

2004

Janet Peterson v. Sunrider Corp., dba Sunrider International and Tei Fu Chen : Brief of Appellant

Utah Court of Appeals

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H. Thomas Stevenson; Brad C. Smith; Stevenson & Smith, PC; Attorneys for Defendants and Appellees.

Thomas W. Seiler; Ryan T. Peel; Robinson, Seiler & Glazier, LC; Attorneys for Plaintiff and Appellant.

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JANET PETERSON,)
)
Plaintiff and Appellant,)
)
vs.)
)
)
SUNRIDER CORP., dba SUNRIDER,)
INTERNATIONAL, and TEI FU)
CHEN,)
)
Defendants and Appellees.)

Case No. 20040116-CA

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

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--	--

JUL 06 2004

IN THE UTAH COURT OF APPEALS

JANET PETERSON,)	
)	Case No. 20040116-CA
Plaintiff and Appellant.)	
)	
vs.)	
)	
SUNRIDER CORP., dba SUNRIDER,)	
INTERNATIONAL, and TEI FU)	
CHEN.)	
)	
Defendants and Appellees.)	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

HONORABLE CLAUDIA LAYCOCK, DISTRICT COURT JUDGE

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the trial court abuse its discretion by granting defendants' motion to dismiss for failure to prosecute when the defendants had asserted a counterclaim and where both parties had failed to prosecute their claims for approximately a one year period?

Standard of Appellate Review

In determining whether the trial court properly granted a motion to dismiss for failure to prosecute, the appellate court will review the decision under an abuse of discretion standard. Hartford Lease Corp. v. State, 888 P.2d 694 (Ut. Ct. App. 1994).

Issues Preserved in Trial Court

This issue was preserved in the trial court at R. 1761-1780.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Utah Rules of Civil Procedure 41(b):

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the

plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

Nature of the Case

This matter comes before this Court pursuant to Janet Peterson's (hereinafter referred to as "Peterson") appeal of the Order signed by the Honorable Claudia Laycock, Fourth Judicial District Court Judge, on January 6, 2004, and entered on January 7, 2004.

This case arises out of a claim by Peterson against Sunrider Corporation, d.b.a. Sunrider International (hereinafter collectively referred to as "Sunrider"), for breach of contract and the covenants of good faith and fair dealing, and against Tei Fu Chen

(hereinafter referred to as "Chen"), the Chairman of Sunrider's Board of Directors, for tortious interference with contract.

Course of Proceedings and Disposition Below

Peterson filed a Complaint in the Fourth District Court of Utah, in and for Utah County on March 19, 1996. (R. 1-9). Sunrider and Chen filed their Answer on May 3, 1996. (R. 13-19). Peterson subsequently filed an Amended Complaint on September 11, 1996. (R. 42-53). Sunrider and Chen filed an Answer To Amended Complaint And Counterclaim on October 8, 1996. (R. 54-63), and Peterson filed an Answer To Counterclaim on October 9, 1996. (R. 64-66).

After successfully appealing to the Utah Supreme Court the dismissal of Peterson's claim, this matter was remanded to the Fourth District Court on May 16, 2002, for further proceedings. (R. 1730-1750). On August 29, 2003, Sunrider and Chen filed a Motion to Dismiss for Failure to Prosecute with accompanying Memorandum in Support of Motion to Dismiss for Failure to Prosecute. (R. 1755-1760). On September 16, 2003, Peterson filed a Memorandum of Points and Authorities in Opposition to the Motion to Dismiss for Failure to Prosecute (R. 1761-1780). Sunrider and Chen filed a Reply to Plaintiff's Memorandum in Opposition to Motion to Dismiss for Failure to Prosecute on September 29, 2003. (R. 1781-1784).

On November 26, 2003, a Ruling on Defendants' Motion to Dismiss for Failure to Prosecute was filed. (R. 1788-1795). The Order of Dismissal With Prejudice was entered on January 7, 2004. (R. 1801-1802).

Statement of Facts

1. After filing an initial Complaint, Peterson filed an Amended Complaint on September 11, 1996, to which Sunrider and Chen filed an Answer To Amended Complaint And Counterclaim on October 8, 1996. (R. 42-63).

