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IN THE SUPREME COURT OF THE STATE OF FLORIDA

Cover sheet corrected

SUPREME COURT CASE #75,370

FOURTH DISTRICT COURT' OF APPEAL
CASE #88-1187

COMMONWEALTH FEDERAL SAVINGS & LOAN. et. al.,

Petitioner/Appellee,

vs.

MOSHE TUBERO,

Respondent/Appellant.

****

APPELLANT'S REPLY BRIEF

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PREFACE

The respondent/appellant Moshe Tubero, will be referred to as respondent, the plaintiff or Tubero. David I. Chapnick, Florida Financial Service Group and Commonwealth Federal Savings & Loan Association will be referred to as the defendants, the petitioners, or, as Commonwealth.

It should be noted that Commonwealth is represented in it's petition before the Supreme Court, but the other defendants are not represented and have no Brief or Argument on the merits in this proceeding. In fact, David Chapnick is believed to be a fugitive from criminal proceedings instituted by the State of Florida on the prepayment/Advance fee money loan scheme for which Tubero originally filed his lawsuit.

RESPONDENT'S STATEMENT OF THE CASE AND THE FACTS

Petitioners' fail to note two major facts: (1). That Tubero's attorney had withdrawn or had attempted to withdraw, and did not actively represent Tubero at the times of the hearings and (2). In Broward County, ex parte motions to compel discovery and Orders can be entered without an 8:45 a.m. motion hearing. In this case, it is unclear whether or not any motion hearings were held until the day of the Order of Dismissal on April 5, 1988 (R-38). It appears from the Record, that the original motion to compel discovery and for the entry of an ex parte Order (R 33-34) was simply an ex parte Order signed pursuant to Local Administrative rules. It should be noted, that Barry Chapnick, David Chapnick and Florida Financial Service Group do not appear to be represented at this stage of the proceedings.

SUMMARY OF ARGUMENT

Petitioner attempts to point out that Mercer v. Raine, 410 So2d 931 (4th DCA 1981) and 443 So2d 944 (Fla. 1983), and it's principles were not observed by the Fourth District Court of Appeal in it's recent Decision rendered in Tubero v. Chapnick, 552 So2d 932 (4th DCA 1989).

Respondent respectfully submits that the trial court can only dismiss a lawsuit or cause of action if the trial court makes express findings of fact which show contumacious conduct, or a willful disregard of the trial court's previously issued discovery Order. In the case at bar, the Circuit Court of Broward County, the Honorable Stephen Booher presiding, did not make any specific findings of fact as to willfullness, contumacious conduct, or a willful disregard by the litigant of the trial court's motion to compel.

ARGUMENT

POINT I

DOES THE DECISION IN TUBERO v. CHAPNICK, 552 So2d 932 (4th DCA 1989) AND/OR IT'S HOLDING, CONFLICT WITH THE HOLDING OF MERCER v. RAINE, 443 So2d 944 (Fla. 1983)?

Petitioners go to extreme lengths, in an attempt to restrict the Decision in Tubero v. Chapnick, 552 So2d 932 (4th DCA 1989) to specific instances wherein a trial court has the discretion to dismiss a lawsuit without making a written finding of willfullness. This is not the law in Florida today, either because of judicial precedent or local practice in Dade or Broward counties. The Holding in Mercer v. Raine, 443 So2d 944 (Fla. 1983), is not in conflict with the Holding in Tubero, Supra, 552 So2d at 933. In fact, Judge Warner cites, with approval, the Holding of the Florida Supreme Court in Mercer:" [the] striking of pleadings or entering a default for noncompliance with [a discovery order]... should be employed only in extreme circumstances. [only] bad faith, willful disregard, or gross negligence to an Order of court [will justify application of the severest sanctions]. See Mercer v. Raine, 443, So2d 944 (Fla. 1983)."

In the case at bar, the trial court entered an ex parte Order on March 8, 1988, and less than thirty days later on April 5, 1988, the trial court dismissed plaintiff's complaint for failure to comply with the trial court's Order of March 8, 1988. There is no finding of willfullness, bad faith, willfull

disregard, or gross negligence in the court's Order of April 5, 1988, and therefore, the Fourth District Court of Appeal was correct in reversing the trial court, because Mercer v. Raine, 443 So2d 944 (Fla. 1983) had not been complied with. Without an affirmative finding of willfulness, the instant case is consistent with the Supreme Court's Decision in Mercer v. Raine, 443 So2d 944 (Fla. 1983). Petitioner's analysis is flawed and suspect, because it would allow dismissal of lawsuits as a discovery sanction for even minor errors or small timelapses in discovery responses. In fact, dismissal is only appropriate in the most severe of cases, and that is why actual findings regarding willfullness are required at the trial court level.

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POINT II

CAN A LITIGANT BE GUILTY OF WILLFUL DISOBEDIENCE, IF HIS LAWYER WITHDRAWS?

In the case at bar, Tubero's lawyer was attempting to withdraw. Under such circumstances, any Order of Dismissal must comply with due process of law in Order to be valid. If a litigant does not respond to discovery, even with a court Order, within thirty (30) days, then he cannot be Held to the same standards as if he is represented by counsel.

POINT III

WHAT IS WILLFUL DISOBEDIENCE UNDER FLORIDA LAW?

Petitioner goes to extreme lengths to justify severe sanctions without ever defining willfullness, although page 12 of Petitioner's Initial Brief attempts to define willfullness, the respondent respectfully suggests that the infraction alleged, or error committed by the non-responding party in an alleged discovery situation in a trial court, must be weighed on any issue of willfullness, and this analysis should include the following:

1). The type of case involved?

2). The type of discovery requested?

3). The amount of time that has lapsed?

4). Prejudice to the requesting party?

5). Have depositions been set, or is the requested material available through another discovery channel?

6). Has the case been set for trial, and when is the trial date in relation to the motion for sanctions?

7). Is the requested discovery readily available to the opposing party or his lawyer?

8). Have their been any previous requests or court Orders on the subject requested discovery?

9). The proposed sanction of dismissal must comply with the requirements of due process of law so that no ex parte Orders can be utilized in any finding of willfullness as occurred in the case at bar.

CONCLUSION

Petitioner's arguments cannot ever justify a dismissal or a sanction of dismissal for a mere discovery violation without a finding of willfulness. The District Court was correct in demanding that Mercer v. Raine, 443 So2d 944 (Fla. 1983) be followed. See also, Sizemore v. Ray Gunter Wrecking Co., 524 So 2d 717 (1st DCA 1988); Pichington PVC v. Metro Corp., 526 So2d 943 (3rd DCA 1988); Morales v. Four Star Poultry, 523 So2d 1183 (3rd DCA 1988) and McNamara v. Bradley Realty Co., 504 So2d 824 (4th DCA 1987), as there was no evidence that the party's failure to attend a deposition was willful; See also, Stoner v. Verkaden, 493 So2d 1126, 1127, (4th DCA 1986) and U.S. Auto Association v. Strasser, 492 So2d 399 (4th DCA 1986).

If the case has not been set for trial within 90 days of the request for sanctions, dismissal under any circumstances, short of a specific finding of willfullness is not appropriate and especially not appropriate if the party is not actively represented by a lawyer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished on this 8th day of March, 1990 by U.S. Mail to: Robert S. Hackleman, Esquire; Connis O. Brown, Esquire, Post Office Box 14636, Fort Lauderdale, Florida 33302.

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