

1993

Hartford Leasing Corporation v. Rio Vista Limited,
a Utah Corporation dba Moab U-Serve aka Stars
Food Store, LA Sal Oil Company, a Utah
Corporation, dba Gordon's Sinclair, State of Utah
Dependable Janitorial Service and John does I-X :
Brief of Appellee

Utah Court of Appeals

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DOCKET NO

IN THE UTAH COURT OF APPEALS

HARTFORD LEASING CORPORATION,
Plaintiff/Appellant,

v.

RIO VISTA LIMITED, a Utah Corporation dba MOAB U-SERVE aka STARS FOOD STORE; LA SAL OIL COMPANY, a Utah Corporation, dba GORDON'S SINCLAIR; STATE OF UTAH; DEPENDABLE JANITORIAL SERVICE; and JOHN DOES I-X,

Defendants/Appellees.

Case No. 930612-CA

Priority 15

BRIEF OF APPELLEE STATE OF UTAH

APPEAL FROM AN ORDER OF DISMISSAL IN THE SEVENTH JUDICIAL
DISTRICT COURT, IN AND FOR GRAND COUNTY, STATE OF UTAH,
THE HONORABLE LYLE R. ANDERSON PRESIDING.

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FILED
Utah Court of Appeals

JAN 19 1994

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IN THE UTAH COURT OF APPEALS

HARTFORD LEASING CORPORATION,)	
)	
Plaintiff/Appellant,)	
)	Case No. 930612-CA
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aka STARS FOOD STORE; LA SAL OIL)	
COMPANY, a Utah Corporation, dba)	
GORDON'S SINCLAIR; STATE OF UTAH;)	
DEPENDABLE JANITORIAL SERVICE;)	
and JOHN DOES I-X,)	
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BRIEF OF APPELLEE STATE OF UTAH

STATEMENT OF JURISDICTION

Appellee State of Utah does not object to the statement of jurisdiction described by Appellant.

STATEMENT OF ISSUES PRESENTED
AND STANDARDS OF REVIEW

Appellee State of Utah concurs with Appellant that the abuse of discretion standard applies to the granting of the Motion to Dismiss for failure to prosecute. However, in regard to Appellant's sixth issue regarding the trial court's interpretation of Rule 4-501 of the Utah Code of Judicial Administration, the appropriate standard of review is one of "correction of error". Ong Int'l (U.S.A.) v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993), citing State v. James, 819 P.2d 781 (Utah 1991).

DETERMINATIVE STATUTES AND RULES

Rule 12(e), Utah Rules of Civil Procedure (Addendum "1")

Rule 41(b), Utah Rules of Civil Procedure (Addendum "2")

Rule 4-501, Utah Code of Judicial Administration (Addendum "3")

STATEMENT OF THE CASE

STATEMENT OF FACTS

1. On June 22, 1988, Appellant filed a Complaint against the State of Utah and others for damages related to its property in Moab, Utah. (R. 1-13).

2. On August 25, 1988, Appellee State of Utah filed a Motion for More Definite Statement pursuant to Rule 12(e) of the Utah Rules of Civil Procedure. (R. 41-43).

3. On September 26, 1988, Judge Bunnell, District Court Judge, issued a "Ruling on Defendant, State of Utah's, Motion for More Definite Statement." (R. 52-53). Said Ruling states that "The Court grants the Motion and orders that the plaintiff file an amendment to the pleadings " URCP Rule 12(e) requires that the amended complaint be filed within ten days or the court may strike the pleading or "make such order as it deems just."

4. Said Ruling was mailed to counsel for the various parties on September 26, 1988. (R. 53).

5. No Amended Complaint was filed. Apparently, by Appellant's own admission, an amended complaint was actually even

prepared by Appellant's counsel, Dale F. Gardiner, on or about December 1, 1988, but such was never filed, and Appellee State of Utah was not aware that such was drafted until it was presented as an exhibit in the subject Motion to Dismiss proceeding in 1993. (R. 242-253).

6. In December, 1988, Appellant apparently filed for bankruptcy. Appellant's counsel filed a Notice of Withdrawal of Counsel and Notice of Bankruptcy. (R. 69). The Notice clearly states that Dale F. Gardiner is withdrawing as counsel and that "[c]ounsel for Hartford Leasing Corporation is George H. Speciale, Esq... ." (R. 69).

