OIA 1-5-88

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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

FILED
SID J. WHITE
NOV 30 1987
CLERK, SUPREME COURT
By _____ Deputy Clerk

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

REPLY BRIEF OF PETITIONER ON MERITS

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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.

REPLY TO STATEMENT OF CASE AND FACTS IN ANSWER BRIEF OF APPELLEE

The Answer Brief of the Defendant includes its own "statement of the case and facts" contrary to Florida Rules of Appellate Procedure 9.210(c). The Answer Brief does not specify any area of disagreement with this portion of the Initial Brief; nor does the Answer Brief's "statement of the case and facts" supply information not furnished in the Initial Brief. We therefore object to this portion of the Answer Brief. Metropolitan Life & Trav. Ins. v. Antonucci, 469 So.2d. 952 (Fla. 1st DCA 1985).

ARGUMENT

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?

Instead of responding to the above issue as presented by Plaintiff in the Initial Brief, the Answer

Brief of Defendant undertakes to present a different issue which reads 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 RE-NOTICED FOR TRIAL

We submit that and Answer Brief's "ISSUE" misses the mark and seeks to present irrelevant matters. Instead of meeting issues presented in the Initial Brief, the Answer Brief (p.6) chooses to characterize the facts of this case as "outrageous" and the position taken in the Initial Brief as "unrealistic". This type of innuendo is not argument and does not deserve a response.

The Answer Brief begins its argument with emphasis on the 69 months of record inactivity from the date of the last (5th) order setting trial to the date of the motion to dismiss for record inactivity and repeats the reference to 69 months eight more times throughout the brief*. If the plaintiff were guilty of causing the delay, the case should have been dismissed after the first 12 months and the additional months would not matter.

We are concerned here with non feasance in judicial administration -- not with inactivity of the litigants. The case had been noticed for trial and the

*Actually the time frame in question in fairness should not include the 10 months which elapsed between the date of the last order setting trial and the last ordered trial date.

entire process of setting and proceeding to trial was in the hands of the judicial staff of the court.

In Visuna v. Metropolitan Transit Authority, 353 So.2d. 183 (Fla. 3d DCA 1977), the court said:

> We find merit in the argument of the appellants that once 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.
>
> 353 So.2d. at p. 184

Again, as stated in Fox v. Playa del Sol Assn. Inc., 446 So.2d 126 (Fla. 4th DCA 1983) review dismissed 443 So.2d 9880 (Fla. 1983):

> We must agree with appellant's assertion that the notice for trial which he filed was all he had to do no matter how long a period elapsed thereafter. Visuna v. Metropolitan Transit Authority, 353 So.2d. 183 (Fla. 3d DCA 1977);

And, as stated in City of Miami v. Dade County, 321 So.2d 140 (Fla. 3d DCA 1975):

> We agree that the primary purpose of the rule governing dismissal for failure to prosecute is to expedite the course of litigation and require litigants to keep the court dockets as nearly current as possible. We also take the view that it is incumbent on the court to do likewise and we so interpret the language and intent of Rule 1.440(c).

The Answer Brief seems to contend that because Plaintiff filed a series of notices to take the deposition of one Boris Dephoure, the dismissal of this action for lack of prosecution was somehow made proper. As noted in the Initial Brief (p. 5) Plaintiff does not contend in this Court that those notices constituted record activity. That issue was put to rest below in Fishe.

This petition for review deals only with the issue of whether or not the filing of the notice of readiness for trial barred dismissal for lack of prosecution thereafter. Yet, the Answer Brief many times (pp. 1, 2, 3, 4, 7, 8, 13) redundantly discusses the deposition notices and sets out the deposition notices in full in its Supplemental Appendix and cites Phillips v. Marshall Berwick Chevrolet, Inc., 467 So.2d 1068 (Fla. 4th DCA 1985), Barnett Bank of East Polk County v. Fleming, 508 So.2d 718 (Fla. 1987) and Fishe on the subject of deposition notices. The consistent filing of these deposition notices does show that plaintiff was at all times aware of the trial court's excessive time lag, and was frustrated by inability to access the court calendar which was hidden from plaintiff in the bosom of the trial court.

