O/a 1-5-88 18

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,542

FISHE & KLEEMAN, INC., etc.

Petitioner

v.

AQUARIUS CONDOMINIUM ASSOCIATION, INC., etc.

Respondent

Proceeding to Review a Decision of the
Fourth District Court of Appeal of Florida
Reported 503 So.2d. 1272

INITIAL BRIEF OF PETITIONER ON MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED

THE FLORIDA CONSTITUTION CITED

COURT RULES CITED

PREFACE

The parties will be referred to in this brief by their circuit court titles of "plaintiff" for petitioner and "defendant" for respondent.

The decision of the Fourth District Court of Appeal in this case, reported 503 So.2d 1272, will be referred to as Fishe.

The Appendix to this Brief will be referred to as A.

The Record in this cause will be referred to as R.

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE

This is an action at law (R. 17) filed in the Circuit Court for Broward County by petitioner, an engineering firm, as plaintiff to recover compensation for engineering services rendered for respondent, a condominium association, as defendant. Respondent interposed a counterclaim. (R. 41)

This action was dismissed (R. 77, A. 13) by the Circuit Court under Florida Rules of Civil Procedure 1.420(f) on the ground of record inactivity for one year. That year had run after plaintiff had filed notice of readiness for trial (R 51, 54 A. 4, 6) in compliance with Florida Rules of Civil Procedure 1.440 and while the litigants, without having re-filed the notice of readiness for

trial, were waiting for that court to set the action for trial for the sixth time. Five successive trial dates had been set sua sponte by three different judges on the basis of the original notices of readiness for trial and no trial had occurred.

The Fourth District Court of Appeal, with one judge dissenting, affirmed (503 So.2d 1272) (A. 1) the Circuit Court's order of dismissal in this cause and held:

> (1) Florida Rules of Civil Procedure 1.440 covers only one order setting trial and is silent as to subsequent procedure. The sole prerogative of the circuit court to determine the order of its trials, free of pressure from the litigants, expired upon the occurrence of the first trial continuance, regardless of the reason for the continuance;
>
> (2) Upon the occurrence of a continuance the burden of initiating further proceedings to move the case forward toward a conclusion on the merits falls upon the litigants, and the court has no further duty under Rule 1.440 until a re-notice of readiness for trial is filed by a litigant.
>
> (3) Dismissal of an action for one year's inactivity subsequent to a continuance is not barred by the fact that prior to the continuance a litigant had filed a Rule 1.440(b)

notice that the action was at issue and ready for trial.

The decision of the Circuit Court as affirmed by the majority opinion of the Fourth District Court of Appeal is the decision here under review. In this brief we will refer to the decision of the Fourth District Court of Appeal in this cause as Fishe.

STATEMENT OF THE FACTS

On October 16, 1978, plaintiff, in compliance with Florida Rules of Civil Procedure 1.440, filed in the Circuit Court a notice that the action was at issue and ready for trial. (R 51, A. 4) That Court then made an Order (R. 53, A. 5) as required by Rule 1.440 setting the case for trial on March 19, 1979. The parties filed their respective Pretrial Catalogues. (R. 57, 59). Defendant also filed a notice of readiness for trial. (R. 54, A. 6)

The Circuit Court set the action for trial five times. The five scheduled trial dates were March 19, 1979, (R. 53, A. 5) April 27, 1979, (R. 55, A. 7) October 22, 1979, (R. 62 A. 8) May 19, 1980, (R. 63, A. 9) and March 30, 1981. (R. 64, A. 10) Three different circuit judges set the various trial dates.

Three times the Circuit Court sua sponte re-set the trial after April 27, 1979, without the re-filing of the notice of readiness for trial.

The record is silent as to the reason why the scheduled trials did not occur, except as to the trial

scheduled for May 19, 1980 which was continued on the motion of defendant and simultaneously reset for March 30, 1981. (R. 64, A. 10)

Plaintiff suggests that the absence of documentation in the court file showing the reason for the continuances raises a strong presumption that the court's trial terms were "over booked" by the three assigned judges in order to compensate for normal late settlements and continuances and that each time this case was set for trial it was not reached during the trial term and was automatically continued without court order. Circuit Judge Henry Latimer, who last set this cause for trial (to occur March 30, 1981) resigned from the bench in 1983. Apparently this case "slipped through the cracks" of judicial administration in the reassignment of Judge Latimer's cases.