7. No Amended Complaint was filed from the date of the Court's Ruling (September 26, 1988) to present.

8. Apparently Appellant entered into a contingency fee agreement with Steven C. Tycksen in early 1993 (presumably then, before the Motion to Dismiss was filed). (See Appellant's Brief at 24 and R. 284-286).

9. After four and one-half years, with no amended complaint filed, Appellee State of Utah, on March 26, 1993, filed a Motion to Dismiss for Lack of Prosecution with Prejudice or Strike and Points and Authorities. (R. 71-75). Said Motion indicated that URCP 12(e) required the conforming pleading to be filed within ten (10) days or the court may make such order as it deems just.

Additionally, URCP 41(b) was cited as allowing for a dismissal for lack of compliance with a court order.

10. On April 7, 1993, Appellant, through attorney Steven C. Tycksen, filed an objection to the Motion to Dismiss as well as a seven-page memorandum opposing dismissal. (R. 110-120). An affidavit was also attached to the objection. (R. 121-125).

11. On April 19, 1993, Appellee State of Utah filed a Reply in support of the Motion to Dismiss. (R. 136-139).

12. On June 7, 1993, Appellant filed a Notice to Submit for Decision stating that the Motion to Dismiss "is now at issue and ready for decision of the Court." (R. 149-150).

13. On June 7, 1993, Appellant attempted to submit another memorandum against the Motion to Dismiss. (R. 151-162).

14. On July 15, 1993, Judge Anderson entered an Order of Dismissal for Lack of Prosecution with Prejudice. (R. 167-169).

15. On July 15, 1993, Appellant filed a nineteen-page memorandum objecting to the order. (R. 175-196).

16. On July 19, 1993, District Court Judge Lyle R. Anderson issued a "Ruling on Objections to Proposed Order" indicating that the objection was filed too late (most of it was faxed after 5:00 p.m.). Despite procedural problems of considering the objections, Judge Anderson also indicated that, in any event, the "supplemental memoranda submitted by plaintiff before it filed the Notice to

Submit for Decision would not have altered the Court's decision."
(R. 313-315).

17. Appellant appealed the Judge's Order of Dismissal.

SUMMARY OF ARGUMENT

Judge Anderson properly found that the Appellant was not prejudiced by any technical noncompliance with Rule 4-506(3) of the Utah Code of Judicial Administration.

Plaintiff had counsel before and during the Motion to Dismiss proceeding. The notice of withdrawal and indication of the appointment of George H. Speciale as counsel for Hartford Leasing Corporation (the Plaintiff) gave Defendants every indication that Mr. Speciale was its counsel. Judge Anderson did not abuse his discretion. To the contrary, it would have been an abuse of discretion to allow a four and one-half year extension of time to file an amended complaint after a motion for more definite statement was granted.

URCP Rule 12 (e) allows the Court to take such action as it "deems necessary". This certainly can include a dismissal with prejudice. URCP Rule 41 (b) also allows a dismissal with prejudice for failure to comply with the Court. Given the extremely long period of failure to comply with the Court, such a dismissal with prejudice was certainly not an abuse of discretion.

There was no abuse of discretion for not holding a hearing.

Appellant waived this hearing in its Notice to Submit for Decision. Appellant did not provide any argument in its Brief that Appellant would have offered something at the hearing that the Judge had not considered. If there was any error here, it was harmless. It would have been an abuse of discretion not to grant Appellee's Motion to Dismiss.

There was no abuse of discretion in the Judge's adherence to the Court Rules regarding memoranda. A page limit, for instance would make no sense, if one can file as many memoranda as one wishes.

ARGUMENT

POINT I

**THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION
BY DISMISSING THE CASE FOR LACK OF PROSECUTION,
DESPITE ANY LACK OF SPECIAL NOTICE UNDER UTAH
CODE OF JUDICIAL ADMINISTRATION RULE 4-506(3).**

Dale Gardiner filed a notice of withdrawal of counsel in 1988 after the Court required an amended complaint to be filed due to the granting of a motion for more definite statement. The notice of withdrawal indicated that George H. Speciale was the new counsel. Appellant contends that this indication of new counsel is in the same paragraph as the bankruptcy notification and that therefore one should interpret the notice as George H. Speciale only being the counsel for bankruptcy. This interpretation is unreasonable. If Appellant was to be unrepresented in this matter,

its withdrawing counsel should have been clearer. Also, one can interpret the notice as having an initial paragraph indicating that Dale Gardiner was withdrawing and a second paragraph indicating the remaining matters.

