

1995

John Panos v. Smiths Food & Drug Centers Inc. : Brief of Appellant

Utah Court of Appeals

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Stephen G. Morgan, Mitchel T. Rice; Morgan & Hansen.

Gordon K. Jensen; Lehman, Jensen & Donahue.

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COURT OF APPEALS

JOHN PANOS,

VS.

Defendant/Appellee.

Case No. 950286-CA

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE JUDGE ANNE STIRBA PRESIDING

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The plaintiff/appellant, John Panos, pursuant to Rule 24 (a) of the Utah Rules of Appellate Procedure, submits the following Appellant's Brief.

JURISDICTION

This Court has jurisdiction to decide this appeal pursuant to Utah Code Ann. §78-2a-3(2)(k). This is an appeal from the Order Granting Defendant's Motion to Dismiss, of the Third Judicial District Court, in and for Salt Lake County, Utah, the Honorable Anne M. Stirba presiding. That Order granted dismissal in favor of the defendant, Smith's Food & Drug Centers, Inc., dismissing the plaintiff's complaint with prejudice.

STATEMENT OF ISSUES

The following issue is presented to this Court for review:

1. Did the trial court err in concluding that the March 11, 1992 dismissal was a dismissal with prejudice pursuant to Rule 41 (b) of the Utah Rules of Civil Procedure, as opposed to a dismissal without prejudice under Rule 4-103 of the Utah Code of Judicial Administration?

STANDARD OF REVIEW

The issue on appeal involves a legal conclusion by the trial court. That legal conclusion will be given no difference by this Court and will be reviewed for legal correctness. Alf v. State Farm Fire and Casualty Co., 850 P.2d 1272 (Utah 1993).

DETERMINATIVE STATUTORY AUTHORITY

The interpretation of the following statutory provision is determinative of the issues on appeal. The language of these designated statutes of these designated rules is set out in the Addendum to this Appellants' brief, pursuant to Rule 24 (f) (2) of the Utah Rules of Appellate Procedure:

Rule 4-103 of the Utah Code of Judicial Administration;

Rule 41 (b) of the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Nature of the case

This is an appeal from a final Order of the Third Judicial District Court in and for Salt Lake County, Utah, the Honorable Anne M. Stirba presiding. Judge Stirba granted the defendant's Motion to Dismiss, dismissing the plaintiff's complaint with prejudice.

B. Course of Proceedings

On June 30, 1994, the plaintiff filed his complaint in the Third Judicial District Court, Civil No. 940904176. (R. 279-283). The defendant moved to dismiss the plaintiff's complaint asserting that a previous dismissal in Panos v. Smiths Food & Drug Centers, Inc., Civil No. 910901425 PI, Third Judicial District Court, was a dismissal with prejudice disposing of the plaintiff's complaint. The plaintiff argued that the previous dismissal was a dismissal without prejudice and did not dispose of his claim against the defendant.

Hearing on the defendant's Motion to Dismiss came before Judge Stirba on January 23, 1995. At that hearing, Judge Stirba concluded that the March 11, 1992 dismissal was a dismissal with prejudice under Rule 41 (b) of the Utah Rules of Civil Procedure. (R.354-356). This appeal followed (R. 357-358).

C. Statement of Facts

1. On or about February 21, 1991, attorney Anthony M. Thurber filed the complaint in Panos v. Smith's Food & Drug Centers, Inc., Civil No. 910901425 PI, Third District Court, on behalf of the plaintiff, alleging that the defendant was negligent and responsible for the injuries the plaintiff sustained in a slip-and-fall on June 30, 1990. (R. 2-5).

2. On November 13, 1991, the court sent an Order to Show Cause to Thurber as to why the case should not be dismissed for failure to prosecute. (R. 8-9).

3. On December 11, 1991, Thurber appeared before Judge Moffat at a hearing on the Order to Show Cause. In a Minute Entry, after the hearing, Judge Moffat ordered as follows:

Counsel have until March 11, 1992 to settle this case or file a Certificate of Readiness for Trial. If neither are done, the case will be dismissed without further notice to counsel. (R. 10).

4. On or about March 11, 1992, the Court entered an Order of Dismissal, which provided:

The court finds that the Certificate of Readiness has not yet been filed and the file does not reflect that this case has ben settled.

Therefore, the court on its own motion orders that this case hereby DISMISSED. (R. 11).

