IN THE SUPREME COURT OF THE STATE OF FLORIDA

BARNETT BANK OF EAST POLK COUNTY, Petitioner, v. GEORGE T. FLEMING, Respondent	)	Appeal Case No. 69,023 D.C.A.-2 No. 85-1116

APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, SECOND DISTRICT

INITIAL BRIEF OF PETITIONER, BARNETT BANK OF EAST POLK COUNTY

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INTRODUCTION

For convenience, Petitioner, BARNETT BANK OF EAST POLK COUNTY, will be referred to herein as BARNETT BANK and Respondent GEORGE T. FLEMING will be referred to herein as FLEMING. Cites to the Record on Appeal will be cited to as follows: "R_____." Cites to the Appendix accompanying this Brief will be cited to as follows: "Appendix, page _____."

STATEMENT OF THE CASE AND THE FACTS

On October 8, 1979, BARNETT BANK filed action against FLEMING on an unsecured promissory note in the original amount of $9,500.00. FLEMING filed an Answer and Counter-Claim essentially alleging that he had repaid the note but that an officer of BARNETT BANK had converted the repayment funds to his own use. FLEMING also filed a Cross-claim against the BARNETT BANK officer. Numerous amended and supplemental pleadings and motions were filed, but the basic issues remained the same.

The action was dismissed at the Trial Court level for failure to prosecute on July 13, 1983, but reinstated. On December 2, 1983, FLEMING filed his Answer, Affirmative Defenses, Amended Counter-claim and Third Party Complaint. No further pleadings were filed by FLEMING until January 17, 1985, when he filed a Request to Produce which was a duplication of a Supoena Duces Tecum filed almost two years before on February 10, 1983.

On February 10, 1984, a Notice of Dismissal was filed directed toward BARNETT BANK's officer. This Notice of Dismissal constituted the last record activity on file in the Trial Court.

On November 9, 1984, prior to the end of the one year time period under Rule 1.420(e) Florida Rules of Civil Procedure, BARNETT BANK filed its Motion to Dismiss pursuant to Rule

1.420(e). On March 17, 1985, the Trail Court dismissed the entire action for failure to prosecute with due diligence.

FLEMING appealed the Trial Court's Order to the Second District Court of Appeal in a timely fashion. On January 17, 1986, the Second District Court of Appeal entered its Order setting an en banc oral argument to be heard on February 13, 1986 (Appendix, page 1) indicating in said Order that the Court might wish to recede from its holding in Johnson v. Mortgage Investors of Washington, 410 So. 2d 541 (Fla. 2d DCA, 1982). On May 9, 1986, the Second District Court of Appeal rendered its decision in the case sub judice (Appendix, page 2). On May 23, 1986, BARNETT BANK filed its Motion for Rehearing and/or Clarification (Appendix, page 9). On June 26, 1986, the Second District Court of Appeal entered its Order denying BARNETT BANK's Motion for Rehearing and/or Clarification (Appendix, page 11). On July 3, 1986, BARNETT BANK filed its Notice to Invoke Discretionary Jurisdiction (Appendix, page 12).

SUMMARY OF ARGUMENT

A prematurely filed Motion under Rule 1.420(e) does not constitute sufficient record activity to prevent dismissal under the Rule inasmuch as it does nothing to advance a case to final resolution on either the merits or the law of the case. Nor is the motion a nullity inasmuch as it serves the purpose of the Rule i.e. to dispose of cases which are not being diligently prosecuted.

ARGUMENT

ISSUE I

DOES THE UNTIMELY FILING OF A MOTION TO DISMISS FOR FAILURE TO PROSECUTE CONSTITUTE RECORD ACTIVITY AS CONTEMPLATED BY RULE 1.420(e), FLORIDA RULES OF CIVIL PROCEDURE?

This Court is being asked to review the merits of the trial Court's opinion which dismissed the case sub judice for failure to prosecute pursuant to the authority vested in the Court under the provisions of Rule 1.420(e), Florida Rules of Civil Procedure.

The Trial Court was called upon to determine the effect to be given a prematurely filed Motion to Dismiss for Failure to Prosecute. The Trial Court ruled that such a motion was not "reasonably calculated to advance the case towards a final resolution." (R 68). Based on that rationale, the Trial Court dismissed the case.