Appellant is arguing that failure to comply with a notification requirement under Utah Code of Judicial Administration Rule 4-506(3), forever precludes any further proceedings by the trial court. Utah Code of Judicial Administration Rule 4-506(3) states that when an attorney withdraws from a case, the opposing counsel must notify the unrepresented client in writing to obtain other counsel or appear in person before further proceedings are initiated by the opposing counsel. The Rule further states that "no further proceedings shall be held in the matter until 20 days have elapsed from the date of filing." It is a logical conclusion from reading the Rule, that the intent is to avoid a situation where an unrepresented person is facing proceedings without counsel and to avoid a situation where any new counsel does not have at least twenty days to prepare.

Appellant was represented by counsel before and during the Motion to Dismiss proceeding and was not prejudiced by any potential "technical" violation of the "counsel notification requirement". The record shows that the new counsel, Steven Tycksen, was able to file extensive documents opposing the Motion

to Dismiss.

Appellant's reliance on Sperry v. Smith, 694 P.2d 583 (Utah 1984), is misplaced. In Sperry, the Utah Supreme Court stated a relationship between obedience with court rules and the abuse of discretion standard. Sperry, however, does not mean that non-prejudicial technical rule violations prohibit a Court from proceeding in a matter. The appropriate course for dealing with any technical violation of the "counsel notification" rule is to assure that the purpose of the rule is satisfied prior to any action that may prejudice an unrepresented party's rights.

Even if there was a violation of the "counsel notification requirement," it would have been an abuse of the Court's discretion to not grant the Motion to Dismiss, where over four and one-half years passed without the filing of an amended complaint, which was required in order to prosecute the action.

POINT II

**THE TRIAL COURT DID NOT ABUSE IT DISCRETION
IN GRANTING THE MOTION TO DISMISS WHERE APPELLANT
HAD NOT FILED A REQUIRED AMENDED COMPLAINT IN OVER
FOUR AND ONE-HALF YEARS.**

"The burden is on the party 'attacking a dismissal for failure to prosecute [to] offer a reasonable excuse for its lack of diligence.'" Country Meadows v. Department of Health, 851 P.2d 1212, 1215 (Utah App. 1993), quoting Meadow Fresh Farms v. Utah State Univ., 813 P.2d 1216, 1218 (Utah App. 1991). The decision

of the trial court to grant the motion to dismiss should not be interfered with unless the abuse of discretion is "clear." Country Meadows, 851 P.2d at 1214, citing Charlie Brown Constr. Co. v. Leisure Sports, Inc., 740 P.2d 1368, 1370 (Utah App. 1987), cert. denied, 765 P.2d 1277 (Utah 1987).

Here, there is no reasonable excuse for the Appellant to not have filed an amended complaint for over four and one-half years beyond the ten day time limit. In fact, no amended complaint against the State was ever served. Appellant admits that an amended complaint was prepared in 1988, but never filed. (R. 242-253).

Appellant contends that the relevant factors enumerated in Maxfield v. Rushton, 779 P.2d 237, 239 (Utah App. 1989) were not met. These factors include the conduct of the parties, opportunity each party had to move the case forward, what each party did to move it forward, prejudice, and injustice. However, the trial court properly considered these factors and concluded that dismissal was appropriate.

CONDUCT OF THE PARTIES AND WHAT EACH PARTY DID

In Country Meadows, 851 P.2d at 1216, the Utah Court of Appeals indicated that even though the defendant may not have moved the case forward, the plaintiff had a duty to exercise due diligence to prosecute its action. In this case, it would be

absurd for the State to prepare and file an amended complaint against itself in order to move the case forward or even to request that plaintiff prosecute the case against the public.

Certainly, as stated above, the Appellant should have been able to serve and file an amended complaint within the four and a half years prior to the Motion to Dismiss.

PREJUDICE AND INJUSTICE

The State would be greatly prejudiced if the case were to move forward. In its original complaint, Hartford Leasing sought damages for the defendant's alleged breach of a lease agreement. The State vacated the subject building after employees became ill. This could have been caused by one or many factors, including mold, the gas plume, the carpet, etc. The building has been sold and alterations have occurred. It would be very difficult at this time to establish the causes of the illness that occurred almost six years ago.

