

1993

Jim Pratt Hansen, et al. v. George Sutton, et al. : Petition for Writ of Certiorari

Utah Court of Appeals

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BRIEF

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IN THE SUPREME COURT OF UTAH

* * * *

JIM PRATT HANSEN, et al.,
Plaintiffs/Petitioners,
vs.

GEORGE SUTTON, et al.,
Defendants/Respondents.

* PETITION FOR
* WRIT OF CERTIORARI
*
*
*
* Case No. 930525
*
* Priority No. 15

* * * *

PETITION FOR WRIT OF CERTIORARI IN CONNECTION WITH
AN OPINION OF THE UTAH COURT OF APPEALS AFFIRMING A FINAL ORDER
OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE TIMOTHY R. HANSEN PRESIDING

* * * *

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the retained assets of Murray
First Thrift and Loan; and Elaine
B. Weis, individually, and as
former Commissioner of Financial
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FILED

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UTAH

IN THE SUPREME COURT OF UTAH

* * * *

JIM PRATT HANSEN, et al.,	*	PETITION FOR
	*	WRIT OF CERTIORARI
Plaintiffs/Petitioners,	*	
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vs.	*	
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LIST OF ALL PARTIES

In accordance with Rule 49(a)(1) of the Utah Rules of Appellate Procedure, Petitioners submit the following list of parties:

Plaintiffs/Petitioners

Jim Pratt Hansen
Rodney F. Gordon
Murray First Thrift and Loan Company
MFT Financial, Inc.
MFT Mortgage Co.

Defendants/Respondents

George Sutton, individually, as Commissioner of the Department of Financial Institutions of the State of Utah, as Commissioner in Possession of the Industrial Loan Guaranty Corporation of Utah, and as Trustee of the retained assets of Murray First Thrift and Loan Company

Elaine B. Weis, individually and as former Commissioner of the Department of Financial Institutions of the State of Utah

Mervin Borthick, individually and as former Commissioner of the Department of Financial Institutions of the State of Utah

The Department of Financial Institutions of the State of Utah

The Industrial Loan Guaranty Corporation of Utah

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QUESTION PRESENTED FOR REVIEW

Whether the state law breach of contract claim alleged in Count One of the Complaint in the instant case is barred by the prior final order of the United States District Court for the District of Utah which dismissed with prejudice Plaintiffs' federal law claims based upon the same operative facts as those set forth in support of Count One.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The Opinion of the Utah Court of Appeals was filed on July 20, 1993, and was published at 217 Utah Adv. Rep. 33.

STATEMENT OF JURISDICTION

A. The Opinion sought to be reviewed was entered July 20, 1993.

B. Plaintiffs' Petition For Rehearing was denied by Order entered September 23, 1993.

C. The Court has sole discretion in granting or denying this Petition For Writ Of Certiorari pursuant to Utah Code Ann. Section 78-2-2(5).

CONTROLLING STATUTES

Utah Code Ann. Section 78-12-40 (1953)

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Utah Code Ann. Section 78-12-23(2) (1984)

Within six years:

...
(2) An action upon any contract, obligation, or liability founded upon and instrument in writing, except those mentioned in Section 78-12-22.

STATEMENT OF THE CASE

(A) Nature of Case, Course of Proceedings and Disposition in Lower Courts

This is an action for damages in which Plaintiffs have alleged the breach of a written contract which they entered into with Defendants on July 17, 1981.¹

Plaintiffs filed their Complaint commencing this action on June 5, 1990. Upon Defendants' motion, the District Court entered its order dismissing the Complaint on December 31, 1990. Plaintiffs timely filed their Notice Of Appeal on January 29, 1991.

The Court Of Appeals issued its Opinion affirming the District Court's order of dismissal on July 20, 1993. Plaintiffs filed a Petition For Rehearing on July 28, 1993. Defendants' response to the Petition For Rehearing was filed on September 14, 1993. Plaintiffs filed a Motion For Leave To File Reply In Support Of Petition For Rehearing on September 21, 1993. The Court Of Appeals issued orders denying both the Petition For Rehearing and the Motion For Leave To File Reply In Support Of Petition For Rehearing on September 23, 1993.

¹The breach of contract at issue in this petition is alleged in Count One of the Complaint.

