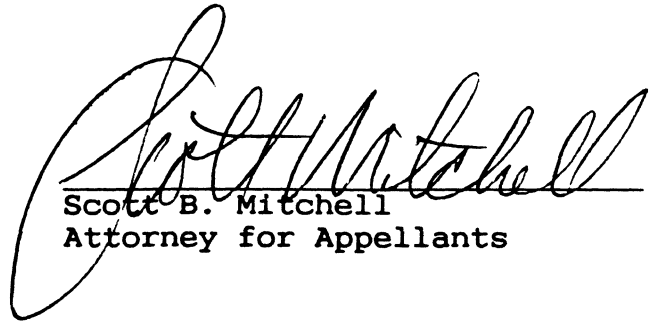
JIM PRATT HANSEN; et al.,
Plaintiffs/Appellants
vs.
GEORGE SUTTON; et al.,
Defendants.

*
* CERTIFICATE OF GOOD FAITH
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* Case No. 920686-CA

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Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, undersigned certifies that Appellants' Petition For Rehearing is presented in good faith and not for delay.

DATED this 27th day of July, 1993.


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