5. On October 30, 1992, Thurber withdrew as counsel for the plaintiff. (R. 12-13).

6. On January 14, 1993, Gordon K. Jensen entered his appearance as counsel for the plaintiff. (R. 15-16).

7. When Jensen received the litigation file from Thurber, all it contained was a copy of the Summons and Complaint. No order to show cause documents or the order of dismissal were included. (R. 240-242).

8. After Jensen entered his appearance as counsel for the plaintiff, the case moved forward through discovery, with both parties exchanging interrogatories and requests for production of documents and taking various depositions, including the depositions of the plaintiff and employees of the defendant. (R. 240-242).

9. At the completion of significant discovery, the defendant filed a motion for summary judgment on liability issues. (R. 38-39).

10. Both the plaintiff and the defendant briefed those liability issues. Hearing on the defendant's motion for summary judgment was scheduled for Friday, June 17, 1994 before Judge Ronald O. Hyde, sitting in for Judge Moffat. (R. 334-336).

19. At that hearing, Judge Stirba concluded that the March 11, 1992 dismissal was a dismissal with prejudice under Rule 41(b) of the Utah Rules of Civil Procedure. (R. 354-356). This appeal followed.(R.357-358).

SUMMARY OF ARGUMENT

The trial court erred in concluding that the March 11, 1992 Order of Dismissal was a dismissal with prejudice pursuant to Rule 41 (b) of the Utah Rules of Civil Procedure. The March 11, 1992 dismissal was a dismissal without prejudice pursuant to Rule 4-103 of the Utah Code of Judicial Administration.

ARGUMENT

THE MARCH 11, 1992 DISMISSAL WAS WITHOUT PREJUDICE FOR FAILURE TO PROSECUTE UNDER RULE 4-103 OF THE CODE OF JUDICIAL ADMINISTRATION. IT WAS NOT A DISMISSAL WITH PREJUDICE UNDER RULE 41(b) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 4-103(2), (3), of the Utah Code of Judicial Administration provides as follows:

(2) If a certificate of readiness for trial has not been served and filed within 180 days of the filing date and absent of showing of good cause, the court shall dismiss the case without prejudice for lack of prosecution.

(3) Any party may, pursuant to the Utah Rules of Civil Procedure, move to vacate a dismissal entered under this rule.

Rule 41(b) of the Utah Rules of Civil Procedure provides, in pertinent part as follows:

11. At the June 17, 1994 hearing on the defendant's motion for summary judgment, Judge Hyde informed counsel that his file reflected that Judge Moffat had dismissed the plaintiff's case back in March of 1992, when Anthony Thurber was representing the plaintiff. (R. 334-336).

12. That was the first time Jensen or the plaintiff, who attended the hearing, had heard of that prior dismissal. (R. 334-336; 344).

13. After discussion between Judge Hyde and both counsel, it was decided that the appropriate way to proceed would be for the plaintiff to file a motion to vacate the prior dismissal. Judge Hyde's ruling on this motion would govern further proceedings in that case. (R. 334-336).

14. Hearing on that motion was held on Friday, June 24, 1994 at 8:45 a.m. (R. 334-336).

15. At that hearing, Judge Hyde denied the plaintiff's motion to vacate dismissal, but declined to rule on whether the March 11, 1992 dismissal was with or without prejudice. (R. 334-336).

16. On June 30, 1994, the plaintiff filed his complaint in Civil No. 940904176 PI, Third District Court. (R. 279-283).

17. The defendant moved to dismiss that complaint asserting that the March 11, 1992 dismissal was with prejudice. (R. 286-287, 288-306).

18. Those issues were briefed and a hearing was held on January 23, 1995. (R. 349-350).

(b) Involuntary Dismissal: effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. . . . unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision 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.

Rule 4-103 of the Utah Code of Judicial Administration and Rule 41(b) of the Utah Rules of Civil Procedure directly conflict in that Rule 4-103 specifically provides that a dismissal for failure to prosecute is without prejudice, while Rule 41(b) provides that such a dismissal is with prejudice.

Case law and factual background of this case support that the March 11, 1992 dismissal was without prejudice. What happened in this case is clear. Through no fault of Panos or his current counsel, his complaint was dismissed based on an order to show cause. Panos's previous lawyer had represented that the case would be settled or a certification of readiness for trial filed within three months of the order to show cause hearing. For whatever reason, Panos's prior counsel did not comply with that deadline and the case was dismissed pursuant to Rule 4-103 of the Utah Code of Judicial Administration.

It is clear that the dismissal was based on Rule 4-103 as a part of this Court's civil calendar management system. The order to show cause of November 13, 1991 was designated "No. 1",

clarifying that it was sent out pursuant to the court's internal calendar management system.

