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 RESPONDENT, GEORGE T. FLEMING

BRIAN P. RUSH, ESQUIRE
ANDERSON & ORCUTT, P.A.
341 Plant Avenue
Tampa, Florida 33606
Telephone: (813) 251-8651
Attorneys for Respondent

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INTRODUCTION

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

STATEMENT OF THE CASE AND FACTS

On October 8, 1979, BARNETT BANK filed this action. Subsequently, FLEMING filed his Amended Counterclaim against BARNETT BANK and the third party complaint against William McKenzie. On February 10, 1984, BARNETT BANK filed a Notice of Dismissal of its Cross-Claim against McKenzie. Thereafter, not quite nine months later, on November 9, 1984, BARNETT BANK filed its premature Motion to Dismiss for failure to prosecute against FLEMING. At the time BARNETT BANK filed this Motion to Dismiss, the motion incorrectly asserted that no record activity had occured for a period of more than one year.

On January 14, 1985, FLEMING filed a Request for Production which was substantially similar to a Deposition Duces Tecum, which the record reflects was not responded to by BARNETT BANK. On March 19, 1985, the Trial Court issued an order granting BARNETT BANK'S Motion to Dismiss, without prejudice. Unfortunately, the Statute of Limitations had run on FLEMING'S claim and this dismissal, if upheld, would time-bar FLEMING'S claim.

In its March 19, 1985 Order of Dismissal, the Trial Court relied upon its "inherent authority" to dismiss FLEMING'S action. Additionally, the Trial Court characterized FLEMING'S January 14th Request for Production as a mere "duplication" of the previous Deposition Duces Tecum, without reference to the fact that the Trial Court record reflected no response to that previous Duces Tecum request.

FLEMING appealed the Trial Court's order to the Second District Court of Appeal in a timely fashion. After a re-hearing en banc, the Second District Court of Appeal rendered its decision in favor of FLEMING and reversed the Trial Court's Order of Dismissal by a six to two vote.

SUMMARY OF ARGUMENT

A premature Motion to Dismiss under Rule 1.420(e), filed by a party, constitutes sufficient record activity to prevent dismissal under the rule, because such a motion is calculated to hasten the conclusion, resolution or disposition of the case. In fact, in the instant case under consideration by this Court, dismissal of the action will forever bar FLEMING'S claim because of the passage of the Statute of Limitations. Therefore, BARNETT BANK'S premature motion, if successful, will result in the permanent conclusion, resolution and disposition of FLEMING'S case.

The Second District Court of Appeals in its re-hearing en banc held that a premature motion was not "record activity", but rather was a "nullity". As an alternative to the argument above, Fleming argues that the premature motion is a nullity and the Supreme Court should affirm the reasoning of the Second District Court of Appeal. BARNETT BANK'S premature motion serves no purpose under Rule 1.420(e). The purpose of the rule is to dismiss litigation which the record affirmatively shows as "stale". At the time of the filing of this motion, less than nine months had passed since the last record activity by BARNETT BANK. Therefore, BARNETT BANK'S premature motion was false on its face and was designed to terminate litigation which was still in progress. No such purpose is permitted by Rule 1.420(e), Florida Rules of Civil Procedure, and therefore, this Court should not recognize the premature motion.

Finally, BARNETT BANK'S premature Motion to Dismiss was not and could not have been the basis for the Trial Court's Order of Dismissal. A closer review of the Order (Appendix Page 1) shows that the Trial Court dismissed FLEMING'S action based upon "the Court exercising its inherent power to dismiss an action for failure to prosecute with due diligence". Unfortunately, the Court had no such inherent authority under Rule 1.420(e), Florida Rules of Civil Procedure. Additionally, the Court had no inherent authority to extend the language of BARNETT BANK'S premature and false Motion to Dismiss to include the four months after the filing of that motion. Finally, while the Court has authority on its own motion to dismiss a case, the Order of Dismissal does not recite that the Court was in fact ruling on its own sua sponte Motion to Dismiss. Even if the Court were ruling on its own motion, there was no notice to FLEMING that the Court intended to rule on a sua sponte Motion to Dismiss. Rule 1.420(e), Florida Rules of Civil Procedure, clearly requires "reasonable notice to the parties".

Under any of the preceeding three arguments, FLEMING is entitled to prevail over BARNETT BANK'S premature Motion to Dismiss.