Plaintiff never moved for a continuance.

Plaintiff, after filing the Rule 1.440 notice that the case was at issue and ready for trial, awaited the sua sponte re-scheduling of the trial by the Circuit Court as was the demonstrated custom.

Meanwhile, the Circuit Court staff totally overlooked this cause and no trial date was re-set after March 30, 1981, even though three prior trials had been set sua sponte on the basis of the original notices of readiness for trial.

Plaintiff was not notified of any change in the prior practice of scheduling trials sua sponte. Plaintiff

did not contact the court for a new trial date as he was prevented from doing so by proper protocol. Even so, plaintiff did not ignore the case. He filed notices of taking depositions (R. 66, 67, 68, 69, 70) from time to time which Fishe, with no supporting testimony, held were insufficient record activity to prevent dismissal. The sufficiency of those notices to prevent dismissal is not made an issue in this brief.

On February 21, 1986, defendant served its motion (R 71, A. 11) to dismiss the cause under Florida Rules of Civil Procedure 1.420(e) on the ground that there was no record activity for one year.

At the hearing in Circuit Court on respondent's motion there was no sworn testimony. (R. 1-15) No exhibits were admitted except a copy of the clerk's docket sheet (R. 85) and a Feb. 19, 1986 letter between counsel concerning the scheduling of a deposition. (R. 76)

At the conclusion of the hearing a new fourth judge granted defendant's motion dismissing the action for lack of prosecution.(R 12, 77, A. 13) From that Order petitioner appealed to the Fourth District Court of Appeal, which affirmed with one judge dissenting. (503 So.2d. 1272) (A. 1) Plaintiff here seeks reversal of that dismissal and affirmance.

SUMMARY OF THE ARGUMENT

Florida Rules of Civil Procedure 1.440 provides the procedure for bringing an action to trial. This Supreme Court has construed that rule to mean that when a

litigant files a notice that the action is at issue and ready for trial, the trial court is required to take charge of its trial calendar and set a trial without further participation by the litigants. The plaintiff is then under no obligation to take further action to move the action toward trial and is foreclosed from trying to pressure the judge into setting a date. Since trial sequence and acceleration is a matter exclusively in the bosom of the court, the filing of the notice for trial bars the court from dismissing the action for lack of prosecution.

Notwithstanding this clear and comprehensive Supreme Court interpretation of Rule 1.440, the Fourth District in this cause erroneously affirmed a dismissal for lack of prosecution ordered while the plaintiff was awaiting the re-setting of the case for trial after plaintiff had filed notice for trial and waited out five abortive trial settings, none of which was continued for the plaintiff, and while plaintiff had been at all times ready for trial.

The Fourth District erroneously held that Rule 1.440 provides procedure for setting the trial date only one time and does not encompass actually bringing the case to trial; that the duty of re-noticing the case for trial after a continuance is on the litigants and unless the plaintiff re-notices the case for trial the case is subject to dismissal for lack of prosecution.

Plaintiff respectfully shows that the affirmance of the dismissal of this action is also an unfair holding which wrongfully penalizes the plaintiff for the trial court staff's inattention or confusion in not performing the court's exclusive duty and function.

The erroneous holding of the Fourth District in this cause directly conflicts not only with the above decision of the Supreme Court, but also with decisions of the Third District holding that the occurrence of a continuance does not terminate the bar against dismissal for lack of prosecution unless the plaintiff obtained the continuance and thus withdrew his prior notice of readiness for trial.

The erroneous holding of the Fourth District in this cause adopts a procedural rule which differs from the clear requirements of the Florida Rules of Civil Procedure, a function which is reserved exclusively to the Supreme Court by the Article V Section 2 of the Florida Constitution.

THE ISSUE

WHETHER THE BAR AGAINST DISMISSAL OF AN ACTION FOR LACK OF PROSECUTION, WHICH ARISES WHEN A LITIGANT FILES A NOTICE THAT THE ACTION IS READY FOR TRIAL, TERMINATES WHEN THE COURT SETS A TRIAL WHICH DOES NOT OCCUR?

ARGUMENT

The District Court below answered the Issue in the affirmative.

