

IN THE UTAH COURT OF APPEALS

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Bill Parker,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellant,	)	Case No. 20070769-CA
	)	
v.	)	F I L E D
	)	(June 12, 2008)
Diamond Rental,	)	
	)	2008 UT App 227
Defendant and Appellee.	)	

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Third District, Salt Lake Department, 060915931  
The Honorable Denise P. Lindberg

Attorneys: Nathan N. Jardine, Salt Lake City, for Appellant  
Kamie F. Brown, Salt Lake City, for Appellee

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Before Judges Thorne, Bench, and Orme.

PER CURIAM:

Bill Parker appeals the trial court's order dismissing his case for lack of prosecution. We affirm.

In addition to considering the lapse of time since the inception of a case, a trial court's decision to dismiss a matter for lack of prosecution should also weigh: (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 prejudice that may have been caused to the other side, and (5) whether injustice may result from the dismissal. See Westinghouse Elec. Supply Co. v. Paul W. Larson Contractor, Inc., 544 P.2d 876, 879 (Utah 1975). Once the trial court has made its decision to dismiss a case for lack of prosecution, this court "will not interfere with that decision unless it clearly appears that the [trial] court has abused its discretion and that there is a likelihood an injustice has been wrought." Charlie Brown Constr. Co. v. Leisure Sports Inc., 740 P.2d 1368, 1370 (Utah Ct. App. 1987).

On appeal, Parker asserts that the trial court's dismissal of his case resulted in injustice. The record indicates that Parker waited nearly four years after his alleged injury before filing his complaint on September 21, 2004. On April 25, 2006,

the trial court dismissed his complaint without prejudice for Parker's failure to timely serve Diamond Rental. Relying on Utah's saving statute, Parker waited an additional five months before filing a new complaint on September 29, 2006. Parker again failed to timely serve Diamond Rental, and the trial court again dismissed this matter on February 21, 2007. However, days later, the trial court granted Parker's motion for an extension of time to serve Diamond Rental and reinstated the case. Once served, Diamond Rental filed a motion to dismiss for failure to prosecute. The trial court granted Diamond Rental's motion to dismiss.

In its order dismissing Parker's complaint, the trial court noted that Parker did not argue that the interests of justice would be harmed by dismissing his case. Despite Parker's failure to raise this issue, the trial court commented that it was completely within Parker's control to pursue justice by timely prosecuting his action, but Parker elected not to do so. Despite having been allegedly injured nearly six-and-a-half years earlier, Parker did nothing other than file a complaint twice and twice failed to serve the complaint upon Diamond Rental in a timely manner. Parker has not demonstrated that the trial court clearly abused its discretion by concluding that injustice would not result from this matter's third dismissal.

Parker next asserts that Diamond Rental also had an obligation to move the case forward, even though Parker had not served Diamond Rental for nearly three years after filing his complaint. In considering whether to dismiss a case for failure to prosecute, a trial court should consider the opportunity each party has had to move the case forward, and what each party has done to move the case forward. See Westinghouse, 544 P.2d at 879. The record demonstrates that once Diamond Rental was served, it immediately filed its motion to dismiss. On the other hand, Parker did almost nothing to move the case forward. Parker's assertion that Diamond Rental bore a duty to move the case forward before the action was commenced lacks merit. Under these circumstances, Parker has failed to demonstrate that the trial court clearly abused its discretion in determining that Parker bore the burden to prosecute his case.

Lastly, Parker asserts that Diamond Rental has suffered little prejudice for Parker's inaction. The trial court properly considered the prejudice that may have been caused to Diamond Rental by Parker's inaction. See id. The trial court noted that neither of the parties addressed this issue, but observed that because the alleged injury occurred in September 2000, the memory of witnesses may have been impaired, if not being unavailable to testify. The record does not support Parker's assertion that the

trial court clearly abused its discretion in determining that Diamond Rental was likely prejudiced by Parker's inaction.

Accordingly, the trial court's order is affirmed.

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William A. Thorne Jr.,  
Associate Presiding Judge

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Russell W. Bench, Judge

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Gregory K. Orme, Judge