The Second District Court of Appeal, in its opinion in the case sub judice, 490 So. 2d 126 (Fla. 2d DCA 1986), endorsed the lower Court's rational and reversed its decision in the case of Johnson v. Mortgage Investors of Washington, 410 So. 2d 541 (Fla. 2d DCA, 1982) where the Court had previously held that a prematurely filed motion was sufficient record activity to prevent dismissal under Rule 1.420(e). The Second District Court of Appeal's decision was rendered prior to the opinion of the First District Court of Appeal in the case of Gant v. Tallahassee Memorial Regional Medical Center, et. al., 490 So. 2d 1020 (Fla. 1st DCA, 1986). There the Court held that a prematurely filed

Motion to Dismiss for Failure to Prosecute was "record activity" sufficient to toll the critical one year period established by the Rule. Ironically, the First District Court of Appeal in the case of Karcher v. F. W. Schinz and Associates, Inc., 487 So. 2d 389 (Fla. 1st DCA, 1986) was faced with a similar problem and came to a conclusion in direct contradiction to Gant, supra. In Karcher, supra, the last record activity occurred on January 9, 1984. The one year time limit would, therefore, expire at the close of business on January 10, 1985. See Johnson v. Mortgage Investors of Washington, supra; Site-Prep, Inc. v. Tai, 472 So. 2d 766 (Fla. 5th DCA, 1985); Zentmeyer v. Ford Motor Company, Inc., 464 So. 2d 673 (Fla. 5th DCA, 1985). In Karcher, supra, on January 9, 1985, one day before the expiration of the one year time limit, a party (not the Court) filed a Motion to Dismiss under the Rule. The Motion to Dismiss was granted on April 1, 1985. The First District Court of Appeal affirmed the Trial Court's Dismissal even though the Motion was prematurely filed.

The Fourth District Court of Appeal has also addressed the question of a prematurely filed motion under Rule 1.420(e). In the case of Chemical Bank of New York v. Polakov, 448 So. 2d 1148 (Fla. 4th DCA, 1984) the Court held that a prematurely filed sua sponte Motion and Order to Show Cause was not sufficient record activity to prevent dismissal under the Rule. See also Nelson v. Stonewall Insurance Company, 440 So. 2d 664 (Fla. 1st DCA, 1983).

The distinction between a Motion filed by a party and one filed by a litigant is one of form rather than substance. Both

motions rely on the same authority and serve the same purpose. The Rule does not recognize a difference between the two filings and neither should this Court. See Boeing Company v. Merchant, 397 So. 2d 399 (Fla. 5th DCA, 1981) where the Fifth District Court of Appeal, quoting from Shalabey v. Memorial Hospital of S. Broward Hospital District, 253 So. 2d 712 (Fla. 4th DCA, 1971) said at page 402:

> "A court can initiate the action to dismiss under Rule 1.420(e); in determining the one-year period 'it makes little difference whether an action to abate is commenced by a party or by the court.' Id., at 714."

Basically then, this Court must decide if a prematurely filed Motion to Dismiss for Failure to Prosecute constitutes sufficient record activity to preclude dismissal under Rule 1.420(e). The Second and Fourth Districts answer that question in the negative, as does the First District in Karcher, supra. The First District in Gant, supra, holds to the opposite view.

The Courts, in examining what constitutes sufficient activity, have furnished guidelines to follow in reaching a determination. In the case of Harris v. Winn Dixie Stores, Inc., 378 So. 2d 90 (Fla. 1st DCA, 1979) the Court inquired if the Notice to Take Deposition filed therein was filed to "merely keep the case on the docket and did not serve to move the case toward a resolution." (emphasis added). Further, Harris, supra, suggests that a court has the discretion to determine if the record activities are "in fact, calculated to move the case

toward trial and disposition or are only a passive effort to avoid dismissal for lack of prosecution." (emphasis added).

The Third District Court of Appeal in the case of Overseas Development, Inc. v. Amerifirst Federal Savings and Loan Association, 433 So. 2d 587 (Fla. 3d DCA, 1983) said at page 588:

> "Indeed, it has long been held that a mere passive effort to keep an action on the docket of a court by the filing of motions or orders which are not reasonably calculated to hasten the suit to judgment does not constitute affirmative record activity sufficient to defeat an otherwise proper motion to dismiss for lack of prosecution under Fla.R.Civ.P. 1.420(e). To defeat such a motion on the ground of record activity within one (1) year prior to the filing of the motion to dismiss, it must be shown that there was affirmative record activity during this time by pleading or order which was reasonably calculated to advance the case toward resolution. Plainly, not all types of record activity, whether by pleading or order, will defeat an otherwise well-taken motion to dismiss for lack of prosecution, but only that record activity which is reasonably calculated to advance the cause to resolution. Bair v. Palm Beach Newspapers, Inc., 387 So.2d 517, 518 (Fla. 4th DCA, 1980); Harris v. Winn-Dixie Stores, Inc., 378 So.2d 90, 93-94 (Fla. 1st DCA 1979); St. Anne Airways Corp. vs. Larotonda, 308 So. 2d 129 (Fla. 3d DCA), cert. denied, 316 So. 2d 295 (Fla. 1975); Gulf Appliance Distributors, Inc. v. Long, 53 So. 2d 706 (Fla. 1951)." (emphasis added).