Mikos v. Sarasota Cattle Co. 453 So.2d 402 (Fla. 1984) teaches that when a litigant has filed a notice under Florida Rules of Civil Procedure 1.440 notifying the Court that the action is at issue and ready for trial the entire management and sole discretion and responsibility regarding the setting of the trial then passes to the trial court and it is inappropriate for the litigants to interfere in the process or pressure a judge into setting a trial date. Mikos, says:

> On appeal the district court reversed, holding that plaintiffs had no obligation to take any further action once they had filed a notice of trial pursuant to Florida Rule of Civil Procedure 1.440(b). The district court reasoned that since it is the trial court's responsibility to enter an order fixing a date for trial under Rule 1.440(c) once notice for trial is given, the filing of the notice bars the trial court from dismissing the action for lack of prosecution, citing (citations, including Visuna v. Metropolitan Transit Authority, 353 So.2d. 183 (Fla. 3d DCA 1977).
>
> We agree with the decision below in all respects. A trial judge has sole discretion in determining the order in which cases will be tried. Lawyers simply have no power or duty to determine which cases will be tried at particular times. The rules contemplate that whenever a plaintiff is ready for trial his attorney must notify the court and ask the court to enter an order setting a trial date. It is inappropriate for a trial attorney to pressure a judge into setting a date. We would like to add, however, that if a plaintiff subsequently indicated that he is not ready for trial, then the filing of the notice of trial will not be a bar to a dismissal for lack of prosecution. (Emphasis supplied)

The above quoted selection from Mikos is a clear and comprehensive statement of the duties of the participants and the procedure to be followed by both the trial

courts and litigants in complying with Rule 1.440 in setting a case for trial.

Mikos totally exonerates a plaintiff from any duty to move the case forward after he files the notice for trial with the one noted exception -- after a plaintiff seeks a continuance and thus withdraws his notice of readiness.

The uniqueness of continuance requested by a plaintiff as the only kind of continuance which interrupts the bar to dismissal for lack of prosecution is further adjudicated in Govayra v. Staubel 466 So.2d 1065 (Fla. 1985), which says:

> The Third District correctly pointed out "that the filing of a proper notice of trial will avoid a dismissal for lack of prosecution when an order of trial is not forthcoming," but that "a notice of trial is no longer viable after a trial date has been set and subsequently continued, where, as here, the continuance is based on the plaintiff's lack of readiness for trial." 444 So.2d at 1023. Mikos v. Sarasota Cattle Company, 453 So.2d 402 (Fla. 1984). The Third District agreed that because respondent (plaintiff) had requested a continuance after giving notice of trial, he had the burden of re-noticing the cause. (Emphasis supplied)

Mikos approvingly cites Visuna v. Metropolitan Transit Authority 353 So.2d 183 (Fla. 3d DCA 1977). In Visuna after the plaintiff had noticed the case for trial, the trial court set a trial which was continued at the instance of the court. The assigned judge then retired and the case was inactive for more than a year. (This is similar to what happened in Fishe.) The Third District held that the dismissal was error because after the plaintiff had noticed the case for trial, it was the continuing

sole duty of the court "to set and proceed to trial" and the failure of the court to do so should not be a basis for dismissal for want of prosecution. Visuna specifically held that the fact that the court had set one aborted trial date was not material and the duty to set the action for trial and proceed to trial remained.

Notwithstanding the clear teachings of this Court in Mikos and Govayra and the prior explicit holding of the Third District in Visuna, the majority in Fishe erroneously held that Rule 1.440 was silent on the subject of what to do after a case had once been set for a trial which did not occur; that the trial courts were insufficiently staffed to monitor their trial settings; that on the basis of common sense, after any continuance, the burden must be placed on the litigants to see to it that the case is moved forward; and that as a result there is no bar to dismissal of an action for lack of prosecution after a continuance.

Visuna did not observe a silence or other omission in Rule 1.440, but instead held that that rule placed a duty on the trial court not only to set a date but also to "proceed to trial." Rule 1.440(c) reads as follows:

> (c) SETTING FOR TRIAL. If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice specified in subdivision (b). By giving the same notice the court may set an action for trial. ***

We submit that this Supreme Court in adopting Rule 1.440 did not create a partial procedure providing only for setting a single trial date. To understand the true meaning of the language in the rule which states that the Court must "set a date for trial" or "set and action for trial", the reader should focus on the word "trial" as the key word and not on "set". This rule copes with the fulfillment of the total judicial function to try pending cases on their merits. The selection of dates on the calendar is only an intermediate step in the process. The Fourth District was usurping the rule making jurisdiction by modifying Rule 1.440 when it held that a trial court completes its function under Rule 1.440 when it sets a date for trial on the calendar without ever conducting that trail and that a notice of readiness for trial must be re-filed after a continuance because a trial court does not have sufficient staff support to monitor trial settings.

