1969

Brasher Motor and Finance Company v. Richard A. Brown and Jacqueline A. Brown : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

BRASHER MOTOR AND FINANCE COMPANY

Plaintiff-Respondent,

vs.

RICHARD A. BROWN and JACQUELINE A BROWN, partners, dba B & C COMPANY, a partnership,

Defendants-Appellants.

Case No. 11,601

APPELLANTS' BRIEF

Appeal from judgment of the Third Judicial District Court for Salt Lake County
Honorable Bryant H. Croft, Judge

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CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

BRASHER MOTOR AND FINANCE COMPANY,

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RICHARD A. BROWN and JACQUELINE A. BROWN, partners, dba B & C COMPANY, a partnership,

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STATEMENT OF THE CASE

Suite for replevin of motor vehicles held by Defendants on trust receipt and counterclaim for usury, funds due for purchase of an automobile, for an accounting, breach of contract, etc.

DISPOSITION IN LOWER COURT

Court on its own motion diismissed the complaint and counterclaim for failure of both parties to prosecute the action.

RELIEF SOUGHT ON APPEAL

Defendant seeks an order vacating the order dismissing the counterclaim and permitting it to proceed to trial.

STATEMENT OF FACTS

The sequence of events involving this matter are as follows:

7-22-63 Plaintiff filed complaint (R. 2)

8-21-63 Defendants filed answer and counterclaim (R. 19)

8-30-63 Plaintiff filed motion to strike counterclaim (R. 20)

1-13-69 Defendant filed notice of readiness for trial (R. 28)

1-20-69 Plaintiff filed objections to notice of readiness for trial (R. 22)

3-10-69 Plaintiff filed motion to strike defenses (R. 24)

3-10-69 Plaintiff filed amended motion to strike counterclaim (R. 25)

3-10-69 Plaintiff filed notice of hearing of their pending motions (R. 27)

3-18-69 Order of dismissal by court (R. 29)

No action was taken by either party for 5½ years after filing of complaint, answer and counterclaim and motion to strike. After 5½ years Defendant requested that the case be set for trial by filing a notice of readiness for trial (R.28). Plaintiff then filed an objection (R. 22) but has never called its objection up for hearing. Two months later Plaintiff filed additional motions and called them up for hearing (R. 24, 25, 27). Neither party made a motion to dismiss for failure to prosecute and each party was proceeding to a determination of the issues on the merits when the Court, at the time set for hearing those motions without notice to either party, with the consent

of Plaintiff and over the objections of Defendants, ordered the complaint and counterclaim dismissed for failure to prosecute (R. 29).

ARGUMENT

POINT I

THE COURT ERRED IN DISMISSING THE COUNTERCLAIM FOR LACK OF PROSECUTION.

The sole issue to be determined by this appeal is whether the Court erred in dismissing the counterclaim under the circumstances.

(a) *Plaintiff's motion in open court to dismiss its complaint and Defendants' counterclaim did not authorize court to dismiss the counterclaim.*

Plaintiff's motion in open court for the dismissal of Plaintiff's complaint (R. 29), after the court had indicated that it was going to dismiss the action for failure to prosecute, did not authorize the Court to dismiss the action because a counterclaim had been filed and Defendants did not consent. The only circumstance under which Plaintiff's complaint could be dismissed on Plaintiffs motion would be when, as stated in the rule, the counterclaim can remain pending for independent adjudication by the court. The Court could properly dismiss Plaintiff's complaint only if the counterclaim were not dismissed.

Rule 41(a)(1) and (2), URCP; Watson v. White, case No. 11321 filed June 18, 1969, _____ U(2d) _____, _____ P. 2d _____.

(b) *Rule* 41 *authorizes the Court to dismiss a counterclaim on motion of the Plaintiff only if counter-*

claim may remain pending for independent adjudication.

Rule 41(b), URCP specifies the circumstances under which an action may be dismissed for failure to prosecute, which rule reads in part as follows:

> Rule 41(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF.
>
> *For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him . . . .*"

Rule 41 (a) and (b) is made applicable to counterclaims by Rule 41(c), URCP. See also Crystal Lime & Cement v. Golden W. Robbins, et al., 8 U(2d) 389, 335 P.2d 624.

The Court is not authorized by rule 41 to dismiss an action on its own motion, but only on motion by the defendant. In Watson v. White, Supra the Utah Supreme Court reversed an order of the Fifth District Court dismissing a complaint and an answer and counterclaim filed 5 2/3 years later. In that case no action whatever was taken by the Defendant in that action until 5 2/3 years after the action had been commenced, which is a period slightly in excess of the dormant period involved in this action. The Court in that case construed the phrase contained in Rule 41(a) (2), URCP which states that the dismissal may only be had "upon such terms and conditions as the court deems proper" to mean that a dismissal cannot be granted unless the defendants are protected by permitting their counterclaim to remain for independent adjudication. The Court in that case, as in our case, did not have a discretion to exercise under the

terms of that rule which permitted it to order the dismissal of the counterclaim, reversed the order of dismissal and remanded the case for further proceedings by the lower court. This case seems to fall squarely within the rule established by that decision that no discretion existed in favor of the Court to dismiss the counterclaim. See also Barron & Holtzoff, Federal Practice and Procedure, Vol 2B quoted with approval by the Court in that case.

