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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,542

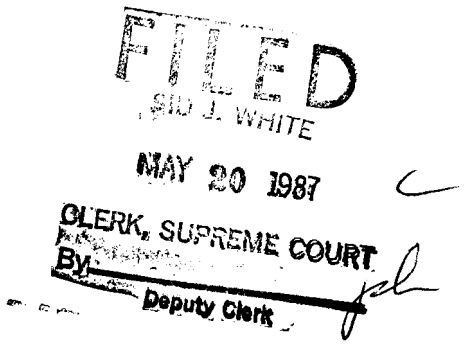
FISHE & KLEEMAN, INC., etc.

Petitioner

v.

AQUARIUS CONDOMINIUM ASSOCIATION, INC., etc.

Respondent



Discretionary Proceeding to Review a Decision of the Fourth District Court of Appeal of Florida

Reported 503 So.2d. 1272

JURISIDICTIONAL BRIEF OF PETITIONER

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TABLE OF CITATIONS

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FLORIDA RULES OF CIVIL PROCEDURE CITED

LEGEND

The decision of the Fourth District Court of Appeal of which review is here sought is reported as Fishe & Kleeman Inc. v. Aquarius Condominium Association, Inc., 503 So.2d 1272 (Fla. 4th DCA 1987). We will refer to that decision in this brief as Fishe.

STATEMENT OF THE CASE AND OF THE FACTS

The nature of this case on appeal is to determine whether or not under Florida Rules of Civil Procedure 1.420(e) and 1.440 an action may be dismissed for lack of prosecution after the plaintiff has filed a notice of readiness for trial and while the plaintiff is awaiting the action of the trial court in re-setting the trial after a previously set trial had not been held.

The trial court in Broward county dismissed the action for lack of prosecution. The Fourth District Court of Appeal rendered a decision affirming the dismissal. Petitioner (Plaintiff/appellant below), now here petitions this Court to review that decision on the ground that the decision conflicts with decisions of this court and another district court appeal.

The complaint is an action at law to collect an engineer's fee.

The relevant facts are these:

After the pleadings and discovery were settled, the

plaintiff filed a notice that the action was at issue and ready for trial, under Rule 1.440. The trial court made an order setting the case for trial under Rule 1.440 but the trial did not occur. Without the filing of another notice for trial, the trial court sua sponte re-set the case for trial three more times, but no trial ever occurred.

The trial scheduled under the third (next to last) setting was continued on the motion of the defendant (Respondent). The record is silent as to the reason why the first, second, and fourth (last) scheduled trials did not occur.

Petitioner (plaintiff) never moved for a continuance.

We would submit that the most likely reason the record is silent as to why the the trials did not occur as scheduled was because the case was automatically continued for re-setting by the various assigned judges, without court order, when the case was not reached on the judge's trial calendar for those trial periods.

When more than one year had elapsed without record activity, since the date of the last (fourth) order setting trial, the trial court, on the defendant's motion, dismissed the case under Rule 1.420(e) for lack of prosecution.

Petitioner (plaintiff) appealed that dismissal to the Fourth District Court of appeal which rendered a decision (Fishe) affirming the dismissal. Petitioner here petitions for review of that decision.

SUMMARY OF THE ARGUMENT

Fishe expressly holds as follows: that after a plaintiff has filed notice that the action is at issue and ready for trial, the trial court, because it lacks the staff to monitor trial settings, is obligated to assume only once the responsibility for setting of the case for trial. If a trial set by the court is continued for any reason, it then becomes the duty of the plaintiff to file another notice that the action is still ready for trial, and to repeat the notice for trial after each continuance until the case proceeds to trial, under pain of dismissal for lack of prosecution if no record activity occurs within one year while plaintiff is waiting for the court to set the trial.

Fishe expressly and directly conflicts with two decisions of the Third District Court of Appeal holding that when, after notice for trial has been filed, the trial court sets a trial which does not occur, the court's exclusive duty to manage the trial docket and proceed to trial continues and after the filing of the notice for trial the action is not subject to dismissal for lack of prosecution if there is no record activity for one year.

