O/C 1-5-88 Orig

20

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 70,542



FISHE & KLEEMAN, INC., etc.,

Petitioner

vs.

AQUARIUS CONDOMINIUM ASSOCIATION, INC., etc.,

Respondent

PROCEEDING FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

# RESPONDENT'S BRIEF ON THE MERITS 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

## INDEX TO BRIEF AND APPENDIX

## TABLE OF CITATIONS

## STATEMENT OF THE CASE AND FACTS

The Respondent, Aquarius Condominium Association, takes exception to certain segments of Petitioner's Statement of the Case and Facts. Some statements are not supported by the record, while others constitute improper argument. In addition, Petitioner did not include all the factual matters in his Statement, and it is necessary for Respondent to supply these facts, which are necessary to paint a complete picture of this case.

In this Brief, Petitioner will be referred to as "Plaintiff" or "Petitioner", and Respondent will be referred to as "Defendant" or "Respondent". The following symbols will be used:

"R" - Record on Appeal

"A" - Appendix to Brief of Petitioner

"SA" - Supplemental Appendix of Respondent

The instant action was filed in Broward County in early 1976 (R 16). On October 16, 1978, Petitioner filed its Notice For Trial (R 51). On April 27, 1979, Respondent filed its Trial Catalogue, which listed Boris Dephoure as a trial witness (R 57-58). The following day, Petitioner filed its Pretrial Catalogue which also listed Mr. Dephoure as a witness (R 59-61). At no time prior to the five subsequent trial settings (R 53,55-56,62,63,64-65), did Petitioner attempt to depose Mr. Dephoure.

On May 22, 1980, the Court entered an order noticing the case for trial on March 30, 1981 (R 64, A 10). This was the fifth trial setting in the case (R 53, 55-56, 62,63, 64-65). For reasons not contained in the record, the case was not tried on March 30, 1981.

In September of 1981, following an extended period of inactivity, Respondent filed the first of two motions to dismiss for lack of prosecution (R 65A; SA 1). The record does not reflect the results of the scheduled hearing. The record does reveal the only activity in the case from that point forward:

1. Notice of Taking Deposition of Boris Dephoure dated December 1, 1982. (R 66, SA 2)

2. Notice of Taking Deposition of Boris Dephoure dated July 29, 1983. (R 67, SA 3)

(NOTE: Mr. Dephoure died in January of 1983) (R90, SA 9).

3. Notice of Taking Deposition of Boris Dephoure dated July 27, 1984. (R 68, SA 4)

4. Notice of Taking Deposition of Boris Dephoure dated July 27, 1985. (R 69, SA 5)

5. Notice of Taking Deposition of Boris Dephoure dated February 19, 1986. (R 70, SA 6)

The record reflects that Mr. Dephoure was never subpoenaed for deposition, and that he was not noticed as an officer or agent of the Defendant (R 66-70; SA

2-6). The record also reflects that Petitioner never sought a Court Order compelling Mr. Dephoure's attendance at deposition. The record does not contain a single court reporter's Certificate of Non-Attendance.

After 69 months of record inactivity (May, 1980 through February, 1986), Respondent again moved to dismiss the case for lack of prosecution (R 71-72; SA 7-8). At the hearing on the motion, the trial court found that the patently repetitious notices of deposition were filed to "keep the case open" (R 10). The trial court then granted the Motion To Dismiss (R 77), and Petitioner sought relief in the Fourth District Court of Appeal. In a written opinion found at 503 So 2d 1272, the Fourth District Court affirmed the lower Court's dismissal.

Respondent objects to the statements contained on pages 2 and 4 of Petitioner's Brief, because the statements violate Rule 9.210, F.A.R. Petitioner's statements on page 2 represent counsel's opinion/argument concerning the Fourth District Court's ruling. On page 4 of its Brief, Petitioner proffers many statements, again in the nature of argument, which are not supported by the record.

## SUMMARY OF ARGUMENT

The trial court did not err in dismissing Plaintiff's case, following 69 months of record inactivity. The record reveals that Plaintiff made no effort to hasten the suit to judgment, in accordance with established Florida case law. To the contrary, Plaintiff adopted a strategy, by filing the patently repetitious notices of deposition, designed "to keep the case open". The trial court acted properly in dismissing Plaintiff's claim.

