1969

Brasher Motor and Finance Company v. Richard A. Brown and Jacqueline A. Brown : Respondent'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

RESPONDENT'S BRIEF

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

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STATEMENT OF THE CASE

Plaintiff filed suit for replevin of certain motor vehicles held by defendants on trust receipts; defendants filed a counterclaim, the exact nature and grounds of which was never quite clear to the plaintiff.

DISPOSITION IN LOWER COURT

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

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent seeks to have the order of the court affirmed.

STATEMENT OF FACTS

The Statement of Facts set forth by the defendants-appellants as relates to the sequence of filings of pleadings and motions in this matter are essentially correct, except that the file and record before this Court does not contain the Notice of Readiness for Trial allegedly filed by the defendants.

The Sheriff's Return on the Writ of Replevin made July 25, 1963 showed that he was unable to locate any of the property sought by the Writ (R. 6). Hence, for all practical purposes plaintiff then lost interest in its Complaint. Almost one month later, on August 21, 1963, defendants filed their counterclaim (R. 9-10). Plaintiff immediately, on August 29, 1963, filed a Motion to Strike the Counterclaim (R. 20) and there the matter stood dormant until January 13, 1969 when defendants served on plaintiff a Notice of Readiness for Trial, although the record fails to disclose that such

Notice was actually filed with the Court. Plaintiff immediately, on January 20, 1969, filed its Objections to such Notice of Readiness (R. 22). Defendants did not even then move to call up such objections or the previous Motions of plaintiff. Plaintiff then filed an Amended Motion to Strike the Counterclaim (R. 25-30) and called the same up for hearing on March 14, 1969. (R. 27). It was at that hearing that the Court on its own Motion dismissed the Complaint and the Counterclaim. Hence, the statement of defendants-appellants in their Statement of Facts that each party was proceeding at the time of dismissal to a determination of the issues of the merits is not true, inasmuch as the case, and particularly the Counterclaim, was never at issue and the defendants were donig nothing to get it at issue.

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ARGUMENT

POINT I

THE TRIAL COURT HAS POWER ON ITS OWN MOTION TO DISMISS BOTH COMPLAINTS AND COUNTERCLAIMS FOR LACK OF PROSECUTION.

Rule 41 (b) of the Utah Rules of Civil Procedure deals with involuntary dismissals and provides in pertinent part that:

> "For failure of the plaintiff to prosecute or comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against him. . . . Unless the court in its order for dismisal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for a lack of jurisdiction or for improper venue or for lack of an indispensible party, operates as an adjudication upon the merits."

Rule 41(c) then goes on to provide: "The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim." Quite clearly, those rules permit a defendant to move for dismissal of a plaintiff's complaint for lack of prosecution and permit a plaintiff to move for dismissal of a defendant's counterclaim for the same reason. However, in the light of the above-stated rule, may a court dismiss a complaint or counterclaim of its own motion? The answer is clearly yes.

It is generally held that courts inherently have the power to dismiss an action for want of prosecution. This power is in addition to the expressed statutory procedure for dismissal. The general rule is stated in 27 C.J.S. Dismissal & Nonsuit §65 at 233 as follows:

> "While statutes or rules of court providing for the dismissal of actions for want of prosecution have been adopted in a number of jurisdictions, such statutes or rules must be read in the light of the existence of such inherent power, which remains unimpaired unless it is limited

> expressly or by necessary implication. Thus it has been held that the affirmative expression of the statutes providing for dismissal does not deprive the court of its inherent powers."

This proposition is amply supported by case law. For example, the Supreme Court of Idaho in interpreting Rule 41(b) of their Rules of Civil Procedure, which is almost word for word the same as our Rule 41(b), said:

> "A trial court has the power to dismiss a case because of failure to prosecute with due diligence; such power is inherent and independent of any statute or rule of court. . . . Rule 41(b) 'did not take away or limit this power but recognized and incorporated it in a code of civil procedure.' " Beckman v. Beckman, 88 Idaho 522, 401 P.2d 810, 812 (1965).

In a similar vein, the Supreme Court of Nevada in *Harris v. Harris,* 65 Nev. 342, 196 P.2d 402 (1948), discussed the inherent power of the court to dismiss for want of prosecution in affirming a lower court's dismissal of a cross-complaint. The court said:

> "Likewise, a court of record has inherent power to dismiss a cross-complaint for lack of diligence in its prosecution. [Citing cases.]
>
> This inherent discretionary power which a court of record possessed remains unimpaired unless it is expressly limited by statute." 196 P.2d at 404.

