

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO. 76,333

027
FILED
SID J. WHITE
JUN 22 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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 REPLY BRIEF

KENNETH P. LIROFF
201 Southeast 19th Street
Ft. Lauderdale, FL 33316

and

BRIAN HERSH
19 West Flagler Street
Miami, FL 33130

and

LARRY KLEIN, of
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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?

Respondent's supplemental brief does not discuss the issue involved, waiver, until page 14 of his brief, at which point he argues that the requirements of Fla.R.Civ.P. 1.120(c), should not be applied to "statutory conditions precedent." There is nothing in the rule that would make a distinction between different types of conditions precedent, and, of course, the two mechanic's lien cases cited in our supplemental brief, Hodusa Corporation v. Abray Construction Company, 546 So.2d 1099 (Fla. 2d DCA 1989), and Davie Westview Developers, Inc. v. Bob-Lin, Inc., 533 So.2d 879 (Fla. 4th DCA 1988), rev. denied, 545 So.2d 1366 (Fla. 1989), did involve a statutory condition precedent. Those cases cannot be distinguished from the present case.

On page 16 respondent argues that a simple denial should be sufficient to deny the occurrence of the condition precedent if the plaintiff pleads notice with specificity. As respondent has recognized on page 2, however, there was only a general allegation of the performance of all conditions precedent in this case. Thus respondent's argument, even if it were the law, would not be applicable to these facts.

On page 2, respondent states that he did state in his pre-trial statement that there was a failure to comply with the

statutory notice requirement, however that was long after the statute of limitations would have run, and is precisely why respondent's conduct in the present case must amount to a waiver.

Rule 1.120(c) is clear. It requires denial of performance of conditions precedent to be pled specifically. We have cited both Florida and Federal cases which hold that the failure to do so constitutes a waiver. Respondent has failed to cite one case supporting his position. If there was ever a case in which the rule should be applied, this is it. In the present case, if respondent had complied with Rule 1.120(c) when he filed his answer, petitioner would still have had time to give the statutory notice and have his case decided on the merits.

CONCLUSION

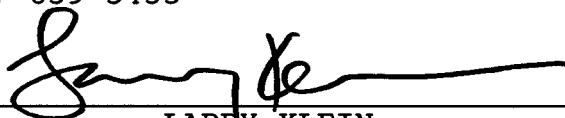
The defendant's failure to specifically deny the occurrence of conditions precedent did constitute a waiver in this case.

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By



LARRY KLEIN

Florida Bar No. 043381

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 10th day of June, 1991, to: G. BART BILLBROUGH, One Biscayne Tower, Suite. 2500, 2 South Biscayne Boulevard, Miami, FL 33130.

By _____



LARRY KLEIN

Florida Bar No. 043381