

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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IN THE UTAH COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

FILED 930612-CA

HARTFORD LEASING CORPORATION,

Plaintiff/Appellant,

Case No. 930612-CA

vs.

Priority 15

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.

BRIEF OF DEFENDANT/APPELLEE RIO VISTA OIL, LTD.

APPEAL FROM A DECISION OF FROM THE SEVENTH JUDICIAL
DISTRICT COURT, GRAND COUNTY, STATE OF UTAH
HONORABLE LYLE R. ANDERSON

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ISSUES AND STANDARDS OF REVIEW

Appellant correctly notes that the appropriate standard of review governing the first five issues delineated in its appellate brief is abuse of discretion. However, the sixth issue it presents for this Court's consideration, whether the trial court erred as a matter of law in interpreting Rule 4-501 of the Utah Code of Judicial Administration, involves the lower court's interpretation of a statute. The proper standard of review for a trial court's interpretation of statutory law is correction of error. Ong Intern. (U.S.A.) v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993), citing State v. James, 819 P.2d 781, 796 (Utah 1991); State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990).

STATEMENT OF THE CASE

Appellant Hartford Leasing Corporation appeals from an Order of Dismissal for Lack of Prosecution With Prejudice, signed by Judge Lyle R. Anderson on July 15, 1993. (R. 167-168).

Appellant filed a complaint on June 22, 1988, against the State of Utah, LaSal Oil and Rio Vista ("Appellees") for damages to its property in Moab. (R. 1-14). Rio Vista filed its answer on July 18, 1988. (R. 29-32). The State of Utah filed a Motion for a More Definite Statement from Appellant, but Appellant never filed a response.

In December 1988, Appellant voluntarily filed for bankruptcy. Later that month Appellant's counsel filed a Notice of Withdrawal of Counsel and Notice of Bankruptcy ("the Notice"). (R.69). Although the Notice stated that Appellant's counsel at that time,

Dale F. Gardiner, was withdrawing from representation of Appellant, it also represented that Appellant had other counsel. Specifically, the Notice explained that "[c]ounsel for Hartford Leasing Corporation is George H. Speciale, Esq...." (R. 69).

The record reflects that after the filing of this Notice, Appellant took no further action in 1991, 1992 or the first part of 1993. As a result, the State of Utah and LaSal filed separate Motions to Dismiss for Lack of Prosecution on March 29, 1993, and March 31, 1993, respectively. ("Motions to Dismiss"). (R. 71-75). Rio Vista joined in the Motions to Dismiss on April 26, 1993. (R. 140-141).

On April 12, 1993, Appellant's new counsel, Steven C. Tycksen, submitted Appellant's Objections in Response to Defendants' Motions to Dismiss, including a Request for Oral Argument. (R. 112). Appellant attempted to submit yet another memorandum objecting to the Motions to Dismiss on June 7, 1993, entitled "Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss." (R. 151-162). On June 8, 1993, Appellant filed a Notice to Submit for Decision stating that the Motions to Dismiss were "ready for decision of the Court." (R. 149-150).

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

SUMMARY OF ARGUMENT

POINT I: Because the Notice failed to clarify that Appellant lacked counsel in the instant proceeding as of December 30, 1988, Rio Vista could not be expected to inform Appellant that it must obtain new counsel or else appear pro se as required under Rule 4-506(3) of the Utah Code of Judicial Administration. Judge Anderson's decision to dismiss this case due to Appellant's longstanding idleness, despite Rio Vista's failure to act upon an ambiguous Notice, was not an abuse of discretion.

POINT II: Judge Anderson did not abuse his discretion in granting Appellees' Motions to Dismiss for lack of prosecution. The Appellant evinced no interest in moving this case towards trial until faced with Appellees' Motions to Dismiss. Its sudden yet untimely procurement of still another attorney to represent it in opposing the Motions to Dismiss cannot excuse more than two years of complete inertia.

