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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,542

FISHE & KLEEMAN, INC., etc.,

Petitioner

vs.

AQUARIUS CONDOMINIUM ASSOCIATION, INC, etc.,

Respondent

BRIEF OF RESPONDENT ON JURISDICTION AND SUPPLEMENTAL APPENDIX TO BRIEF

MORGAN, CARRATT AND O'CONNOR, P.A.
Attorneys for Respondent
2601 E. Oakland Park Boulevard
Suite 500
Ft. Lauderdale, Florida 33306
Tel: (305) 565-0501

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PREFACE

In this Response to the Petition to invoke the Court's discretionary jurisdiction, the Respondent, AQUARIUS CONDOMINIUM ASSOCIATION, INC., will file a Supplemental Appendix to their Brief.

The Respondent will refer to the Petitioner as "FISHE", and the Respondent as "AQUARIUS", and it will use the following symbol in connection with its Brief:

"SA" -- Supplemental Appendix to Respondent's Brief.

STATEMENT OF THE CASE AND OF THE FACTS

AQUARIUS does not agree with the Statement of the Facts as set forth in Petitioner's Brief and it will supplement the Statement of Facts in this Brief.

This matter involves a 1976 case, which was pending until March 6, 1986, when it was dismissed by Order of the trial Court (SA 1-2). The case was initially set for trial in 1978, and it was subsequently set for several dates prior to March 30, 1981, which trial dates were continued by Order of the trial Court (SA 1-2). The last time it was set for trial was by Order entered on May 22, 1980, which Order set the case for jury trial on March 30, 1981 (SA 4).

The trial of the case was apparently not had during the calendar for March 30, 1981, and no further Order was entered by the Trial Court, setting the case for trial (SA 1-3). No further action was taken by FISHE to have the case

reset for jury trial. Instead, FISHE would send out yearly notices of taking the deposition of the same witness for the next five years (SA 6-10). Thus, on December 1, 1982, Defendant initially noticed the the taking of the deposition of a witness, Boris Dephoure (SA 6), and again, on July 29, 1983 (SA 7), on July 27, 1984 (SA 8), and on July 27, 1985 (SA 9). On February 19, 1986 (SA 10), FISHE sent the last notice of the taking of that same witness, Boris Dephoure. In fact, the witness, Boris Dephoure, had died on January 14, 1983 (SA 13), and consequently, he was not even available as a witness for deposition during those last four years. In February, 1986, AQUARIUS moved the Court to dismiss the case for failure of FISHE to prosecute same, in that, there had been no activity in the case for more than one year (SA 11-12). In fact, there had been no real activity for several years, and Plaintiff had taken no action towards prosecuting the case to trial (SA 11-12).

The lower Court granted Defendant's Motion on March 6, 1986 (SA 2), and the Order was affirmed by the Fourth District Court of Appeal on January 21, 1987 (SA 1-3).

In its Brief, FISHE suggests that the record is silent as to why the trial did not occur as scheduled, and suggests that the reason the case was not automatically continued for resetting because of an assignment of judges. AQUARIUS would respectfully suggest that the case was simply not reached during that trial period, and further action was required by Plaintiff to have the case reset for another trial date. No

such action was taken by FISHE to have the trial reset by the lower Court. FISHE was aware that further action would be required to have the case reset for trial, as evidenced by the fact that FISHE would continue to renotice the taking of the deposition of Boris Dephoure from 1982 through 1986. The only purpose of such action by FISHE was an attempt to show "record activity" on its part for the purposes of avoiding a dismissal of the action by the lower Court, and yet, it never took any action to have the case reset for trial.

FISHE subsequently filed a Petition for Rehearing and a Petition for Rehearing En Banc, which were denied by the Fourth District Court of Appeal on April 8, 1987 (SA 1-3).

SUMMARY OF ARGUMENT

In its Brief on Jurisdiction, Petitioner contends that there is express and direct conflict between the decision of the Fourth District Court of Appeal in this case, and the decisions of the Third District Court of Appeal in Visuna v. Metropolitan Trans. Authority, 353 So.2d 183 (Fla.3d DCA 1977), and Miami National Bank v. Greenfield, 488 So.2d 599 (Fla.3d DCA 1986), conflict with the decision of the Florida Supreme Court in Mikos v. Sarasota Cattle Company, 453 So.2d 402 (Fla.1984).

The facts in this case are considerably different than those in the cases relied upon by FISHE, and there is no conflict between the decision of the Fourth District Court of Appeal in this case and the decisions cited by Petitioner.

The decision is in conformance with this Court's decision in Govayra v. Straubel, 466 So.2d 1065 (Fla.1985), wherein the case was continued and no further action was taken by a party for a period of some twenty-eight months, at which time it was dismissed by the lower Court for failure to prosecute. The Court held that the trial Court had properly dismissed the cause because of Petitioner's failure to take any action for said period.

