SUPREME COURT OF FLORIDA

MICHAEL DEL DUCA, ET AL.,

Petitioners,

v.

CASE NO. 75,756

ESTATE OF JACQUELYN ANTHONY, ET AL.,

DISTRICT COURT OF APPEAL
2ND DISTRICT - NO. 89-01171

Respondents.
_____/

ON CERTIORARI TO THE FLORIDA SUPREME COURT

ANSWER BRIEF OF RESPONDENT

LAW OFFICES OF
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ISSUE PRESENTED

Whether the Second District Court of Appeal was correct in reversing the Order of Dismissal of the trial Court where there was record activity within one year which acted to hasten the cause to judgment.

STATEMENT OF THE CASE AND FACTS

An action for damages was filed on December 17, 1979 by Paul Anthony, as Personal Representative of the Estate of Jacqueline Anthony on behalf of himself and his minor daughter, against the Defendants Michael Del Duca and Paul Schmidt (R-II-10).

The Defendant Del Duca was the driver of a vehicle which struck the Plaintiff's vehicle head on. The Defendant Del Duca was charged and convicted of manslaughter. The Respondent alleged the Defendant Schmidt was the lawful owner and discovery showed that he had backdated the title to make it appear that he was not the lawful owner at the time of the accident.

Del Duca appealed his conviction to the Second District Court of Appeal. The Second District Court of Appeal reversed the conviction on a Miranda point and remanded the case back to the trial court for trial.[1] Del Duca was retried and convicted in a second trial on reckless driving. He also appealed that conviction to the Second District Court of Appeal.[2]

During the course of the second criminal trial, Del Duca's counsel refused to allow any discovery other than

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[1] At 422 So.2d 46 (Fla. 2d DCA 1982).

[2] At 459 So.2d 1046 (Fla. 2d DCA 1984).

"name, rank and serial number." (R-376-378). Counsel for Del Duca later filed an affidavit setting forth the status of the criminal case (R-412). The trial Court refused to allow the sought discovery.

In 1983, the Plaintiffs filed a notice of trial. Del Duca's and General Accident and Fire's counsel filed a motion to strike the notice for trial, and as a basis alleged the criminal appeal (R-443).

The recusal of two Circuit Court Judges further added to some additional delay in bringing this cause to trial.

The Personal Representative and husband of the deceased, Paul Anthony, became ill with liver cancer and during 1987 had extensive hospitalization and surgery out of state. The trial Court found that this constituted "good cause" and the action was not dismissed (R-948).

At that same hearing, the Honorable Charles T. Carlton stated:

> I am going to do that, get with Judge Blackwell on the first of his trial calendar so the case can be disposed of.

Despite this statement from the Court, this matter was not set by the Court on any trial calendar (R-948).

Apparently, Judge Carlton then assigned this cause to Judge Blackwell.

On December 22, 1988, the Plaintiff mailed a set of interrogatories and a request for production to both Defendants. Both Defendants answered (R-946, 947).

The request for production sent to both Defendants requested production of the following items:

> 1. Any and all statements obtained from the plaintiff and members of the plaintiff's family since December, 1987.
>
> 2. Any and all documents obtained from any witness, which the defendant plans to introduce at the time of trial.

The interrogatories were also directed to and mailed to each Defendant and asked the following questions:

> 1. Please state whether the defendant intends to call any witnesses not previously disclosed in prior answers to interrogatories.
>
> 2. State current address of Peggy Nielson.
>
> 3. State current address for William Kehoe.

Both Defendants filed responses to the request for production and interrogatories.

The Defendants filed a motion to dismiss alleging that these pleadings did not facilitate the hastening of the matter to trial.

The trial Court granted the motion. The Respondent took an appeal to the Second District Court of Appeal. The Second District reversed the trial Court.[3]

This Honorable Court accepted jurisdiction and set this matter for oral argument to be conducted on January 11, 1991.

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[3] The trial Court also granted its dismissal of the complaint sua sponte because of failure of Plaintiff's counsel to attend the pre-trial status hearing because he was in trial in Dade County and could not attend. The Second District Court of Appeal reversed the trial Court on this issue, but the petitioners did not petition for certiorari on this issue.