(B) Statement of Facts Relevant to the Issues Presented for Review

1. On or about March 14, 1979, Defendant Mervin Borthick, acting in his capacity as Commissioner of the Department of Financial Institutions of the State of Utah, issued an order (hereinafter referred to as the "Impairment Order") placing certain restrictions upon the operations of Plaintiff Murray First Thrift and Loan Company ("MFT&L") on the grounds that MFT&L was:

1. Conducting its business in an unsound and unsafe manner;
2. Pursuing plans which jeopardized the position of its thrift holders;
3. Operating with an impairment of capital; and
4. Had violated a law applicable to industrial loan corporations.

(R. 00006).

2. The Impairment Order also recommended certain corrective action in order to avoid having "the Commissioner of Financial Institutions, under authority of Section 7-2-1 Utah Code Ann. 1953, as amended, to forthwith take possession of the business and property of Murray First Thrift & Loan Co." (R. 00006-7).

3. At the time of the issuance of the Impairment Order, approximately eighty percent (80%) of the stock of MFT&L's parent corporation, Plaintiff MFT Financial ("MFTF") was owned by MFT Holding Company, which in turn was one-hundred percent (100%) owned by R. Howard Harmer, Cora Beth Harmer, Franklin Johnson and Glendon Johnson. (R. 00008-9).

4. At all relevant times, Plaintiffs Rodney F. Gordon and Jim P. Hansen were controlling shareholders, officers and/or

directors of Irving Financial Corporation. (R. 00009).

5. Motivated in large part by the restrictions imposed upon MFT&L under the terms of the Impairment Order, R. Howard Harmer, Cora Beth Harmer, and R. Howard Harmer, Trustee for Glendon Johnson and Franklin Johnson, as "Sellers", entered into a Stock Purchase Agreement dated October 6, 1980, whereby said parties agreed to sell their stock in MFT Holding Company to Irving Financial Corporation for the purchase price of \$16,000,000.00. (R. 00009).

6. On or about December 31, 1980, and pursuant to negotiations between Irving Financial Corporation and Borthick regarding Irving's contemplated purchase of the stock of MFT Holding Company, Borthick issued an Order essentially providing for the approval of the proposed purchase and the lifting of the Impairment Order on the condition precedent that Irving inject certain specified new capital into MFT&L. (R. 00009-10).

7. Subsequently, on or about July 17, 1981, Irving and Borthick entered into an agreement modifying the terms of the December 31, 1980, Order, pursuant to which Defendant Department of Financial Institutions of the State of Utah ("DFI") agreed to lift the Impairment Order on certain conditions, including Irving's contribution to MFT&L of the sum of \$1,900,000.00 as paid-in capital. (R. 00010).

8. The agreement was modified again by letter dated July 30, 1981, to reduce the required sum of paid-in capital to \$1,800,000.00. (R. 00011).

9. Plaintiffs were intended third-party beneficiaries of the July 17, 1981, agreement. (R. 00013).

10. Despite Plaintiffs' substantial compliance with the terms of the agreement, Defendants failed and refused to perform their end of the bargain. Specifically, on or about July 22, 1982, and after Plaintiffs had injected approximately \$11,900,000.00 in new and replacement capital into MFT&L, Defendants DFI and Elaine B. Weis seized the business and property of Plaintiffs MFT&L and MFT Mortgage Co., purporting to act under authority of Utah Code Ann. Section 7-2-1. (R. 00013).

11. On January 22, 1987, Plaintiffs filed an action against Defendants in the United States District Court for the District of Utah entitled Harris, et al. v. Weis, et al., civil no. C-87-0031S (hereinafter referred to as the "Harris" case).² (R. 00083); 217 Utah Adv. Rep. 33.

12. In the Second Amended Complaint filed in Harris, Plaintiffs alleged various federal statutory claims³ based upon the following factual allegations:

On or about July 17, 1981, the Defendant State of Utah, through its Department of Financial Institutions ... proposed an agreement in writing which agreement was affirmed and accepted by Plaintiffs Hansen ... and Gordon and others.

²Plaintiffs had originally brought their claims against Defendants in the United States District Court for the Northern District of California, civil no. C86-2894, on May 30, 1986. That case was dismissed as to Defendants without prejudice on venue grounds on November 10, 1986.

³One of the plaintiffs in Harris who is not a party to the case at bar also alleged a state law claim for defamation.