The mechanical filing of a Notice of Readiness for trial does not excuse Plaintiff from taking the necessary steps to bring the cause to conclusion, especially where the notice preceded five subsequent trial settings. Plaintiff has an affirmative duty, pursuant to the Rules of Civil Procedure and the Rules of Judicial Administration, to prevent extended delays. Plaintiff must alert the Court of its readiness for trial.

The problem complained of by Plaintiff could have been resolved at any time during the 69-month inactive period. Plaintiff should have resolved the problem with a 2-minute telephone call to the Judge's office. Plaintiff finds a call or any other activity unreasonable and improper, because it would "pressure" the Judge. Because Plaintiff opted for passive inactivity in a case which warranted affirmative action, the decision of the lower Court should be affirmed.

## ISSUE ON APPEAL

Respondent does not agree with Petitioner's statement of the Issue, as contained in Petitioner's Initial Brief. As framed, the Issue is both confusing and incomplete. Respondent would restate the issue as follows:

> WHETHER THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CASE, WHICH HAD BEEN PREVIOUSLY NOTICED FOR TRIAL BY PLAINTIFF AND SET FOR TRIAL FIVE TIMES, FOLLOWING 69 MONTHS OF RECORD INACTIVITY, DURING WHICH PERIOD PLAINTIFF MADE NO EFFORT TO HAVE THE CASE RESET OR RENOTICED FOR TRIAL.

## ARGUMENT

### ISSUE

WHETHER THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CASE, WHICH HAD BEEN PREVIOUSLY NOTICED FOR TRIAL BY PLAINTIFF AND SET FOR TRIAL FIVE TIMES, FOLLOWING 69 MONTHS OF RECORD INACTIVITY, DURING WHICH PERIOD PLAINTIFF MADE NO EFFORT TO HAVE THE CASE RESET OR RENOTICED FOR TRIAL.

The trial court did not err in dismissing Plaintiff's case for failure to prosecute, following 69 months of record inactivity, during which period Plaintiff made no effort to have the matter rescheduled for trial. The facts present in the instant case, which are far more outrageous than any other Rule 1.420 (e) case reported in Florida, clearly support the decisions of the trial court and the Fourth District Court of Appeal. Plainly stated, Plaintiff made absolutely no effort to hasten the case towards final conclusion. As a result, the dismissal of the case was proper.

The main argument espoused by Petitioner, in support of a reversal, is that Petitioner had no duty to do anything to bring the case to conclusion (trial) once he filed his original notice for trial in 1978. In fact, Petitioner adopts the unrealistic position that it was, and still is, improper to file a re-notice for trial. Petitioner relies on Mikos v. Sarasota Cattle Co., 453 So 2d 402 (Fla.1984) as rock-solid support for his argument. Petitioner's argument espousing passive inactivity is contrary to Florida case law and also contrary to Rules 1.010 and 1.200 of the Florida

Rules of Civil Procedure and Rule 2.085 of the Florida Rules of Judicial Administration.

Petitioner's reliance on Mikos, supra, is not well placed. At first blush, Mikos appears factually parallel to the instant case, as the action was filed in 1975 and noticed for trial in 1979. Here, however, the similarity ends. The trial court in Mikos never set the cause for trial following receipt of Plaintiff's notice for trial. After a period of inactivity, the Mikos Defendant moved to dismiss pursuant to Rule 1.420(e), which motion was granted. Because the case was never set for trial, this Court held that dismissal was improper, and ordered the cause reinstated.

Clearly, the Mikos facts do not apply to the instant case. Here, the case was actually set for trial on five (5) different occasions following the trial notice. After trial was not held pursuant to the fifth trial order, dated May 22, 1980, Plaintiff opted to do nothing other than file patently reptitious deposition notices.

Although factually different from the instant case, Mikos, supra, does provide legal guidance for the Issue on Appeal. In Mikos, supra, this Court stated:

> "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.." Mikos, supra, at 403. (emphasis added)

Of course, Petitioner sidesteps this language, and argues that 69 months of record hibernation was proper, because

Petitioner is not supposed to pressure the court into setting a trial date. On Page 8 of its Brief, Petitioner states "it is inappropriate for the litigants to interfere in the process or pressure a judge into setting a trial date." Petitioner either does not really believe the previous sentence, or Petitioner is confused, because page 13 of its Brief states that Defendant "should have alerted the court to proceed to trial."

