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SID J. WHITE
MAY 17 1991
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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 76,333

JOHN INGERSOLL and KAY INGERSOLL, his wife,

Petitioners,

vs.

WARREN HOFFMAN, D.D.S.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' SUPPLEMENTAL BRIEF

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PREFACE

Petitioner files this supplemental brief pursuant to this court's order of May 6, 1991.

SUMMARY OF ARGUMENT

Dr. Hoffman waived his right to defend based on lack of statutory notice when he failed to properly raise this issue in his answer. He never sought to amend his answer, and if he had moved to amend, after the statute of limitations would have run, it would have been so prejudicial to plaintiff that the amendment could not properly have been granted.

ARGUMENT

ISSUE

DID DR. HOFFMAN WAIVE PLAINTIFF'S FAILURE TO PROVIDE STATUTORY NOTICE WHEN HE FAILED TO DENY WITH SPECIFICITY, IN HIS ANSWER, THE PERFORMANCE OF ALL CONDITIONS PRECEDENT?

Florida Rule of Civil Procedure 1.120(c) provides:

> **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity. (Emphasis added).

In Hodusa Corporation v. Abray Construction Company, 546 So.3d 1099 (Fla. 2d DCA 1989), defendant failed to deny with specificity that the plaintiff had not provided a contractor's affidavit

required in our mechanic's lien law. In holding that defendant had waived this requirement, the court stated on page 1101:

> Although the furnishing of the affidavit is a condition precedent to bringing an action to foreclose a mechanic's lien, failure to do so does not create a jurisdictional defect. Thus, Hodusa was required under rule 1.120, Florida Rules of Civil Procedure, to plead nonperformance of the condition precedent "specifically and with particularity." Hodusa's second affirmative defense, captioned "Breach of Contract," asserting that Abray had not fulfilled conditions of the contract in which the contractor's affidavit is merely mentioned does not satisfy the standard prescribed in rule 1.120. Thus, Hodusa has waived this argument. (Citations omitted).

The Fourth District has also found that the failure to specifically plead non-performance of a condition precedent (the required contractor's affidavit under the mechanic's lien law) constituted a waiver. Davie Westview Developers, Inc. v. Bob-Lin, Inc., 533 So.2d 879 (Fla. 4th DCA 1988), rev. denied, 545 So.2d 1366 (Fla. 1989).

The requirement that the defendant plead the non-performance of a condition precedent with specificity is similar to an affirmative defense. Florida Rule of Civil Procedure 1.140(h) provides:

> (h) **Waiver of Defenses.**
>
> (1) A party waives all defenses and objections that he does not present either by motion under subdivisions (b), (e) or (f) of this rule or, if he has made no motion, in his responsive pleading except as provided in subdivision (h)(2).
>
> (2) The defenses of failure to state a cause of action or a legal defense or to join an indispensable party may be raised by motion for

> judgment on the pleadings or at the trial on the merits in addition to being raised in either a motion under subdivision (b) or in the answer or reply. The defense of lack of jurisdiction of the subject matter may be raised at any time.

If the failure to give notice was an affirmative defense, it would certainly fall within the classification of affirmative defenses which are waived if not raised.

In Hudson v. Keene Corporation, 445 So.2d 1151 (Fla. 1st DCA 1984), opinion approved, 472 So.2d 1142 (Fla. 1985), the First District held that the running of the statute of limitations is a waivable affirmative defense. Accord, Pritchett v. Kerr, 354 So.2d 972 (Fla. 1st DCA 1978).

In McSwain v. Dussia, 499 So.2d 868 (Fla. 1st DCA 1986), rev. denied, 511 So.2d 298 (Fla. 1987), cited on page 14 of petitioner's initial brief on the merits, the defendant state agency answered without specifically raising the failure to give notice to the Department of Insurance as required by Section 768.28(6), Florida Statutes. Two years later, after the statute of limitations had run, defendant moved to dismiss based on lack of notice, and the First District held that the failure to give notice could be waived. In City of Pembroke Pines v. Atlas, 474 So.2d 237 (Fla. 4th DCA 1985), rev. denied, 545 So.2d 1366 (Fla. 1989), the Fourth District held that the failure of a plaintiff to allege compliance with the notice provision of Section 768.28(6), Florida Statutes, was waived by the defendant. Accord, Meli v. Dade County School

Board, 490 So.2d 120 (Fla. 3d DCA), rev. denied, 500 So.2d 543 (Fla. 1986).

The facts, as well as the law, support a waiver in this case. This incident occurred in 1987, and the lawsuit was filed in December of 1987. The complaint alleged that the course of treatment when the dental malpractice occurred was from July 5, 1984, through December 8, 1986. Defendant answered in February of 1987, without specifically questioning the sufficiency of notice in any manner. On March 20, 1989, the first day of trial, the defendant first filed a motion to dismiss, specifically alleging that the proper defendant had not been served with the statutory notice of intent. It is clear that the defendant was waiting as long as possible to raise this issue, so that the statute of limitations would have run.

Federal Rule of Civil Procedure 9(c) is the same as Florida Rule of Civil Procedure 1.120(c). In Jackson v. Seaboard Coast Line Railroad Company, 678 F.2d 992 (11th Cir. 1982), the plaintiffs generally alleged meeting all conditions precedent to bringing an employment discrimination action, and the defendant did not specifically deny the occurrence of any condition precedent. The Eleventh Circuit stated on page 1010:

> If,...the defendant does not deny the satisfaction of the preconditions specifically and with particularity, then the plaintiff's allegations are assumed admitted, and the defendant cannot later assert that a condition precedent has not been met.

It is clear under the law and our rules that the defendant was required to specifically deny the occurrence of a condition precedent in its answer. The defendant did not do that in the present case. The failure to raise this issue, under the cases cited above, constituted a waiver. Pleadings can be amended, of course; however, the test as to whether an amendment to the pleadings should be allowed is whether the amendment would prejudice the other side. Horacio O. Ferrea North American Division, Inc. v. Moroso Performance Products, Inc., 553 So.2d 336 (Fla. 4th DCA 1989). See also, Atlantic Coast Line Railroad Company v. Feagin, 93 Fla. 1015, 113 So. 89 (1927).

If the defendant in the present case had sought to amend its answer, which is the proper procedure it should have followed but did not, leave to amend would have to have been denied, since there clearly would have been prejudice to the plaintiff. Had the defendant timely raised the issue the technical problem of proper notice could have been cured by the plaintiff. Instead of raising it when plaintiff could have cured the problem, defendant waited until the last possible moment to raise it, the first day of trial, at which point the statute of limitations had run.

CONCLUSION

The defendant waived his right to claim lack of notice when he failed to specifically deny the occurrence of this condition precedent, in his answer, as required by Florida Rule of Civil Procedure 1.120(c).