Pursuant to this agreement, Plaintiffs Hansen ... and Gordon were to become owners of controlling stock interests (not less than 80%) in [MFT&L], MFT Financial, MFT Mortgage and MFT Leasing Company by investing their personal cash, certain personal assets and assets of associates into said companies' capital account in an amount of approximately \$11,100,000 ... The capital was infused by Plaintiffs ... in the manner demanded by defendants. However, on July 22, 1982, ... [MFT&L] was seized by the State of Utah and such seizure included the capital infused by Plaintiffs ...

(R. 00355).

13. On June 5, 1989, the Harris case was dismissed with prejudice.⁴ (R. 00161-62).

14. Plaintiffs refiled the instant case within one-year of the order dismissing Harris in accordance with Utah Code Ann. Section 78-12-40. (R. 00002).

ARGUMENT

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S DECISIONS IN PENROD V. NU CREATION CREME AND FOIL V. BOLLINGER

The Court of Appeals' based its affirmance of the District Court's order dismissing Count One of the Complaint on the fact that the Harris court's June 5, 1989, order

"specifically states that 'all claims in the Amended Complaint, together with the corresponding claims of the Second Amended Complaint are dismissed with prejudice.' Every cause of action in Harris was dismissed on the merits."

⁴The June 5, 1989, order originally indicated that "all claims in the Amended Complaint, together with the corresponding claims of the Second Amended Complaint [were] dismissed with prejudice." (R. 00161-62). However, by order dated July 20, 1990, the Harris court granted Plaintiffs relief under Rule 60(b), F.R.C.P., revising the June 5, 1989, order to reflect that dismissal of the only state law claim alleged in the Second Amended Complaint was on jurisdictional grounds and was without prejudice. (R. 00260).

217 Utah Adv. Rep. at 34.

Because all of Plaintiffs' claims were dismissed on the merits by the Harris court, the Court of Appeals held that Plaintiffs were not entitled to rely on the one-year savings provision of Section 78-12-40, U.C.A., as authority for the refiling of Count One of the instant action. 217 Utah Adv. Rep. at 34.

Plaintiffs respectfully submit that the Court of Appeals' holding is in conflict with this Court's decisions in Penrod v. Nu Creation Creme, Inc., 669 P.2d 873 (Utah 1983), and Foil v. Bollinger, 601 P.2d 144 (Utah 1979).

As in the case at bar, in Penrod, the plaintiffs had filed their first action in federal court. The federal action asserted a claim under the Federal Trade Commission Act, as well as four state common law fraud claims. Also as in the case at bar, the federal court dismissed the federal claim with prejudice for failure to state a claim upon which relief might be granted, while the state law fraud claims were dismissed without prejudice for lack of subject matter jurisdiction.

Thereafter, the Penrod plaintiffs refiled their action in the Third Judicial District Court of Salt Lake County. In their state court action, the plaintiffs again alleged the same state law fraud claims previously alleged in their federal action. Additionally, they asserted a new state law claim of negligent misrepresentation based upon the "same operative facts" as their prior Federal Trade Commission Act claim which had been dismissed

with prejudice by the federal court. The Third District Court dismissed the negligent misrepresentation claim on the ground that it was barred by the prior with prejudice dismissal of the Federal Trade Commission Act claim which had been based upon the "same operative facts".

This Court identified the issue for determination on appeal as follows:

Since the second claim for relief alleges a different legal theory for recovery than the claim whose merits were ruled upon by the federal court, the issue is whether the federal district court adjudication acts to bar that claim in this case even though the federal court did not rule on the merits of the common law claim of negligent misrepresentation.

669 P.2d at 875.

This Court ruled that the negligent misrepresentation claim was not barred by the prior with prejudice dismissal of the federal claim based upon the "same operative facts" because the dismissal of the plaintiffs' Federal Trade Commission Act claim left the federal court without subject matter jurisdiction over any state law claims and, therefore, the negligent misrepresentation claim could not have been litigated in federal court.

In short, the plaintiffs did not litigate, and could not have litigated, their second cause of action in the federal court because that court had no subject matter jurisdiction.

669 P.2d at 877.

As applied to the case at bar, the Penrod ruling means that the Harris court's with prejudice dismissal of Plaintiffs' federal claims does not operate to bar the state law breach of

contract claim alleged in Count One even though the two claims are base upon the "same operative facts".