Respondent agrees that a litigant or his counsel should not pressure a judge to do anything! However, there is a vast difference between reasonable inquiry and pressure. Petitioner had multiple options at his disposal to hasten the case to trial, none of which would ever be construed as pressuring the court. The following are a few examples of reasonable (non-pressurized) inquiry:

> 1. File a motion for pretrial conference in accordance with Rule 1.200, F.R.C.P.; or
> 2. File a motion to reset the cause for trial; or
> 3. File a re-notice of readiness for trial; or
> 4. Call the Court's judicial assistant to find out why the case has not been scheduled for trial.

Instead of making reasonable inquiry, Petitioner opted to file the repeated yearly notices of deposition, hoping to maintain a pulse in an otherwise dead case. Significantly, the yearly notices followed the 1981 motion to dismiss for lack of prosecution filed by Respondent. Clearly, the patently repetitious notices did not constitute "record" activity, Phillips v. Marshall Berwick Chevrolet, Inc., 467 So2d 1068 (Fla. 4th DCA 1985); Fishe and Kleeman, Inc. v. Aquarius Condominium Association, Inc., 503 So 2d 1272 (Fla.

4th DCA 1987) and the 1981 motion to dismiss for lack of prosecution did not constitute "record" activity. Barnett Bank of East Polk County v. Fleming, 508 So 2d 718 (Fla. 1987) Hence, the case remained inactive for 69 months, from May, 1980 through February, 1986. This dormant state advocated by Petitioner violated Florida law, common sense and the Rules of Civil Procedure.

In cases dealing with lack of prosecution, the general rule in Florida has remained constant for more than 35 years. In Gulf Appliance Distributors v. Long, 53 So 2d 706 (Fla. 1951), this Court stated:

> "We think that a step in the prosecution of a suit means something more than a mere passive effort to keep this suit on the docket of the court; it means some active measure taken by plaintiff, intended and calculated to hasten the suit to judgment." Gulf Appliance Distributors, supra, at 707

A scholarly analysis of the rule concerning dismissal for lack of prosecution is found in Dobson v. Crews, 164 So 2d 252 (Fla. 1st DCA 1964).

> "It is evident that the purpose of the statute is to expedite the course of litigation and to keep the court dockets as near current as possible, and to speed decision of disputes by penalizing those who would allow their litigation to become stagnant...It is our view that a logical construction of the Rule is designed, among other things, to deal with the situation where a plaintiff fails or refuses to go forward with his case when the circumstances demand that he do so...". Dobson, supra, at 259 (emphasis added)

See also Eastern Elevator, Inc. v. Page, 263 So 2d 218 (Fla.1972)

As Dobson indicates, the purpose of the Rules of Civil Procedure is to expedite the disposition of cases with

fairness and justice to all parties. Dobson, supra. According to Rule 1.010, F.R.C.P., the rules of civil procedure "...shall be construed to secure the just, speedy and inexpensive determination of every action". This rule serves as the preface to all other rules of civil procedure, and it mandates that litigants take the necessary steps to timely resolve legal proceedings. Petitioner's argument in support of inactivity directly conflicts with this rule.

Petitioner's argument also flies in the face of Rule 1.200 F.R.C.P., which provides for case management conferences, on motion of the court or any party. Subsection (a) (2) specifically addresses the setting and re-setting of trials pursuant to Rule 1.440 (c). In everyday practice, case management conferences are usually not held until a case is reasonably close to trial. Of course, Petitioner would have this Court believe that it is improper to request, after a notice for trial has been filed, a pretrial conference to discuss the trial setting.

Lastly, Petitioner's argument defies the time standards promulgated in Rule 2.085, Fla. R. Jud. Admin. Specifically, a jury case of this type is to be resolved in 18 months (filing to final disposition). This case was inactive four times longer than the standard! The case has been pending for 137 months! If this Court were to adopt Petitioner's argument, it would be ignoring the guidance of Rule 2.085, Fla. R. Jud. Admin.

The frivolity of Petitioner's argument, if carried to its logical conclusion, is readily apparent. If one would accept Petitioner's argument that it is improper under Mikos for any party to contact the Court in any way to obtain a new trial setting, then the instant case could never be dismissed. Amazingly, Petitioner could continue to file his yearly deposition notices to avoid dismissal and there would be absolutely nothing Defendant could do. According to Petitioner's Brief, it would be improper to contact the Court, and the Court could not grant a motion to dismiss for lack of prosecution. This argument cannot be accepted.

In addition to Mikos, supra, Petitioner cites Govayra v. Straubel, 466 So 2d 1065 (Fla.1985) as a supporting authority for reversal. In Govayra, supra, the parties, after the case had been set for trial, filed a stipulation for continuance, and the Court entered an Order which read:

> "This cause shall be reset for trial upon further notice therefor." Govayra at 1066.