Fishe also conflicts with a decision of this court holding that after notice of trial has been filed, the trial court has the exclusive duty of managing the trial docket and proceeding to trial: that the action cannot be dismissed for lack of prosecution after the filing of notice of trial; and that it

is inappropriate for the litigants to pressure the trial judge into setting a case for trial.

This conflict as to trial docketing procedure is a mischief of great importance to the public whose rights may be sacrificed by dismissal due to the lethergy or pre-occupation of court officials whose function or lack of function is beyond the discipline or control of the litigants.

ARGUMENT

THE ISSUE

SHOULD THE SUPREME COURT EXERCISE JURISDICTION TO RESOLVE CONFLICT ON THE ISSUE OF WHETHER A PLAINTIFF WHO HAS FILED NOTICE THAT THE CASE IS AT ISSUE AND READY FOR TRIAL IS OBLIGATED, ON PAIN OF DISMISSAL FOR LACK OF PROSECUTION, TO RE-NOTICE THE CASE AS STILL READY FOR FOR TRIAL AFTER THE COURT SETS A TRIAL WHICH DOES NOT OCCUR?

The Fourth District Court of Appeal, in its decision in this case [Fishe & Kleeman Inc. vs. Aquarius Condominium Association, Inc., 503 So.2d 1272 (Fla. 4th DCA 1987)], which we refer to simply as Fishe, expressly decided, with one of the three judges dissenting, as follows: that when the plaintiff has filed notice under Florida Rule of Civil Procedure 1.440 that the case is at issue and ready for trial, and when the trial court under Rule 1.440 then sets one or more trials which are not held, it is the obligation of the plaintiff to re-notice the case for trial after each time the case is set for a trial which is not held.

Fishe further holds that if the plaintiff fails to thus re-notice the case for trial, the case is subject to dismissal for lack of prosecution under Florida Rule of Civil Procedure 1.420(e), if the court does not re-set the trial or other record activity does not occur, within a year.

In reaching this decision, Fishe states that Rule 1.440 is silent on the matter of who is responsible for initiating the process of re-setting the case for trial after the case has been set for a trial which is not held and, since Florida trial courts lack staff support sufficient to monitor trial settings, the task of provoking the court to re-set the case for trial should rest on the "litigants" and not on the trial court.

The procedure as to re-setting trials is contrary-wise however, in the trial courts of the Third Appellate District of Florida, where the Third District Court of appeal has decided two cases which are in express and direct conflict with Fishe. We refer to Visuna v. Metropolitan Transit Authority, 353 So.2d 183 (Fla. 3d DCA 1977), which will be referred to as Visuna and Miami National Bank v. Greenfield, 488 So.2d 559 (Fla. 3d DCA 1986), review denied, 497 So.2d 1217 (Fla. 1986), which will be referred to as Greenfield.

In Visuna, after the plaintiffs had filed notice for trial, the trial court then set a trial and continued it sua sponte. Thereafter the case lay dormant for more than one year and was then dismissed on for lack of prosecution. The Third District Court of Appeal reversed, holding that when, after the

case had been noticed for trial, the trial court set a trial which was not held, the duty of the trial court to re-set and conduct the trial continued; that there was no duty on the plaintiff file a second notice that the case was ready for trial, and that dismissal of the case for lack of prosecution after the filing of the notice for trial was erroneous. Visuna says:

> "(O)nce they had noticed the actions for trial it was the duty of the court to set and proceed to trial thereof, and the failure of the court to do so should not be basis for dismissal for want of prosecution.
>
> * * *
>
> 'The only distinction here is that the court, after having set the actions for trial, in effect withdrew or vacated the setting, and neither the judge nor his successor set the actions for trial thereafter for a period of more than one year, notwithstanding plaintiffs' prior notice for trial and their continued and subsequent readiness for trial. That distinction is not material. The duty to set the actions for trial remained. (citations)."
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> 184 So.2d at pages 184, 185