There is, of course, an obvious distinction between Penrod and the case at bar. The issue in Penrod was whether the subsequently asserted state law claim was barred by res judicata. The issue in the case at bar, on the other hand, is whether the dismissal of Plaintiffs' federal claims "on the merits" bars Plaintiffs from relying on the one-year saving provision of Section 78-12-40, U.C.A., as authority for pursuing an action for the breach of a written contract despite the expiration of the six-year period of limitations set forth in Section 78-12-23, U.C.A.

Plaintiffs submit that the distinction is not material. In Foil v. Bollinger, supra, this Court held that

The tolling statute [i.e., U.C.A. Section 78-12-40] requires only that the claim or claims for relief stated in the second action arise out of the transaction or occurrence on which the claim or claims in the first action were founded.

601 P.2d at 144 (emphasis added).

It is beyond credible dispute that the claim asserted in Count One of the Complaint in the case at bar arises out of precisely the same "transaction or occurrence" as that upon which the federal claims alleged in Harris were founded.

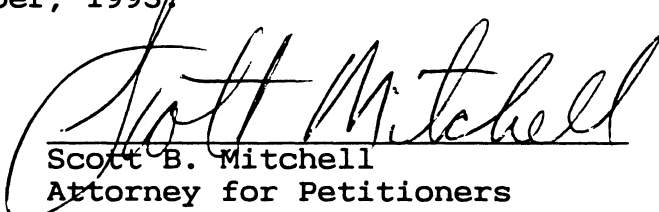
Accordingly, because the Harris court lacked jurisdiction to address the merits of Plaintiffs' state law claims and because the breach of contract claim asserted in Count One is based upon the same "transaction or occurrence" as the federal claims

asserted in Harris, Plaintiffs respectfully submit that they were entitled to rely on the one-year period set forth in Section 78-12-40 in which to file Count One of the case at bar.

CONCLUSION

Based upon the foregoing, Plaintiffs submit that the Court of Appeals' Opinion, insofar as it affirms the District Court's order dismissing Count One of the Complaint, is in conflict with this Court's decisions in Penrod and Foil, supra. Accordingly, Plaintiffs respectfully petition the Court for a Writ Of Certiorari with respect thereto.

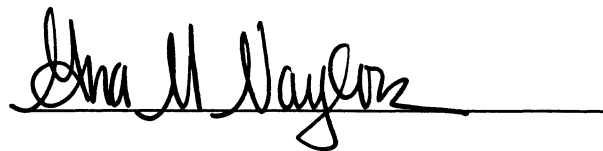
DATED this 21st day of October, 1993,


Scott B. Mitchell
Attorney for Petitioners

MAILING CERTIFICATE

Undersigned certifies that four copies of the foregoing
Petition For Writ Of Certiorari were served upon
Defendants/Respondents via first class U.S. Mail, postage
prepaid, this 25 day of October, 1993, addressed as follows:

Jan Graham
Attorney General
Bryce H. Pettey
Assistant Attorney General
50 South Main Street, Suite 900
Salt Lake City, Utah 84144

A handwritten signature in black ink, appearing to read "Dana M. Hays", is written over a horizontal line.

APPENDIX

This opinion is subject to revision before
publication in the Pacific Reporter.

JUL 20 1993

IN THE UTAH COURT OF APPEALS

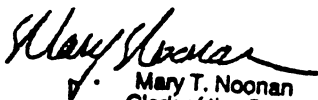
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Jim Pratt Hansen, et al.,)
)
Plaintiffs and Appellants,)
)
v.)
)
Department of Financial)
Institutions, et al.,)
)
Defendants and Appellees.)

OPINION
(For Publication)

Case No. 920686-CA

F I L E D
(July 20, 1993)


Mary T. Noonan
Clerk of the Court

Third District, Salt Lake County
The Honorable Timothy R. Hanson

Attorneys: Earl Spafford, L. Charles Spafford, and Scott B.
Mitchell, Salt Lake City, for Appellant
Jan Graham, Bryce H. Pettey, and Michael N.
Emery, Salt Lake City, for Appellee

Before Judges Bench, Garff, and Jackson.

JACKSON, Judge:

Plaintiffs appeal from the final order of the district
court, entered November 15, 1991, granting defendants' motion to
dismiss under Utah Rule of Civil Procedure 12(b)(6). We affirm.