Appellee is even prejudiced in trying to argue this factor. Because no amended complaint was filed, no answer by the State has been filed. Therefore, it is not documented in the record of this case as to what the issues of the case will be. It is anticipated that if the State had to file an answer to an extremely late amended complaint, that the issues would not be limited to the gas plume, but would likely include construction defects that may now

have been altered in the building by the new owners.

When a District Court grants a Motion for More Definite Statement and the plaintiff does not file an amended complaint, and over four and one-half years passes since the ten day deadline, justice is served by dismissing the matter.

POINT III

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN GRANTING THE DISMISSAL AS APPELLANT HAD
NOT REACTIVATED THE CASE PRIOR TO ITS MOTION
TO DISMISS.**

Appellant argues that it obtained new counsel and reactivated the case, and therefore the case should not have been dismissed for lack of prosecution. However, there is nothing in the record of this case showing any action of new counsel prior to the motion to dismiss for lack of prosecution. The new counsel (or perhaps any of the attorneys that Appellant sought advice from over the past five years, including Dale Gardiner) could have file an amended complaint, but did not.

Appellant misinterprets the case of Country Meadows v. Department of Health, 851 P.2d 1212 (Utah App. 1993). Appellant misconstrues this case when it argues that when a case is reactivated at any time, a motion to dismiss for lack of prosecution would be improper. In Country Meadows, 851 P.2d at 1216, the court made it clear that where the case is not reactivated prior to the dismissal motion, an attempt to reactivate

the case after the dismissal motion does not make the dismissal an abuse of discretion.

Even though Appellant had a contingency fee agreement with the new counsel in this matter, prior to the filing of Appellee's Motion to Dismiss on March 26, 1993 (R.285-287), the new counsel did not file anything in the matter until April 7, 1993 (R. 110-113). Thus, Appellant had the opportunity to reactivate the case prior to the filing of the Motion to Dismiss, but did not do so. There was no abuse of discretion by the trial court under these circumstances.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING THE MOTION TO DISMISS WITH PREJUDICE.

The court did not abuse its discretion by granting the dismissal with prejudice. The Appellant had not filed an amended complaint in over four and one-half years. URCP 12(e) allows the court to "make such order as it deems just" when the Appellant is more than ten (10) days late. Certainly the great length of time here indicates that the Court's order of dismissal with prejudice was within the realm of reason under URCP 12(e) and not an abuse of discretion.

This dismissal with prejudice is consistent with URCP Rule 41(b) and the decision of the Utah courts supporting dismissals

with prejudice. County Meadows v. Department of Health, 851 P.2d 1212, 1217 (Utah App. 1993); Maxfield v. Rushton, 779 P.2d 237 (Utah App. 1989); and Charlie Brown Constr. Co. v. Leisure Sports, Inc., 740 P.2d 1368 (Utah App. 1987) cert. denied, 765 P.2d 1277 (Utah 1977).

POINT V

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
BY NOT HOLDING A HEARING WHEN THE APPELLANT
INDICATED THE MATTER WAS AT ISSUE AND READY
FOR DECISION AND APPELLANT OFFERS NO ARGUMENT
AS TO HOW A HEARING MAY HAVE MADE A DIFFERENCE.**

Appellant requested an oral argument at the time it responded to the Motion to Dismiss on April 7, 1993. (R. 112). However, on June 7, 1993 (two months later), Appellant served a "Notice to Submit for Decision" which stated that the Motion for Dismissal "is now at issue and ready for decision of the Court." (R. 149-150).

The District Court interpreted the actions of Appellant as a waiver of the hearing request. (R. 313-314).

Appellant argues that a hearing may not be waived under Rule 4-501(3)(d) of the Utah Code of Judicial Administration. Appellant's argument is flawed. Rule 4-501(3)(d) applies when a request for hearing is "denied." The trial court did not deny the request. The trial court ruled that Appellant waived the hearing.

It is not an abuse of discretion for the trial court to grant the motion to dismiss based upon a consideration of the court file

and the memoranda of the parties, when the Appellant withdrew a request for oral argument.

Even if the Appellant's special language in its Notice to Submit for Decision was not a waiver of the hearing, Appellant has failed to indicate any argument in its Brief as to how such lack of hearing prejudiced the Appellant. See Rule 61, Utah Rules of Civil Procedure. Additionally, since Appellant was over four and one-half years late in complying with the Court decision in regard to amending the Complaint, it would have been an abuse of discretion for the Court to not grant the Motion to Dismiss, regardless of whether there was a hearing.