Although Visuna was cited in both of plaintiff's briefs in the District Court in Fishe, Visuna, was ignored in the Fishe opinion. Fishe directly conflicts as well with the clear and controlling language of this Supreme Court in Mikos and Govayra.

Visuna was followed in Miami National Bank v. Greenfield, 488 So.2d. 559 (Fla. 3d DCA 1986) where the filing of a notice for trial was held to bar dismissal for lack of prosecution after several continuances for the defendants. Greenfield holds that after the continuances, the plaintiff:

"had a right to rely on the court's continuing control of the docket for the purpose of setting a new trial date."

Fishe sought to distinguish Greenfield because reversal could also have been grounded on estoppel. We submit that the distinction is not relevant and the fact that there was a second ground for reversal does not detract from the clear language of the Greenfield opinion quoted above which was one of the grounds for reversal.

The dismissal of this cause for lack of prosecution impinges unfairly on the plaintiff's right to rely on a "track record" of established local procedure for re-setting trials sua sponte which conforms with the teachings of Mikos. The last three times the case was re-set for trial, the court did so sua sponte without re-noticing of readiness for trial . If there was to be change of this practice after the third re-setting, the plaintiff should have been notified of the change before the court invoked a new re-filing requirement and dismissed the action. Compare Neff Machinery, Inc. v. Allied Electrical Co. 258 So.2d 314 (Fla. 3d DCA 1972)

The impropriety of visiting upon the plaintiff retroactively a newly adopted court administrative policy of requiring litigants to file a re-notice of readiness for trial after a continuance by the court is further demonstrated by the inconsistency of such a new policy with the facts which occurred. The expanding population of Broward county has resulted in a constantly expanding circuit court judiciary with resultant re-assignment of

cases between the judges. In this case 3 judges set the case for trial five times. The last judge who set the case for trial resigned from the bench and the case assignment methodology somehow broke down for the sixth trial setting and as a result the court's staff failed to fulfill its former practice of re-setting the case for trial sua sponte. This is a fault of the Broward judicial system and not the fault of the plaintiff. To penalize this plaintiff with dismissal because of a breakdown in judicial administration is unconscionable especially when no one has been harmed. If the defendant had been prejudiced it should have alerted the court to proceed to trial instead of playing gamesmanship and waiting in ambush to trap the plaintiff.

The responsibility of the trial court and not the attorneys under Rule 1.440 to administer court calendars is further explained in Bennett v. Continental Chemicals, Inc. 492 So.2d 724 (Fla. 1st DCA 1986) where the First District, sitting en banc, said:

> The Rules Committee on two occasions asked the Supreme Court to make the rule directory in non-jury actions so that a notice of trial could be served by the attorneys. The court refused to do so, saying from the bench that trial courts should take charge of their calendars and administer them rather than permitting the attorneys to do so.
> * * *
> Only the Supreme Court of Florida has the power to authorize trial courts to adopt and follow procedural rules that differ from the clear requirements of the civil rules promulgated by that court.

But the panacea for any deficiency in judicial staff support has recently been furnished by this Supreme

Court in the new court discipline of Florida Rules of Judicial Administration. 2.085 which became effective July 1, 1986. A quarter-annual monitoring system has been implemented which will militate strongly against a break down in judicial administration such as occurred in this cause.

CONCLUSION

Petitioner, the plaintiff in the Circuit Court and appellant in the Fourth District Court of Appeal, petitions this Court to reverse the Circuit Court and the affirming decision of the District Court and remand this cause with directions to vacate the order of the Circuit Court dismissing this cause for lack of prosecution, restore this cause to the circuit court trial docket and set this cause for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to MORGAN, CARRATT AND O'CONNOR, Attorneys for Respondent, 2601 East Oakland Park Blvd., Suite 500, Fort Lauderdale, FL 33306, by mail this October 13, 1987. (October 12, 1987, was a legal holiday.)

CECIL T. FARRINGTON
Attorney for Petitioner