FACTS

In March 1979, defendant Mervin Borthick, acting in his
capacity as the Commissioner of the Department of Financial
Institutions of the State of Utah (DFI), issued an order placing
certain restrictions upon the operation of plaintiff Murray First
Thrift & Loan (MFT&L). Coincident with this order, Borthick
recommended that certain "corrective actions" be taken in order
for MFT&L to avoid having the Commissioner of Financial
Institutions take possession of MFT&L under Utah Code Ann. § 7-2-
1 (1988).

At the time of Borthick's order, eighty percent of the stock
in MFT&L was owned by the Reading Holding Company. The owners of
the holding company entered into a Stock Purchase Agreement in

October 1980, agreeing to sell their stock to Irving Financial Corporation (Irving), owned by plaintiffs Rodney Gordon and Jim Hansen. Plaintiffs allege that Borthick, as DFI Commissioner, entered into a related reorganization agreement with Irving, promising to lift the restrictions placed on MFT&L upon compliance with certain conditions. Plaintiffs claim that despite their substantial compliance with the reorganization agreement, DFI, under authority of its new commissioner, Elaine Weis, seized the business and property of MFT&L and its parent company, Murray First Thrift Mortgage Company (MFT), on July 22, 1982.

On December 13, 1982, MFT&L and MFT entered into a Purchase and Assumption Agreement (P & A Agreement), under which a majority of MFT&L's assets were transferred to First Security Financial and the remainder were retained by DFI, whose commissioner was then George Sutton. Under the agreement, DFI was to terminate control over the retained assets within six months or at the earliest possible time, consistent with defendant Sutton's statutory responsibilities. As part of the agreement, DFI agreed not to impede any sale or development of the retained assets by MFT&L. Despite MFT&L's repeated demands, DFI retained control over certain assets for several years, and sold some of the assets while MFT&L itself was negotiating for their sale.

On May 30, 1986, plaintiffs in the present suit filed an action in federal court (the Nelson case) against the same defendants in the present suit and others. The Nelson case was originally dismissed on venue grounds. On January 22, 1987, the action was refiled in the proper venue (the Harris case). On June 6, 1989, a judgment was entered in Harris dismissing the case with prejudice.

On June 5, 1990, plaintiffs filed the present case alleging breach of contract by DFI, Weis, and Borthick¹ for failing to abide by the reorganization agreement (count I), and breach of contract by DFI, Sutton, and the Industrial Loan Guaranty Corporation of Utah (ILGC) for breaching the P & A Agreement (count II). The trial court granted defendants' motion to dismiss the complaint.

1. We note that Borthick was never served individually or in his capacity as DFI Commissioner.

ISSUES

The issue in this case is whether the causes of action alleged in counts I and II were properly dismissed because they were barred by statutes of limitations.

ANALYSIS

Standard of Review

When reviewing a motion to dismiss based on Rule 12(b)(6), an appellate court must accept the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims. Anderson v. Dean Witter Reynolds, Inc., 841 P.2d 742, 744 (Utah App. 1992). Because the propriety of a 12(b)(6) dismissal is a question of law, "we give the trial court's ruling no deference and review it under a correctness standard." Id. (quoting St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991)). A trial court's determination that a statute of limitations has expired is also a question of law which we review for correctness, giving no particular deference to the lower court's determination. Gramlich v. Munsey, 838 P.2d 1131, 1132 (Utah 1992).

Count I

In count I, the individual and corporate plaintiffs allege a breach of the reorganization agreement by defendants Borthick, Weis, and DFI for their seizure of MFT&L and MFT on July 22, 1982. The alleged breach occurred nearly eight years before the filing of the present lawsuit. Section 78-12-23 of the Utah Code places a six year limitation on the time in which "[a]n action upon any contract, obligation, or liability founded upon an instrument in writing" may be brought. Utah Code Ann. § 78-12-23 (1992).

Plaintiffs argue they are not time-barred by section 78-12-23 because the Utah Code provides the following savings statute:

If any action is commenced within due time
and . . . if the plaintiff fails in such
action or upon a cause of action otherwise
than upon the merits, and the time limited
either by law or contract for commencing the
same shall have expired, the plaintiff . . .

may commence a new action within one year
after the . . . failure.

Utah Code Ann. § 78-12-40 (1992).