POINT VI

THE TRIAL COURT DID NOT ERR BY DISALLOWING THE APPELLANT'S SUPPLEMENTAL MEMORANDUM

Appellant sought to file a Supplemental Memorandum opposing the Motion to Dismiss after the Defendant had already submitted the Reply regarding the Motion to Dismiss.

Rule 4-501 (1) (a) of the Utah Code of Judicial Administration provides that the Memorandum in opposition to the Motion shall be no longer than ten pages in length unless waived by order of the Court. The Rule also provides for one memorandum in opposition.

The Court appropriately interpreted Rule 4-501 and did not commit any error in granting the Motion to Dismiss based upon only having "one round" of memoranda.

CONCLUSION

Based on the foregoing, Appellee State of Utah respectfully requests that this Court affirm the order of the Seventh Judicial District Court which granted the Motion to Dismiss with prejudice.

DATED this 19th day of January, 1994.

JAN GRAHAM
Attorney General

By: 
ALAN S. BACHMAN
Assistant Attorney General

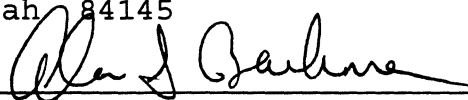
CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Appellee State of Utah were mailed, first class, postage prepaid, to the following on the 19th day of January, 1994:

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ADDENDA

ADDENDUM 1

Rule 12(e), Utah Rules of Civil Procedure

outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff.

ADDENDUM 2

Rule 41(b), Utah Rules of Civil Procedure

ner, there was no abuse in the district court's denial of plaintiff's second motion. *Hill v. Dickerson*, 839 P.2d 309 (Utah Ct. App. 1992).

—Need.

Where the defendant's counsel had three weeks to prepare for trial, and where two of the witnesses, purportedly important to his case, were actually present at trial and thus subject

to cross-examination, the purely speculative need for a third witness did not entitle the defendant to the granting of a motion for continuance. *State v. Humpherys*, 707 P.2d 109 (Utah 1985).

Cited in *Thorley v. Thorley*, 579 P.2d 977 (Utah 1978).

COLLATERAL REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d Continuance § 1 et seq.; 75 Am. Jur. 2d Trial §§ 76, 80, 83, 84.

C.J.S. — 17 C.J.S. Continuances § 1 et seq.; 88 C.J.S. Trial §§ 18 to 35.

A.L.R. — Admissions to prevent continuance sought to secure testimony of absent wit-

ness in civil case, 15 A.L.R.3d 1272.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Key Numbers. — Continuance ⇨ 1 et seq.; Trial ⇨ 1 to 7.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof.

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary dismissal; effect thereof.** 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.

(c) **Dismissal of counterclaim, cross-claim, or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive

ADDENDUM 3

Rule 4-501, Utah Code of Judicial Administration

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all district and circuit courts except proceedings before the court commissioners and the small claims department of the circuit court. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) Filing and service of motions and memoranda.

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) Motions for summary judgment.

(a) **Memorandum in support of a motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be

deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) Expedited dispositions. Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone conference. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991)

Amendment Notes. — The 1990 amendment rewrote this rule to such an extent that a detailed description is impracticable.

The 1991 amendment deleted "and a copy of

the proposed order" following "supporting documentation" in Subdivision (1)(b) and made related stylistic changes and inserted "principal" in Subdivision (3)(b).

NOTES TO DECISIONS

ANALYSIS

When rule applies.
Cited.

When rule applies.

Because the defendants' Rule 56(e) objection to the plaintiff's first affidavit was framed as a separate, written motion to strike, the plaintiff

should have been given ten days to respond, as prescribed by Subdivision (1)(b) of this rule. *Gillmor v. Cummings*, 606 P.2d 1205 (Utah Ct. App. 1991).

Cited in *Huston v. Lewis*, 818 P.2d 531 (Utah 1991); *Lucero v. Warden of Utah State Prison*, 841 P.2d 1230 (Utah Ct. App. 1992).

ADDENDUM 4

RULING ON MOTION TO DISMISS, DATED 6/21/93

SEVENTH DISTRICT COURT
Grand County

FILED JUN 21 1993

CLERK OF THE COURT

BY _____
Deputy

IN THE SEVENTH DISTRICT COURT IN AND FOR GRAND COUNTY

STATE OF UTAH

HARTFORD LEASING CORPORATION,

Plaintiff,

vs

RIO VISTA OIL LIMITED, a Utah
Corporation, dba MOAB U-SERV, aka
STARS FOOD STORE, LaSALLE OIL CO.,
a Utah corporation, dba GORDON'S
SINCLAIR, STATE OF UTAH,
DEPENDABLE JANITORIAL SERVICE and
JOHN DOES I-X,

Defendants.