The Supreme Court of Oregon has clearly stated the rule in *Horn v. California-Oregon Power Co.*, 221 Ore. 328, 351 P.2d 80 (1960), as follows:

> "Virtually all courts rule that they have inherent power to dismiss cases if failure to prosecute with due diligence is established." 351 P.2d at 83.

It is also clear that as part of this inherent power to dismiss every court has, in the absence of direct regulation by statute, the power to dismiss an action of it own motion without the necessity of either party moving for dismissal. For example, in *City of Wichita v. Katino,* 175 Kan. 657, 265 P.2d 849 (1954), a defendant in a criminal prosecution appealed from a police court to the district court. The district court dismissed on its own motion for lack of prosecution. The defendant appealed to the Supreme Court and the Supreme Court affirmed. In so doing, the court recognized the general rule that: "The power of a court to dismiss a case, upon its own motion, because of failure to prosecute with due diligence is inherent and exists independently of any statute." 265 P.2d at 850. Similarly, the Supureme Court of Wyoming has held in *Moshannon Nat'l. Bank v. Iron Mountain Ranch Co.,* 45 Wyo. 265, 18 P.2d 623, rehearing denied, 21 P.2d 834 (1933), that courts have the inherent power to dismiss of their own motion for want of prosecution. The Supreme Court of Oregon has also so held in *Reed v. First Nat'l Bank of Gardner,* 194 Ore. 45, 241 P.2d 109 (1952). In affirming a lower court's dismissal

for want of prosecution, the court characterized the two ways of proceeding to dismiss as follows:

> "In dismissing an action for want of prosecution, the court may proceed under the statute or it may, of its own motion, take action to that end. In acting on its own motion, the court must proceed with judicial discretion. Its ruling will not be disturbed on appeal unless it is manifest in the records that the court's discretion has been abused." 241 P.2d at 115.

A recent Arizona decision has also recognized this power. In *Cooper v. Odom,* 6 Ariz. App. 466, 433 P.2d 646 (1967), the Arizona court made the following comment in affirming the lower court's exercise of discretion in dismissing an action for want of prosecution:

> "Trial courts have the inherent power to dismiss a case on their own motion if the case has not been diligently prosecuted. [Citing cases.] In this respect the exercise by the trial court will not be reviewed on appeal in the absence of an abuse of discretion." 433 P.2d at 646.

The Supreme Court of New Mexico has also recognized the inherent power in the court in the decision of *Baker v. Sojka,* 74 N.M. 587, 396 P.2d 195 (1964). The trial court had dismissed the plaintiff's complaint on its own motion, and the plaintiff appealed. In upholding the trial court's decision in dismissing the action, the Supreme Court said:

> "We have many times held that the district court has inherent power to dismiss a case for failure to prosecute, independent of statute, and

> unless there has been an abuse of discretion, the trial court's dismissal will not be disturbed on appeal."

Not only are state court cases unanimous in their recognition of the inherent power of a court to dismiss of its own motion for want of prosecution, but federal cases interpreting Rule 41(b) of the Federal Rules of Civil Procedure have also consistently held that that rule in no way impairs the inherent power of the court. These federal cases take on some added importance when it is recognized that the Utah rules are patterned after the federal rules and Utah has recognized the persuasiveness of federal precedent in interpreting those rules. In *Wynerger v. Slim Olson, Inc.*, 122 Utah 487, 252 P.2d 205 (1953), the court said with respect to the Utah Rules of Civil Procedure:

> "Since these rules were fashioned after the Federal Rules of Civil Procedure, it is proper that we examine decisions under the Federal Rules to determine the meanings thereof."

In reviewing the federal decisions, it has been observed in 5 *Moore's Federal Practice*, ¶41.11[2] at 1115:

> "Rule 41(b) clearly places dismissal for failure to prosecute in the district court's discretion.
>
> While Rule 41(b) provides that 'a defendant may move' for dismissal for want of purosecution, a district court may—either under Rule 83 or the exercise of its inherent power to keep its docket clear—dismiss of its own motion for want of prosecution. . . ."