Plaintiffs argue the cause of action alleged in count I of the present case arose out of the same transaction or occurrence that prompted the filing of the Harris case. They argue that Harris was commenced within the statutory time period and it failed for reasons other than on the merits. Thus, they conclude count I of the present case is timely because it was commenced within one year after the failure. We disagree.

Harris was commenced within the statutory time period, however, the final judgment, entered June 6, 1989, specifically states that "all claims in the Amended Complaint, together with the corresponding claims of the Second Amended Complaint are dismissed with prejudice."² Every cause of action in Harris was dismissed on the merits. Plaintiffs argue that the attempted third amended complaint, which alleged a cause of action similar to count I of the present case, failed on grounds other than the merits. The third amended complaint, however, was stricken and was not part of the Harris action.³ The Harris court found that

2. Additionally, in the court's ruling and order of September 30, 1988, the court "dismissed on the merits and with prejudice" all the claims of the amended complaint and all the claims of the second amended complaint except for one claim of defamation, and one claim of civil rights violation by a public official.

3. The third amended complaint was stricken because the plaintiff filed it without leave of court. Amended complaints filed without leave of court are "without legal effect and will not be considered." Baxter v. Strickland, 381 F. Supp. 487, 491 n.4 (ND Ga 1974). It is important to note the distinction between cause of action that is dismissed, and an amended complaint that is stricken. The first had a legal "life." The second never did. Although there is no Utah case directly on point, courts in other jurisdictions have treated stricken amended complaints as non-existent with respect to tolling a statute of limitations and reviewing the proposed amendment on appeal. See McGinnis v. A.R. Abrams, Inc., 490 N.E.2d 115, 117 Ill. Ct. App. 1986) (unauthorized amendments were considered nullities and did not satisfy nor toll statute of limitations); Midwest Bank & Trust v. Village of Lakewood, 447 N.E.2d 1358, 1362 (Ill. Ct. App. 1983) ("An amendment to a pleading which is filed without leave of court to do so may be stricken and must be disregarded on review."); People v. Alarcon, 324 P.2d 58, 59 (order striking pleading is not ordinarily appealable).

"the third amended complaint is not properly before the court and will not be considered." The attempted third amended complaint never rose to the level of a cause of action. Accordingly, the third amended complaint was not a "cause of action" within an action "commenced within due time" as required by the savings statute. Thus, the trial court correctly dismissed count I as being untimely filed.

Count II

In count II, the corporate plaintiffs MFT&L and MFT, allege defendants Sutton, DFI, and ILGC⁴ breached the P & A Agreement by retaining assets longer than the agreed upon six months, and by ultimately selling some of the assets. Plaintiffs argue that the breach occurred when the retained assets were sold in 1987. They argue that the present suit was brought within the six year statutory period for contract causes of action. We disagree.

The defendants breached the contract when the assets were retained longer than contractually agreed upon. This event created a cause of action. Section 16-10-100 of the Utah Code places a two year limitation on the time in which a dissolved corporation can bring a claim for a predissolution cause of action. Utah Code Ann. § 16-10-100 (1991). The corporate plaintiffs were dissolved on December 31, 1984. The six-month period agreed upon by the plaintiffs and defendants for returning the assets ended on June 13, 1983, making the breach of the P & A Agreement a predissolution cause of action. As already noted, the present case was filed in 1990, more than five years after the dissolution.

The savings statute does not prevent count II from being time-barred. The Nelson case, which arguably contained the same cause of action as that brought by the corporate plaintiffs in count II, was filed within the two year statutory period. The cause of action brought in Nelson failed on grounds other than the merits on November 10, 1986. However, the failure occurred before the two-year statutory limitation had expired, preventing the invocation of the savings statute. An additional order was entered in Nelson on July 15, 1988, after the expiration of the two-year statutory limit. This additional order still does not help the corporate plaintiffs because this order dismissed all the defendants on the merits. Finally, even if Nelson was brought within the statutory limitation and failed on July 15, 1988, on grounds other than the merits, count II of the present

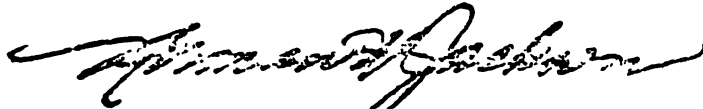
4. The claims against Sutton and ILGC were resolved pursuant to a stipulation agreement.

case was brought well after the one year extension granted by the savings statute.