We can only attribute the Answer Brief's intensive focusing on this "straw man" non-issue to be an effort to distract the Court and this Reply Brief from the true issue and that the frequent reiteration of this non-issue in the Answer Brief is a tacit admission that Defendant has no real defense to the true issue here under consideration.

The Initial Brief points out that Miami National Bank v. Greenfield, 488 So.2d. 559 (Fla. 3d DCA 1986) review denied 497 So.2d 1217 (Fla. 1986) and Visuna v. Metropolitan Trans. Authority 353 So.2d 183 (Fla. 3d DCA 1977 explicitly hold that the trial court's exclusive duty to set and conduct the trial continues after the case has

been set for trial and continued, (unless the continuance was requested by plaintiff), and that the the case cannot be dismissed for lack of prosecution while the litigants are waiting for the court to re-set the case for trial.

The Answer Brief (pp. 12-13), like the majority decision below in Fishe attempted to distinguish Greenfield because in Greenfield there was a second ground for reversal in the holding that the defendants were barred by estoppel from seeking dismissal. Greenfield specifically adjudicates that a trial setting does not change the trial court's exclusive duty to manage its calendar and bring its cases to trial and that an aborted trial setting does not burden the litigants with the duty of filing a new notice of readiness for trial or terminate the bar against dismissal for lack of prosecution, saying

> (Plaintiff) had a right to rely on the court's continuing control of the docket for the purpose of setting a new trial date. See City of Miami v. Dade County (rule governing dismissal for lack of prosecution requires the courts, as well as litigants, to keep the dockets as nearly current as possible).

The Answer Brief (p. 13) states that it declines to comment on Visuna for the stated reason that Visuna was decided before this Court decided Mikos v. Sarasota Cattle Co., 453 So.2d 402 (Fla. 1984). (We will discuss Mikos beginning on page 7 of this brief.) Visuna was cited with approval in Mikos. (453 So.2d at p. 403) and stands as supporting authority relied on by this Court in Mikos. For appellee to side step discussion of Visuna, which explicitly holds that the setting and continuance of a trial does not lift the bar against dismissal for lack of

prosecution, is to reveal that appellee cannot distinguish Visuna, which is in direct conflict with Fishe, the decision here under review.

The Answer brief (p. 8) contends that there were several devices which appellant should have pursued to prompt the trial court into setting a trial and that this would not be "pressuring" the judge. It seems to appellant that all of those devices are camouflaged forms of pressuring the assigned judge to advance the case. It just is a matter of degree. Persuasion of a presiding judge is seldom attempted by a disrespectful "hard sell". As mentioned in the Initial Brief, the defendant itself could also have prodded the trial judge, but, like the plaintiff, deemed it advisable to tolerate the court's delay.

But, our concern here is not with what might have been done to prod the trial judge with more or less graciousness, but instead we labor to determine whether or not this Plaintiff was sufficiently delinquent in his duty to the court under Florida Rules of Civil Procedure 1.440(b) and 1.420(e) to justify the severe penalty of dismissal of this action for lack of prosecution. We submit that Plaintiff was not guilty of such delinquency and that under Rules 1.440 and 1.420 the entire mischief which caused the prolonged delay in bringing this action to trial was with the local system of judicial administration.

The Answer Brief cites several obsolete cases which deal with the duty of litigants to move their cases to trial. As noted in City of Miami v. Dade County 321 So.2d 140 (Fla. 3d DCA 1975) cases such as these which antedate the January 1, 1973 amendment to Rule 1.440 were decided under a different trial setting procedure in which counsel had direct participation. We refer to the following cases cited in the Answer Brief: Dobson v. Crews, 164 So.2d 252 (Fla. 1st DCA 1964), Gulf Appliance Distributors v. Long, 53 So.2d. 706 (Fla. 1951) and Eastern Elevator, Inc. v. Page, 263 So.2d 218 (Fla. 1972).