Panos's current counsel entered his appearance in January of 1993 and the case has moved forward through substantial discovery to the point where a dispositive motion was filed by the defendant on liability issues. Counsel for both Panos and Smiths moved the case forward efficiently to the point of briefing and preparing to argue Smith's motion for summary judgment on liability. Only at the hearing on Smith's Motion for Summary Judgment were present counsel informed, for the first time, that the case had been dismissed under Rule 4-103 over two years earlier.

The procedural circumstances of this case confirm that the March 1992 dismissal was made under Rule 4-103 of the Utah Code of Judicial Administration. That rule established a procedure which allows trial courts to manage civil case processing and is designed to reduce the time between case filing and disposition. The rule states that if a certificate of readiness of trial has not been filed within a specified period of time, the court shall dismiss the case. That rule specifically provides that the dismissal will be "without prejudice for lack of prosecution."

The Order to Show Cause was a form document sent out by Judge Moffat's clerk. The Court's Order of Dismissal is a form document incorporating the certificate of readiness for trial language of

Rule 4-103. Nowhere in any of those documents, including the Order of Dismissal, does it state that the appellant's claim is dismissed with prejudice. The language of Rule 4-103 makes it clear that the proceeding is designed to move cases forward quickly. If an action is dismissed under Rule 4-103, the action is taken off the court docket, and the plaintiff is not prejudiced because he has the ability to refile that claim within the applicable statute of limitations or savings statute.

The March 1992 dismissal cannot be deemed a dismissal with prejudice and on the merits. Issues were never joined. Smiths had not even filed an answer at the time of dismissal. To deprive Panos his right to pursue this claim, through no fault of his own, is unreasonable, unjust, and contrary to Rule 4-103 and decisions of the Utah appeals courts.

Utah appeals court decisions do not support a dismissal with prejudice for failure to prosecute, or for failure to obey a court order, under the facts of this case. In cases affirming such a dismissal with prejudice, the parties had been engaged in ongoing litigation for years and the plaintiff has showed inexcusable dilatory conduct in moving the case forward. For example, in Country Meadows v. Department of Health, 851 P.2d 1212 (Utah Ct. App. 1993), there had been five years of inactivity on the case, which the court deemed an "inexcusable abuse of the judicial

process." In Maxfield v. Rushton, 538 P.2d 1323 (Utah 1975), the plaintiff had made no attempts at discovery and had no medical expert to testify on the morning of trial. In Charlie Brown Construction v. Leisure Sports, Inc., 740 P.2d 1368 (Utah Ct. App. 1987), the case had been inactive for three and a half years and counsel for the plaintiff did not show up for any of the pretrial conferences. In Hill v. Dickerson, 839 P.2d 309 (Utah Ct. App. 1992), the plaintiffs were given a number of opportunities to designate expert witnesses and complete discovery. Still there was no expert to testify at the time of trial, when a second motion for continuance was made. Dismissal with prejudice under those circumstances was affirmed because of the plaintiff's own failure to designate expert witnesses and by abusing the opportunity to move her case forward.

Finally, in Department of Social Services v. Romero, 609 P.2d 1323 (Utah 1980), the defendant moved to have the plaintiff's complaint set aside for failure to prosecute after an adverse bench trial ruling. There had been no activity on the case for more than four years before trial. The Utah Supreme Court affirmed the trial court's denial of that motion to dismiss stating that, although the plaintiff had not moved the case forward for four years, "it does not appear that during the delay of which the defendant complains, he made any motion or any effort to move the case forward nor to

discover why that was not being done." Id. at 1324. While the facts of the Romero case are not analogous to the facts of this case, it is true that Smiths has never filed any motion for dismissal for failure to prosecute. Of course, Smiths could not have done that in the first action because it never entered an appearance nor filed an answer before the case was dismissed.

This case is most similar to Westinghouse Electric Supply Co. v. Paul W. Larsen Construction, Inc., 544 P.2d 876 (Utah 1975). In that case, over a number of years, discovery was ongoing. A voluminous amount of documents were requested from Westinghouse which, rather than producing them, told counsel for the defendant that they could come and examine the documents. The defendant's counsel never made that examination and instead, served a motion to dismiss for failure to prosecute based on Westinghouse's failure to deliver those documents. The trial court granted the defendant's motion to dismiss for failure to prosecute. In its decision, the Utah Supreme Court laid out the elements to consider when evaluating such a motion:

It is not to be doubted that in order to handle the business of the court with efficiency and expedition the trial court should have a reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse. But that prerogative falls short of unreasonable and arbitrary action which will result in injustice. Whether there is such justifiable excuse is to be determined by considering more factors than merely the length of time

since the suit was filed. Some consideration should be given to the conduct of both parties, and for the opportunity each has had to move the case forward and what they have done about it; and also what difficulty or prejudice may have been caused to the other side; and most importantly, whether injustice may result from the dismissal.

