IN THE SUPREME COURT OF THE STATE OF FLORIDA

JUL 1986
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GEORGE T. FLEMING, Appellant/Respondent, v. BARNETT BANK OF EAST POLK COUNTY Appellee/Petitioner	)	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

APPELLEE/PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

FOR CONVENIENCE, Appellee/Petitioner, BARNETT BANK OF EAST POLK COUNTY, will be referred to as BARNETT BANK, and Appellant/Respondent, GEORGE T. FLEMING will be referred to as FLEMING. Cites to the appendix which accompany this brief will be cited to in the following manner: 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 Subpoena 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 Trial Court dismissed the 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 APPELLEES/PETITIONERS ARGUMENT

The Supreme Court should exercise its jurisdiction to review the decision of the Second District Court of Appeal in this case because it directly and expressly conflicts with decisions of other District Courts of Appeal.

ARGUMENT

THE SUPREME COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE INSTANT CASE ON THE BASIS OF ARTICLE V, SECTION 3 (b) (3), FLORIDA CONSTITUTION.

In rendering its decision in the case sub judice, 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." (Appendix, page 3)

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." (Appendix, page 3)

The Second District Court of Appeal has therefore held that the premature filing of a Motion to Dismiss under Rule 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 said 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, 410 So. 2d 541 (Fla. 2d DCA, 1982), the case which they attempted to recede from. 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.

Whether this result was based on the theory that the premature motion was a nullity, as in the instant case, or constituted record activity sufficient to defeat the motion, as in JOHNSON, supra, is unimportant inasmuch as it is the conflict of decisions, not of opinions or reasons, which supply jurisdiction for review by certiorari. See FIRESTONE v. TIME, INC., 271 So. 2d 745 (Fla. 1972); GIBSON v. MALONEY, 231 So. 2d 823 (Fla. 1970), cert. den. 398 U.S. 951, 90 S. Ct. 1871, 26 L. Ed. 291. Therefore, the question presented to the Supreme Court is whether the decision in the instant case conflicts with the decision of other District Courts of Appeal. A review of the decisions of the First and Fourth District Courts of Appeal reveals express and direct conflict.

In CHEMICAL BANK OF NEW YORK v. POLAKOV, 448 So. 2d 1148 (Fla. 4th DCA, 1984) the Fourth District Court of Appeal was faced with a case similar to the one presented herein for consideration. There, the Trial Court, under the Rule, prematurely filed a sua sponte Motion and Order to Show Cause why the

action should not be dismissed for lack of prosecution. The hearing on the Court's Motion was substantially more than one year after the last record activity. The Fourth DCA stated at page 1148:

> "Obviously, the court should not have miscalculated the time and should have waited an additional day before entering the order to show cause. Johnson v. Mortgage Investors of Washington, 410 So. 2d 541 (Fla. 2d DCA, 1982). However, a plaintiff faced with this situation has only to file a pleading designed toward prosecution plus file its notice of good cause within the requisite five day period before hearing, pointing out the miscalculation, which action would forestall dismissal."

While it is true that the Fourth District Court of Appeal dealt with a sua sponte Motion and Order in CHEMICAL BANK OF NEW YORK, supra, the First District Court of Appeal has addressed a similar situation arising from a premature Motion under Rule 1.420 (e) filed by a party. In the case of KARCHER v. F. W. SCHINZ & ASSOICATES, INC. 487 So. 2d 389 (Fla. 1st DCA, 1986) the last record activity occurred on January 9, 1984. The one year time limit would, therefore, expire at the close of business on January 9, 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 CO., 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 filed a Motion to Dismiss under Rule 1.420 (e) Florida Rules of Civil Procedure. The Motion of 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.

A review of the conflicting decisions of the Second, First and Fourth District Courts of Appeal makes it evident that the question of a prematurely filed Motion to Dismiss under Rule 1.420 (e) Florida Rules of Civil Procedure has not been addressed by the District Courts with the kind of uniformity that is necessary

to the certain administration of justice. It is this very lack of uniformity that forms the basis for the jurisdiction of the Supreme Court under Article V, Section 3, (b) (3) of the Florida Constitution. The Supreme Court, in interpreting the Court's discretionary jurisdiction by virtue of Article V, Section 3 (b) (3) has stated that the primary function of the Supreme Court, particularly in the area of review of conflicting decisions, is to stabilize the law by a review of decisions which form patently irreconcilable precedents. See FLORIDA POWER & LIGHT CO. v. BELL, 113 So. 2d 696 (Fla. 1959).

The decision in the case under consideration simply cannot be reconciled with decisions of the First and Fourth District Courts of Appeal becasue the factual situations on which the conflicting decisions rest are basically identical. See KYLE V. KYLE, 193 So. 2d 885 (Fla. 1982).

In addition, the Fifth District Court of Appeal relied on JOHNSON, supra, from which the Second District Court of Appeal has retreated, in deciding the case of ZENTMEYER v. FORD MOTOR CO., INC., supra. Because the Second District Court of Appeal has now retreated from JOHNSON, supra, there is also an apparent conflict between the Second and Fifth District Courts of Appeal.

The very uncertainty present in the authorities dealing with the question of the effect to be given a prematurely filed Motion to Dismiss under Rule 1.420 (e) makes it imperative that the Supreme Court accept jurisdiction to review this matter and lay to rest the dilemma of litigants faced with this question.

CONCLUSION

The Supreme Court should exercise its discretionary jurisdiction under Article V, Section 3 (b) (3) of the Florida Constitution to resolve the conflict existing between the District Courts of Appeal on the question of the effect to be given a prematurely filed Motion to Dismiss under Rule 1.420 (e).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Appelle/Petitioner's Brief on Jurisdiction was mailed by regular U.S. Mail on the 14th day of July, 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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