2004

# Janet Peterson v. Sunrider Corp. Sunrider, International, Tei Fu Chen : Reply Brief

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

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

**REPLY 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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### I. Even With Defendants' Counterclaim Dismissed, the Trial Court Still Abused Its Discretion in Dismissing Plaintiff's Case for Failure to Prosecute.

Defendants' counsel correctly points out that in the trial court's Order dated March 30, 2000 and entered on March 31, 2000 the Defendants' counterclaim was dismissed by the trial court. However, even with the Defendants' counterclaim dismissed, the trial court still abused its discretion in dismissing the Plaintiff's case for failure to prosecute where neither party pursued this case for nearly one year.

In analyzing any dismissal for failure to prosecute, the five factors must be considered: (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). The trial court's discretion in determining whether to dismiss for failure to prosecute "'must be balanced against' the priority of 'affording disputants an opportunity to be heard and to do justice between them.'" Rohan v. Boseman, 2002 UT App 106, ¶28, 46 P.3d 753, quoting Maxfield, 779 P.2d at 239 and Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 554 P.2d 876, 879 (Utah 1975). Even without

considering the Defendants' counterclaim, the trial court still abused its discretion in dismissing the Plaintiff's case.

**a. The conduct, opportunity and accomplishments of both parties.**

The first three Maxfield factors requires this Court to examine each party's actions or inactions, the opportunity each party had to move the case along, as well as the overall conduct of the parties. In reviewing both the Defendants' and the Plaintiff's actions, it appears that substantial discovery occurred throughout this case, albeit before the Plaintiff's appeal to the Utah Supreme Court in 2000. This extensive discovery process included the Plaintiff taking numerous depositions in California, as well as many written discovery requests, which were subject to several motions to compel. Indeed, at the July 8, 2002 hearing before Judge Claudia Laycock, Plaintiff's counsel stated "there is a lot of discovery that was done almost five years ago..." (Brief of Appellees, Exhibit E, p. 6). Thus, both parties completed substantial discovery before the Plaintiff's appeal to the Utah Supreme Court in 2000. In interpreting the corresponding federal rule, some courts may excuse a delay in prosecuting an action when the plaintiff has been otherwise diligent. Romandette v. Weetabix Co., 807 F.2d 309 (2d Cir. 1986). In the present action, the Plaintiff has been diligently pursuing her claim for several years, and a nearly one year delay should not cause her entire claim to be dismissed.

The Defendants attempt to portray the time incurred in the appeals process as further delay of Plaintiff prosecuting her case. However, federal courts have also found

that only delay which are attributable to the plaintiff should be considered in deciding a motion to dismiss for failure to prosecute. Rogers v. Kroger Co., 669 F.2d 312, 317 (5th Cir. 1982).

While this case was filed in 1996, a motion for summary judgment was granted in June, 1998. During that time, the Plaintiff was diligent in pursuing discovery, including the numerous California depositions. The Plaintiff appealed that decision but because it was not a final order, the appeal was dismissed on December 15, 1998. Therefore, because of a dismissed appeal, a six month time period elapsed because of the timing of the appellate courts. When the trial court was finally able to enter a finalized order granting the June, 1998 motion for summary judgment, which order was entered on March 31, 2000, the Plaintiff again sought an appeal in April, 2000. Again, because of the timing of the appellate process, this case was not ruled upon by the Utah Supreme Court until April 26, 2002, and remitted to the trial court in May, 2002. Because of a successful appeal, the Plaintiff's case was delayed for over two years. The time elapsed during these two appeals processes, over two and a half years, should not be characterized as the Plaintiff's fault in further delaying the prosecution of this case. What is only before this Court is the nearly one year period of time from July, 2002 to August, 2003; any other period of delay cannot be attributed to the Plaintiff.

Utah case law has demonstrated that the time period for delay regarding a dismissal of a case for failure to prosecute is a much larger length of time than the mere one year in

this matter. Brasher Motor & Fin. Co. v. Brown, 23 Utah 2d 247, 461 P.2d 464 (1969) (a period of five and a half years), Grundman v. Williams & Peterson, 685 P.2d 538 (Utah 1984) (a period of four years), Country Meadows Convalescent Ctr. v. Utah Dept. of Health, 851 P.2d 1212 (Ut. Ct. App. 1993) (a period of five years), and Crystal Lime & Cement Co.v. Robbins, 8 Utah 2d 389, 335 P.2d 624 (1959) (a period over eight years). The period where this matter has sat idle is merely one year and has not been a sufficient time whereby the trial court could have found that the Plaintiff has failed to prosecute her claims.

**B. The prejudice to the Defendant by the Plaintiff's one year delay.**

The fourth Maxfield factor which this Court must consider is what prejudice may have been caused to the Defendants by the Plaintiff's one year delay. See also Westinghouse, 544 P.2d 876 . A federal court, interpreting the corresponding federal rule, has held that a dismissal for failure to prosecute would be improper when the defendant made no claim of prejudice by the delay. Ford v. Sharp, 758 F.2d 1018, 1021 (5th Cir. 1985).