POINT III: Contrary to Appellant's assertion, Judge Anderson had no obligation to dismiss this case without prejudice. Recognizing that Rule 41(b) of the Utah Rules of Civil Procedure permits dismissal with prejudice, Utah courts have often exercised their discretion by dismissing cases with prejudice for failure to prosecute. Judge Anderson did not abuse his discretion because his order of dismissal with prejudice was supported by procedural rule and case precedent.

POINT IV: Judge Anderson did not abuse his discretion by ruling on the Motions to Dismiss without holding a hearing. Further, Appellant withdrew its request for oral argument by its Notice to Submit for Decision.

POINT V: Judge Anderson did not misinterpret Rule 4-501 of the Utah Code of Judicial Administration. Rather than allowing parties to file potentially endless streams of supplemental memoranda in support of a motion, Rule 4-501 efficiently limits parties to filing a memorandum in support of a motion, one in opposition, and one in reply. Appellant's Supplemental Memorandum of June 7, 1993, was a second opposition memorandum not authorized under Rule 4-501.

ARGUMENT

POINT I

JUDGE ANDERSON DID NOT ABUSE HIS DISCRETION BY DISMISSING THIS CASE FOR LACK OF PROSECUTION BY APPELLANT SIMPLY BECAUSE RIO VISTA FAILED TO COMPLY WITH RULE 4-506(3) OF THE UTAH CODE OF JUDICIAL ADMINISTRATION THROUGH NO FAULT OF ITS OWN.

Appellant argues that Appellees failed to advise it of its responsibility to obtain new counsel or appear pro se as required by Rule 4-506(3) of the Utah Code of Judicial Administration when Dale F. Gardiner withdrew as its attorney in 1988. For this alleged inadvertence of Appellees back in 1988, Appellant asks that this entire proceeding be revived by overturning Judge Anderson's Order of Dismissal.

Nonetheless, Rio Vista never received clear notice from Dale F. Gardiner that Appellant was without counsel for this proceeding as of December 31, 1988. Instead, the Notice informed Rio Vista that he was withdrawing as counsel, that Appellant had filed for bankruptcy, and that Appellant's counsel was George H. Speciale. Rio Vista and the other Appellees reasonably understood this Notice to mean that the matter was automatically stayed and that Appellant had obtained new counsel for this proceeding. Thus, none of the Appellees notified Appellant of its need to acquire new counsel or appear pro se. If Rio Vista failed to comply with Rule 4-506(3) in this manner, it was because Rio Vista was never correctly apprised of Appellant's lack of counsel in this proceeding.

Moreover, Judge Anderson noted in his Ruling on the Motion to Dismiss that Rule 4-506(3) does not require denial of a motion to remedy noncompliance. The more pertinent remedy, he observed, is to give the unrepresented party adequate time for procuring counsel to respond to any pleadings filed by the opposing party.

In view of the ambiguous Notice purportedly notifying Rio Vista that Appellant lacked counsel in 1988 and the availability of a more appropriate remedy for noncompliance with Rule 4-506(3) than denial of a motion, Judge Anderson did not abuse his discretion by concluding that Appellant's years of dilatory conduct could not be excused by an inadvertence of Appellees back in 1988.

POINT II

JUDGE ANDERSON'S DISMISSAL FOR LACK OF PROSECUTION WAS NOT AN ABUSE OF DISCRETION BECAUSE APPELLANT IGNORED THIS CASE FOR MORE THAN TWO YEARS.

Appellant states that the trial judge may consider five factors in deciding whether to grant a motion to dismiss for failure to prosecute: the conduct of both parties; the opportunity that each has had to move the case forward; what each party has done to move the case forward; what difficulty has been caused to the other side; and whether injustice may result from dismissal. K.L.C. Inc. v. McLean, 656 P.2d 986, 988 (Utah 1982). It then claims that the Appellees have done as little as Appellant to move this case to trial, thereby precluding dismissal for its failure to prosecute.