In Nelson, supra, the First District stated at page 665 that "the record activity held necessary to prevent a Rule 1.420(e) dismissal not only substantially furthered the prosecution of the case but, also, was initiated either by a party to the action or by a court order entered in response to a party's notice or motion that advanced the cause." (emphasis added).

These guidelines suggest that the test to be met is that the activity in some way must assist the Court and the litigants in reaching a decision on the merits or law of the case.

As the First District stated in Strader v. Morrill, 360 So. 2d 1137 (Fla. 1st DCA 1978) one of the basic purposes of the Rule, other than to prevent the court docket from becoming clogged with abandoned litigation, is to "require prompt and efficient prosecution of the case up to the point of submission for disposition or determination by the judge or jury." This basic purpose necessarily envisions that any activity designed to assist the court in making a decision in favor of the Plaintiff or in favor of the Defendant or in making a decision concerning the law governing the case would prevent dismissal. A motion for failure to prosecute under Rule 1.420(e) does none of these.

This Court's task in examining the Motion to Dismiss for Failure to Prosecute in the case sub judice, is to determine if the motion moved the case toward final resolution, judgment or disposition. After an analysis of the Motion this Court must conclude that it does not. The Motion filed herein would, in fact, have the opposite effect. The Motion did not, and was not designed to, hasten the action to judgment or other resolution on the merits or law of the case. It was designed to point out to the Court that the litigants had failed to move the case toward the final resolution that is the ultimate goal of all actively prosecuted litigation.

ISSUE II

DOES A MOTION TO DISMISS FILED PREMATURELY UNDER RULE 1.420(e), FLORIDA RULES OF CIVIL PROCEDURE, CONSTITUTE A NULLITY?

Assuming this Court finds that a prematurely filed Motion to Dismiss for Failure to Prosecute does not constitute sufficient record activity to preclude dismissal under the Rule, the next issue to be addressed is the effect that Motion should be given. The Second District Court of Appeal, in the case sub judice, has held that the Motion was a nullity for the purposes of the Rule and that it did not give the party against whom it was directed sufficient notice to enable the Court to rule on the Motion. In rendering its decision, the Second District Court of Appeal stated:

> "In the instant matter, Barnett Bank of East Polk County filed a motion to dismiss for lack of prosecution on November 9, 1984. There had been no record activity up to February 10, 1984, making February 10, 1985 the critical date. At a hearing held after the expiration of one year the trial court dismissed the action. We hold that the mere fact that the hearing took place after the one year period and no other pleading had been filed in the meantime did not breath life into the motion such that it could be granted by the court." (490 So. 2d 126, at 127)

And further:

> "The concern which prompted our en banc hearing is the principal that record activity sufficient to preclude dismissal must be an affirmative act that is reasonably calculated to hasten the suit to judgment. Harris v. Winn Dixie Stores, Inc., 378 So. 2d 90 (Fla. 1st DCA 1979). A motion to dismiss for failure to prosecute which is premature does not fall within this category, it does not achieve the termination of the litigation and, for purposes

> of the rule, the premature motion is a nullity. We therefore recede from the statement in Johnson v. Mortgage Investors of Washington, supra that a prematurely filed motion to dismiss for lack of prosecution constitutes record activity. Accordingly, we reverse and direct that the case be reinstated." (490 So. 2d 126, at 127) (emphasis added)

The Second District Court of Appeal has therefore held that a premature Motion to Dismiss under R 1.420(e), Florida Rules of Civil Procedure, cannot be given effect by the Trial Court. As a result, even though nothing else is filed which would constitute record activity sufficient to defeat the Motion from the time the Motion is filed until the hearing on the Motion, (which occurs after the one year deadline) the Court cannot dismiss the action under the Rule. The Second District Court of Appeal, in holding that the prematurely filed Motion had no effect, in essence, reached the same result obtained in Johnson v. Mortgage Investors of Washington, supra, the case from which they attempted to recede. The Court in Johnson, supra, held that the prematurely filed Motion constituted sufficient record activity to defeat a Motion to Dismiss filed pursuant to Rule 1.420(e). The Second District Court of Appeal in the case sub judice retreated from that holding, but reached the same result based on the theory that the premature motion was a nullity under the Rule.