Perhaps the leading federal case in this area, and the one that encompasses the principles of the federal rule is the decision of the United States Supreme Court in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 8 L.Ed. 2d 734 (1962), in which the Supreme Court held that a district court had the inherent power to dismiss on its own motion an action for want of diligent prosecution. The court there stated:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law, e.g., 3 Blackstone, Commentaries (1768), 295-296, and dismissals for want of prosecution of bills in equity, e.g., id., at 451. It has been expressly recognized in Federal Rules of Civil Procedure 41(b) . . . "

> "Petitioner contends that the language of this Rule, by negative implication, prohibits involuntary dismissals for failure of the plaintiff to prosecute *except* upon motion by the defendant. In the present case there was no such motion."

> "We do not read Rule 41(b) as implying any such restriction. Neither the permissive language of the Rule—which merely authorized a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases

that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power', governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

* * *

"Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting."

In contrast to the vast source of precedent touched on above, appellants claim that the district court has no power either by statute or inherently to dismiss both the complaint and counterclaim of its own motion for want of prosecution and cite in support thereof a rule of civil procedure which has no application to this situation and a Utah Supreme Court decision which is totally irrelevant. Appellants cite and use extensively Rule 41(a) which involves *voluntary* dismissal of actions and *Watson v. White,* .... Utah ...., ... P.2d ...., June 18, 1969, which interprets that rule.

Rule 41(a) provides that a plaintiff may not *voluntarily* move to have his own action dismissed unless a counterclaim filed by the defendant may stand independently. Quite obviously, the purpose of the rule is to prevent a plaintiff from dismissing and putting out of court a defendant, who may have a perfectly

valid cause of action on a counterclaim, by voluntarily dismissing his own action. That rule clearly has no application to a dismissal for want of diligence in prosecuting an action. In this case plaintiff made no motion to voluntarily dismiss his action. The dismissal resulted from action taken by the court, of its own motion, to dismiss both the plaintiff's complaint and the counterclaim for want of due diligence in prosecution. All the plaintiff did was fail to object to the court's dismissal of its complaint and joined with the court in its motion to dismiss the defendant's counterclaim for want of prosecution. With this background, the decision of *Watson v. White* becomes quite irrelevant. In that decision, the plaintiff moved to dismiss the entire action, both his complaint and the counterclaim. The motion to dismiss the complaint was based upon Rule 41(a) and the motion to dismiss the defendant's counterclaim was based upon laches, the plaintiff claiming that the defendant was barred as a matter of law from prosecuting his counterclaim because of his laches in failing to file said counterclaim until almost six years after the filing of the complaint. The court ruled that plaintiff's motion to dismiss the counterclaim was not timely. Initially the court noted that under Rule 41(a), once defendant's counterclaim is filed plaintiff may not voluntarily dismiss his claim unless the counterclaim may stand independently of the complaint. Since this Court did not reverse the trial court's judgment dismissing the complaint, the court must have found that the counterclaim could exist independently of the com-

plaint .The court then went on to correctly point out that the only way a counterclaim could be dismissed under a Rule 41(a) *voluntary* dismissal motion was by agreement of the defendant. With reference to the question of defendant's laches, the court held that the trial court was without discretion to rule upon that issue until the propriety of a voluntary dismissal under Rule 41(a) was determined. That decision clearly has no application to a dismissal by the court of the defendant's counterclaim for want of prosecution under Rules 41 (b) and (c) and through the court's inherent power. This motion to dismiss in the *White* case could not possibly have been construed as a Rule 41(b) motion since it was made almost immediately after the defendant's counterclaim had been filed. The holding in that case is totally inapplicable to any question involved in this appeal.

POINT II

THERE IS NO NEED FOR A PARTY TO SHOW PREJUDICE ON HIS PART BEFORE HE MAY MOVE FOR A DISMISSAL FOR WANT OF PROSECUTION.

Although some cases have appeared in talk in terms of the necessity of showing prejudice or injury before a party may move for a nonsuit or dismissal, it is generally held that such injury or prejudice may be presumed by the court from a long delay. The general rule has been stated as follows:

> "While it has been held that the defendant in order to be entitled to a nonsuit or a dismissal must show injury, as well as lack of due diligence on plaintiff's part, the law will presume injury from the unreasonable delay." 27 C.J.S. Dismissal & Nonsuit §65(2) at 440.

