IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 64,988

MANUEL ANTONIO GOBAYRA,

Appellant,

vs.

DONALD S. STRAUBEL,

Appellee.
_____/

APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE THIRD DISTRICT COURT OF FLORIDA

CASE NO. 83-794

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

DONALD S. STRAUBEL (hereinafter referred to as STRAUBEL) commenced this action on July 25, 1979 by filing his Complaint against MANUEL ANTONIO GOBAYRA (hereinafter referred to as GOBAYRA), requesting damages resulting from Defendant's negligent operation of his automobile. (Record at 1 - 2, hereinafter referred to as "R,1-2"). GOBAYRA'S Motion to Dismiss the Complaint was denied on September 11, 1979 (R,4) and he filed his Answer and Demand for Jury Trial on October 2, 1979. STRAUBEL filed his Reply to Affirmative Defenses on October 9, 1979. After extensive discovery was conducted by the parties, STRAUBEL noticed the cause for trial on May 29, 1980. (Appendix at 3). The Court, on June 20, 1980, entered an Order setting the cause for jury trial (R,8).

On September 18, 1980, the parties filed a Stipulation for Continuance of Trial (R.9), requesting that the Court continue the cause from the scheduled two-week period commencing September 29, 1980. On September 29, 1980 the Court entered an Order Continuing the Cause (R,12). The Order, by its terms, removed the cause from the trial calendar commencing September 29, 1980 and recited:

> "This cause shall be reset for trial upon further proper notice therefor".

On March 18, 1982, counsel for GOBAYRA moved to withdraw, (R, 13 - 14A). On March 30, 1982, the Court granted the motion to withdraw (R, 15).

The Court, instead of resetting the trial, filed a "Notice Preceding Order of Dismissal" on February 16, 1983. (R, 16). On March 3, 1983, after a hearing, the Court dismissed the cause for want of prosecution pursuant to Rule 1.420 of the Florida Rules of Civil Procedure (R, 18).

A timely Notice of Appeal was filed on April 4, 1983 (R, 17), challenging the propriety of the final order dismissing the case, and this appeal resulted in a reversal of the trial court; the opinion of the District Court of Appeal of the Third District of Florida found the trial court order setting the trial date to be ambiguous, and determining that such ambiguity be construed in favor of proceeding to a trial on the merits, rather than dismissed.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DISMISSING THE CAUSE ON ITS OWN MOTION DUE TO LACK OF PROSECUTION PURSUANT TO THE FLA. R. CIV. P. 1.420, WHERE PLAINTIFF HAD ALREADY NOTICED THE CAUSE FOR TRIAL WHEN THE COURT ORDERED A CONTINUANCE, AND WHERE THE COURT FAILED TO RESET THE ACTION FOR TRIAL.

The Third District Court of Appeal has consistently held that once a Plaintiff has noticed an action for trial, it is incumbent upon the Court to set a trial date, and the failure of the trial court to set and proceed to trial cannot be the basis for dismissal for want of prosecution. Visuna v. Metropolitan Trans. Authority, 353 So.2d 183 (Fla. 3d DCA 1977); City of Miami v. Dade County, 321 So.2d 140 (Fla. 3d DCA 1975); Megdell v. Adeff, 296 So.2d 596 (Fla. 3d DCA 1974); Neff Machinery, Inc. v. Allied Electrical Co., Inc., 258 So.2d 314 (Fla. 3d DCA 1972). See also Sarasota Cattle Co. v. Mikos, 431 So. 2d 260 (Fla. 2d DCA 1983).

In City of Miami v. Dade County, 321 So.2d 140 (Fla. 3d DCA 1975), the defendant filed its notice for non-jury trial on September 6, 1973. No action of record or affirmative non-record activity was taken by either of the parties or the Court until September 12, 1974, at which time defendant moved to dismiss for

failure to prosecute. The Court entered an order of dismissal on October 18, 1974. On appeal, plaintiff contended that once the case had been noticed for trial pursuant to Rule 1.440, Fla. R. Civ. P., it was the court's duty to enter an order fixing the date for trial, and therefore, the Plaintiff was not required to take any further affirmative action to avoid dismissal for want of prosecution. The precise question before the court in City of Miami, and in the case at bar, is therefore, when a trial court fails for a period of one year to enter an order setting a cause for trial, and the proper notice under the rule was given by a party that the cause is ready for trial, whether it is the duty of a party to take some action within the one year period from the notice of trial so as to prevent dismissal of the cause by the trial court for failure to prosecute. Id. at 142. After distinguishing cases decided under Rule 2.2 of the 1954 Florida Rules of Civil Procedure, which did not impose the requirement that the court enter an order fixing the trial date, the Court in the City of Miami held that Rule 1.440(c) of the present Rules imposes a duty on the trial court to enter an order setting the cause for trial after notice is given that the cause is ready for trial, and therefore, the plaintiff's case could not be dismissed for lack of prosecution. See also Yankee Construction Corp. v. Jones-Mahoney Corp., 430 So. 2d 973 (Fla. 2d DCA 1983) (Trial Court improperly dismissed the action after the appellant filed a

Notice of Trial and then took no action for more than one year after filing the notice).