Neither the First District Court of Appeal in Karcher, supra, nor the Fourth District Court of Appeal in Chemical Bank, supra, recognizes this distinction. Both cases resulted in dismissals based on premature filings. These rulings are in line

with the opinion of J. Lehan, who wrote an opinion concurring in part and dissenting in part with the majority opinion of the Second District Court of Appeal in the case, sub judice:

> "It seems to me to be an unnecessary technicality to require, as the majority opinion in effect requires, that the party who filed a motion to dismiss for lack of prosecution before the expiration of one year from the last record activity file another such motion after the expiration of that one year in order to have the subject of that motion properly heard. The motion was not ruled upon until after the one year had expired without other intervening record activity....It is apparent that there was notice of the hearing on the bank's motion because appellant does not argue lack of adequate notice of hearing on that motion which the trial court's order of dismissal recites was the subject of the hearing and was argued by counsel for both sides....Therefore, I disagree with the majority opinion's implicit conclusion that it was necessary to otherwise breathe life into the motion, and I disagree with the majority opinion's specific conclusion that life was not breathed into the motion."
> (490 So. 2d 126, at 128)

As J. Lehan further states:

> "The law is replete with instances where effect is given to a premature document or pleading upon the happening of a subsequent event which gives meaning to the document or pleading. An example of such effect given to documents is the after acquired title doctrine under which a real estate contract signed by a seller or a real estate deed given by a grantor before the seller or grantor acquired title to the property becomes effective upon the seller's or grantor's subsequent acquisition of title without the necessity for the execution of a new contract or deed. 44 Fla. Jur. 2d Real Property Sales and Exchanges Section 26; 19 Fla. Jur. 2d Deeds Section 158. An example of such effect given to appellate pleadings is the premature filing of a notice of appeal from a final judgment before the final judgment is rendered, i.e., filed, which becomes effective simply upon the

> rendering, i.e., the filing, of the final judgment without the necessity of another notice of appeal being filed. Williams v. State, 324 So.2d 74, 79 (Fla. 1975). An example of such effect given to a judicial act in a trial court is a prematurely issued writ of garnishment procured by a judgment creditor before the rehearing period on the judgment has expired; the writ becomes effective upon the expiration of the rehearing period without the necessity for the issuance of another writ. Sun Bank/Southwest N.A. v. Schad, No. 85-864 (Fla. 2d DCA Feb. 5, 1986) [11 FLW 381]." (490 So. 2d 126 at 128).

The majority opinion of the Second District in the case sub judice ignores this well reasoned approach. In effect, the opinion reaches the same result as Johnson, supra, the case from which the Second District Court of Appeal has purportedly receded. The Court has misinterpreted the effect to be given the premature Motion. The fact that the Motion does not constitute sufficient record activity to prevent dismissal under the Rule, and thus is arguably a nullity for purposes of the Rule, does not mean that it is a nullity for all purposes and that the Court cannot act upon it. This result defies the obvious intent of the Rule inasmuch as it perpetuates cases that the Rule would eliminate.

CONCLUSION

The Supreme Court should reverse the Second District Court of Appeal's opinion herein in part and should affirm in part. Prior case law has established a firm basis from which this Court can affirm the Second District Court of Appeal's ruling that a prematurely filed Motion to Dismiss for Failure to Prosecute under Rule 1.420(e) Florida Rules of Civil Procedure, does not constitute sufficient record activity to prevent dismissal under the Rule. The Second District Court of Appeal's opinion that such a prematurely filed Motion constitutes a nullity is neither supportable nor understandable in view of the clearly established purpose of the Rule.

Respectfully submitted.

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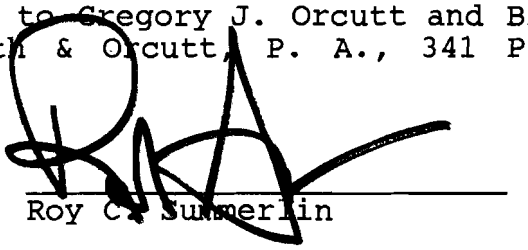
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief was mailed by regular U. S. Mail on the 14th day of November, 1986 to Gregory J. Orcutt and Brian P. Rush of Anderson, Thorn, Smith & Orcutt, P. A., 341 Plant Avenue, Tampa, Florida.



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