In affirming a lower court's decision dismissing an action for want of prosecution, the Supreme Court of Montana in interpreting Rule 41(b) of their Rules of Civil Procedure, a rule which is patterned after the Federal rule and very similar to the Utah rule, said with reference to the question of prejudice:

> "Plaintiff argues that the action could not be dismissed as defendant has shown no injury by the delay. When a plaintiff has slept on his cause for over 12 years the law presumes injury and places the burden on the plaintiff to show good cause for the delay." *Creemer v. Braaten*, 438 P.2d 553, 554 (Mont. 1968).

California also has recognized this general rule when in the decision of *Welden v. Davis Auto Exchange*, 315 P.2d 33 (Cal. 1957), the court said:

> "Appellant contends the trial judge ought not to have granted the motion for there was no affirmative showing that respondent was prejudiced by the delay. In Gray v. Times-Mirror Co., 11 Cal. App. 155, at pages 163-164, 104 P. 281, at page 484 we find: 'We do not understand it to be necessary for the party moving to dismiss for want of diligence in prosecuting an action to affirmatively show the extent of the inconvenience or injury he has suffered, or may

suffer by reason of the delay. The law will presume injury from unreasonable delay.' " 315 P.2d at 36-37.

On the other hand, it is quite clear that in exercising its discretion, the trial court may consider the existence of prejudice in deciding whether or not to dismiss. An understanding of this principle explains the decisions cited by the appellants in their brief which on the surface appear to hold that showing of prejudice is necessary. In the decision of *Wright v. Howe,* 46 Utah 488, 150 P. 956 (1915), a decision rendered some 20 years prior to the adoption of our present rules of procedure, the Utah Supreme Court upheld a lower court's refusal to dismiss for lack of diligence. In so doing, the court observed that the defendant in making his motion to dismiss had failed to show that he had been prejudiced in any way by the delay. Likewise, in *Lyon v. State,* 76 Idaho 374, 283 P.2d 1105, the Supreme Court of Idaho upheld a lower court's decision refusing to dismiss for want of due diligence when the defendant had failed to show any prejudice. Neither court affirmatively held that a showing of prejudice is a prerequisite to dismissal. All these cases in fact held is that the lower court did not abuse their discretion in failing to dismiss where no prejudice was demonstrated. It is suggested that the appellate court in each case was merely permitting the trial court to consider prejudice as one of the factors upon which it could base its decision.

This has been suggested in 2*B Barron and Holtzoff's Federal Practice and Procedure,* §918 at 143-144.

> "It has been said on the one hand that dismissal will not be ordered unless there has been prejudice to the defendant, and on the other hand, that if the delay is unreasonable, prejudice will be presumed. Probably the sound answer is that the defendant need not show prejudice, but that the court will consider the prejudice, if any, to the defendant, in determining whether to excuse plaintiff's failure."

That statement is amply supported by citation of federal cases in the footnotes. State courts have also come to this same conclusion in interpreting their state rules of procedure. For example, the Supreme Court of Alaska in *Silverton v. Marler,* 389 P.2d 3 (1964), said in upholding the lower court's dismissal of an action for want of diligence:

> "The court below had sufficient reason to dismiss the action for failure to prosecute. It was not necessary, as appellant contends, for appellees to show prejudice by reason of delay in service before dismissal would be justified. The operative condition of Civil Rule 41(b) is lack of reasonable diligence on the part of the appellant and not a showing by appellees that they would be prejudiced if the action were not dismissed. Prejudice or lack of it is a factor that may be considered by the court in the case of moderate excusable neglect. But here the neglect on the appellant's part was neither moderate nor excusable." 389 P.2d at 6.

The Supreme Court of Oregon has also quite clearly pointed out that prejudice is a factor to be considered, though it is not a necessary prerequisite to a dismissal for lack of prosecution. In *Horn v. California-Oregon Power Co., supra,* the court made the following observation in discussing the factors going into showing a lack of due diligence:

> "Justice should be administered with reasonable promptness and any action upon the part of the suitor which is at variance with that objective must be given consideration whether the procrastination is of long duration or short. The issue of diligence generally cannot be determined by doing nothing more than counting the days that have passed. Illness, the absence of a witness, prejudice to the defendant, the impending decision of a similar case in another court and other similar factors must generally be considered in addition to the length of delay in resolving the issues of due diligence." 351 P.2d **at 84.**

However, the court went on to indicate quite clearly that prejudice is not a necessary prerequisite to the finding of lack of due diligence :

> "Even though the defendants did not accompany their motion which sought dismissal with a showing of prejudice, such a showing was not essential." 351 P.2d at 84.