RULING ON MOTION
TO DISMISS

Civil No. 880705692
Judge Lyle R. Anderson

Defendant State of Utah ("Utah") has filed a motion to dismiss the complaint of plaintiff Hartford Leasing Corporation ("Hartford") with prejudice for failure to prosecute, pursuant to Rule 41(b), U.R.C.P. The other defendants, La Sal Oil Company ("La Sal") and Rio Vista Oil Limited ("Rio Vista") have either joined in or moved separately for the same relief. Hartford has filed an objection and a supporting memorandum.

Hartford has also filed a supplemental memorandum, to which La Sal responded with a motion to strike. The Court agrees with La Sal that the rules do not provide for supplemental memoranda. The motion to strike is accordingly granted and the Court will not consider the arguments contained therein in its decision.

This action was filed in June 22, 1988, Rio Vista answered on July 18, 1988. Utah responded on August 24, 1988, with a Motion for More Definite Statement, which was granted.¹ La Sal answered on December 7, 1988. On December 30, 1988, counsel for Hartford filed a Withdrawal of Counsel and Notice of Bankruptcy. This document states that counsel for Hartford is George H. Speciale; but from the context, it is not possible to be sure whether Mr. Speciale was bankruptcy counsel or counsel in this case. Certainly Mr. Speciale did not file a notice of appearance in this case.

There is no question that, between December 30, 1988, and the filing of the first motion to dismiss on March 29, 1993, Hartford has done nothing to move this case forward. It is incumbent upon Hartford to explain why four years of inaction are justified by a bankruptcy filing. Hartford has provided no information about why this case could not have been pursued during the bankruptcy, or even when the bankruptcy ended.² It is also incumbent upon Hartford, as plaintiff, to move a case forward. That defendants have not pressed Hartford to pursue its action during the last four years is no excuse for the failure of Hartford to do so.

¹Hartford has never filed the amended complaint required by this ruling.

²La Sal asserts, in its reply memorandum, that the bankruptcy was dismissed in October, 1990.

Hartford has presented no substantial explanation of its failure to pursue this action. The Court is convinced, from the evidence and arguments presented, that Hartford elected to ignore this action, hoping that something would happen to make prosecution of the case less expensive, or improve its chances of success.

The defendants claim that they have suffered prejudice because the passage of time has affected their ability to gather evidence for the defense. The Court discounts some of those claims because most of the defendants have had the opportunity and the incentive to gather much of the same evidence in related matters. However, the Court recognizes that witnesses become less available as time passes and that some tests, particularly on carpeting, cannot be performed now that the carpeting has been replaced.

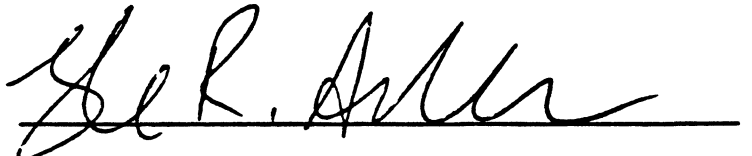
Hartford asserts that the failure of defendants to give notice to appoint successor counsel or appear in person mandates denial of the motion. The Court agrees that defendants did fail to comply with Rule 4-506, Utah Code of Judicial Administration. Given the ambiguity in the notice of withdrawal and the absence of a notice of appearance by other counsel, the defendant should have given a notice under Rule 4-506. However, the remedy for such a failure is not necessarily denial of the motion. The remedy is to grant Hartford sufficient time after a pleading is

RULING ON MOTION TO DISMISS
Civil No. 880705692
Page 4

filed in violation of Rule 4-506 to obtain counsel and adequately respond. It is evident here that Hartford has had that opportunity.

The motions to dismiss are granted. Counsel for the defendants are directed to prepare an order or orders for execution by the Court.

DATED this 21st day of June, 1993.