Accordingly, the trial court correctly dismissed the cause of action alleged in count II by the corporate plaintiffs as untimely. Because both counts were barred by statutes of limitation, we do not reach the other issues raised by the plaintiffs..

CONCLUSION

We see no set of facts that can support plaintiffs claims. Accordingly, the trial court correctly held that the plaintiffs' cause of action in counts I and II of the present case were barred by statutes of limitation.

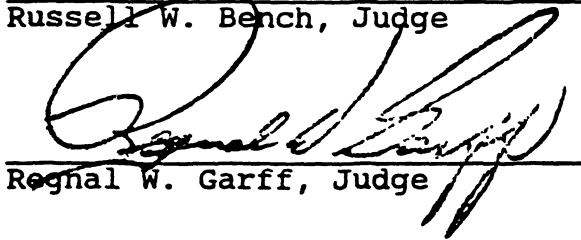


Norman H. Jackson, Judge

WE CONCUR:



Russell W. Bench, Judge



Reginald W. Garff, Judge

JUN 6 1989

BY MARKUS B. ZIMMER CLERK
DEPUTY CLERK

MAY 19 1989

JUN 09 1989

OFFICE OF JUDGE
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ATTEST: A TRUE COPY
MARKUS B. ZIMMER, CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

BY J. Brown
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8/11/89

Attorneys for Defendants Elaine B. Weis, George Sutton,
R. Scott Baker, Mary Amidan, Robert S. Gale and the
State of Utah

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

GARY S. HARRIS, et al.,

Plaintiffs,

vs.

ELAINE B. WEIS, et al.,

Defendants.

JUDGMENT OF DISMISSAL
WITH PREJUDICE

Civil No. C 87-0041S

The court, having entered its Order of Entry of Judgment
on _____, 1989,


IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant
to Rule 54(b) Federal Rules of Civil Procedure, that all claims

0261

- Exhibit 2

in the Amended Complaint, together with the corresponding claims of the Second Amended Complaint are dismissed with prejudice.

DATED this 5th day of June, 1989.



Honorable Davis Sam
U. S. District Court Judge

Copies mailed to 6/6/89:dp
See attached list

FILED
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JUN 6 10 50 AM '89
HARRIS J. CLARK
CLERK
BY _____
DEPUTY CLERK

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of ~~March~~^{May}, 1989, a true and correct copy of the foregoing ORDER OF ENTRY OF JUDGMENT was mailed, postage prepaid, to the following:

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FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

JUL 11 1990

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BY *Sn* *z*
DEPUTY CLERK

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

* * * * *

GARY S. HARRIS, et al.,)
Plaintiff(s),)
vs.) ORDER GRANTING RELIEF
ELAINE B. WEIS, et al.,) UNDER RULE 60(b)(1)
Defendant(s).) Civil No. 87-C-0041-S

* * * * *

Plaintiffs, Gary S. Harris, et al., have moved this court for relief from the June 5, 1989 Judgment of Dismissal to the extent that it relates to the ninth claim of the second amended complaint which alleges a state law claim for defamation.

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

DATED this 9th day of July, 1990.

ttys 7/11/90sm

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s R. Holbrook Esq.
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BY THE COURT:

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DAVID SAM
U.S. DISTRICT JUDGE

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SEP 23 1993

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Jim Pratt Hansen,)
et al.,)
)
Plaintiffs and Appellants,)
v.)
)
Department of Financial)
Institutions,)
)
Defendant and Appellee.)


Mary T. Noonan
Clerk of the Court

ORDER DENYING
PETITION FOR REHEARING

Case No. 920686-CA

Before Judges Jackson, Bench and Garff.

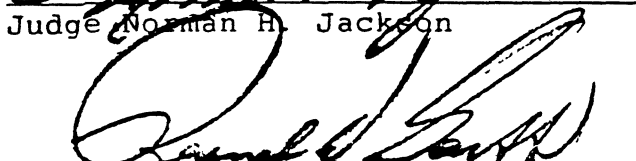
This matter is before the Court upon a petition for rehearing filed by appellants.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 23rd day of September, 1993.

BY THE COURT:


Judge Norman H. Jackson


Judge Reginal W. Garff

I dissent.


Judge Russell W. Bench