The court then pointed out that when the delay is of an excesively long period of time, the court may presume that injury has occurred and the burden of

showing justification for the delay is then placed upon the claimant.

> "[W]hen the plaintiff came to the hearing of March 4, 1958, she knew that she was confronted with the duty of explaining her long delay. She also knew that the court would presume that her dilatory course had injured the defendant." 351 P.2d at 84.

POINT III

A DECISION OF A LOWER COURT DISMISSING AN ACTION, FOR WANT OF DUE DILIGENCE IN PROSECUTION, MAY NOT BE OVERTURNED ON APPEAL UNLESS THERE HAS BEEN A CLEAR ABUSE OF DISCRETION BY THE COURT.

In some strange way, the appellant tries to intimate that the district court has no discretion in dismissing a complaint or counterclaim for want or lack of prosecution. However, there is nothing either in the case law or in the rule itself which would support such a conclusion. Rule 41(b) which deals with dismissal of actions for want of prosecution does not spell out the grounds upon which such a dismissal may be made or the factors to be taken into consideration by the court. Quite obviously, the rule leaves the dismissal within the court's discretion to be determined upon the facts and circumstances involved in each case. If the courts did not have discretion, they would be effectively precluded from ever dismissing an action for want of

prosecution under the present structure of Rule 41(b) since there is no definition of the phrase "failure to prosecute." Appellant apparently bases his claim that the court lacks discretion upon his misunderstanding of Rule 41(a). It is true that with reference to a *voluntary* dismissal, the court does not have discretion to grant the voluntary motion of the plaintiff to dismiss the entire action if a counterclaim has been filed and the counterclaim may not exist independently of the complaint. However, as noted above, this rule has no application whatsoever to the present situation.

The cases cited above under Point I clearly demonstrate that the courts have recognized that a dismissal for lack of prosecution is within the discretion of the trial court. Those cases also indicate that once that discretion has been exercised by the trial court, the decision may not be overturned on appeal unless a clear abuse of discretion may be demonstrated. A few additional citations might be helpful in further tying down this principle. In *Creemer v. Braaten, supra,* the Supreme Court of Montana phrased it this way:

> "It is within the discretion of the trial court to dismiss an action if it has not been prosecuted with reasonable diligence. It is presumed that the trial court acted correctly and its decision will not be overturned without a showing of an abuse of discretion." 438 P.2d at 554.

The Supreme Court of Idaho in interpreting their Rule 41(b) in the decision of *Beckman v. Beckman, supra,* stated the rule as follows:

> "The trial court's order or judgment dismissing an action for lack of prosecution will be reversed only for an abuse of discretion. [Citing cases.] We are constrained to view that the trial court did not abuse its discretion." 401 P.2d at 812.

In *Horn v. California-Oregon Power Co., supra,* the court required the following kind of demonstration of abuse of discretion before it would overturn the lower court's decision:

> "[W]hen a case has been long neglected and no adequate excuse is offered for the neglect, an inference arises that the case lacks merit. Under those circumstances an affidavit or something of a similar nature should be offered showing that the case actually possesses merit. Nothing of that kind is on file in the case. A party whose case is dismissed in the circuit [trial] court for lack of prosecution and who asks an appellate court to reverse the circuit court's order should see to it that the record contains something substantial which will justify the appellate court's reversing." 351 P.2d at 85.

The federal case law has been summarized in 5 *Moore's Federal Practice,* ¶41.11 [2] at 1125, as follows:

> "Since the order of dismissal for failure to prosecute is discretionary, it will not be disturbed on appeal unless there has been an abuse of discretion."

POINT IV

IN DISMISSING THE COMPLAINT AND COUNTERCLAIM, THE LOWER COURT DID NOT ABUSE ITS DISCRETION.

There is ample evidence contained in the record on appeal that the defendants-appellants are truly guilty of a failure to prosecute and nothing to indicate otherwise. Initially, it is clear that the burden of proceeding forward with the case is upon the claimant. Under normal circumstances, the adverse party has no affirmative duty to move the case forward but needs only to defend against the claim and take whatever steps are necessary in effecting that defense. The Supreme Court of Colorado in interpreting their Rule 41(b) in *Koon v. Barmettler,* 134 Colo. 221, 301 P.2d 713 (1956), stated the rule as follows:

> "The burden rests upon plaintiff and not upon defendant, to prosecute a case in due course and without unusual delay."