(c) *Dismissal for failure to prosecute is not authorized where a counterclaim has been filed and both parties had the power to take action to obtain relief themselves.*

Crystal Lime & Cement Co. v. Golden W. Robbins, supra, which, as in our case, involved a counterclaim and therefore subjected both parties to the penalty of dismissal of their action for failure to prosecute. This Court ruled that it was error for the district court to dismiss the action with prejudice as to a party who failed to take action for 8 *years* since both plaintiff and defendant had the power to obtain relief following a decree of the Supreme Court. In our case the delay was 2½ years less than that in the Crystal Lime & Cement v. Robbins, supra, case, and as in that case either the plaintiff or defendant could have called Plaintiff's motion up for hearing by mailing of notice to the other party. In that case the Court stated

"Since any party to this action could have obtained the relief to which it was entitled at any time it had wanted but both parties chose to dally for a number of years, it was an abuse of discretion for the court to grant respondents' motion to dismiss with prejudice." (Emphasis added).

(d) *A party is not harassed or annoyed by failure to prosecute when it had power at all times to take action to obtain relief themselves.*

A reason generally advanced for dismissal of an action for failure to prosecute is that to permit the case to remain pending indefinitely would result in undue harrassment and annoyance of the defendant. 24 Am Jur 2d 50, Sec. 59; Barron & Holtzoff, Vol. 2B, page 139, Sec. 918. That rule is not applicable however where the parties are equally at fault. Barron & Holtzoff, Vol. 2B, page 144, Sec. 918 footnote 13; 24 Am. Jur. 2d 57, Sec. 66, footnote 3; In Crystal Lime and Cement Co. v. Robbins, *Supra*, the Utah Supreme Court expressly adopted this exception to the general rule permitting dismissal for failure to prosecute by the following ruling in that case:

> "*It can,* therefore, *hardly be reasonably argued that they were harassed and annoyed by appellant's action* in failing to draw and present to the court findings of fact, conclusions of law and decree embodying the decision of the court granting them the amounts they claim *when they had it in their power at all times to obtain relief by themselves presenting such findings and decree to the court for signing.*" (emphasis added)

In Wright v. Howe, 46 U. 588, 150 P. 956 the Utah Supreme Court held that in the absence of showing of any prejudice, a defendant who had the same right as the plaintiff to press the action to trial, but who permitted it to remain pending for about three years could not complain of the overruling of their motion to dismiss the action for failure to prosecute.

In Lyon v. State, 283 P.2d 1105, 76 Idaho 374, the Court refused to dismiss where the plaintiff moved for the

cause to be reinstated after it had been inactive for over eleven years in which case it did not appear that the defendants had lost any rights, or had been prejudiced by the delay, or that plaintiffs had unreservedly abandoned the action, delay in prosecution alone not entitling the defendants to summary dismissal over objection.

The record in our case fails to show that the plaintiff has lost any rights or has been prejudiced by the delay in prosecution of this action, and the filing of the notice of readiness for trial by Defendants two months before the first action was taken by the court to dismiss for failure to prosecute, clearly shows that the Defendants had not abandoned their counterclaim.

In our case the Plaintiff at all times had it within its power to obtain relief by simply noticing up their own motion for hearing.

(e) *Earlier delay does not justify dismissal when party is prosecuting action with diligence at time of dismissal.*

In our case the parties had resumed active prosecution of the case some two months prior to the first indication by the Court that the case should be dismissed for failure to prosecute. An action cannot be dismissed at a time when the parties are prosecuting the case with diligence because at some earlier time the plaintiff failed to act with diligence. Barron & Holtzoff, Federal Practice and Procedure, Vol. 2B, Page 140, Sec. 918; Rollins v. U. S., C.A.9th, 1961, 286 F. 2d 761; 24 Am. Jur. 51, Sec. 59; Ayers v. D. F. Quillen & Sons, Inc., (Del. Sup) 188 A2d 510;

(f) *Drastic remedy of dismissal with prejudice*

should be applied only in extreme cases.

Dismissal of an action with prejudice is a drastic remedy which should be applied only in extreme cases, and in final analysis the court has the responsibility of doing justice and general principles cannot justify denial of party's fair day in court except on serious showing of willful fault. Mely v. Morris, (Alaska), 409 P.2d 979; Independent Prods. Corp. v. Loew's, Inc., 283 F.2d 730, 733 (2d Cir. 1960); Producers Releasing Corp. De Cuba v. PRC Pictures, 2 Cir., 1949, 176 F.2d 93, 96; Gill v. Stolow, 2 Cir, 1957, 240 W.2d 669, 670; 2B Barron & Holtzoff, Federal Practice and Procedure, Sec. 917, at 136.

SUMMARY

The Court abused its discretion by dismissing Defendants' counterclaim on its own motion, over their objections for failure to prosecute where, although case had been dormant for 5½ years. Defendant had 2½ months earlier filed a notice of readiness for trial asking that the case be set for trial. Where both parties had equal power to call Plaintiff's pending motion up for hearing, Plaintiff filed no motion to dismiss for failure to prosecute and there is no showing that Plaintiff lost any right or had been prejudiced by the delay, and the long pending motions had been called up for hearing by the parties and were about to be heard by the Court when the Court ordered the case dismissed without notice to the parties. Rule 41 pertaining to dismissal of actions does not authorize this dismissal.

Respectfully submitted,
RONALD C. BARKER
Attorney for Defendant-Appellants