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IN THE THIRD DISTRICT COURT, WEST JORDAN DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BANK,

Plaintiff,

v.

[DEFENDANT]

Defendant.

**MOTION TO DISMISS FOR FAILURE
TO PROSECUTE**

Case No. 123456789
Judge _____

STATEMENT OF RELIEF

[Defendant] (“Defendant”), by and through her counsel of record, hereby submits this Motion to Dismiss the civil case brought against her by Bank (“Plaintiff”). Plaintiff filed its Complaint in this Court on November 9, 1903, seeking relief for damages in the amount of \$[MONEY], which it alleges resulted from a breach of contract on the part of Defendant; Plaintiff further alleges, inter alia, unjust enrichment on the part of Defendant. As Plaintiff, without any reasonable nor justifiable excuse, failed to dutifully prosecute the case, it should be dismissed pursuant to UCJA Rule 4-103 and Utah R. Civ. P. 41(b). WHEREFORE, we respectfully request the Court to dismiss Plaintiff’s case for failure to prosecute, and that it be done so with prejudice, pursuant to Utah R. Civ. P. 41(b) in this manner.

STATEMENT OF RELEVANT FACTS

1. Plaintiff debt collector filed its Complaint in this Court on November 9, 1903,¹ where it alleged to breach of contract, monies due, open account, and unjust enrichment on the part of Defendant, and prayed that judgement be entered against Defendant for damages in the amount of \$[MONEY].²
2. Defendant, after unsuccessful attempts to settle the matter with Plaintiff,³ filed her Answer on July 22, 1904.⁴
3. Thereafter, due to Plaintiff's inactivity, the Court ordered Plaintiff to show cause why the case should not be dismissed for failure to prosecute; accordingly, a telephone conference was set for September 21, 1904, to resolve the issue.⁵
4. Plaintiff requested to stay on the docket for another 60 to 90 days and promised to file a motion within that time.⁶
5. The Judge allowed for tracking to be reset for 120 days, whereupon if no action was made on the part of Plaintiff, the case would automatically go back on the Order to Show Cause (the "OSC") calendar.⁷
6. The 120 days passed with no action from Plaintiff, but for some reason the case did not appear on the OSC calendar.
7. From September 21, 1904, to August 1, 1906, there was no communication whatsoever between the Parties, nor any action from either Party.⁸

¹ See Docket No. 1.

² See Complaint.

³ Declaration of [Attorney Name] dated September 11, 1906.

⁴ See Docket No. 18.

⁵ Id. No. 20.

⁶ [Attorney Name], September 11, 1906.

⁷ Id.

⁸ Id.

8. On August 1, 1906, nearly two years after the telephone conference, Plaintiff sent Rule 26 Initial Disclosures.⁹

ARGUMENT

Defendant has satisfactorily fulfilled all of her duties thorough the course of this case, whereas (1) Plaintiff's conduct has demonstrated inexcusable negligence in prosecuting the case; (2) Plaintiff has failed to demonstrate an avid pursuit of justice in its own behalf, which by doing so has caused unfair prejudice to come upon Defendant; (3) Plaintiff has failed to act pursuant to the Utah Rules of Civil Procedure, which in itself is prima facie to move the Court to dismiss the case; and (4) Plaintiff's case can be dismissed with prejudice pursuant to Utah R. Civ. P. 41(b). Accordingly, the Court should dismiss Plaintiff's case for failure to prosecute, with prejudice and upon the merits mentioned hereinafter.

A. Plaintiff failed its responsibility to advance the case; has caused unfair prejudice to Defendant, which would become aggravated if the case is not dismissed; and there would be no injustice done to Plaintiff if the case is dismissed. Therefore, the case should be dismissed.

In Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.,¹⁰ plaintiff electrical supply company challenged the judgement of a trial court (Utah), which dismissed its action against defendant general contractor, with prejudice, for failure to prosecute the action with sufficient haste. In its analysis, the court used five factors¹¹ to determine if the case was properly dismissed, which were,

⁹ See Docket No. 21.

¹⁰ 544 P.2d 876, 879 (Utah Sup.Ct. 1975).

¹¹ These five factors are known as the "*Westinghouse*" factors, which have become the standard in Utah courts when analyzing and deciding upon a party's motion to dismiss for failure to prosecute. See Cheek v. Clay Bulloch Constr., Inc., 2011 UT App 418, 269 P.3d 964; Meadow Fresh Farms v. Utah State Univ. Dep't of Agric. & Applied

(1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each party has done to move the case forward; (4) the amount of difficulty or prejudice that may have been caused to the other side; and (5) "most important, whether injustice may result from the dismissal."¹²

Accordingly, the same factors compel the conclusion that Plaintiff's case should be dismissed for failure to prosecute.