A 28-month dormant period followed, and the trial court entered its motion, notice and order of dismissal, which order required Plaintiff to file a pleading demonstrating good cause at least five days prior to the scheduled dismissal date. Plaintiff did not timely respond, and the trial court dismissed the case.

On appeal, the Third District Court reversed, and ordered the case reinstated. This Court accepted jurisdiction and quashed the Third District Court's decision, and stated:

> "Rather, we think the language in question is clear and can only mean that notice had to be given by either Plaintiff or Defendant, or the Court on its own motion, in order to have the case reset for trial." Govayra, at 1067.

The Govayra decision presents strong foundation for affirmance, especially when one considers that the factual underpinnings of Govayra are a far cry from the mind-boggling inactivity in the instant case. In Govayra, the dormant period was 28 months; here, the period was 2-1/2 times greater (69 months). More importantly, in Govayra, the case was actually set for trial, and then not heard by the court. Notwithstanding the pending trial notice, the case was dismissed.

Govayra also cites Mikos, supra, but this Court still approved the dismissal. The precedential value of Govayra is clear: The filing of a notice for trial does not automatically prevent dismissal for lack of prosecution once a case has been set for trial and passed over. If, as Petitioner argues, a re-notice of trial is unnecessary, then Mikos, supra, warranted an affirmance by this Court in Govayra, supra.

After Mikos, supra, and Govayra, supra, the Third District Court decided Miami National Bank v. Greenfield, 488 So 2d 559 (Fla. 3d DCA 1986), a case relied on by Petitioner. As will be seen, Greenfield is factually distinguishable from the case sub judice, and of no genuine precedential value. In Greenfield, supra, the defendants sought and obtained repeated continuances, including one indefinite continuance, and one

continuance of the last trial setting. Following more than one year of inactivity, the trial court entered its own motion for dismissal, and Defendants followed up with their motion to dismiss pursuant to Rule 1.420(e) two days later. Based upon its interpretation of Rule 1.420(e), the trial court dismissed the case. On appeal, the Third District Court reversed, and ordered the case reinstated. The basis for reversal was estoppel, in that defendants should be estopped from moving for dismissal after having obtained the requested continuances.

This Court, in the instant case, is not faced with an estoppel argument. Respondent did nothing to place Petitioner in its comatose posture. In reality, if estoppel is to be applied at all, it must be applied against the inactivity espoused by Petitioner.

Petitioner relies on two cases, Neff Machinery, Inc. v. Allied Electrical Co. 258 So 2d 314 (Fla. 3d DCA 1972) and Visuna v. Metropolitan Trans. Authority, 353 So 2d 183 (Fla. 3d DCA 1977), which Respondent will not address because they are factually inapposite and predate Mikos, supra, and Govayra, supra. A third case cited by Petitioner, Bennett v. Continental Chemicals, Inc. 492 So 2d 724 (Fla. 1st DCA 1986) does not have any precedential value to the issue before this Court.

In conclusion, the ruling of the trial court was correct, as Petitioner chose to take action designed only to keep the case pending rather than advance it to trial. Both Mikos,

supra, and Govayra, supra, although factually distinguishable from the instant case, do indicate that Petitioner was required to make an effort to reset the case for trial. Plaintiff's lower court inactivity directly violated the Rules of Civil Procedure, the Rules of Judicial Administration and practical, good old-fashioned common sense. Therefore, Respondent respectfully requests that this Court affirm the decision below.

## CONCLUSION

For the foregoing reasons, Respondent requests this Court affirm the decision initially rendered by the trial court.

Respectfully submitted this 6th day of November, 1987.

Terrence P. O'Connor
Fla. Bar #376582
and

Harry G. Carratt
Fla. Bar #012182
of
MORGAN, CARRATT AND O'CONNOR, P.A.
Attorneys for Appellee
2601 E. Oakland Park Boulevard
Suite 500
Ft. Lauderdale, Florida 33306
Tel: (305) 565-0501

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief and attached Supplemental Appendix to Brief was furnished by mail to WALTER WOLF KAPLAN, Esq., One Financial Plaza, Suite 1700, Ft. Lauderdale, Florida 33394, and CECIL T. FARRINGTON, Esq., 221 South Andrews Avenue, Ft. Lauderdale, Florida 33301, this 6th day of November, 1987.

Terrence P. O'Connor