Mikos v. Sarasota Cattle Co. 453 So.2d 402 (Fla. 1984) holds that once a litigant has filed a notice that the action is at issue and ready for trial, the action cannot thereafter be dismissed for lack of prosecution. The duty to proceed thereafter and to conduct the trial rests on the trial court alone. Since further progress with the case is exclusively in the hands of the trial court, litigants are obligated to do nothing but await the action of the trial court in setting and proceeding to trial.

After a continuance, when there has been no change in status and when the case continues to be ready for the trial, no purpose would be served by the litigants re-filing a duplicate of the former notice of readiness for trial, except to "prod" (or "pressure") the trial court and that is not the appropriate function of counsel and therefore is not required. Litigants are not to be

held responsible for non feasance in the judicial staff of the court.

Therefore, after filing notice for trial, there is no further duty on the plaintiff to move the case forward, and the action cannot be dismissed for lack of prosecution, unless the plaintiff revokes his readiness for trial by moving for a continuance.

The Answer Brief (p. 6-7) contends that Mikos does not govern this case because in Mikos the trial court never set a trial. That argument is supported by no authority. Mikos is not mentioned in Fishe. The declared basis for the Mikos decision relates solely to the exclusive function of the trial court in managing its calendar and disposing of its cases. Mikos disclaims any responsibility on the part of the litigants to remind, persuade, pamper or "pressure" the trial court to set the case for trial.

Mikos when considered together with Govayra v. Straubel, 466 So.2d 1065 (Fla. 1985) does reveal in its own text that the bar against dismissal for lack of prosecution while the litigants are awaiting setting of a trial by the court extends beyond a trial setting. This is true because the of the caveat in Mikos that:

> 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 dismissal for lack of prosecution.

This caveat was applied in Govayra to refer to a plaintiff's application for a continuance, viz:

> The Third District correctly pointed out "that the filing of a proper notice of trial will avoid a dismissal for lack of prosecution when a 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 Co. 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)

It is thus seen that in both Mikos and Govayra this Court was explaining the procedure regarding continuances after a case had been set for trial, and restricted the effect of a continuance in lifting the bar against dismissal to situations where the plaintiff requested the continuance and in effect withdrew his previous notice of readiness for trial.

Since the notice for trial is no longer viable after plaintiff requests a continuance, a re-notice is then necessary. Otherwise, the original notice for trial remains in full force and effect.

There is no provision in Florida Rules of Civil Procedure 1.440 for a second notice for trial after the case has once been set for trial and no such provision was intended. This rule was designed for the court alone to manage the trial calendar after the notice for trial is filed. If it should be deemed necessary to impose a new requirement of re-filing the same notice for trial after every continuance the change should be accomplished by amendment to Rule 1.440. Unless this court exercises its rule making jurisdiction to amend Rule 1.440, only one

notice for trial is needed to activate the continuing exclusive duty of the trial court to set and proceed to trial, regardless of the number of aborted trial settings, unless, as noted in Mikos and Govayra the plaintiff cancels his notice for trial by requesting a continuance.

If Mikos and Govayra had not intended to teach that the bar against dismissal after notice of readiness for trial continued to after the case has been set for trial, this Court would not have pointed out that the bar against dismissal was lifted in situations where the plaintiff requests the continuance -- it would simply have said that the bar against dismissal was lifted after a continuance.

The unambiguous language of Mikos that:

> "plaintiffs had no obligation to take any further action once they had filed a notice for trial"

means just what it says-- "no obligation". The effort in the Answer Brief (p. 11) to discredit such language as being "frivolity" is hardly a substitute for logical argument.

Respectfully submitted,

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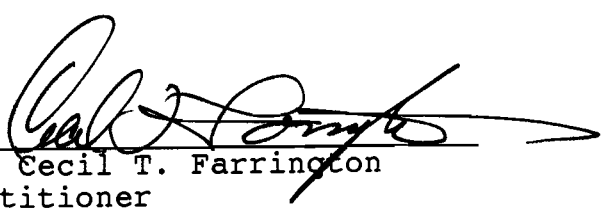
By 
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CERTIFICATE OF SERVICE

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 November 25, 1987.

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