ARGUMENT

ISSUE I

WHETHER A MOTION TO DISMISS FOR FAILURE TO PROSECUTE, FILED BY BARNETT BANK, MORE THAN THREE MONTHS PREMATURELY, IN AN ATTEMPT BY BARNETT BANK TO TERMINATE FLEMING'S GOOD FAITH COUNTERCLAIM, CONSTITUTES "RECORD ACTIVITY" PRECLUDING DISMISSAL UNDER RULE 1.420(e), FLORIDA RULES OF CIVIL PROCEDURE.

This Court is asked to review the reasoning of the Trial Court's opinion which dismissed this case for failure to prosecute pursuant to its "inherent authority" and pursuant to the Court's reasoning that BARNETT BANK'S Motion to Dismiss for failure to prosecute, under Rule 1.420(e), Florida Rules of Civil Procedure, did not amount to "record activity" such as to preclude the dismissal of FLEMING'S lawsuit. Under the facts of the instant case, the Trial Court's Order of Dismissal will act as a time-bar against all future claims by FLEMING against BARNETT BANK. If BARNETT BANK'S premature Motion to Dismiss results in the dismissal of FLEMING'S case, that premature motion will conclude, resolve and dispose of FLEMING'S case.

The Second District Court of Appeal in its opinion in the instant case, FLEMING v. BARNETT BANK OF POLK COUNTY, 490 So. 2d 126 (Florida 2nd D.C.A. 1986), reversed the Trial Court and held that BARNETT BANK'S premature motion was a "nullity". In so doing, the Second District Court of Appeal receded from its previous holding in Johnson v. Mortgage Investors of Washington, 410 So. 2d 541 (Florida 2nd D.C.A. 1982), where the Court had held that a prematurely filed motion was sufficient record activity to prevent dismissal under Rule 1.420(e).

Only four cases have clearly decided the issue of whether a premature motion, filed by a party, amounts to sufficient record activity. In the recent case of Gant v. Tallahassee Memorial Regional Medical Center, et al., 490 So. 2d 1020 (Florida 1st D.C.A. 1986), the First D.C.A. held that a premature Motion to Dismiss amounts to record activity sufficient to preclude dismissal under Rule 1.420(e). The Court stated:

> None of these definitions indicate that such activity must further a decision on the merits of a case, only that it further the conclusion thereof. This is consistent with the stated purpose of Rule 1.420(e), that is to expedite litigation and keep the Court's docket as current as possible (citation omitted). It can not be disputed that a Motion to Dismiss for failure to prosecute filed by a party is calculated to hasten the conclusion, resolution or disposition of the case; it can have no other purpose. Therefore, we must find that the Motion to Dismiss filed one day prematurely by the fund was "record activity" sufficient to toll the one year period provided in the rule, rendering the grant of the later motion erroneous as a matter of law. Id. at 1022. (emphasis added.

In Zentmeyer v. Ford Motor Company, Inc., 464 So. 2d 673 (Florida 5th D.C.A. 1985), the Fifth District Court unanimously held that where a party filed a Motion to Dismiss for failure to prosecute one day prematurely, the Trial Court was without authority to dismiss the action. The Court stated:

> Because the last record activity occured on October 6, 1982, the one-year period did not begin to run until October 7, 1982 and would not have expired until the end of the day on the following October 6th. Therefore, the Motion to Dismiss was filed one day to soon, and was thus premature. Id. at 674.

The other two cases dealing with an instance where a party has filed a premature Motion to Dismiss are the cases of

Johnson v. Mortgage Investors of Washington, 410 So. 2d 541 (Florida 2nd D.C.A. 1982) and the instant case of FLEMING v. BARNETT BANK OF EAST POLK COUNTY, 490 So. 2d 126 (Florida 2nd D.C.A. 1986). These two Second District Court cases are in obvious conflict and resulted in the instant appeal to the Supreme Court of Florida.

The decision of the Second District Court of Appeal should be upheld, but the rational of the Second District Court of Appeals should be reversed and the Supreme Court should hold that a premature Motion to Dismiss does amount to record activity. The rational set forth above in the Gant case is the most pursuasive analysis of a premature Motion to Dismiss. Quite simply, the Gant Court reasoned that where a Motion to Dismiss has the effect of terminating the case, it can not be argued that the motion is not reasonably "calculated" to hasten the conclusion, resolution or disposition of the case. 490 So. 2d 1022. This is all the more so true in the instant case where FLEMING'S claim would be terminated and time-barred.