In its appeal to the Fourth District Court of Appeal, FISHE relied principally upon an earlier decision of that Court in Fox v. Plaza Del Sol Association, 446 So.2d 126 (Fla.4th DCA 1983), in which case the Fourth District Court reached a similar decision as the cases cited by FISHE. The Fox case was distinguished by the Appellate Court in its decision, and FISHE's Petition for en banc rehearing based on said Fox case was denied by the Fourth District Court of Appeal.

In this case, there was a failure of activity for a period of five years after the case was not tried on March 30, 1981, and no affirmative action was taken by FISHE for a period of five years after said time period to have the case reset for trial. In none of the cases cited by Petitioner do the facts match those in this case.

PETITIONER'S ISSUE PRESENTED FOR REVIEW

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 TRIAL AFTER THE COURT SETS A TRIAL WHICH DOES NOT OCCUR?

ARGUMENT

In an early case, Nielsen v. City of Sarasota, 117 So.2d 731 (Fla.1960), the Court set forth a basis for invoking the Court's conflict jurisdiction. The Court stated that there may be conflict jurisdiction when (1) there is an announcement of a rule of law which conflicts with the rule previously announced by this Court or (2) that the application of a rule of law produces a different result in a case which involves substantially the same controlling facts as the prior case disposed of by the Court.

To the same effect, see Florida Power & Light v. Bell, 113 So.2d 697 (Fla.1959). This rule with respect to conflict jurisdiction was recognized more recently by the Court in Chase Federal Sav. & Loan Ass'n. v. Schreiber, 479 So.2d 790 (Fla.1985). Also see England and Williams, Florida Appellate Reform One Year Later, Fla.St.L.Rev. 221, 244 (1981).

In order for FISHE to show direct and express conflict in this case, it must show either (1) that the Court in this case stated a rule of law in conflict with the rule of law set forth in the cases cited by FISHE or (2) that the facts in this case were substantially the same as those in the cases cited by FISHE.

The cases cited by FISHE for conflict, that is, Mikos, supra, Miami National Bank, supra, and Visuna, supra, are not in express and direct conflict with the decision in this case,

since the Fourth District did not announce a different rule of law and the facts in this case are not similar to those cases. In the cited cases, the facts related to a situation where a Plaintiff had noticed the case for trial, but the case had not been set for trial within the one year time period. Under those circumstances, it was held that a case may not be dismissed, since the trial Court has sole control of the trial calendar for the setting of trial cases. The rationale of those decision was set forth by this Court in Mikos, supra, wherein the Court stated as follows:

> "A trial judge has sole discretion in determining the order in which cases will be tried. The lawyers simply have no power or duty to determine which cases will be tried at the 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 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."
> (P. 403).

In this case, the trial Court set the trial for March 3, 1981, and the case was not tried at that time. The record is silent as to why the case was not tried during the trial period. FISHE was under a duty to proceed to ask the Court to reset the case for trial, and it took no further action in that regard. FISHE was aware of its lack of action by its subsequent attempts to show record activity by sending a

notice of deposition for the same witness for five consecutive years, and yet, never taking the deposition of that witness.

The decision in this case is consistent with this Court's decision in Goyayra, supra, wherein the trial of the case was continued pursuant to the stipulation of the parties which provided that the case would be reset for trial upon proper notice therefor. Thereafter, no record activity occurred for a period of twenty eight months, after which the trial Court entered an Order dismissing the cause. The Third District Court reversed the trial Court's Order on the basis that the trial Court had a responsibility of re-noticing the case for trial and that further action on the plaintiff's part was not necessary. Govayra v. Straubel, 442 So.2d 1022 (Fla.3d DCA 1984).

In quashing the decision of the Third District Court, the Court held that the language of the trial Court's Order was clear and that the case had to be re-noticed by either the plaintiff, defendant, or by the Court, on its own motion, in order to have the reset for trial.

In this case, similar action was required by Petitioner to have the case reset for trial, and FISHE's failure to seek to have the case reset for trial or to take any meaningful action for a period of some five years justified the lower Court's decision in dismissing FISHE's suit for failure to prosecute pursuant to Rule 1.420(e), Florida Rules of Civil Procedure.

CONCLUSION

It is respectfully submitted that there is no express and direct conflict between the decision of the Fourth District Court of Apepal in this case and the decisions cited by the Petitioner in its Brief. It is, therefore, respectfully suggested that there is an absence of jurisdiction to review the decision below and that Petitioner's application for review should therefore be denied.

Respectfully submitted this 29 day of May, 1987.

MORGAN, CARRATT AND O'CONNOR, P.A.
Attorneys for Respondent
2601 E. Oakland Park Boulevard
Suite 500
Ft. Lauderdale, Florida 33306
Tel: (305) 565-0501

BY Harry G. Carratt
Harry G. Carratt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by mail to WALTER WOLF KAPLAN, Esq., One Financial Plaza, Suite 1700, Fort Lauderdale, Florida 33394, and to CECIL T. FARRINGTON, Esq., 221 South Andrews Avenue, Fort Lauderdale, Florida 33301, attorneys for Petitioner, this 29th day of May, 1987.

Harry G. Carratt