IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 13

WCC No. 9807-8006

SYNTHETIC TECHNOLOGIES CORPORATION

Petitioner

vs.

ROBERT MURKER and UNINSURED EMPLOYERS' FUND

Respondents.

ORDER DENYING MOTION TO DISMISS AND
SCHEDULING TRIAL WITH NO FURTHER CONTINUANCES

Summary of case: Respondent UEF moves to dismiss petition for lack of prosecution. The case has been pending for more than two and one half years and has been continued numerous times, first because the parties were awaiting a decision, then because they had reached an oral settlement which was to be reduced to writing but never was.

Held: Motion to dismiss denied since dismissal would be with prejudice and no prior warning was given that the action might be dismissed with prejudice if not tried or a settlement agreement filed. However, case is set for trial with no further continuances and with the warning that it will be dismissed with prejudice if the parties are not ready for trial on the date set.

Topics:

> **Judgments: Involuntary Dismissal.** Dismissal for lack of prosecution is with prejudice and res judicata as to issues raised in the case.
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> **Judgments: Involuntary Dismissal.** Dismissal for lack of prosecution inappropriate and unnecessary where two and a half year delay has in part been due to the parties waiting for a decision in another case and where the remainder of the delay was caused by belief that the parties had a settlement agreement which was to be reduced to writing. More appropriate remedy is to schedule case for trial with no further continuances.
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> **Procedure: Motion to Dismiss.** Dismissal for lack of prosecution inappropriate and unnecessary where two and a half year delay has in part been due to the parties

waiting for a decision in another case and where the remainder of the delay was caused by belief that the parties had a settlement agreement which was to be reduced to writing. More appropriate remedy is to schedule case for trial with no further continuances.

¶1 This case has been pending since July 1, 1998. It has been continued numerous times and respondent Uninsured Employers' Fund (UEF) has now moved to dismiss for lack of prosecution. Petitioner, Synthetic Technologies Corporation, filed a response indicating that it does not object to dismiss without prejudice, however, the UEF wants dismissal with prejudice. Respondent Robert Murker (Murker), who has a counterclaim for benefits, has not responded.

Background

¶2 The issue raised in the petition is whether Murker, who was allegedly injured at work on March 14, 1997, was an officer and 20% shareholder and therefore exempt from workers' compensation coverage requirements. The same issue was presented in a case prosecuted by the UEF for a penalty against Synthetic Technologies. A hearing officer of the Department of Labor and Industry held that Van Smith owned the companies and that three purported shareholders were in fact employees, not shareholders. On appeal to this Court, I affirmed, holding that Synthetic Technologies Corporation and another Smith owned company - Weatherguard Corporation - were "shams to eveade workers' compensation insurance coverage requirements." Synthetic Technologies Corporation and Weatherguard Corporation v. Employment Relations Division, Uninsured Employers' Fund, WCC No. 9812-8106, 1999 MTWCC 55, ¶17 (*Synthetic Technologies I)*. That decision issued September 1, 1999 and was not appealed.

¶3 While the appeal of the UEF penalty was pending, the parties in this case agreed to continue these proceedings pending resolution of the penalty case. Based upon correspondence attached to the UEF's motion to dismiss, the parties apparently contemplated filing a stipulation stating that the decision in the penalty case would be binding in the present proceeding. A stipulation was circulated but neither executed nor filed.

¶4 In November 1999, counsel for Synthetic Technologies requested a trial setting. The matter was set for trial during the week of March 27, 2000. order resetting scheduling order (November 22, 1999). Less than two weeks before trial, Murker changed attorneys. stipulation for substitution of counsel (March 17, 2000). Murker's new attorney filed a motion to continue trial date. The motion was granted and trial was rescheduled for the week of May 29, 2000. order resetting scheduling order (March 21, 2000).

¶5 Then on May 26, 2000, counsel for Synthetic Technologies notified the Court by letter that the attorneys believed the case could be settled by stipulation. He requested the case again be vacated. The case was vacated but no stipulation has ever been forthcoming.

¶6 On January 3, 2001, the Clerk of this Court notified all counsel that unless they provided the Court with a status report concerning settlement by January 11, 2001, the case would be dismissed without prejudice. Counsel for both Synthetic Technologies and Murker responded before the deadline, indicating that a settlement had been reached and that settlement documents would be forthcoming. Counsel for Murker requested that the case not be dismissed.

¶7 Still no settlement agreement has been forthcoming.

Discussion

¶8 A judgment for dismissal for lack of prosecution is a harsh remedy since it is res judicata as to merits of the claims made in the case. *See Mondakota Gas Co. v. Reed,* 244 F. Supp. 327, 332 (1966), aff'd 363 F.2d 879 (1966), *cert. denied, 385 U.S. 1005* (1967). In light of that harsh result, "courts should refrain from dismissing an action or claim unless there is no other adequate remedy available and facts sufficiently call for such a result. " *Doug Johns Real Estate, Inc. v. Banta,* 246 Mont. 295, 298, 805 P.2d 1301, 1303 (1990). One factor which must be considered in determining whether to grant the motion to dismiss is "whether there has been prior warning to the party occasioning the delay." *Id.* at 299, 805 P.2d at 1304. The only notice given of potential dismissal in this case was that it would be dismissed "without prejudice" unless the parties provided the Court with a status report. Moreover, there is a lesser remedy available: that is to reschedule the trial with the warning that no further continuances will be granted.

ORDER

¶9 The motion to dismiss is **denied**. This case is scheduled for trial during the week of June 4, 2001, in Great Falls. **Any party who does not appear for trial will be deemed in default and judgment entered against that party as to all claims made by or against the party, including any claims for relief contained in any responses filed with in answer to the petition. If counsel are not ready for trial during the week of June 4, 2001 the petition and all claims made in the responses filed with respect to the petition will be dismissed with prejudice. THERE WILL BE NO FURTHER CONTINUANCES.**

DATED in Helena, Montana, this 6th day of April, 2001.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Gary S. Deschenes
Mr. Daniel B. McGregor
Mr. Tom L. Lewis
Submitted: April 5, 2001