SUMMARY OF ARGUMENT

The pleadings filed by the Respondent instituted record activity which hastened the matter to judgment.

The record activity was not filed for "bad faith" in that the sought information was calculated to hasten the matter to judgment, and were necessary to ensure a fair trial for the Respondent.

Therefore, under either standard this Court chooses to accept, the decision and judgment of the District Court should be affirmed.

ARGUMENT

Florida Rule of Civil Procedure 1.420(e) can only be activated by a motion by the defendant, or by the Court alleging that there has been no record activity for one year. The rule is not self-executing although defense counsel have referred to it as a "12-month statute."[4]

Further, at the same hearing defense counsel misled the Court by stating the person (Peggy Nielson) had never appeared in anything in this case prior to that time. In fact, witness Nielson testified in the criminal trial and had been listed on pre-trial witness lists previously. It's conceded that the request for production and interrogatories were sent out before any motions to dismiss were filed. Therefore, the Court must look to these pleadings and determine whether they are merely "passive" or whether they hastened the matter to judgment and were thus active.

The request for production asked for two items. In that the Personal Representative had heard that "investigators" had been talking to his daughter, Plaintiff's counsel wanted to know if a statement had been obtained from the daughter or other members of the family since December, 1987.

Plaintiff's counsel further wanted to review any documents obtained which were going to be used at trial.

There were not repetitive requests but were important.

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[4] Page 8 of the December 7, 1988 hearing.

In the past, relatively short trial dates had been received when this matter was noticed for trial (R-921-922).[5] In that the Plaintiff's counsel resided on the other side of the state, he wanted enough time to take and prepare for any new statement or documents which were obtained by the Defendants.

Therefore, both of these requests served to advance the action.

The Plaintiff sent a supplemental set of interrogatories to both Defendants. Both Defendants answered the interrogatories, which read as follows:

> 1. Please state whether the defendant intends to call any witnesses not previously disclosed in prior answers to interrogatories.
>
> 2. State current address of Peggy Nielson.
>
> 3. State current address for William Kehoe.

It is obvious that the effect of the amendment in 1977 of 1.420(e) is to preclude a trial court from exercising its supposed "inherent discretionary power" to dismiss a case for failure to prosecute when there is activity of record within the one-year prior to dismissal. American Salvage & Jobbing Co. v. Salomon, 367 So.2d 716 (Fla. 3d DCA 1979).

In the American Salvage case, the plaintiff filed interrogatories and noticed a hearing to compel answers on the same. The Third District Court of Appeal reversed finding that the plaintiff's actions should not have been disregarded

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[5] There was a three month setting of trial after a previous notice of trial was filed by the Plaintiff.

or argued in the determination of whether or not the lawsuit had been assiduously prosecuted.

It is well settled that the filing of interrogatories is sufficient record activity to satisfy the active versus passive issue. City of Jacksonville v. Hinson, 202 So.2d 806 (Fla. 1st DCA 1967).

In Phillips v. Marshall Berwick Chevrolet, Inc., 467 So.2d 1068 (Fla. 4th DCA), the court held that the interrogatories filed by the plaintiff, which contained two questions of the most elementary in nature, were facially sufficient to defeat a motion to dismiss for lack of prosecution. Id. at 1069-1070.

The court further added:

> A court cannot inquire further as to how well the activity advances the cause. This rule is easy of application and relieves the trial court of the burden of determining whether just the right questions were propounded. We have no desire to send the trial courts into that quagmire.

The Phillips case is a well reasoned decision. can one imagine the chaos that would result if one party had to reveal to the court and the opposing party the reason why he is filing a motion, setting a deposition or sending out discovery. Certainly the work-product privilege and the attorney-client privilege would be in danger of erosion if this court were to determine that trial courts of this state could go behind the pleadings, take evidence and determine that issue.

In the instant case, the Plaintiff had no opportunity to

present evidence at a hearing so that the trial Court could hear evidence as to how the interrogatories and request for production hastened the cause for trial. The trial Judge simply made a finding that they did not hasten the matter and dismissed the case.