2. Sunrider's and Chen's Counterclaim stated that "a case and controversy exists between the parties regarding their respective rights and duties" and sought a judicial determination of the force, scope and effect any agreements which may govern the relationship between the parties. (R. 55-56).

3. On May 18, 1998, the Honorable Howard H. Maetani held consolidated oral arguments on Peterson's motion for partial summary judgment, and Sunrider's and Chen's motions to dismiss and for summary judgment, as well as other non-dispositive motions filed by both Peterson and Sunrider and Chen. (R. 1472).

4. On June 15, 1998, Judge Maetani issued a Memorandum Decision granting Sunrider's and Chen's motions to dismiss and for summary judgment, and denying Peterson's motion for partial summary judgment. (R. 1575-85).

5. On October 6, 1998, Judge Maetani signed and entered an Order memorializing his ruling in the June 15, 1998 Memorandum Decision. (R. 1613-16).

6. On October 14, 1998, Peterson filed a Notice Of Appeal with the trial court. (R. 1620-21).

7. On December 15, 1998, Chief Justice Howe signed an Order dismissing Peterson's appeal because the Order appealed from was ruled to be a nonfinal judgment. (R. 1640).

8. On January 21, 2000, the Supreme Court issued a Remittur to the trial court. (R. 1641).

9. On March 31, 2000, the Honorable James R. Taylor entered an Order adopting the findings and conclusions of fact and law in Judge Maetani's June 15, 1998 Memorandum Decision, granting Sunrider's and Chen's motions to dismiss and for summary judgment, and denying Peterson's motion for partial summary judgment. (R. 1668-69).

10. On April 19, 2000, Peterson filed a Notice Of Appeal with the trial court. (R. 1690-91).

11. On April 26, 2002, the Utah Supreme Court entered its decision, which reversed the order dismissing Peterson's claims, affirmed the denial of Peterson's Motion for Summary Judgment, and remanded the matter to the trial court. (R. 1739-1748).

12. On July 8, 2003, a scheduling conference was held before Judge Laycock; present were counsel for Peterson, Sunrider and Chen. (R. 1754).

13. According to the Minutes of Scheduling Conference for July 8, 2003, "the amended complaint is to be filed by 8-12-2002. Counsel will then file a scheduling order and a pre-trial may be set at that time." (R. 1754).

14. On August 29, 2003, Sunrider and Chen filed a Motion to Dismiss for Failure to Prosecute with accompanying Memorandum in Support of Motion to Dismiss for Failure to Prosecute. (R. 1755-1760).

15. On November 26, 2003, a Ruling on Defendants' Motion to Dismiss for Failure to Prosecute was filed, which granted the motion, and the Order of Dismissal With Prejudice was entered on January 7, 2004. (R. 1788-1795 and 1801-1802).

SUMMARY OF ARGUMENT

The trial court erred in entering the January 7, 2004 Order of Dismissal with Prejudice. The trial court abused its discretion in dismissing with prejudice Peterson's case where Sunrider and Chen had asserted a counterclaim and neither the Plaintiff nor the Defendants had failed to prosecute their claims within a one year period.

ARGUMENT

I. Did the trial court abuse its discretion by granting defendants' motion to dismiss for failure to prosecute when the defendants had asserted a counterclaim and where both parties had failed to prosecute their claims for approximately a one year period?

Pursuant to Utah Rules of Civil Procedure 41(b), a defendant may move for dismissal of an action or of any claim against him for the plaintiff's failure to prosecute. In reviewing whether a motion to dismiss for failure to prosecute, the trial court has discretion whether to grant such a motion. Wilson v. Lambert, 613 P.2d 765 (Utah 1980). The trial court must consider the following factors when determining whether to grant a motion to dismiss for failure to prosecute: (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side by the party's delay; and (5), most important, whether injustice may result from the dismissal. Maxfield v. Rushton, 779 P.2d 237 (Ut. Ct. App. 1989), cert. denied, 789 P.2d 33 (Utah 1989) citing K.L.C. Inc. v. McLean, 656 P.2d 986 (Utah 1982) and Utah Oil Co. v. Harris, 565 P.2d 1135 (Utah 1977).