Upon receipt of Defendant's Answer on July 22, 1904, Plaintiff failed to diligently pursue the case, and was consequently ordered to show cause on September 21, 1904; this shows a first instance of unexcused neglect on the part of Plaintiff. Thereafter, despite Plaintiff promising the Court that it would file a motion within the 120-day reset the Judge granted, it did not do so and went into a period of total inactivity between September 21, 1904 and August 1, 1906. Therefore, Plaintiff's conduct has on two occasions shown a complete failure to exercise the "due diligence" [of] a reasonably prudent person under similar circumstances"¹³ as required by the Utah Supreme Court in Mini Spas, Inc. v. Industrial Comm'n.,¹⁴ and its case should consequently be dismissed for (1) failure to comply with Utah Rules of Civil Procedure¹⁵ and for (2) failure to diligently prosecute its claim against Defendant.

Sci., 813 P.2d 1216 (Utah Ct. App. 1991); PDC Consulting, Inc. v. Porter, 2008 UT App 372, 196 P.3d 626; and Face v. Beutler Enters., 2007 UT App 275 (all cases where the five *Westinghouse* factors were used).

¹² Meadow Fresh Farms v. Utah State Univ. Dep't of Agric. & Applied Sci., 813 P.2d 1216 (Utah Ct. App. 1991) (quoting 544 P.2d 876, 879 (Utah Sup.Ct. 1975)).

¹³ Id. (quoting Mini Spas, Inc. v. Industrial Comm'n., 733 P.2d 130, 132 (Utah 1987)).

¹⁴ 733 P.2d 130, 132 (Utah 1987).

¹⁵ On the first occasion, Plaintiff failed to comply with Utah R. Civ. P. 26(a)(2)(A) (which states that "[t]he disclosures required by paragraph (a)(1) shall be served on the other parties . . . by the plaintiff within 14 days after filing on the first answer to the complaint") when it failed to send Rule 26 Initial Disclosures within 14 days of receiving Defendant's Answer. Furthermore, as will be expounded upon later, Plaintiff's case can be dismissed for failure to comply with Utah R. Civ. P. alone. See Utah R. Civ. P. 41(b) (stating that "[if] the plaintiff fails to prosecute or to comply with these rules [(i.e., the Utah Rules of Civil Procedure)] or any court order, a defendant may move to dismiss the action or any claim against it.") (emphasis added); see also Velander v. LOL of Utah, LLC, 2015 UT App 171, 355 P.3d 243, 245, P7 (stating that "[u]nder rule 41(b), a case can be dismissed '[f]or failure of the plaintiff to prosecute or comply with [the Rules of Civil Procedure].'" Utah R. Civ. P. 41(b).").

With respect to (1) Defendant's conduct; (2) the opportunity she may have had to move the case forward; (3) and what she did to move the case forward, we stand with the court in Cheek v. Clay Bulloch Constr., Inc.¹⁶ who held that

the plaintiff bears the primary responsibility for advancing the case and that the defendant's responsibility in this area "is limited." Hartford Leasing, 888 P.2d at 699. Further, "[a]lthough inaction on the part of a defendant may contribute to the justifiability of a plaintiff's excuse for delay, the duty to prosecute is a duty of due diligence imposed on a plaintiff, not on a defendant." Country Meadows Convalescent Ctr. v. Utah Dep't of Health, 851 P.2d 1212, 1216 (Utah Ct. App. 1993).

Therefore, irrespective of Defendant's conduct, Plaintiff's failure to prosecute was inexcusable, as Plaintiff had the primary responsibility to move the case forward, while Defendant's responsibility was limited only to responding timely to an action by Plaintiff,¹⁷ had any such action been made. Furthermore, we argue that as the defending party, our conduct was proper under the circumstances, and that we fulfilled our duties diligently and responsibly, especially given the fact that "the ball" was in Plaintiff's "court," and that our conduct in no way did or could have reasonably constituted some actual hindrance to Plaintiff in pursuing its case.¹⁸ As did the court in Meadow Fresh Farms v. Utah State Univ. Dep't of Agric. & Applied Sci.,¹⁹ we argue that "'the burden is upon the plaintiff to prosecute a case in due course without unusual or unreasonable delay.' Plaintiffs are required 'to prosecute their claims with due diligence, or accept

¹⁶ 2011 UT App 418, 269 P.3d 964, 966, P8.

¹⁷ See id. (referring "to this concept as 'the obvious' in explaining: What each party has done to move the case forward can only be evaluated in light of each party's responsibility concerning the case. Of course, the plaintiff, as the party initiating the lawsuit, has the primary responsibility to move the case forward. The defendant's responsibility is limited to responding timely to the action, expeditiously attending to discovery, and moving any counterclaim along. The defendant has no general responsibility to move plaintiff's action to judgment. Hartford Leasing, 888 P.2d at 698 n.2 (emphasis in original).")

