


IN THE SUPREME COURT
STATE OF FLORIDA

FILED

SID J. WHITE

AUG 17 1984

CLERK, SUPREME COURT

By: 
Chief Deputy Clerk

MANUEL ANTONIO GOVAYRA,

Appellant,

v.

CASE NO. 64,988

DONALD S. STRAUBEL,

Appelle,

An appeal from the District
Court of Appeal, Third District
Case No. 83-794

INITIAL BRIEF OF APPELLANT

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OTHER AUTHORITY

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ISSUE PRESENTED

WHETHER THE TRIAL COURT PROPERLY DISMISSED THE ACTION FOR LACK OF PROSECUTION PURSUANT TO FLA. R. CIV. P. 1.420 AFTER THE CAUSE WAS CONTINUED UPON MOTION OF THE PARTIES AND WHEN THE ORDER OF CONTINUANCE CLEARLY INDICATED THAT THE CAUSE WOULD ONLY BE RESET FOR TRIAL UPON A PARTY'S PROPER NOTICE AND THE PLAINTIFF FAILED TO TIMELY PROSECUTE THE ACTION.

STATEMENT OF THE CASE
AND FACTS

Plaintiff/Appellee, DONALD S. STRAUBEL, (hereafter "STRAUBEL" or "Appellee") initiated this action by filing a Complaint against the Defendant/Appellant, MANUEL ANTONIO GOVAYRA, (hereafter "GOVAYRA" or "Appellant") on July 25, 1979, in the Eleventh Judicial Circuit in and for Dade County, Florida. (R, 1 & 2). STRAUBEL alleged that GOVAYRA negligently operated his automobile and caused an automobile accident between the parties. STRAUBEL alleged that he suffered injuries as a result of the accident and sought to recover damages. (R, 1 & 2).

GOVAYRA filed a Motion to Dismiss on August 21, 1979. (R, 3). The Court denied GOVAYRA's Motion to Dismiss on September 11, 1979, (R, 4); and he filed his Answer and demand for Jury Trial on October 2, 1979. (R, 5 & 6). STRAUBEL filed a Reply to Affirmative Defenses on October 9, 1979. (R, 7).

STRAUBEL noticed the cause for jury trial on May 29, 1980. (Appendix, page 7). On June 20, 1980, the Court entered an Order Setting Cause for Trial for the three-week period commencing September 29, 1980. (R, 8).

On September 18, 1980, the parties filed a Stipulation for Continuance of Trial to alleviate a conflict faced by Appellee's counsel. (R, 9). On September 29, 1980, the trial court entered its Order continuing the cause. (R, 12). The Order removed the cause from the three-week trial calendar beginning September 29, 1980, and further provided:

"2. This cause shall be reset for trial upon further proper notice therefor. [Emphasis supplied].

(R, 12)

On March 18, 1982, GOVAYRA's counsel moved to withdraw. (R, 13 & 14A). The court granted the Motion to Withdraw on March 30, 1982. (R, 15). GOVAYRA's new counsel filed a Notice of Appearance on April 20, 1982. (Appendix, p. 4 from original record).

The court filed a Notice Proceeding Order of Dismissal upon its own motion on February 16, 1983. (R, 16). Said order stated on its own terms that:

"That the cause will stand dismissed upon the Court's own motion on Thursday, March 3, 1983, at 9:30 a.m., after hearing unless a party shows good cause in writing why the action should remain pending at least five (5) days before said hearing."

(R, 16).

The hearing was held on March 3, 1983, and the court dismissed the case for lack of prosecution pursuant to Rule 1.420 of the Florida Rules of Civil Procedure. (R, 18). The order of dismissal reflected that no responsive pleading had been in response to the Notice Preceding Order of Dismissal. (R, 18). STRAUBEL appealed the Order of Dismissal to the District Court of Appeal, Third District. (R, 17). The Third District Court of Appeal reversed the Order of Dismissal. (Appendix 3-6).

The Appellant petitioned this Court to accept this cause pursuant to Article V, Section 3(b)(3) of the Florida Constitution. On July 26, 1984, this Court accepted jurisdiction.

ARGUMENT

The trial court properly dismissed this action for lack of prosecution pursuant to Fla. R. Civ. P. 1.420, when the plaintiff failed to take record activity during the time limits as set by Fla. R. Civ. P. 1.420, following a continuance requested by the plaintiff and granted upon stipulation by the trial court. The court's Order removing this cause from the three-week trial calendar upon the continuance was clear and provided that:

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

(R, 12).

The Third District Court of Appeal agreed with the Appellee's alternative contention that he was misled into his post-continuance inaction by the language of the order continuing the case. (Appendix 5). The Appellee contended that the burden was on the trial court to reset the action for trial at a later date.

The decision by the Third District Court of Appeal in the instant case is an express and direct conflict with the decision with the District Court of Appeal, Second District in Bogart v. F. B. Condominiums, 438 So.2d 856 (Fla. 2 DCA 1983). In Bogart, the District Court of Appeal, Second District, affirmed the trial court's dismissal for lack of prosecution under facts which were nearly identical to the facts in the instance case. Id.

In Bogart, a proper notice of trial was filed and the case was set for trial. Appellants' attorney then moved to continue

the case because he was not adequately prepared for trial. Pursuant to Appellants' motion, the court entered an order continuing the trial:

"Until a date during the fourth quarter of 1978 or thereafter to be established by this court:"

Id. at 857. The case was never reset for trial. After a twelve month lapse in record activity, the court dismissed the case for lack of prosecution. Id.