A review of the record indicates that both Sunrider and Chen have not undertaken any action to move this case to a resolution during the approximately one year Peterson failed to act—no correspondence with Pedersen's counsel inquiring about the status of the Amended Complaint, no further discovery, no inquiry about a pre-trial conference, and no follow-up on a Motion to Compel which was granted, which required Pedersen to provide

additional answers to Sunrider's and Chen's Interrogatories. Furthermore, both Sunrider and Chen did nothing to prosecute their counterclaim, the declaratory judgment regarding any contractual relationships between the parties. The Utah Supreme Court has held that it was an abuse of discretion for the trial court to dismiss an action for failure to prosecute where either party could have obtained relief to bring the case to a conclusion, but neither did so for almost four years. Johnson v. Firebrand, Inc., 571 P.2d 1368 (Utah 1977). The Johnson court reasoned that "since any party to this action could have obtained the relief to which was entitled...but both parties chose to dally for a number of years, it was an abuse of discretion to grant respondent's motion to dismiss." Johnson, 571 P.2d at 1369 quoting Crystal Lime & Cement Co.v. Robbins, 8 Utah 2d 389, 393. 335 P.2d 624, 626 (1959). In Crystal Lime, the case lay idle for approximately eight years when the defendant sought a motion to dismiss for failure to prosecute; however, the Crystal Lime court reasoned that because the defendant had filed a counterclaim, it had become "cross-complainants in the action" and could not seek to dismiss the opposing party's claim when he himself had dallied "for a number of years." Crystal Lime, 8 Utah 2d at 393, 335 P.2d at 626. Like the defendant in Crystal Lime, both Sunrider and Chen have filed a Counterclaim, seeking declaratory relief from this Court and have become "cross-complainants" in this matter. And also like the defendant in Crystal Lime, Sunrider and Chen cannot seek to dismiss Peterson's claim because of a failure to prosecute when they themselves have not prosecuted their own claims within the same period of time.

Another factor which the trial court must weigh is what difficulty or prejudice may have been caused to the other side by the delay. Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975). Both Sunrider and Chen have not suffered any prejudice as a result of a nearly one year delay in this matter. In fact, nowhere in the Defendants' Memorandum in Support of the Motion to Dismiss does either Sunrider or Chen allege that they have been prejudiced by the one year delay. (R. 1755-1760).

The most important Maxfield factor is whether injustice may result from the dismissal of the action. Maxfield, 779 P.2d at 239. This matter has been ongoing for several years—through two appeals and countless motions and discovery—and will soon be ready for trial since most of the discovery has already occurred. It would serve as a great injustice to Peterson, who has undertaken extensive prosecution of this matter from depositions to an appeal before the Utah Supreme Court, if her claims are summarily dismissed because both her and the opposing parties failed to act during the past year.

It is further important to note that in other cases whether one party sought dismissal of the case for failure to prosecute, the actual time period which the matter had sat idle was a greater time than merely the one year in the present action. The Utah Supreme Court has found that it was not an abuse of discretion to grant a motion to dismiss for failure to prosecute where five and a half years had elapsed before prosecuting the claim. Brasher Motor & Fin. Co. v. Brown, 23 Utah 2d 247, 461 P.2d 464 (1969). See also Grundman v. Williams & Peterson, 685 P.2d 538 (Utah 1984) (a period of four years of case

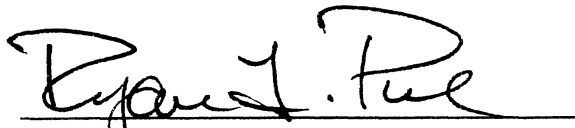
idleness), Johnson v. Firebrand, Inc., 571 P.2d 1368 (Utah 1977) (where neither party brought the case to a conclusion for nearly four years), Country Meadows Convalescent Ctr. v. Utah Dept. of Health, 851 P.2d 1212 (Ut. Ct. App. 1993) (inactivity for over five years), and Crystal Lime & Cement Co. v. Robbins, 8 Utah 2d 389, 335 P.2d 624 (1959) (inactivity by both parties over an eight year period). The period where this matter has sat idle is only approximately one year and has not been a sufficient time whereby the trial court could have found that Peterson has failed to prosecute her claims.

CONCLUSION

Based upon the foregoing reasons and analysis, Peterson respectfully requests that this Court reverse the trial court's January 7, 2004 Order of Dismissal with Prejudice.

DATED this 6th day of July, 2004.

ROBINSON, SEILER & GLAZIER, LC

A handwritten signature in dark ink, appearing to read "Ryan T. Peel", is written over a horizontal line.