Lyle R. Anderson, District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on June 21st, 1993, I mailed a true and correct copy of the foregoing RULING ON MOTION TO DISMISS, postage prepaid, to the following:

Steven C. Tycksen
Attorney for Plaintiff
45 East Vine Street
Murray, UT 84107

Allan S. Backman
Asst. Attorney General
4120 State Office Building
Salt Lake City, UT 84114-0811

J. Michael Hansen
Claudia F. Berry
175 S. West Temple #700
Salt Lake City, UT 84101

James J. Clegg
10 Exchange Place, 11th Floor
P.O. Box 4500
Salt Lake City, UT 84145


Vicki Riley, Deputy Clerk

ADDENDUM 5

ORDER OF DISMISSAL, SIGNED 7/15/93

JAN GRAHAM - Bar No. 1231
ATTORNEY GENERAL
ALAN S. BACHMAN - Bar No. 5028
ASSISTANT ATTORNEY GENERAL
4120 STATE OFFICE BUILDING
SALT LAKE CITY, UTAH 84114-0811
TELEPHONE: (801) 538-1017

SEVENTH DISTRICT COURT
Grand County

FILED JUL 15 1993

CLERK OF THE COURT

BY _____
Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT OF GRAND COUNTY

STATE OF UTAH

HARTFORD LEASING CORPORATION,)	
)	ORDER OF DISMISSAL
Plaintiff,)	FOR LACK OF
)	PROSECUTION WITH
vs.)	PREJUDICE
)	
RIO VISTA OIL LIMITED, a)	
Utah corporation, dba MOAB)	Civil No. 880705692
U-SERVE, aka STARS FOOD STORE,)	
LASALLE OIL COMPANY, a Utah)	Judge Lyle R. Anderson
corporation, dba GORDON'S)	
SINCLAIR, STATE OF UTAH,)	
DEPENDABLE JANITORIAL SERVICE)	
and JOHN DOES I-X)	
)	
Defendants.)	

After review of the pleadings and filings of counsel in this matter and upon receipt of the Notice to Submit for Decision, and good cause appearing therefore, it is therefore ORDERED that:

1. The Motions to Dismiss the complaint of Plaintiff Hartford Leasing Corporation ("Hartford") with prejudice for failure to prosecute, pursuant to Rule 41(b), U.R.C.P., are hereby granted. The entire complaint of Plaintiff is hereby dismissed with prejudice against all Defendants. The Motions to Dismiss include the Motion to Dismiss filed by Defendant State of Utah, Defendant La Sal Oil Company ("La Sal") and as joined by Defendant Rio Vista Oil Limited. Hartford filed an objection and supporting memorandum. Defendant State of Utah ("State") and Defendant

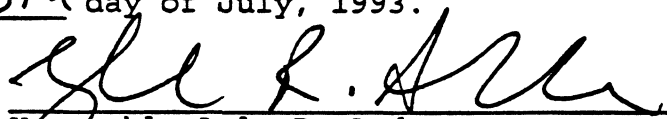
La Sal filed a reply.

2. Hartford also filed a supplemental memorandum. Defendant State and Defendant La Sal filed a motion to strike the supplemental memorandum. This is based on the determination that the Utah Code of Judicial Administration, Rule 4-501, does not provide for supplemental memoranda and the motion to strike is accordingly granted and the Court did not consider the arguments contained in the supplemental memoranda in its decision.

3. This Order is based upon the Court's "Ruling on Motion to Dismiss", dated June 21, 1993,*on file herein, and hereby incorporated by reference.

4. Each party is responsible for its own costs and fees incurred in this matter.

DATED this 15th day of July, 1993.


Honorable Lyle R. Anderson
District Court Judge

CERTIFICATE OF MAILING

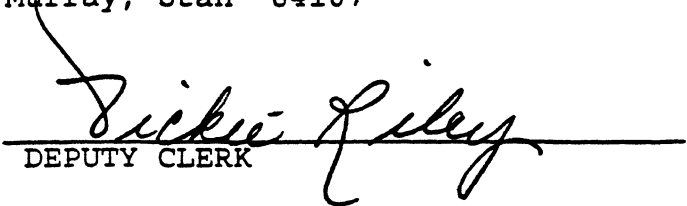
I hereby certify that on JULY 15, 1993,
I mailed a true and correct copy of the foregoing ORDER OF
DISMISSAL FOR LACK OF PROSECUTION WITH PREJUDICE, U.S. Mail, first-
class, postage prepaid, to the following:

Alan S. Bachman
Assistant Attorney General
Room 4120 State Office Building
Salt Lake City, Utah 84114