Even though the first three factors request a judge to examine a defendant's conduct as well as the plaintiff's, the ultimate burden "is upon **the plaintiff** to prosecute a case in due course without unusual or unreasonable delay." Charlie Brown Constr., Inc. v. Leisure Sports, Inc., 740 P.2d 1368, 1370 (Utah App. 1987), cert. denied, 765 P.2d 1277 (Utah 1987) (emphasis added). The plaintiff faces responsibility for prosecuting its claim with diligence, not the defendant; if the plaintiff is dilatory, it must accept the penalty of dismissal. Id.

Consequently, the mere fact that a defendant may have missed an opportunity to move a case forward cannot serve to prevent a

dismissal for lack of prosecution. At most, inaction on the part of a defendant may contribute to the plaintiff's excuse for delay. Country Meadows v. Dept. of Health, 851 P.2d 1212, 1216 (Utah App. 1993).

The plaintiff in Country Meadows sought to overturn a dismissal for lack of prosecution by drawing attention away from its own inactivity. It claimed, as does Appellant, that the defendant was dilatory because the defendant could have requested a scheduling conference or an order to show cause. The court rejected this attempt to lay blame upon the defendant, observing that the plaintiff could have just as easily done the same. Id. at 1216.

Indeed, Appellant contends that it diligently pursued this case, but only "up to December 1990." Brief of Appellant at 23 (emphasis added). The sole explanation it offers for registering no activity on the record until March 1993 was that it took **more than two years** to find an attorney to represent it. Brief of Appellant at 23. Nevertheless, dismissals following dormancy periods of two or three years have been deemed to be within the trial court's discretion. See Maxfield v. Fishler, 538 P.2d 1323, 1324 (Utah 1975); Charlie Brown Constr., 740 P.2d at 1369-70.

Finally, Appellant maintains that Judge Anderson abused his discretion by granting dismissal after Appellant at long last found an attorney it hoped would reactivate its case. It cites Johnson v. Firebrand, Inc., 571 P.2d 1368 (Utah 1977), as support for its

contention that dismissal after new counsel reactivates the case constitutes an abuse of discretion. That case is distinguishable from the instant case because the plaintiff's new counsel in Firebrand, Inc. had revived the case **prior to** the filing of the motion to dismiss. In the situation at hand, Appellant's new counsel filed his appearance as counsel only **after** Appellees filed their Motion to Dismiss. As a result, this case is more analogous to Country Meadows, where the court upheld a dismissal upon distinguishing Firebrand, Inc. from proceedings involving reactivation after the filing of a motion to dismiss. Country Meadows, 851 P.2d at 1216.

Trial courts have considerable discretion to dismiss cases for lack of prosecution. Grundmann v. Williams & Peterson, 685 P.2d 538 (Utah 1984). Judge Anderson's decision to dismiss this case due to Appellant's absolute inactivity for more than two years lay within this extensive discretion.

POINT III

JUDGE ANDERSON DID NOT ABUSE HIS DISCRETION BY
DISMISSING THIS CASE WITH PREJUDICE.

Appellee points out that Rule 41(b) of the Utah Rules of Civil Procedure implicates a trial court's discretion to dismiss an action without prejudice. Of course, the language of the rule likewise implies that the court has authority to dismiss with prejudice. Utah courts have often exercised their authority to dismiss with prejudice for failure to prosecute. See, e.g.,

Country Meadows, 851 P.2d at 1217; Maxfield v. Rushton, 779 P.2d 237 (Utah App. 1989); Charlie Brown Constr., 740 P.2d 1368 (Utah App. 1987).

POINT IV

JUDGE ANDERSON WAS NOT REQUIRED TO HOLD A HEARING ON THE MOTION TO DISMISS BECAUSE APPELLANT WITHDREW ITS REQUEST FOR ORAL ARGUMENT.