Thomas W. Seiler

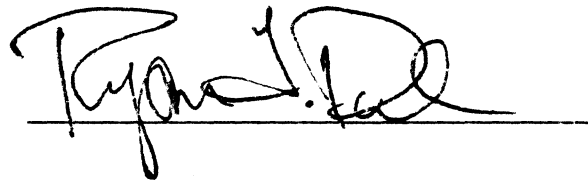
Ryan T. Peel

Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of July, 2004, I caused the foregoing Brief of Appellant to be served upon Appellees by mailing, via first class mail, true and correct copies of the same, to:

H. Thomas Stevenson
Brad C. Smith
STEVENSON & SMITH, PC
3986 Washington Blvd.
Ogden, UT 84403

A handwritten signature in black ink, appearing to read "Ryan L. Peterson", is written over a horizontal line.

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ADDENDUM

1. November 26, 2003 Ruling on Defendants' Motion to Dismiss for Failure to Prosecute
2. January 7, 2004 Order of Dismissal With Prejudice

Tab 1

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
3:24 pm - 11/25/03 Depl
6

**IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH**

<p>JANET PETERSON,</p> <p>Plaintiff,</p> <p>v.</p> <p>SUNRIDER CORP., dba SUNRIDER INTERNATIONAL, and TEI FU CHEN,</p> <p>Defendants.</p>	<p>RULING ON DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO PROSECUTE</p> <p>Date: November 26, 2003 Case No. 960400174 Judge Claudia Laycock Division 5</p>
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This matter comes before the Court on a *Motion to Dismiss for Failure to Prosecute*, filed by the defendants, Sunrider Corp., dba Sunrider International, and Tei Fu Chen ("defendants"), which was fully briefed and submitted to the Court on October 1, 2003. Defendants requested a hearing; however, pursuant to Rule 4-501(3)(C)(b), the Court deems a hearing unnecessary, as the "dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided." Therefore, having read the memoranda and being duly informed, the Court now enters the following ruling.

RELEVANT FACTS

1. The original complaint in this matter was filed on March 19, 1996.
2. After a pretrial conference on March 11, 1999, no action was taken by plaintiff for a period of ten months.
3. Defendants brought a motion to dismiss for failure to prosecute on February 2, 2000.
4. Defendant's motion to dismiss was submitted to the Court on February 22, 2000,

without a response from plaintiff. Plaintiff filed an untimely response on February 24, 2000.

5. After defendants filed the motion to dismiss, plaintiff began the series of actions to secure a final order and start the appellate process.

6. On March 30, 2000, Judge James R. Taylor signed an order which clarified previous orders and provided a “final order,” so that plaintiff could begin her appeal.

7. On April 30, 2000 plaintiff filed her notice of appeal.

8. On April 26, 2002 the Supreme Court of Utah issued an opinion which reversed the summary judgment order dismissing plaintiff’s claim, affirmed the denial of plaintiff’s own motion for partial summary judgment, and remanded the case back to the district court level.

9. On May 14, 2002 this case was remitted back to the district court for proceedings consistent with the previously issued opinion.

10. On June 10, 2002 counsel for defendants filed a document entitled *Request for Scheduling Conference*, asking to establish dates for the completion of discovery and other pre-trial activities.

11. During a scheduling conference held on July 8, 2002, this Court ruled that Janet Peterson (“plaintiff”) could file an amended complaint and established August 12, 2002 as a deadline for such filing. The Court also ordered the parties’ attorneys to then file a scheduling order, after which a pretrial conference could be set.

12. The amended complaint has never been filed, nor have the parties’ attorneys ever filed a scheduling order or requested a pretrial conference. In fact, no further documents were filed by either party until August 29, 2003.

13. On August 29, 2003, counsel for defendants filed their *Motion to Dismiss for Failure to Prosecute*, asking the Court to dismiss this action according to Rule 41(b) of the Utah Rules of Civil Procedure, because plaintiffs have done nothing to advance this case since the July 8, 2002 hearing.