BARNETT BANK makes several arguments which have no merit. First of all, BARNET BANK sites the case of Karcher v. F. W. Schinz and Associates, Inc., 487 So. 2d 389 (Florida 1st D.C.A. 1986) as a case "in direct contradiction to Gant". This assertion is absolutely incorrect. In fact, the Court in Karcher never addressed the issue of whether the motion was prematurely filed. In fact, the Court limits its review to an issue as to

whether a single interrogatory constituted affirmative record activity. The Court stated:

> Therefore, the key issue in this appeal is whether Karcher's interrogatory filed on January 4, 1985 constitutes affirmative record activity. Id. at 390.

The Karcher case is not in contradiction to Gant and the Court never even mentions or discusses a premature Motion to Dismiss. Quite simply, the issue was not raised in the text of the opinion.

BARNETT BANK also continues to argue that there is no distinction between a motion filed by a party, seeking to advance its own partisan cause, and a Motion to Dismiss filed by the Court "in admininstration" of the Rule 1.420(e). As authority for this proposition, BARNETT BANK continues to site Shalabey v. Memorial Hospital of South Broward Hospital District, 253 So. 2d 712 (Florida 4th D.C.A. 1971). In Shalabey, the Court stated a very limited proposition that "in determining the one year period", it makes little difference whether an action to abate is commenced by a party or by the Court. 253 So. 2d at 714.

This statement by the Shalabey Court does not state that there is no distinction between a motion filed by a party seeking to terminate his opponents case and a motion filed by the Court in administration of the rule. The Shalabey dicta refers only to a time determination and the facts of Shalabey do not refer in any way to a premature Motion to Dismiss. For these reasons, Shalabey is not helpful in determining whether a premature Motion to Dismiss filed by a party should be treated differently than a premature Motion to Dismiss filed by the Court in administration of the Rule 1.420(e).

BARNETT BANK sites two cases which have held that a Trial Court's sua sponte premature Motion to Dismiss filed under Rule 1.420(e) does not amount to record activity. See Chemical Bank of New York v. Polakov, 448 So. 2d 1148 (Florida 4th D.C.A. 1984) and Nelson v. Stone Wall Insurance Company, 440 So. 2d 664 (Florida 1st D.C.A. 1983). These cases are not on point with the instant case where the Trial Court did not file its own sua sponte Motion to Dismiss, and for this reason, these cases should be ignored.

In short, BARNETT BANK argues that its Motion to Dismiss, does not amount to record activity because the premature motion was not reasonably calculated to advance the cause to resolution. This is not a reasonable interpretation of BARNETT BANK'S reason for filing the motion or for the real result of terminating and time-barring FLEMING'S claim. The reasoning in

Gant (supra) is that such a motion, filed by a party, is calculated to hasten the conclusion, resolution or disposition of the case. Under the reasoning in Gant, the Supreme Court should affirm the holding and reverse the rationale of the Second District Court of Appeal and hold that BARNETT BANK'S premature motion was in fact sufficient record activity to preclude dismissal under Rule 1.420(e), Florida Rules of Civil Procedure.

ISSUE II

WHETHER A MOTION TO DISMISS FOR FAILURE TO PROSECUTE, FILED MORE THAN THREE MONTHS PREMATURELY, UNDER RULE 1.420(e), FLORIDA RULES OF CIVIL PROCEDURE, IS A NULLITY, SO AS TO PRECLUDE THE DISMISSAL OF FLEMING'S CASE.

If the Supreme Court finds that BARNETT BANK'S premature Motion to Dismiss does not constitute sufficient record activity to preclude dismissal under the rule, the Court must decide whether BARNETT BANK'S motion constituted a nullity. The Second District Court of Appeal held that under Rule 1.420(e), a premature Motion to Dismiss does not amount to an affirmative act that is reasonably calculated to hasten the suit to judgment. As such, a party has no right to file a premature Motion to Dismiss and therefore, "for purposes of the rule", the premature motion is a nullity.

A premature Motion to Dismiss serves no purpose under Rule 1.420(e). The purpose of the rule is to clear Court dockets and remove litigation which is stale "on the face of the record". BARNETT BANK'S premature motion was filed at a time when its only intention could have been to remove and terminate litigation still in progress. On the face of the record, BARNETT BANK should never have filed its premature motion and was not authorized under the rule to file such a motion. Based upon this analysis, a premature motion is not sanctioned by the rule and does not serve any purpose under the rule and therefore, should not be accorded any existence by the Court.