In affirming the trial court's order, the Bogart court noted that after a proper notice of trial is filed, a party has no duty to take any affirmative action to prevent dismissal of the cause for failure to prosecute. Id. However, the court reasoned that since the case was not tried on the appointed date because the appellants were not ready, it was incumbent upon the Appellants to notify the court when the case was ready by filing a new Notice for Trial. Further, the court reasoned that any ambiguities created by the language of the trial court's Order continuing the case should have been dispelled when the trial was not set for the designated time pursuant to the Court's Order. Id.

Finally, the court in Bogart applied some common sense policy reasons for upholding the trial court's order of dismissal by stating:

"While we adhere to the view that the filing of the proper notice of trial is sufficient to avoid a dismissal for lack of prosecution, when an order of trial is not forthcoming, we do not believe that a notice of trial once filed carries over beyond the setting of the trial date in subsequent Order of Continuance. The caseload of our

courts is such that the parties must bear their share of the burden of seeing to a prompt disposition of the trial docket."

Id. at 857.

The Third District Court of Appeal, herein, reasoned that the Appellee was justified in believing that the Court had undertaken the responsibility of renoticing a case for trial by virtue of Fla. R. Civ. P. 1.440(c) which authorizes a trial court to set an action for trial on its motion. Consequently, the Third District ruled that the Appellee shown good cause why the action should remain pending and reversed the Order of dismissal for failure to prosecute.

The language of the Order continuing the cause in Bogart was also susceptible to the interpretation that the trial court would undertake to reset the action for trial at a later date. However, the Bogart court dismissed the plaintiff's contention in that case that he was misled into inaction by the language of the "Order of Continuance by reasoning that such a motion should have been dispelled when the trial was not set during the fourth quarter of 1978". Bogart, supra, at 857. Furthermore, the Bogart court recognized that the courts are very congested and a litigant should not rely on Fla. R. Civ. P. 1.440(c) which authorizes a trial court to set an action for trial on its own motion, by giving proper notice. Id. The Bogart court shifted the burden of monitoring the prompt disposition of the trial docket to the parties. In contrast, the language of the Order continuing the cause in the instance case

is not susceptible to the Bogart interpretation that the trial court would not undertake to reset the cause for trial. No where in this particular Order does it state that the court below would take any action to reset the cause for trial. The burden is clearly upon the plaintiff/appellee.

Moreover, the Order continuing the case below was entered on September 25, 1980. (R, 12). The Order of dismissal was entered on March 3, 1983. (R, 16) The record is devoid of any pleading in the trial court by the plaintiff/appellee of good cause as to why the action should remain pending pursuant to the court's Notice Preceding Order of Dismissal (R, 16).

By not filing a pleading with the trial court showing good cause in writing five (5) days prior to the March 3, 1983, hearing, the plaintiff/appellee, again, failed to procede forward to prosecute the cause and the cause should remain dismissed. Koppers Company, Inc. v. Victoire Development Corp., 284 So.2d 193 (Fla. 1973); Executive Commercial Services, Ltd. v. South Parts & Supply, Inc., 361 So.2d 737 (Fla. 4 DCA 1978). Thus, without filing such a pleading, the Appellee had no basis to then attempt to present "good cause" to the Appellate Court.

Assuming, arguendo, that the Order of continuance below was susceptible to the interpretation that the trial court had assumed its share of responsibility for rescheduling the case for trial, it was unreasonable for the appellee to believe that he was relieved of the duty of renoticing the cause for trial. Such a belief and consequent reliance by the Appellee was unreasonable because the trial court had not rescheduled

the cause for trial in excess of thirty (30) months and because the cause had been continued due to the appellee's lack of readiness for trial. The respondent was the only one who knew whether he was prepared for trial and it was only reasonable that the burden of noticing the case for trial should fall upon the party who obtained a continuance because he was unprepared. To hold otherwise is to impose an unreasonable burden on an already congested and overburdened trial court. The dismissal of the case below should be affirmed based upon the principles espoused in Bogart, supra. Even the Third District Court of Appeal, herein, stated that:

"If indefinite continuance of a trial date has been ordered, the plaintiff will be well advised to re-notice the case for trial, unless the trial court has on no uncertain terms relieved the plaintiff of such responsibility."

(Appendix, 6).

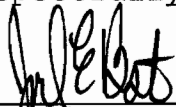
That would have been the better practice in this case and to impose that burden on the trial court herein, would be unfair on the court system and upon the appellant, GOVAYRA, who has an interest in having this matter finally resolved.

CONCLUSION

The language of the trial court's order granting the continuance is clear, and if a dismissal for lack of prosecution is to be avoided, it is incumbent upon the plaintiff to advise the trial court when the case was again ready for trial by the filing of a new notice of trial. If the plaintiff was relying upon the court to reset the cause for trial based upon the original notice, then this reliance was dispelled when the trial was not set for the period thirty (30) months.

WHEREFORE, the Appellant, MANUEL ANTONIO GOVAYRA, respectfully requests that this Court reverse the decision of the Third District Court of Appeal below and affirm the trial court's dismissal pursuant to Fla. R. Civ. P. 1.420.

Respectfully submitted,



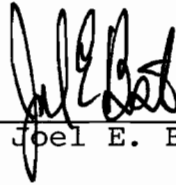
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed this 15th day of August, 1984, to RICHARD F. O'BRIEN, III, Hall and O'Brien, P.A., Suite 200, The Brickell Concours, 1401 Brickell Avenue, Miami, FL 33131

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