The same result obtains where the trial court grants a continuance after the cause has been properly noticed and set for trial. In Visuna v. Metropolitan Trans. Authority, 353 So.2d 183 (Fla. 3d DCA 1977), the Plaintiff noticed three consolidated actions for trial; the court set the actions to be tried during the period of the weeks of December 1 and December 8, 1975. During that period, a continuance was ordered by the court on its own motion. In Visuna, as in the case at bar, it did not appear that any definite provision was made at the time of the continuance as to a future date for the trial or as to procedures to be taken thereafter with reference to trial. More than a year later, with no record showing of progress, the defendant moved on January 3, 1977 for an order of dismissal for want of prosecution. The defendant's motion was granted, and the plaintiff appealed. Citing City of Miami v. Dade County, supra, the Third District Court of Appeal held that even after the continuance, the duty to set the action for trial remained with the trial court and therefore, it was error to dismiss the action for want of prosecution. Accord, Neff Machinery, Inc. v. Allied Electrical Co., Inc., 258 So.2d 314 (Fla. 3d DCA 1972); Megdell v. Adeff, 296 So.2d 596 (Fla. 3d DCA 1971). Appellant recognizes that Rule 1.420(e) requires litigants to keep the court dockets

as current as possible. However, Rule 1.440(c) makes its incumbent upon the courts to do likewise. Sarasota Cattle Co. v. Mikos, 431 So. 3d 260 (Fla. 2d DCA 1983). The rules contemplate that once counsel has properly noticed the case for trial, the ball is in "the court's court." See Fox v. Playa Del Sol Assoc., Inc., 446 So. 2d 126 (Fla. 4th DCA 1983).

Because the language of the trial court's order granting the continuance did not clearly shift the burden to reset the trial from the court to counsel, it is manifestly unfair for the trial court to have dismissed this action on its own motion. The trial court, having abused its discretion, committed reversible error and this court should affirm the decision of the Third District Court of Appeal, allowing this case to proceed to trial on its merits.

Appellant has mistated the issue presented to this Court; Appellant's statement of the issue begs the question. Appellant's Answer Brief before the Third District Court of Appeal frames the issue as :

> Whether the Trial Court properly dismissed the action for lack of prosecution pursuant to Fla. R. Civ. P. 1.420 when the cause was continued upon motion of the parties and when the Order of Continuance clearly indicated that the cause would be reset for trial upon a party's propermotion therefor. (Emphasis supplied)

As can be gleaned from a perfunctory reading of the Order of Continuance (R,12), the Order did not "clearly indicate" that the cause would be reset only upon a party's Motion. What is clear and obvious is that it was the Court's responsibility to reset

the Trial.[1] Visuna v. Metropolitan Transit Authority, 353 So. 2d 183 (Fla. 3rd DCA 1977). Rule 1.440(c) of the Florida Rules of Civil Procedure, in pertinent part, provides:

> If the Court finds the action ready to be set for trial, it shall enter an order fixing a date for trial.

Thus, the burden is on the court, not the litigants, to determine if the case is ready to be tried, and if so, to set it for trial. There is no provision in the rule shifting this burden after a continuance. Any ambiguity in the Order should be resolved in favor of allowing this case to proceed to trial on the merits.

The rule in the Third District of Florida is that once a Plaintiff files a proper notice of trial, it is the Court's duty to set the case for trial, even after the granting of a continuance. Visuna v. Metropolitan Transit Authority, 1353 So.2d, 183 (Fla 3rd DCA 1977); Neff Machinery, Inc. v. Allied Electrical Co., 258 So2d 314 (Fla 3rd DCA 1972); In Bogart v. F.B. Condominiums, Inc., 438 So. 2d 856 (Fla. 2d DCA 1983) the Second District Court of Appeal affirmed the lower court which granted a motion to dismiss where Defendant, not trial court, moved for a dismissal?

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[1] Surely, a party cannot unilaterly decide when to reset a cause. The Trial Court, which has and should have control over its own calendar, does so.

The Third District in its opinion in the instant case agreed with the Second District's opinion in Bogart but decided the case on the alternate ground that the specific orders in each case were different and distinguishable and the order in the instant case was vague as to be without any ascertainable time frame on shifting of the burden to notice the set for trial (unlike Bogart) and as such, the Court below should not have dismissed the case.

CONCLUSION

The language of the Trial Court's Order granting the continuance did not clearly shift the burden of re-noticing the cause from the Court to counsel. In the absence of any explicit language shifting that burden, the duty remained in the Trial Court.

WHEREFORE, Appellee, DONALD S. STRAUBEL, respectfully requests that this Honorable Court affirm the judgment of the Appellate Court which reversed the trial court and remand this cause for further proceedings.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed to JOEL E. BERNSTEIN, ESQUIRE, Law Offices of Leland E. Stansell, Jr., P.A. 903 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, on this 1st day of October, 1984.

By: Richard F. O'Brien

RICHARD F. O'BRIEN, III

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