That this is also true with reference to the prosecution of a counterclaim is demonstrated by the decision of the Supreme Court of New Mexico in *Pettine v. Rogers,* 63 N.M. 457, 321 P.2d 638 (1958). The plaintiff moved to have defendant's counterclaim dismissed under Rule 41 of the New Mexico Rules of Civil Procedure for want of prosecution. In affirming the trial court's dismissal, the Supreme Court said:

> "The duty rests upon the claimant in every

> stage of the proceeding to use diligence to expedite his case." 321 P.2d at 640.

It should be obvious from the record in this action that the defendant has not carried its burden in proceeding forward with the case. The record on appeal which is the certified file of the district court indicates that the Notice of Readiness of Trial prepared by the defendant which brought this action to a head was in fact never filed. As a result, no official action was taken by the defendant on his counterclaim for approximately 5½ years. As it turns out, the only action taken during that period of time was taken by the planitiff. Defendant's delay has been excessive; it is suggesetd that under the cases cited above, the delay is of a long enough duration to enable the court to assume prejudice on the part of the plaintiff. In addition, the defendant has been in a position during this entire period to serve process on and bring into the action the other parties which defendant alleged were in conspiracy with Brasher Motor Company and as a result should be parties to the action. However, no such action was taken. The case are quite clear that a failure to serve a party which should be and is a part of the action when that party has been available for service clearly demonstrates a lack of due diligence. See, *e.g.*, *Beenally v. Pigman,* 78 N.M. 189, 429 P.2d 648 (1967); *Silverton v. Marler,* 389 P.2d 3 (Alaska 1964).

Defendants have attempted to show justification by claiming that the action was, at the time of the dismissal, being actively prosecuted. They argue that

regardless of the prior delays, now that the action is being prosecuted it may not be dismissed. The whole basis of defendants' counterclaim relates to matters which defendants allege plaintiff did in concert with others whom defendants' counterclaim states would later be joined as third-party defendants. Nothing was done by defendants under Rule 14(a) or otherwise to join such third parties and the statutes of limitations obviously would bar any such actions against such proposed third parties at this late date. How can defendants therefore claim that they either diligently, seriously, or at all pursued their counterclaim? The record is absolutely void of any evidence that the defendants were actively prosecuting their counterclaim. The only basis upon which they may make such a claim is the preparation of a Notice of Readiness for Trial. However, even if defendants had or did file such a notice, it alone would not be sufficient to show an active prosecution of the case. The Supreme Court of Oregon in *Horn v. California-Oregon Power Co., supra,* indicated that a mere filing of a Motion for Continuance was not sufficient to show an active prosecution of the case. The court said:

> "The mere fact that a plaintiff who is accused of inexcusable delay files a motion for a continuance—such as the plaintiff in the case at bar filed—cannot be viewed as an automatic release from the predicament created by the delay for if the plaintiff could escape that easily from the exigency into which his slothful ways cast him, O.R.S. 18.260 and the inherent power of the

> court to dismiss inactive cases would be stripped of their potency." 351 P.2d at 85.

It would appear that much of the language of the Oregon court could be applicable to the filing of a Notice of Readiness for Trial. A filing of such a motion does certainly not, in and of itself, indicate that the party so filing has been actively prosecuting the case. This is especially true with reference to this action where it is obvious that even if such a notice had been filed, the defendant was not prepared to proceed on his counterclaim, since he had never included as parties to the action those he claimed were in conspiracy with Brasher Motor and Finance Company, and furthermore, the case was not even at issue, since plaintiff's Motion to strike the counterclaim filed 5½ years before, had never been called up by defendants or disposed of in any way. In addition, even a cursory reading of the counterclaim demonstrates that substantial discovery work would be necessary to prove the allegations contained therein. No discovery work of the nature required by the counterclaim has been performed. In filing the Notice of Readiness, defendants-appellants had to know that the representations therein were not true because the state of the record showed plainly that the case was *not* at issue. The filing of the Notice of Readiness for Trial appears to have been merely a stalling tactic in hopes of putting pressure on the plaintiff to make some kind of offer of settlement. The California courts have recognized that an attempt to get a trial date was not sufficient

to demonstrate that the plaintiff in fact had been actively prosecuting the case. In *Atkinson v. County of Los Angeles,* 180 Cal. App. 2d 467, 4 Cal. Rptr. 423 (1960), the lower court dismissed an action for want of prosecution. In affirming that decision, the court said:

> "The sole issue on this appeal is whether the trial court abused its discretion in dismissing the action. The discretion was that of the trial court and the exercise thereof will not be disturbed except in cases of manifest abuse. [Citing cases.] The trial court was bound to consider whether the plaintiff had had a reasonable opportunity to bring the action to trial and had discharged the duty imposed upon every person who filed an action to prosecute it with reasonable promptness and diligence. [Citing cases.] The fact that the motion for dismissal was made after a date for trial had been set pursuant to the request filed on September 5, 1957, did not in and of itself preclude the granting of the motion." 4 Cal. Rptr. at 426.

It is obvious that something more than a mere filing of a Notice of Readiness for Trial must be done to demonstrate that the defendants were actively prosecuting their claim.

As an excuse for the lack of diligence in prosecuting his claim and apparently as a justification for a finding of abuse of discretion upon the part of the lower court, the defendants claim that the delay was due in part to the fault of the plaintiff, and in so doing cite the decision of *Crystal Lime & Cement Co. v. Rob-*

bins, 8 Utah 2d 389, 335 P.2d 624. The defendants claim that that case stands for the proposition that whenever either party may bring the action to trial or to a conclusion, a granting of a motion to dismiss for lack of prosecution is improper. However, if such were the holding of that case, it would totally abrogate the operation of Rule 41(b), and no motion to dismiss for lack of prosecution could ever be granted, since both parties to an action are always free to file a Notice of Readiness for Trial, or to call up pending motions. A close reading of the *Crystal Lime & Cement Co.* case clearly demonstrates that the holding of the court is not nearly so broad, and is predicated entirely upon the factual situation in that case. In that case, the plaintiff's complaint and the defendant's counter-claim had been fully tried. The court had rendered a decision in part for the plaintiff on his complaint and also in part for the defendant on his counterclaim. However, neither party filed findings of fact and conclusions of law and no judgment of the court was ever entered. Some 8 years later, the lower court granted defendant's motion to dismiss for failure to prosecute. The Supreme Court reversed holding that since both the defendant and plaintiff had received partial judgment, either could have brought the case to conclusion simply by submitting the proper findings of fact and conclusions of law. As a result, this court said a motion to dismiss made by either party was improper since both parties were equally at fault in failing to bring the matter to a conclusion. This decision is clearly dis-

tinguishable from the instant case. In the *Crystal Lime & Cement* case both parties *equally* shared the responsibility to file the proper papers with the court. It was not a case of equal opportunity, but of equal responsibility. In the present action, plaintiff has no responsibility to prosecute the defendants' case for them. Furthermore, in the *Crystal* case, there was no question of prejudice by reason of testimony or evidence becoming stale or unavailable, because the testimony and evidence had all theretofore been presented.

The plaintiff herein readily admits that it has totally abandoned its complaint and has no intention whatsoever of pressing that action. The Sheriff's Return on the Writ of Replevin showed that none of the property sought by plaintiff could be found (R. 6). The plaintiff made no objection to the court's dismissal with prejudice of its complaint. In effect, the plaintiff became a defendant in the action initiated by the defendants in their counterclaim. The burden therefore was no longer upon the plaintiff to move forward with the case but was upon the defendants to move forward with the case with their counterclaim. We submit that the holding in the *Crystal Lime & Cement* case is in no way pertinent to the matter here before the court.

No fault upon the part of the plaintiff can be shown by the record. There is no evidence of settlement negotiations which might justify the long delay. Nor is there any evidence that the plaintiff instigated the delay by motions to the court for continuances or by

the failure of plaintiff's counsel to appear in court nor otherwise. The record does not disclose evidence that the plaintiff has acquiesced in the defendants' delay or has given them permission either by agreement or stipulation of counsel to delay the proceedings. As a result, the defendants have totally failed to show any justification for their failure to actively and diligently prosecute their counterclaim and to bring it to a conclusion. As a result of this and the failure to show any abuse of discretion on the lower court's part and in face of the extended length of time which this action has lain dormant, the relief sought by defendants on appeal should be denied.

CONCLUSION

We respectfully submit that the trial court had the power on its own motion to dismiss both the complaint and the counterclaim for lack of prosecution; that no abuse of discretion has been or could be shown on the part of the court; and, that the judgment of the trial court should be affirmed.

Respectfully submitted,

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