14. On September 16, 2003 plaintiff filed a memorandum in opposition to the motion.

15. On September 29, 2003 defendants filed a reply memorandum.

16. On October 1, 2003 plaintiff filed a notice to submit.

DISCUSSION

Rule 41(b) states in relevant part, “For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision...operates as an adjudication upon the merits.” Both parties acknowledge that a significant portion of the decision on a motion to dismiss is based upon the Court’s discretion. *See Wilson v. Lambert*, 613 P.2d 765, 767 (Utah 1980).

In addition to the “mere elapse of time,” the court may consider the following factors when interpreting Rule 41(b) and motions to dismiss for failure to prosecute: “(1) ‘The conduct of both parties’; (2) the opportunity available to each party to move the case forward; (3) what each party has accomplished in moving the case forward; (4) the difficulty or prejudice imposed on the opposing party by reason of the delay; and (5) “‘most important, whether injustice may result from the dismissal.’” *Hartford Leasing Corp. v. State of Utah*, 888 P.2d 694, 697-698 (Ut.

App. 1994). These are factors that the court *may* consider, but they are neither mandatory nor exhaustive.

The case presently before the Court was filed in 1996 and has had a long and complicated history, including a ruling on summary judgment that was appealed to and reversed by the Utah Supreme Court. Although the case was remitted to the district court level on May 14, 2002, the record demonstrates that plaintiff has made no attempt to move this case along since that date. Defendants have filed the only two motions found in the file since May 2002: (1) a motion for a scheduling conference and (2) this motion for dismissal for failure to prosecute. Both parties appeared at the July 8, 2003 hearing before the Court, at which time the Court granted plaintiff's request to file her amended complaint adding a new party. Plaintiff subsequently failed to comply with the Court's deadline, and, to this date, has still not submitted an amended complaint.

Plaintiff argues that defendants should not prevail on this motion because the "defendants have done nothing in the past year to move this case forward." Specifically, plaintiff faults defendants for (1) their failure to inquire through correspondence as to the status of the amended complaint, (2) their failure to undertake any further discovery, (3) their failure to inquire about the required attorneys' planning meeting, and (4) their failure to follow up on their earlier successful motion to compel (requiring plaintiff to provide additional answers to

interrogatories).¹ Surprisingly, plaintiff offers no excuse or justification for her failure to file her amended complaint or for her failure to set up the Rule 26 meeting and to request a pretrial conference.

Based upon the particular circumstances of this case, the Court finds that it was not defendants' responsibility to move this case forward. Placing that burden upon defendants would have put them in the absurd position of begging plaintiff to file her amended complaint so that defendants could respond to it and proceed with discovery. Clearly, defendants had no motive to incur the additional cost of further discovery or trial, when plaintiff was supposed to file an amended complaint, but did not. As stated in *Hartford*:

We pause to note the obvious: What each party has done to move the case forward can only be evaluated in light of each party's responsibility concerning the case. Of course, the plaintiff, as the party initiating the lawsuit, has the primary responsibility to move the case forward. The defendant's responsibility is limited to responding timely to the action, expeditiously attending to discovery, and moving any counterclaim along. The defendant has no general responsibility to move plaintiff's action to judgment.

Id. at 698.

This Court finds that defendants have fulfilled their responsibility in this matter, as they have had no "general responsibility" since July 8, 2003 to "move plaintiff's action to judgment."

Id. In the history of this case, plaintiff has twice allowed this case to stagnate; however, this

¹Plaintiff's counsel has submitted no support for this position through affidavit or any other evidentiary source. The Court can determine from the file that no discovery documents have been filed by either party subsequent to the July 8, 2003 hearing (other than the present motion, etc.), but the Court has absolutely no admissible evidence before it that there has been no correspondence between the parties or inquiry about the attorneys' planning meeting.

second occasion is of greater concern, as it was clearly plaintiff's responsibility to move this forward after her successful appeal. More than a year elapsed before defendants filed their motion to dismiss; plaintiff accomplished absolutely nothing during that year-plus time period.

The Court is not persuaded by plaintiff's arguments that, since this case was filed in 1996, a one-year delay does not prejudice the defendants. The opposite argument is much more persuasive; where the case was already 6 years old when the appellate decision was rendered, time was clearly of the essence, and plaintiff should have kept this matter moving.