¹⁸ See id. (expounding upon the preceding note, the court explained that "[u]ltimately what this means is that inaction by the defendant to move the plaintiff's claim along is irrelevant unless that inaction constitutes some actual hindrance, i.e., where the plaintiff can show that the defendant's inaction 'contributed to [the plaintiff's] own delays.' PDC Consulting, Inc. v. Porter, 2008 UT App 372, ¶ 10, 196 P.3d 626.")

¹⁹ 813 P.2d 1216, 1218 (Utah Ct. App. 1991) (quoting Charlie Brown Construction, Inc. v. Leisure Sports, Inc., 740 P.2d 1368, 1370 (Utah App.), cert. denied, 765 P.2d 1277 (Utah 1987) (citations omitted)).

the penalty of dismissal." WHEREFORE, analyzing Plaintiff's and Defendant's conduct through the first three *Westinghouse* factors compels the conclusion that (1) Plaintiff acted inordinately negligent in pursuing the case; (2) that Plaintiff on two occasions, with no reason nor excuse, failed to act with the due diligence of a reasonably prudent person under similar circumstances; (3) that Plaintiff bore the primary responsibility to move the case forward, and that on the two occasions where it failed to do so it was not in any way due to Defendant's conduct; (4) that on the two occasions where it failed to diligently pursue the case it was during its turn to act; (5) that Defendant was cooperative and acted in good faith, diligently, timely, and responsibly within the scope of all her duties throughout the course of the case; and (6) that Plaintiff's unjustifiable, unprofessional, and reprehensible conduct is the direct cause of this case's delays and the negative consequences thereof.

In regard to the fourth *Westinghouse* factor, Defendant has been prejudiced by Plaintiff's failure to prosecute in that (1) she has had to incur costs of litigation along the way; (2) has suffered the stress associated with litigation; (3) has suffered psychologically from the uncertainty and uneasiness caused by having this case perpetually "looming over" her head; and (4) has had her credit worthiness and future purchasing power negatively impacted for longer than necessary due to Plaintiff's delays. Therefore, not dismissing this case would result in Defendant having to unfairly accrue additional costs of litigation due to Plaintiff's continued inadequacies, which would consequently result in additional undue stress and prejudice upon Defendant.

With respect to the fifth *Westinghouse* factor, i.e., regarding any potential injustice to Plaintiff resulting from dismissing this case, we argue that "such injustice is a result of Plaintiff's own inaction," as held the court in Face v. Beutler Enters.²⁰ Indeed, as did the court in PDC

²⁰ 2007 UT App 275.

Consulting Inc. v. Porter,²¹ we argue that Plaintiff has “had more than ample opportunity [to pursue the case] . . . and simply failed to do so.” Therefore, it is clear that if Plaintiff had been anxious about, and truly desirous to, repair the injustice it alleges was done unto it, it would have pursued the case diligently and not have dilated it to the extent it did; that if Plaintiff truly had a meritorious claim against Defendant for which justice could be brought about, it surely wouldn’t have failed on two occasions to diligently pursue the case. As has been heretofore demonstrated and argued, it is clear by Plaintiff’s lackadaisical conduct that bringing justice to its case is low in its list of priorities; therefore, we argue that there can be no injustice done by dismissing a case where no justice was pursued, and that Plaintiff’s reprehensible conduct has caused for significant injustice to be brought upon Defendant through the lengthy course of this case.

B. Pursuant to UCJA Rule 4-103(2), Plaintiff’s case should have been dismissed by the Court for failure to prosecute. Pursuant to Utah R. Civ. P. 41(b), Defendant can move to dismiss Plaintiff’s claim, and can do so with prejudice despite UCJA Rule 4-103(3) stating that “all orders of dismissal entered under this rule must contain the language ‘without prejudice,’” as has been interpreted by the Utah Supreme Court in Holmes v. Cannon, 2016 UT 42, 387 P.3d 971 (Sup.Ct.), who also stated that the matter of dismissing a case with or without prejudice is governed by Utah R. Civ. P. 41(b) and not UCJA Rule 4-103(3).

UCJA Rule 4-103(2) states that,

If a certificate of readiness for trial has not been served and filed within 330 days of the first answer, the clerk will mail written notification to the parties

²¹ 2008 UT App 372, 196 P.3d 626, 631, P 13; see Maxfield v. Rushton, 779 P.2d 237, 240 (Utah Ct. App. 1989) (rejecting claim of injustice where plaintiff “had more than ample opportunity to prove his asserted interest and simply failed to do so,” and determining that “[s]uch nonaction is inexcusable”); accord Rohan v. Boseman, 46 P.3d 753, 2002 UT App 109, P 32.

stating that absent a showing of good cause by a date specified in the notification, the court will dismiss the case without prejudice for lack of prosecution.