In Eastern Elevator, Inc. v. Page, 263 So.2d 218 (Fla. 1972), this court held that interrogatories which were unanswered were sufficient to constitute action within Rule 1.420(e). This court distinguished the filing of discovery requests from the "passive" such as the filing of a "substitution of counsel" as in the Gulf Appliance Distributors, Inc. v. Long case, 53 So.2d 706 (Fla. 1951), which was addressed and distinguished in Eastern Elevator at page 219.

Certainly the interrogatories filed were an "affirmative act to hasten the suit to judgment."

The knowledge of whether there were new witnesses not previously disclosed hastens the suit to judgment. Certainly if there were new witnesses, they would have to be deposed prior to the matter being noticed for trial because of the relatively short trial setting which had been received previously.

The interrogatories which requested the current address of Peggy Nielson, contrary to the argument of Defendant's counsel, was an essential eyewitness to the accident and in fact testified as the state's witness in both criminal trials.

The interrogatories which requested the address of witness William Kehoe were similarly important to depose him before noticing this matter for trial.

As the Second District Court of Appeal noted in its Anthony decision at page 658, both Peggy Nielson and William Kehoe had testified in the second criminal trial, and Kehoe had been a key witness for the defense, concerning his sobriety.

In Barnett Bank of East Polk County v. Fleming, 508 So.2d 718 (Fla. 1987), this Honorable Court stated the purpose of Rule 1.420(e) is to encourage prompt and efficient prosecution of cases and to clear trial dockets of litigation that has essentially been abandoned. Accordingly, the courts have generally defined "record activity" as any act designed to move the case forward towards a conclusion on the merits or to hasten the suit to judgment. Barnett Bank at 720.

There can be no question that the request for production and interrogatories sent to the Defendants on December 22, 1988 were designed to hasten the suit to judgment.

As the Second District Court of Appeal stated in Anthony, the current Florida Rules of Civil Procedure do not require a party to update answers to interrogatories. It is common for litigants to request updated answers concerning year old interrogatories. Further, as the Second District Court of Appeal held, the timing of an interrogatory should not affect

the value or genuineness of the interrogatory.[6]

In conclusion, the Respondent respectfully submits that the interrogatories and request for production individually and collectively constituted activity which ws calculated towards concluding the case. Alternatively, even should this Honorable Court hold that the trial Courts of this state can now get involved in evidentiary hearings to determine if the activity is "bad faith," then this court should further find as the Second District Court of Appeal found, that the activity undertaken by the Respondent was not in "bad faith" for the reasons previously cited, but were genuine measures to hasten this matter to judgment and in the opinion of counsel were necessary to effectively represent the Respondent, and to be prepared for the short trial setting.

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[6] See footnote 9 at page 660.

SUMMARY OF ARGUMENT

The pleadings filed by the Respondent instituted record activity which hastened the matter to judgment.

The record activity was not filed for "bad faith" in that the sought information was calculated to hasten the matter to judgment, and were necessary to ensure a fair trial for the Respondent.

Therefore, under either standard this Court chooses to accept, the decision and judgment of the District Court should be affirmed.

CONCLUSION

The Respondent should not be penalized because the trial Court failed to put this matter on the trial docket as announced. The Defendants have a remedy if they want a trial on the merits. They may simply notice all outstanding motions and notice this matter for trial.

Respondents respectfully suggest that as long as there is record activity that hastens the cause to judgment, then the trial courts of this state should not be dragged into a chaotic quagmire by holding evidentiary hearings to determine what is in the thought processes of counsel, why certain pleadings were filed, why depositions are set, or why hearings on motions are necessary. This procedure would violate both the work-product and attorney-client privilege.

The Respondent respectfully suggests that the standard set up this court in Eastern Elevator, Inc. v. Page, 263 So.2d 218 is the law that should be applied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of November, 1990 to ROBERT E. DOYLE, JR., ESQ., 3174 East Tamiami Trail, Naples, Florida 33962; JOHN W. MACKAY, ESQ., 3202 Henderson Boulevard, Suite 204, Tampa, Florida 33609; and RONALD L. NAPIER, ESQ., 1570 Shadowlawn Drive, Naples, Florida 33942.

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