Plaintiff also argues that the matter "will soon be ready for trial," dismissing the case "would serve as a great injustice" to the plaintiff, and one year of inactivity does not justify dismissal. The case law indicates that the simple matter of time is highly fact-sensitive and is not determinative. In this case, which is now almost 8 years old, the Court has nothing before it which would persuade it that the case will soon be ready for trial, especially when the last hearing before this Court resulted in permission for plaintiff to file an amended complaint, which would add a party. The Court is also persuaded that the plaintiff's inattention to this case during 2 distinct time periods demonstrates that plaintiff fears no great prejudice due to dismissal of this matter; otherwise, she would have kept this matter moving forward.

Any injustice that results from this dismissal is outweighed by plaintiff's own lack of interest in the case and the injustice to defendant of carrying the burden of a law suit forward on behalf of plaintiff.

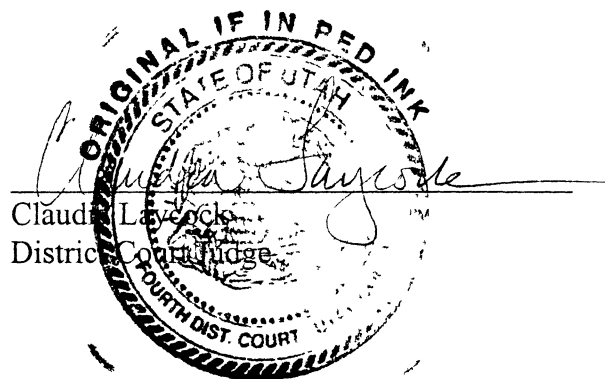
CONCLUSION

Defendant's *Motion to Dismiss for Failure to Prosecute* is granted. Counsel for

defendant is to prepare findings of fact, conclusions of law and an order consistent with this ruling.

DATED this 26th day of November, 2003.

Case No. 960400174



CERTIFICATE OF MAILING

I hereby certify that I served the foregoing by mailing a true and exact copy thereof,
postage prepaid on the 25th day of November, 2003, to:

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Deputy Court Clerk

Tab 2

FILED
Fourth Judicial District Court
of Utah County, State of Utah

1/7/04 11:21 Deputy

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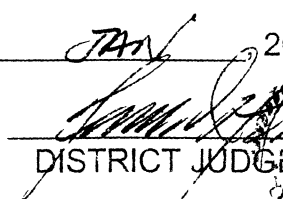
Attorneys for Defendants

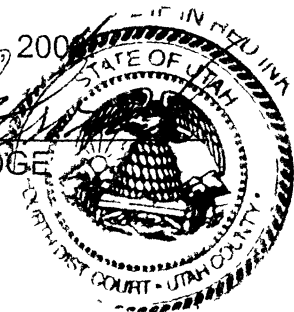
IN THE FOURTH DISTRICT COURT FOR UTAH COUNTY
PROVO DEPARTMENT
STATE OF UTAH

JANET PETERSON,	:	
	:	ORDER OF DISMISSAL
Plaintiff,	:	WITH PREJUDICE
vs.	:	
SUNRIDER CORP., dba SUNRIDER	:	Case No. 960400174
INTERNATIONAL, and TEI FU	:	Judge: Claudia Laycock
CHEN,	:	
Defendants.	:	

The above-entitled matter came on regularly on Defendant's motion to dismiss for failure to prosecute. The court having entered its ruling, and findings of fact and conclusions of law in favor of Defendant, the Court hereby ORDERS, ADJUDGES AND DECREES that the above-entitled case be and hereby is dismissed with prejudice based upon Plaintiff's failure to prosecute.

DATED this 6 day of JAN 2004


DISTRICT JUDGE



APPROVED AS TO FORM:

Thomas H. Seiler
Attorney for Plaintiff

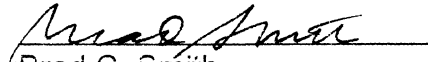
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RULE 4-504 NOTICE

Pursuant to Rule 4-504 of the Code of Judicial Administration, the undersigned will submit the foregoing Order to Judge Claudia Laycock of the Fourth Judicial District Court of Utah County, for signature upon the expiration of eight days from December 16 2003, unless written objection is filed prior to that time.

STEVENSON & SMITH, P.C.


Brad C. Smith
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Order by U.S. Mail, postage prepaid, this 16 day of December, 2003, to the following:

Thomas H. Seiler
ROBINSON, SEILER & GLAZIER
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P.O. Box 1266
Provo, UT 84603-1266