ISSUE III

WHETHER THE TRIAL COURT HAD "INHERENT AUTHORITY" TO DISMISS FLEMING'S ACTION ON ITS OWN MOTION, WITHOUT GIVING PRIOR NOTICE OF THE COURT'S INTENT TO DISMISS FLEMING'S ACTION.

The Trial Court's order in the instant case stated that FLEMING'S action was dismissed under the Court's "inherent authority", which Rule 1.420(e) denies to a Court. Therefore, the Trial Court's order dismissing FLEMING'S action was based upon alleged inherent authority, which the Court did not possess. Rule 1.420(e) clearly states that an action may be dismissed by motion only. The rule states:

> Rule 1.420(e) Failure to Prosecute. All actions...shall be dismissed by the Court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties...mere inaction for a period of less than one year shall not be sufficient cause for dismissal for failure to prosecute. (emphasis added).

Alternatively, BARNETT BANK argues that the Trial Court may dismiss, on its own sua sponte Motion, FLEMING'S action. While this argument is facially correct, a Trial Court must provide "reasonable notice" that it intends to decide its own sua sponte Motion to Dismiss. The Trial Court in this action never provided such notice to either party until the hearing on the premature motion of BARNETT BANK.

BARNETT BANK then argues that its notice that it intended to argue the contents of its premature motion amounts to notice to FLEMING of the Trial Court's motion. However, the lan-

guage of BARNETT BANK'S premature Motion to Dismiss clearly limits the grounds upon which BARNETT BANK will move for dismissal. FLEMING was only on notice that BARNETT BANK would argue that up to the filing date of BARNETT BANK'S premature motion, no record activity had occured for one year. Unfortunately, the record clearly reflects that record activity had occured less than nine months before the filing of BARNETT BANK'S premature Motion to Dismiss. Therefore, the Court could not have granted BARNETT BANK'S Motion to Dismiss on the grounds stated in BARNETT BANK'S own motion.

Apparently, the Trial Court order rests entirely upon two surprise arguments: (1) The Court has inherent authority to clear its own docket and; (2) BARNETT BANK can expand its premature Motion to Dismiss, by arguing that there was no record activity for more than one year prior to the March, 1986 hearing before the Trial Court.

Unfortunately, FLEMING had no notice of BARNETT'S intention to expand its motion, nor did BARNETT ever have any reasonable notice that the Court intended to dismiss this case on its own "inherent authority".

Because BARNETT BANK'S motion was incorrect on its face, and because the Court never gave reasonable notice that it intended to dismiss this action either on its own inherent authority or on some expanded reading of BARNETT'S original motion, the Trial Court's order fails to give the "reasonable notice to the parties" required by Rule 1.420(e).

CONCLUSION

The Supreme Court should affirm the Second District Court of Appeals decision in the instant case. Of the four cases dealing with a premature motion, filed by a party, only the Second District Court is in conflict with itself. The reasoning in the Gant case is persuasive and correct in that a premature Motion to Dismiss which terminates and time-bars FLEMING'S claim must obviously hasten the conclusion, resolution or disposition of the case. Alternatively, the Court can rule that BARNETT BANK'S Motion to Dismiss under Rule 1.420(e) is a nullity, in that a premature motion is neither authorized by the rule, nor does it serve any reasonable purpose under the rule. Finally, a close review of the Trial Court's order reveals that the Trial Court dismissed FLEMING'S action based upon the two surprise arguments of "inherent authority" of the Court or upon matters argued outside of the content of BARNETT BANK'S motion.

The result under either of the three rationals is that the Trial Court's decision should be reversed and FLEMING'S claim should be reinstated.

Respectfully submitted.

Brian P. Rush
BRIAN P. RUSH, ESQUIRE
ANDERSON & ORCUTT, P.A.
341 Plant Avenue
Tampa, Florida 33606
Telephone: (813) 251-8651
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed by United States Mail on the 9th day of December, 1986 to ROY C. SUMMERLIN, ESQUIRE, P.O. Drawer 798, Winter Haven, Florida 33882-0798.

Brian P. Rush

BRIAN P. RUSH, ESQUIRE

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