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IN THE SUPREME COURT
STATE OF FLORIDA

MANUEL ANTONIO GOVAYRA,

Appellant,

v.

DONALD S. STRAUBEL,

Appelle,

_____ /

CASE NO. 64,988

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Citations	iii
Issue Presented	1
Argument	2
Conclusion	4
Certificate of Service	5

TABLE OF CITATIONS

	<u>PAGE</u>
<u>City of Miami v. Dade County,</u> 321 So. 2d 140 (Fla 3DCA, 1975)	2
<u>Megdell v. Adeff,</u> 296 So. 2d 596 (Fla. 3DCA, 1974)	2
<u>Mikos v. Sarasota Cattle Company,</u> 453 So. 2d 402 (Fla. 1984)	2, 3
<u>Neff Machinery, Inc. v. Allied</u> <u>Electrical Company, Inc.,</u> 258 So. 2d 2d 314 (Fla. 3DCA, 1972)	2
<u>Sarasota Cattle Company v. Mikos,</u> 431 So. 2d 260 (Fla. 2DCA, 1983).	2
<u>Visuna v. Metropolitan Trans Authority,</u> 353 So. 2d 183 (Fla. 3DCA, 1977)	2

ISSUE PRESENTED

WHETHER THE TRIAL COURT PROPERLY DISMISSED THE ACTION FOR LACK OF PROSECUTION PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 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.

ARGUMENT

The Appellee cites a number of cases for the proposition that once a plaintiff has noticed an action for trial, it is incumbent upon the trial 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. 3DCA, 1977); City of Miami v. Dade County, 321 So. 2d 140 (Fla. 3DCA, 1975); Megdell v. Adeff, 296 So. 2d 596 (Fla. 3DCA, 1974); Neff Machinery Inc. v. Allied Electrical Company, Inc., 258 So. 2d 314 (Fla. 3DCA, 1972). Incidentally, the Appellee also cites Sarasota Cattle Company v. Mikos, 431 So. 2d 260 (Fla. 2DCA, 1983). However, the Appellee fails to cite to the decision of this court affirming Mikos at 453 So. 2d 402 (Fla. 1984).

However, the plaintiff fails to recognize the issue in this matter. This is not a situation wherein, the plaintiff noticed the case for trial and the trial judge failed to set the cause for trial. In fact, the trial court, based upon the original notice for trial, set this cause for trial. It was upon plaintiff's request, the court, by stipulation, continued the original trial date. The plaintiff then took no further action to prosecute this case. The plaintiff is claiming that the original notice of trial should bar an Order dismissing the case for lack of prosecution some thirty months later.

This court in affirming the Second District in Mikos v. Sarasota Cattle Company, 453 So. 2d 402 (Fla. 1984), addressed the specific issue herein:

We would like to add, however, that if the plaintiff subsequently indicates that he is not ready for trial, then the filing of the Notice of Trial will not be a bar to a dismissal for lack of prosecution. Id. at 403.

The plaintiff should not be allowed to rely upon a Notice for Trial filed on May 29, 1980, when the plaintiff requested a continuance of the September 29, 1980, trial date and then failed to timely prosecute the matter for thirty months.

The Order of the trial court in removing the cause from the three-week trial calendar commencing September 29, 1980, was clear and provided that the case would be:

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


There was no further proper notice given to reset this cause for trial and as such the cause should stand dismissed.

CONCLUSION

The language of the trial court's Order granting the continuance was clear, and if a dismissal for lack of prosecution was to be avoided, it was 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. The plaintiff had no justifiable reason to rely upon the original 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 misplaced when the trial was not reset for a period of thirty 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 Florida Rule of Civil Procedure 1.420.

Respectfully submitted,

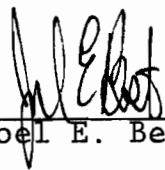


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I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed this 11th day of October, 1984, to RICHARD F. O'BRIEN, III, Hall and O'Brien, P.A., Suite 200, The Brickell Concourse, 1401 Brickell Avenue, Miami, FL 33131.

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