J. Michael Hansen
Sutiter, Axland, Armstrong & Hanson
Attorneys at Law
175 South West Temple #700
Salt Lake City, Utah 84101

J. James Clegg
Snow, Christensen & Martineau
Attorneys at Law
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145

Steven C. Tycksen
45 East Vine Street
Murray, Utah 84107


DEPUTY CLERK

ADDENDUM 6

RULING ON OBJECTIONS TO PROPOSED ORDER, DATED 7/19/93

BY Deputy

THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY
STATE OF UTAH

HARTFORD LEASING CORPORATION,
Plaintiff,

vs

**RIO VISTA OIL LIMITED,
LA SAL OIL COMPANY,
STATE OF UTAH,
Defendants.**

RULING ON OBJECTIONS TO PROPOSED ORDER

Civil No. 880705692
Judge Lyle R. Anderson

Plaintiff filed Hartford Leasing's Objection to Proposed Order dated July 15, 1993, by beginning a facsimile transmission at 4:58 p.m., which ended at 5:10 p.m. The Court had already signed the Order of Dismissal with instructions to file it if no objection was received on July 15, 1993. That order was filed before the facsimile transmission was received.

Plaintiff asks the Court to set aside its ruling for several reasons.

It is true that plaintiff requested oral argument when it filed its original memorandum in opposition to the motion to dismiss. Under Rule 4-501, plaintiff would have been entitled to oral argument. However, plaintiff thereafter filed a Notice to Submit for Decision that reads in full as follows:

RULING ON OBJECTIONS
TO PROPOSED ORDER
Civil No. 880705692
Page 2

Plaintiff's Objection to Defendants' Motion for Dismissal filed with the Court on or near the 7th day of April, 1993, by Steven C. Tycksen, Attorney for Plaintiff, is now at issue and ready for decision of the Court.

The natural interpretation of this notice is that nothing remained to be done before the Court rendered a decision, and that plaintiff had waived its right to oral argument. The Court accordingly ruled without oral argument.

Plaintiff now presents evidence, or at least argument, about additional efforts it made to push this case toward a resolution. The Court cannot consider these arguments or evidence. They should have been presented before the motions were submitted for decision.

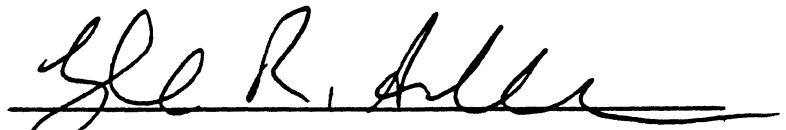
The Court reaffirms its ruling that supplemental memoranda are not permitted. Even if they were permitted, the supplemental memoranda submitted by plaintiff before it filed the Notice to Submit for Decision would not have altered the Court's decision.

Rule 41, U.R.C.P. clearly states that dismissals for failure to prosecute are with prejudice unless the Court otherwise specifies. This Court specifically states that this dismissal is with prejudice.

RULING ON OBJECTIONS
TO PROPOSED ORDER
Civil No. 880705692
Page 3

Plaintiff's objection is accordingly overruled and the dismissal is confirmed.

DATED the 19th day of July, 1993.


Lyle R. Anderson, District Court Judge

CERTIFICATE OF MAILING

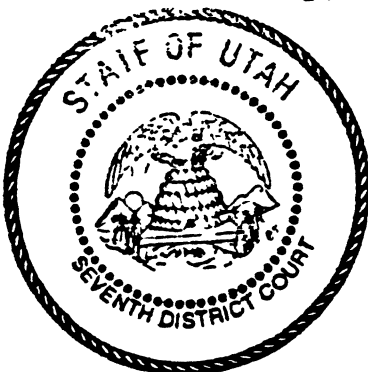
I hereby certify that on July 19, 1993, I mailed a true and correct copy of the foregoing RULING ON OBJECTIONS TO PROPOSED ORDER, postage prepaid, to the following:

Steven C. Tycksen
Attorney for Plaintiff
45 East Vine Street
Murray, UT 84107

Alan S. Bachman
Assistant Attorney General
Room 4120, State Office Building
Salt Lake City, UT 84114

J. James Clegg
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place 11th Floor
Post Office Box 45000
Salt Lake City, UT 84145

J. Michael Hansen
SUITTER, AXLAND ARMSTRONG & HANSON
175 South West Temple #700
Salt Lake City, UT 84101




Deputy Clerk