Although Appellant originally requested a hearing on the Motion to Dismiss, it does not dispute Judge Anderson's understanding of its Notice to Submit for Decision, that Appellant waived its right to oral argument with its statement that the issue was ready for the court's decision. Appellant merely contends that waiver is not among the grounds for denial of the request listed in Rule 4-501(3)(c) of the Utah Code of Judicial Administration. Since this waiver operated as a withdrawal of Appellant's original request for oral argument, however, Rule 4-501(3)(c) is inapplicable. It is not an abuse of discretion for a judge to rule on a motion for dismissal without a hearing when the parties have not requested oral argument.

POINT V

JUDGE ANDERSON'S DETERMINATION THAT APPELLANT COULD NOT FILE A SECOND MEMORANDUM IN OPPOSITION DID NOT MISINTERPRET A UTAH CODE PROVISION EXPRESSLY PERMITTING A PARTY TO FILE ONLY ONE MEMORANDUM OPPOSING A MOTION.

Appellant somehow thinks that Rule 4-501(1)(a) of the Utah Code of Judicial Administration, which limits memoranda to ten

pages in length in the interest of judicial economy, conversely sanctions endless streams of supplemental memoranda at the same time. Appellant maintains that the word "memoranda" as used in the rule refers to an infinite number of memoranda a single party may wish to unload on the court. The word instead refers to the "memoranda" that **all** parties are permitted to file in regards to a motion under Rule 4-501(1)(b) and (c). Thus, if a party files a motion with a supporting **memorandum**, Rule 4-501(1)(b) allows each party opposing the motion to file a **memorandum** in opposition. Rule 4-501(1)(c) then permits the party that filed the motion to submit a reply **memorandum**. Appellant's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss represented a second memorandum in opposition to the motion not contemplated by Rule 4-501. Therefore, Judge Anderson did not err in interpreting Rule 4-501 to mean that Appellant could not file as many opposing memoranda as it wanted.

CONCLUSION

Based upon the foregoing, Rio Vista respectfully requests that this Court deny Hartford Leasing Corporation's appeal and affirm the trial court's Order of Dismissal.

DATED this 15 day of December, 1993.

SNOW, CHRISTENSEN & MARTINEAU

By Julianne P. Blanch
H. James Clegg
Julianne P. Blanch
Attorneys for Appellee Rio Vista

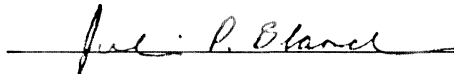
CERTIFICATE OF SERVICE

This is to certify that I mailed true and correct copies of the foregoing Brief of Defendant/Appellee Rio Vista Oil, Ltd. first class, postage prepaid to the following on the 15 day of December, 1993.

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IN THE UTAH COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

DEC 16 1993


Mary T. Noonan
Clerk of the Court

HARTFORD LEASING CORPORATION,

Plaintiff/Appellant,

Case NO. 930612-CA

vs.

Priority 15

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.

BRIEF OF DEFENDANT/APPELLEE RIO VISTA OIL, LTD.

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HONORABLE LYLE R. ANDERSON

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to §78-2-2(4) and §78-2a-3(2)(K) of the Utah Judicial Code, permitting the Court of Appeals to preside over cases transferred to it by the Utah Supreme Court.

SNOW, CHRISTENSEN & MARTINEAU

By Julianne P. Blanch
H/ James Clegg
Julianne P. Blanch
Attorneys for Appellee Rio Vista

ADDENDA

ADDENDUM 1

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.

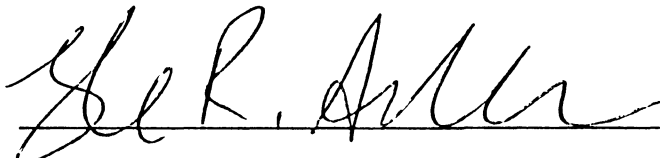
The defendants claim that they have suffered prejudice because the passage of time has affected their ability to gather evidence for the defense. The Court discounts some of those claims because most of the defendants have had the opportunity and the incentive to gather much of the same evidence in related 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

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:

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Vicki Riley, Deputy Clerk

ADDENDUM 2

Order of Dismissal Signed 7/15/93

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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

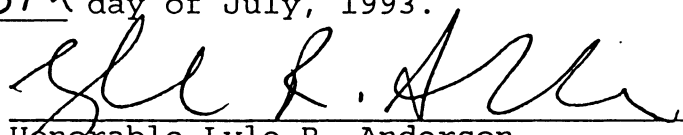
La Sal filed a reply.