Hence, we recognize that the Court notified the Parties of the missing certificate of readiness and ordered Plaintiff to show cause on September 21, 1904, after Defendant's Answer on July 22, 1904; i.e., 62 days after Defendant's Answer. However, between September 21, 1904 and August 1, 1906, a time span of 680 days, the Court did not put Plaintiff back on the OSC calendar despite Plaintiff's lack of prosecution during that time. Therefore, under this rule, Plaintiff's case is dismissible, and we argue that it should have been dismissed regardless of it not showing on the OSC calendar, because Plaintiff was or should have been reasonably aware of the action it needed to take, but failed to do so; i.e., Plaintiff should have diligently fulfilled its duty to pursue the case regardless of court instruction.

Utah R. Civ. P. 41(b) states that,

If the plaintiff fails to prosecute or to comply with these rules or any court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order otherwise states, a dismissal under this paragraph and any dismissal not under this rule, other than a dismissal for lack of jurisdiction, improper venue, or failure to join a party under Rule 19, operates as an adjudication on the merits.

Accordingly, we argue that (1) Plaintiff failed to diligently prosecute its case, as has heretofore been shown; (2) that Plaintiff failed to comply with Utah R. Civ. P. 26(a)(2)(A) when it failed to serve the defense with Rule 26 Initial Disclosures within 14 days after Defendant's Answer, and that this factor alone is sufficiently meritorious to move the Court to dismiss Plaintiff's case; (3) that Plaintiff's promise to the Court to submit a motion within the 120-day extension given by the Judge on the September 21, 1904, telephone conference sufficiently constitutes a court order, which Plaintiff did not comply with; and (4) that we have sufficient cause to move the Court to dismiss Plaintiff's case for failure to prosecute, inter alia. Therefore, under

Utah R. Civ. P. 41(b), we move for the Court to dismiss Plaintiff's case for failure to prosecute and for failure to comply with Utah R. Civ. P. 26(a)(2)(A), and that it be done so with prejudice pursuant to the Utah Supreme Court in Holmes v. Cannon,²² who stated that,

We have interpreted [the] 'adjudication on the merits' [clause at the end of Utah R. Civ. P. 41(b)] to mean that the case is dismissed with prejudice—i.e., the plaintiff is barred from re-filing the same claim in the same court. See Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne, 2012 UT 66, ¶¶ 22-23, 289 P.3d 502.

Further, pertaining to the issue of UCJA Rule 4-103(3) stating that "all orders of dismissal entered under this rule must contain the language 'without prejudice,'" the Utah Supreme Court in Holmes stated that "Panos^[23] incorrectly relied on Rule 4-103(3) of the Utah Code of Judicial Administration rather than relying on Utah Rule of Civil Procedure 41(b),"²⁴ and that "Utah Rule of Civil Procedure 41(b) controls whether a case is dismissed with or without prejudice."²⁵ Therefore, the conclusions compelled hereto, and with which we substantiate our argument in this section, are that (1) pursuant to UCJA Rule 4-103(2), Plaintiff's case should have been dismissed after its failure to submit a certificate of readiness or show cause during the time between September 21, 1904 and August 1, 1906; that (2) there is sufficient merit for Defendant to move the Court to dismiss Plaintiff's case for failure to prosecute; that (3) pursuant to the Utah Supreme Court in Holmes, Utah R. Civ. P. 41(b) controls whether a case is dismissed with or without prejudice, and not UCJA Rule 4-103(3); and that (4) Plaintiff's case can be dismissed with prejudice pursuant to Utah R. Civ. P. 41(b).

²² 2016 UT 42, 387 P.3d 971, 973, P8 (Sup.Ct.).

²³ Referring to Panos v. Smith's Food & Drug Centers, Inc., 913 P.2d 363 (Utah Ct. App. 1996).

²⁴ 2016 UT 42, 387 P.3d 971, 973 (Sup.Ct.).

²⁵ Id. at 975, P21.

CONCLUSION

WHEREFORE, Defendant respectfully requests that Plaintiff's Complaint be dismissed pursuant to Utah R. Civ. P. 41(b), with prejudice and upon the merits, that Plaintiff takes nothing, and that Defendant be awarded attorney's fees and costs incurred in defending this action, and for such other and further relief as the Court may deem necessary, just and proper under the circumstances.

DATED: this 20th day of September, 1906

[LAW FIRM NAME], PLLC

[Attorney Name]

Attorney for Defendant [Defendant]