

IN THE SUPREME COURT OF THE STATE OF FLORIDA

**FILED**  
SID J. WHITE

JAN 16 1987

CLERK SUPREME COURT

By Deputy Clerk

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BARNETT BANK OF EAST  
POLK COUNTY,

Petitioner,

v.

GEORGE T. FLEMING,

Respondent

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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

REPLY 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.

## STATEMENT OF THE CASE AND FACTS

FLEMING'S recitation of the facts in this case included one point to which BARNETT BANK must respond. FLEMING states that the record in the case sub judice does not reflect that BARNETT BANK ever responded to a Deposition Duces Tecum, which was later duplicated by a Request to Produce filed by FLEMING on January 14, 1985. BARNETT BANK would point out to the Court that the record in any case would not reflect the proper and timely response to such a Deposition Duces Tecum. The record would only reflect an improper response thereto, as filed by the serving party, or an objection thereto, as filed by the receiving party. Inasmuch as the record in the case sub judice does not show a Motion to Compel filed by FLEMING or any other indication that BARNETT BANK did not respond to the Deposition Duces Tecum, the Court must conclude that BARNETT BANK properly responded in a timely and appropriate fashion, as, in fact, BARNETT BANK did.

ARGUMENT

BARNETT BANK'S REPLY TO ARGUMENT PRESENTED  
IN FLEMING'S ANSWER BRIEF

FLEMING has argued that a premature Motion to Dismiss under Rule 1.420(e) is in fact calculated to hasten the conclusion, resolution or disposition of the case and as such constitutes sufficient record activity to prevent dismissal under the Rule. In support, FLEMING directs our attention to the fact that in the instant case FLEMING'S claim will be barred by the Statute of Limitations if this Court upholds the Trial Court's ruling.

While it is true that the Statute of Limitations would bar FLEMING from refileing his claim if this Court upholds the Trial Court's ruling, it should be pointed out that FLEMING could easily have prevented this result by filing an appropriate pleading within the one year time limit. In fact, the prematurely filed motion should have put FLEMING on notice that the time limit was expiring and that if he intended to diligently pursue his claim he must do so within the one year time limit. The fact that FLEMING did not do so makes it obvious that this litigation was not still "in progress" and was ripe to be dismissed under Rule 1.420(e) at the end of the one year time limit.

FLEMING further argues that the Trial Court did not have inherent power to dismiss an action for failure to prosecute. The Trial Court does have the authority under Rule 1.420(e) to

examine the activities occurring in an action to determine if such activity constitutes sufficient record activity to prevent dismissal under the Rule. The Court is not totally without discretionary power under the Rule. See Harris v. Winn Dixie Stores, Inc., 378 So. 2d 90 (Fla. 1st DCA, 1979). The Trial Court in the case sub judice exercised its power and determined that the January 17, 1985, Request to Produce filed by FLEMING was insufficient record activity and acted accordingly.

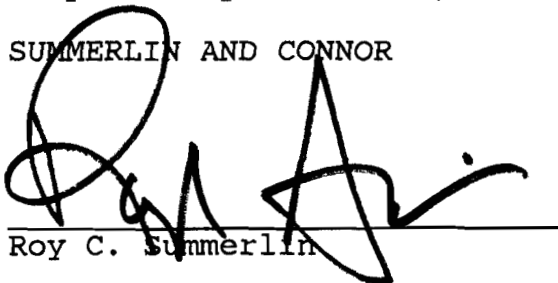
Furthermore, as BARNETT BANK pointed out in its initial brief, the distinction between a motion filed by a party and one filed by a litigant is one of form rather than substance since both motions originate from the same source and serve the same purpose. To try to differentiate them, as FLEMING attempts to do, is futile and any argument so advanced is specious, at best.

CONCLUSION

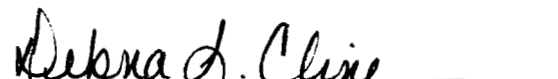
BARNETT BANK urges this Court to uphold the Trial Court's ruling herein and dismiss this case under authority of Rule 1.420(e). To do otherwise, as FLEMING urges, would thwart the purpose of the Rule.

Respectfully submitted,

SUMMERLIN AND CONNOR

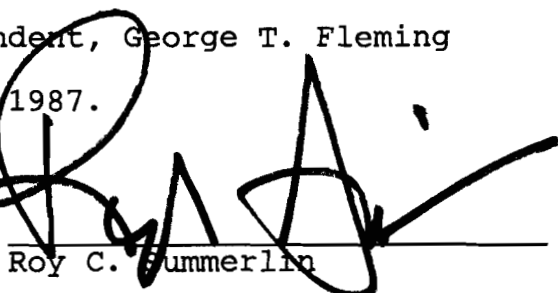


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by regular U. S. Mail to Brian P. Rush, Esquire, ANDERSON & ORCUTT, P.A., 341 Plant Avenue, Tampa, Florida 33606, Attorney for Respondent, George T. Fleming this the 14th day of January, 1987.



Roy C. Summerlin