In the present case, the Defendants never claimed nor provided any evidence to the trial court that they were prejudiced by the Plaintiff's one year delay. The Defendants argue that "Defendant is a corporation and many of the witnesses who were present prior to the first appeal in 1998, have sought other employment in the intervening six years." (Brief of Appellees, p. 29). However, the Defendants never provided any evidence of its

employees seeking other employment in the intervening six years. This Court does not have any evidence before it that the Defendants were prejudiced by the Plaintiff's one year delay—indeed, an examination of both the Defendants' Memorandum in Support of Motion to Dismiss for Failure to Prosecute and Reply to Plaintiff's Memorandum in Opposition to Dismiss for Failure to Prosecute do not contain any evidence of prejudice. (R. 1755-1760, 1781-1784). Since there is no evidence of prejudice to the Defendants before this Court, this Court must conclude that there is no prejudice to the Defendant as a result of the one year delay.

**C. Injustice will result from the dismissal of the Plaintiff's case.**

The final, and most important Maxfield factor is whether injustice may result from the dismissal of the Plaintiff's claims. Maxfield, 779 P.2d at 239. The Plaintiff has diligently prosecuted her case for several years, conducting extensive written discovery, taking numerous depositions of the Defendants' out of state employees, filing and opposing motions for summary judgment, as well as availing herself of her right to appeal. This case has been ongoing for several years, whereby the Plaintiff has been prosecuting her claim during most of that time; the Plaintiff's claims should not be so summarily dismissed for the lapse of a short period of time, after such extensive discovery and successfully appealing a motion for summary judgment against her. Such action would be inherently unfair and serve as a great injustice to Plaintiff by not allowing her to bring

her claims before the trial court after such an exhaustive discovery phase and successful appellate litigation.

## II. Plaintiff's Argument is Not Frivolous Within the Meaning of Ut. R. App. P. 40 and Sanctions are Inappropriate.

Defendants' contend that Plaintiff's argument on appeal is subject to sanctions by this Court pursuant to Utah Rules of Appellate Procedure 40(a), because Plaintiff's argument "hinges exclusively on her factual assertion that under applicable Utah case law, such a dismissal was improper where there was a pending counterclaim..." (Brief of Appellees, at 33). Defendants seek sanctions, specifically attorney's fees, for having to respond to such an argument when the Defendants dismissed their counterclaim before the Plaintiff's appeal to the Utah Supreme Court in 2000. However, as argued above, even with the Defendants' counterclaim dismissed, the trial court abuse its discretion in dismissing the Plaintiff's claims for failure to prosecute where the Plaintiff's delay was only a one year period in an action which has been ongoing since 1996 and which has been at the appellate level for over two and a half years (not including this appeal) and where no evidence of prejudice was presented by the Defendants. Under Rule 40(a), Utah Rules of Appellate Procedure 33, is referenced, which allows this Court to award damages for the presentation of a frivolous appeal. 'Frivolous' is defined as "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Ut. R. App. P. 33(b). As demonstrated by the Plaintiff's arguments, her appeal of the trial court's dismissal of her claims for failure to prosecute

are adequately grounded in fact, even without the additional fact of the Defendants' counterclaim, and warranted by existing law.

As to the Defendants' contention that the Plaintiff's Docketing Statement contained an error as to the number of appeals in this case, Plaintiff's counsel recognizes and admits that the Docketing Statement failed to state the first appeal in this case, which was dismissed on December 15, 1998 as a not originating from a final, appealable order. However, the Defendants argue that had Plaintiff reviewed the 2000 Docketing Statement, Plaintiff would have discovered the first appeal. An examination of the 2000 Docketing Statement states that there are "no prior or related appeals." Therefore, a review of the 2000 Docketing Statement would not have discovered the prior appeal as Defendants contend. Additionally, case law interpreting the requirement of a Docketing Statement, Utah Rules of Appellate Procedure 9, have held that without any prejudice alleged to be suffered by a party for an untimely filing of a docketing statement, a dismissal for failure to follow the requirements are discretionary with the appellate Court. Gorostieta v. Parkinson, 2000 UT 99, 17 P.2d 1110. The same reasoning could be extended to the incorrect listing of prior appeals—absent any real prejudice to be suffered by the Defendants, there is actually no harm because the fact of the first appeal has been brought to the Court's attention.

Utah courts have held that sanctions for frivolous appeals:

> should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions. However,

> sanctions should be imposed when 'an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delayed implementation of the judgment of the lower court; increased costs of litigation; and dissipation of the time and resources of the Law Court.'

Porco v. Porco, 752 P.2d 365, 369 (Ut. Ct. App. 1988) citing Auburn Harpswell Ass'n v. Day, 438 A.2d 234, 239 (Me. 1981). The facts of this case do not constitute an egregious case, is taken with substantial merit and has a reasonable likelihood of success. Additionally, Utah court decisions which have awarded sanctions for frivolous appeals have demonstrated, by their particular facts, to be most egregious: Porco, 752 P.2d 365, (plaintiff's apparent harassment of defendant through repeatedly bringing civil actions and forcing her to pay substantial court costs and attorney fees) and Lundahl v. Quinn, 2003 UT 11, 67 P.3d 1000 (plaintiff's history of numerous frivolous litigation). Surely, Plaintiff's case does not fall within such parameters of awarding sanctions and Defendants' claims for such damages are inappropriate and should not be allowed by this Court.

## CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that this Court determine that the trial court abused its discretion by dismissing the Plaintiff's case for a failure to prosecute for a one year time period and reverse the trial court's January 7, 2004 Order of Dismissal with Prejudice.

Additionally, Plaintiff's argument on appeal is presented without an attempt to delay nor is it frivolous and Defendants' claims for appropriate sanctions should not be allowed.

DATED this 9th day of September, 2004.

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CERTIFICATE OF MAILING

I hereby certify that on the 13th day of September, 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:

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