Id. at 878-79.

In evaluating those elements, this case had been pending for just over one year at the time of dismissal. It appears that what happened is Panos's prior counsel filed the complaint and then granted Smiths an open extension in filing an answer while settlement discussions progressed. Certainly, Panos is not at fault in this case. Like both counsel, Panos knew nothing of the 1992 dismissal until the June 17, 1994 hearing. As soon as he found out that Mr. Thurber had withdrawn as counsel, he contacted new counsel. New counsel entered his appearance and the case began moving forward through discovery and dispositive motions. Since both parties have been engaged in litigation, the case has moved forward efficiently, with both parties fulfilling their obligations to the court. Under those circumstances, no difficulty or prejudice is caused to Smiths if the dismissal is without prejudice. How could there be any such prejudice? Smiths did not even know of the 1992 dismissal until the June 17, 1994 hearing. Certainly severe injustice will result to Panos if the 1992

dismissal is deemed with prejudice. His personal injury claim is lost without adjudication.

As was the case in Westinghouse, the circumstances of this case are "unusual". The final observations of the Utah Supreme Court in Westinghouse are relevant:

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is an reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

It is our conclusion that the trial court failed to give proper weight to the higher priority; and that under the circumstances described herein, the order of dismissal was an abuse of discretion.

Id. at 879. See also Maxfield v. Rushton, 779 P.2d 237 (Utah Ct. App. 1989).

CONCLUSION

Based on the law and facts set forth above, the March 11, 1992 dismissal was a dismissal without prejudice under Rule 4-103 of the Utah Code of Judicial Administration. That dismissal was not intended to be a dismissal with prejudice pursuant to Rule 41 (b) of the Utah Rules of Civil Procedure. The Order of the trial Court, dismissing Panos's complaint with prejudice in Civil No. 940904176 PI, was error. That Order Granting Defendant's Motion to

Dismiss should be vacated and this case should be remanded to the trial court for trial on the merits.

DATED this 17th day of August, 1995.

LEHMAN, JENSEN & DONAHUE, L.C.

A handwritten signature in black ink, appearing to read "Gordon K. Jensen", written over a horizontal line.

GORDON K. JENSEN
Attorneys for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that two true and correct copies of the foregoing Brief of Appellant were mailed, first class postage prepaid to the following this 7th day of August, 1995.

Stephen G. Morgan
Mitchell T. Rice
MORGAN & HANSEN
136 South Main Street, Eighth Floor
Salt Lake City, Utah 84101

Gordon K. Jensen

ADDENDUM

Rule 4-103. Civil calendar management.

Intent:

To establish a procedure which allows the trial courts to manage civil case processing.

To reduce the time between case filing and disposition.

Applicability:

This rule shall apply to the District and Circuit Courts.

Statement of the Rule:

(1) If a default judgment has not been entered by the plaintiff within 60 days of the availability of default, the clerk shall mail written notification to the plaintiff stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution.

(2) If a certificate of readiness for trial has not been served and filed within 180 days of the filing date, the clerk shall mail written notification to the parties stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution.

(3) Any party may, pursuant to the Utah Rules of Civil Procedure, move to vacate a dismissal entered under this rule.

(Amended effective January 15, 1990; May 1, 1993; May 15, 1994.)

Amendment Notes. — The 1990 amendment inserted "and absent a showing of good cause" in Subdivision (1) and substituted "shall" for "may" in both subdivisions.

The 1993 amendment added Subdivision (3).

The 1994 amendment added the requirement of mailing written notification in Subdivisions (1) and (2).

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 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.

Compiler's Notes. — Subdivisions (a) to (d) of this rule are substantially similar to Rule 41, F.R.C.P.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR THE
COUNTY OF SALT LAKE CITY, STATE OF UTAH

JOHN PANOS

Plaintiff,

-VS-

SMITH'S FOOD KING

DEFENDANT

:

:

COURT'S ORDER OF DISMISSAL

:

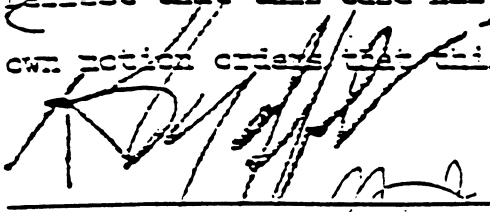
CASE NO. 910901425 PI

:

This case came before the court on DECEMBER 11, 1991 for a hearing on the Court's Order To Show Cause for dismissal. At that hearing, counsel were advised that this case had to be settled by MARCH 11, 1992 or a Certificate of Readiness for Trial filed. If neither of these were done, then the court on it's own motion would dismiss this case without further notice to counsel.

