IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
AUG 3 1987
CLERK, SUPREME COURT
By ______ Deputy Clerk

JOSEPH MASON,

Petitioner,

vs. Case No. 70,187

GEORGE BOYUNG, et al.,

Respondents.

ANSWER BRIEF OF RESPONDENT, GEORGE BOYUNG

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QUESTION PRESENTED

WHETHER THE LOWER COURT CORRECTLY AFFIRMED DISMISSAL OF THE ENTIRE CAUSE OF ACTION BASED UPON THE DEFENDANTS/ RESPONDENTS' MOTIONS TO DISMISS FOR FAILURE TO PROSECUTE.

ARGUMENT

A premature Motion to Dismiss for Failure to Prosecute is sufficient to serve as the basis for a dismissal when said motion is not ruled upon until the expiration of the one (1) year period. No new motion need be filed, and the premature motion itself is not sufficient record activity to defeat a motion to dismiss for failure to prosecute under Florida Rule of Civil Procedure 1.420(e). Fleming v. Barnett Bank of East Polk County, 12 FLW 300, 301 (Fla. June 19, 1987).

Pursuant to this Court's decision in Fleming, therefore, the May 1, 1986, ruling of the trial court below dismissing the subject cause of action gave effect to Respondent, Boyung's, premature motion to dismiss for failure to prosecute. There was no record activity between February 5, 1986, the date the premature motion was filed, and May 1, 1986, the date on which said motion was heard, except for Respondent, LaMont's, motion to dismiss for failure to prosecute and Petitioner's affidavits in opposition thereto. As this Court stated in Fleming:

> "The filing of the motion merely invokes the application of the rule...Moreover, to permit a case to be kept alive without any significant movement toward resolution is not consistent with the meaning, spirit, and purpose of Rule 1.420(e)." Fleming, 12 FLW at 300.

The purpose of the rule is to clear the dockets of cases that have been abandoned. Fleming, supra.

Furthermore, the lower appellate court was correct that Bowman v. Peel, 413 So.2d 90 (Fla. 2d DCA 1982) applies one party's motion to the entire action and not just to the moving party. Because Respondent, Boyung's, motion was given effect by the trial court's ruling after the one (1) year period, however, either motion is sufficient to dismiss the entire action pursuant to Bowman.

Finally, Petitioner, Mason, argues that the filing of the answers to Petitioner's interrogatories by Respondent, Boyung, on February 5, 1985, was record activity. This is incorrect as patently repetitious interrogatories are insufficient to constitute record activity. Philips v. Marshall Berwick Chevrolet, Inc., 467 So.2d 1068, 1069 (Fla. 4th DCA 1985). Record activity, as defined by this Court in Fleming, supra, and Harris v. Winn Dixie Stores, Inc., 378 So.2d 90,92 (Fla. 1st DCA 1979), is any activity in the court file designed to move the case towards a final disposition of the merits. The interrogatories served upon Respondent, Boyung, sought information clearly repetitious with information already well known to Petitioner. Thus, it could not constitute record activity.

CONCLUSION

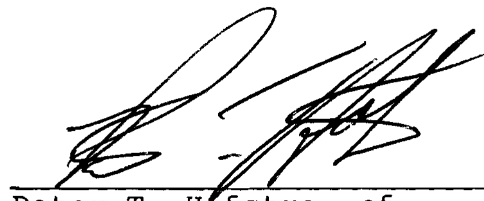
Respondent, Boyung's, motion to dismiss for failure to

prosecute was effective and sufficient to support the dismissal granted by the trial court in this action. No activity of record took place within the one (1) year period before May 1, 1986, that was not related to the motions to dismiss filed by Respondents. Thus, the order of the trial court on May 1, 1986, gave effect to Respondent, Boyung's, premature motion which was sufficient to dismiss the action under Fleming, supra. Moreover, the motion filed by Respondent, LaMont, should be sufficient to dismiss the entire action pursuant to Bowman, supra.

The disposition of this case was consistent with the purpose of the rule, to-wit: to terminate an action when no activity of record has been taken within one (1) year from the date on which the motion is decided. The decision of the lower appellate court, especially in light of this Court's holding in Fleming, should be affirmed.

Wherefore, based on the foregoing arguments, Respondent, Boyung, respectfully requests this Court to affirm the holding of the lower court dismissing the entire action herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U.S. Mail to Mr. J. Stanford Lifsey, 201 East Kennedy Boulevard, Suite 803, Tampa, FL 33602, and to Mr. Kenneth C. Deacon, Jr., P.O. Drawer 1441, St. Petersburg, FL 33713, this 30th day of July, 1987.

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