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

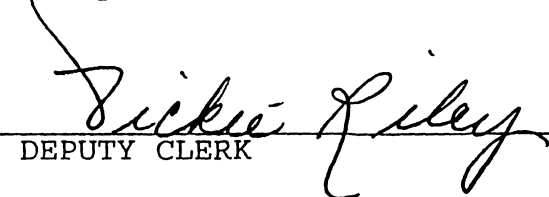
I hereby certify that on JULY 15,, 1993,
I mailed a true and correct copy of the foregoing ORDER OF
DISMISSAL FOR LACK OF PROSECUTION WITH PREJUDICE, U.S. Mail, first-
class, postage prepaid, to the following:

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 3

Ruling on Objections to Proposed Order Dated 7/19/93

SEVENTH DISTRICT COURT
Grand County

FILED JUL 19 1993

CLERK OF THE COURT

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:

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.

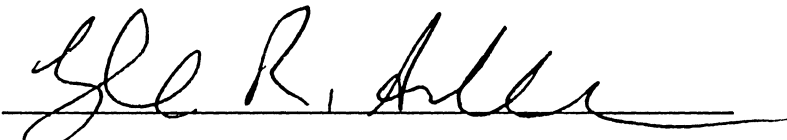
The Court reaffirms its ruling that supplemental memoranda are not permitted. Even if they were permitted, the supplemental memoranda submitted by plaintiff before it filed the Notice to Submit for Decision would not have altered the Court's decision.

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

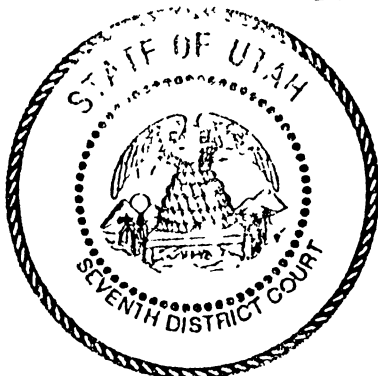
I hereby certify that on July 19, 1993, I mailed a true and correct copy of the foregoing RULING ON OBJECTIONS TO PROPOSED ORDER, postage prepaid, to the following:

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

ADDENDUM 4

**Utah Code of Judicial Administration, Rules 4-501
and 4-506(3)**

tion 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.)

ARTICLE 5.

CIVIL PRACTICE.

Rule 4-501. Motions.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

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 applica-

Rule 4-506. Withdrawal of counsel in civil cases.**Intent:**

To establish a uniform procedure and criteria for withdrawal of counsel in civil cases.

Applicability:

This rule shall apply to all counsel in civil proceedings in trial courts of record except guardians ad litem and court-appointed counsel.

Statement of the Rule:

(1) Consistent with the Rules of Professional Conduct, an attorney may withdraw as counsel of record without the approval of the court except when (a) a motion has been filed and is pending before the court or (b) a certificate of readiness for trial has been filed. Under these circumstances, an attorney may not withdraw except upon motion and order of the court.

(2) When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney and upon all other parties not in default and a certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

(3) When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, opposing counsel must notify, in writing, the unrepresented client of his/her responsibility to retain another attorney or appear in person before opposing counsel can initiate further proceedings against the client. A copy of the written notice shall be filed with the court and no further proceedings shall be held in the matter until 20 days have elapsed from the date of filing.

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

ADDENDUM 5

Utah Rules of Civil Procedure, Rule 41(b)

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 pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of previously-dismissed action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) **Bond or undertaking to be delivered to adverse party.** Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

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