The court finds that a Certificate of Readiness has not yet been filed and the file does not reflect that this case has been settled.

Therefore, the Court on it's own motion orders that this case is hereby DISMISSED.


RICHARD E. MOFFAT, DISTRICT JUDGE

JUL - 7 1994

[Handwritten signature]

Stephen G. Morgan, No. 2315
Mitchel T. Rice, No. 6022
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136 South Main Street
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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOHN PANOS,	:	
Plaintiff,	:	ORDER
vs.	:	
SMITH'S FOOD & DRUG CENTER,	:	Civil No. 930901425 PI
INC.,	:	Judge Richard Moffat
Defendant,	:	

This matter came before the Court for a hearing on the Motion for an Order Vacating the Order of Dismissal entered on March 11, 1992 of John Panos, Plaintiff in the above-entitled action, with Gordon K. Jensen appearing as attorney for Plaintiff, and Mitchel T. Rice appearing as attorney for Defendant Smith's Food and Drug Centers, Inc.; and

After reading the Motion to Vacate Dismissal and Memorandum in Support thereof, and the Memorandum in Opposition thereto, and after consideration of the argument of counsel for Plaintiff and Defendant,

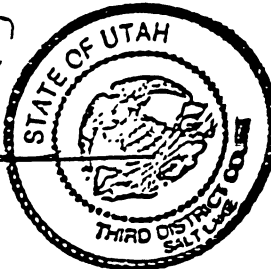
IT IS ORDERED THAT:

1. The Motion for an Order Vacating the Order of Dismissal entered on March 11, 1992 is hereby denied.

Dated this 7th day of July, 1994.

BY THE COURT

[Signature]
For RONALD O. HYDE
District Court Judge



CERTIFICATE OF SERVICE

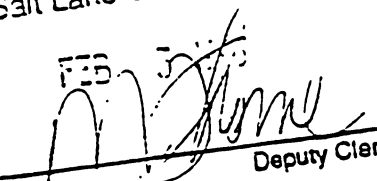
I hereby certify that on the 29th day of June, 1994, I caused a true and correct copy of the ORDER to be Hand-Delivered to the following:

Gordon K. Jensen
LEHMAN, JENSEN & DONAHUE
136 South Main Street, Suite 721
Salt Lake City, UT 84101

[Signature]

FILED IN CLERK'S OFFICE
Salt Lake County Utah

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By  Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOHN PANOS,	:	
Plaintiff,	:	ORDER GRANTING DEFENDANT'S
	:	MOTION TO DISMISS
vs.	:	
SMITH'S FOOD & DRUG CENTERS,	:	Civil No. 940904176 PI
INC.,	:	
Defendant.	:	Judge Anne M. Stirba
	:	

This matter came before the Court for a hearing on the Motion to Dismiss Plaintiff's Complaint of Smith's Food & Drug Centers, Inc., Defendant in the above-entitled action, with Gordon K. Jensen appearing as attorney for Plaintiff, and Mitchel T. Rice appearing as attorney for Defendant Smith's Food and Drug Centers, Inc.; and

After reading the Motion to Dismiss and Memorandum in Support thereof, the Memorandum in Opposition to Defendant's Motion to Dismiss, the exhibits attached to said Memoranda, and Affidavits, and after consideration of the argument of counsel for Plaintiff and Defendant,

The Court finds that the Order of Dismissal entered by Judge Richard H. Moffat on March 11, 1992, in John Panos v. Smith's Food King, Civil No. 910901425, was made pursuant to Rule 41(b) of the Utah Rules of Civil Procedure and operated as an adjudication upon the merits of the case, and

IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss is hereby granted;
2. Plaintiff's Complaint against Defendant Smith's Food & Drug Centers, Inc. is hereby dismissed with prejudice;
3. Defendant Smith's Food & Drug Centers, Inc. is awarded its costs of the action as are allowed by law.

Dated this 3rd day of February, 1995.

BY THE COURT


ANNE M. STIRBA
District Court Judge