Later, in Greenfield, the Third District Court of Appeal further held that the occurrence of several unfulfilled orders setting trial, did not affect the principle which precludes dismissal for lack of prosecution after plaintiff has filed notice of readiness for trial. Greenfield states:

> "Generally, once the plaintiff notices an action for trial, it is the duty of the court to set the cause for trial and the court's failure to do so precludes dismissal for failure to prosecute despite the lack of record activity during the ensuing one year. (citations) MNB (Miami National Bank, 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." (Emphasis supplied)
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> 488 So.2d at page 562

Fishe attempts to distinguish Greenfield because Greenfield holds that its defendant was estopped to seek dismissal. However, we submit that Greenfield teaches that its lower court dismissal was reversible on three independent grounds, only one of which was estoppel. Greenfield explicitly decides that reversal of the dismissal for lack of prosecution was also called for because under Florida Rule of Civil Procedure 1.440, the trial court alone, and not the plaintiff, was responsible for setting the trial and proceeding to trial.

Fishe also expressly and directly conflicts with the decision of this Court in Mikos v. Sarasota Cattle Co., 453 So.2d 402 (Fla. 1984) (hereafter Mikos), and Sarasota Cattle Co. v. Mikos, 431 So.2d 260 (Fla. 2d DCA 1983) which Mikos affirms and adopts.

In Mikos, the trial court failed to set a trial after the plaintiff filed notice of readiness for trial. The record was inactive for one year. In holding it improper to dismiss the case for lack of prosecution after the filing of the notice for trial, Mikos says:

> "On appeal the (second) 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). * * * (O)nce notice for trial is given, the filing of the notice bars the trial court from dismissing the action for lack of prosecution. (citations)"

> "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 nor 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 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 indicates that he is not ready for trial, then the filing of the notice of trial will not be a bar to dismissal for lack of prosecution."

Mikos is clear and direct. "No obligation to take any further action once he has filed a notice for trial" means just what it says: "no obligation." The statement that "the filing of the notice bars the trial court from dismissing the action for lack of prosecution" is equally commanding. The directness of Mikos is emphasized with the comment that it was "inappropriate" for plaintiff's attorney to try to pressure the trial judge into setting a trial date.

The last above quoted sentence from Mikos, as well as Govayra v. Straubel, 466 So.2d 1065 (Fla. 1985), point out that there when a plaintiff moves for a continuance the motion in effect withdraws a prior notice of readiness for trial and the plaintiff must then re-notice the case for trial. We will not dwell further on this proposition because Fishe does not indicate that the plaintiff (Petitioner) in this cause at any time asked for a continuance.

Petitioner urges that this Court take jurisdiction of this cause and resolve the conflict in trial setting procedure which results from Fishe. Trial setting (and dismissal) is a

problem of the utmost importance to litigants which should be uniform throughout the state.

The trial judges, trial lawyers and other citizens of the Fifth Florida Appellate District will be forced by Fishe to speculate at their peril as to which trial setting procedure will be adopted by their District Court of Appeal in case of multiple trial settings, unless this Court resolves the conflict, as it can do in this cause at this time.[1]

CONCLUSION

Petitioner petitions this Court to take jurisdiction of this cause and resolve the conflict which it raises with the decisions of the Third District Court of Appeals and this Court.

Respectfully submitted,

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1. The First District in Palatka Housing Authority v. Betts, 349 So.2d 784 (Fla. 1st DCA 1977), seems to be aligned with Fishe although the 4th DCA had rejected Palatka Housing Authority in Fox v. Playa Del Sol Association, 446 So.2d 126 (Fla. 4th DCA 1983). Palatka Housing Authority was disapproved by inference by this court in Mikos after conflict with it had been certified by the Second District which this Court affirmed in Mikos.

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to MORGAN, CARRATT, and O'CONNOR, 2601 East Oakland ParkBlvd., Suite 500, Fort Lauderdale, FL 33306, attorney for Respondant, by mail, this May 18, 1987.

By:_____
CECIL T. FARRINGTON
Of counsel for Petitioner