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**IN THE
SUPREME COURT
STATE OF FLORIDA**

CASE NO. 78,503

KEITH LEROY TONEY, ET. AL.,

Petitioners,

vs.

NEBUCHADNEZZAR FREEMAN, ET. AL.,

Respondents.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The amended complaint filed on October 10, 1988 on behalf of Respondents, Nebuchadnezzar Freeman and Helen Freeman, alleged that Mr. Freeman had been injured in an automobile accident that occurred on August 13, 1985. (R. 4-6). The amended complaint further alleged that the accident was caused by the negligence of Keith Leroy Toney and that Mr. Toney's employer, Orkin Exterminating Company, Inc., was vicariously liable for Mr. Toney's negligence.

The petitioners filed an answer on November 3, 1988 and initial discovery requests were exchanged. The Respondents were noticed for deposition on February 8, 1989. Following the answer the only activity of record consisted of a notice of a charging lien, filed on June 2, 1989, and a stipulation and order for substitution of counsel, dated June 26, 1989. (R. 10-13).

The trial court entered an order to advise of status on February 9, 1990.[1] Petitioners filed their response on February 22, 1990 pointing out that Mr. Freeman was deceased. (R. 15-16). No response was filed by respondents.

On March 6, 1990 the trial court filed a motion and notice of hearing re: involuntary dismissal and set it for hearing on May 7, 1990. (R. 17). The motion and notice recited that there

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[1] The order provided: "The Florida Supreme Court has established time standards for all types of cases. This case was filed on February 25, 1988 and exceeds the time standards prescribed. It is thereupon ORDERED that within fifteen (15) days, counsel for each party shall briefly advise the assigned Judge of it's status by mailing the information below." (R. 14). The tear-off portion filed by petitioners is found at R. 16.

had been "no activity by filing of pleadings, orders of court or otherwise" for a period of one (1) year. It directed that good cause be shown, in writing, at least five (5) days before the hearing, and stated in the absence of same the cause would be dismissed. (R. 17).

On April 4, 1990 another motion for substitution of counsel was filed, (R. 18), and on May 1, 1990 plaintiffs' response and affidavit in opposition to defendants' motion to dismiss for lack of prosecution was filed. (R. 21-24). It was supplemented on May 7, 1990, (R. 25-27), but at the hearing on May 7, 1990 the case was involuntarily dismissed. (R. 28).

Respondents filed a motion for rehearing on May 17, 1990 which was amended on July 13, 1990. (R. 21-27, 28, 29-33, 37-40). The court denied the motion for rehearing as amended, by order dated August 6, 1990. (R. 42). A notice of appeal was filed on August 13, 1990. (R. 43).

On appeal the Fourth District Court of Appeal reversed, holding that the trial court's order to advise of status and/or petitioners' (defendants) response constituted sufficient record activity to prevent dismissal of the case.[2] The petitioners sought to invoke the jurisdiction of this court pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv) alleging that the decision of the Fourth District Court of Appeal in this case expressly and directly

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[2] A per curiam opinion of the Fourth District Court of Appeal, dated July 17, 1991, was substituted for the original opinion dated March 20, 1991, which was withdrawn following petitioners' motion for rehearing.

conflicts with the decisions of other district courts of appeal on the same question of law.

On December 4, 1991 this Court accepted jurisdiction and directed petitioners to file a brief on the merits.

SUMMARY OF THE ARGUMENT

The interpretation of Fla. R. Civ. P. 1.420(e) by the Fourth District Court of Appeal creates an express and direct conflict with the decisions of two (2) other district courts of appeal on the same question of law.

The provisions of Fla. R. Civ. P. 1.420(e) mandate record activity which requires an affirmative act by a party directed toward the disposition of the cause.

The holding by the Fourth District Court of Appeal that the trial court's status order to advise of status and petitioners' response to that order constituted sufficient record activity to prevent a dismissal of the case is contrary to the provisions of the rule as it has been interpreted and is contrary to the opinions of two (2) district courts of appeal.

The better reasoned view is that the failure of a party to affirmatively act by creating record activity for more than one (1) year brings Fla. R. Civ. P. 1.420(e) gives the trial court the discretionary authority to dismiss the case.

ARGUMENT

I.

IS THE HOLDING BY THE FOURTH DISTRICT COURT OF APPEAL THAT THE TRIAL COURT'S STATUS ORDER AND RESPONDENTS' RESPONSE THERETO CONSTITUTED SUFFICIENT RECORD ACTIVITY TO PREVENT A DISMISSAL OF THE COURT ERRONEOUS IN LIGHT OF CONFLICTING OPINIONS OF TWO OTHER COURTS OF APPEAL?

The Fourth District Court of Appeal held "that the trial court's status order and Orkin's [respondent's] response constituted sufficient record activity to prevent a dismissal of the case." Fla. R. Civ. P. 1.420(e) provides in pertinent part as follows:

> [A]ll actions in which it appears on the face of the record that no activity by filing of pleadings, order of court or otherwise has occurred for a period of one year shall be dismissed by the court on its own motion or on the motion of any interested party ... after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least five days before the hearing on the motion why the action should remain pending.

When the court entered its order on February 9, 1990, it directed the parties to advise the court within fifteen (15) days as to the status of the case. At the time that order was filed there had been no record activity since the filing of the

answer on November 3, 1988.[3] Therefore, more than one (1) year had elapsed prior to the entry of the order of February 9, 1990 and making the provisions of Fla. R. Civ. P. 1.420(e) already applicable. The trial court at that time could have entered the order giving the parties notice of its intention to dismiss the case for lack of prosecution. This was not done until March 6, 1990.

Nevertheless, the Fourth District Court of Appeal held that the status order and the petitioners' response to that order constituted record activity.

"Record activity" has been defined by this Court as "an affirmative act (by either party) directed toward the disposition of the cause." Eastern Elevator, Inc. v. Paige, 263 So.2d 218, 220 (Fla. 1972).

In Norflor Construction Corporation v. City of Gainesville, 512 So.2d 266 (Fla. 1st DCA 1987), rev. den., 520 So.2d 585 (Fla. 1988), the First District Court of Appeal rejected the argument that a sua sponte order entered by the trial court to advise of the status of the case and a response to that order by the plaintiffs[4] were sufficient record activity to prevent dismissal.

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[3] No contention was made that the notice of charging lien or the stipulation for substitution of counsel would constitute record activity.

[4] It should be noted that the plaintiffs did not respond to the order in this case.

The court reasoned that activity of a party is necessary and must represent an affirmative act directed toward disposition of the case. Id. at 267.

The court held that "the order to advise of status is insufficient activity to preclude dismissal," and further, that the response by plaintiffs' counsel to the order was likewise insufficient.

Similarly, in Caldwell v. Mantei, 544 So.2d 252 (Fla. 2nd DCA 1989), a status report requested by the trial judge and responses by attorneys for both parties were held insufficient to avoid dismissal, "since they did not move the case forward toward disposition." Id. at 254.

In direct conflict of the holdings of these cases, the Fourth District Court of Appeal in this case held that the order concerning status and the defendants' response had the effect of advancing the case toward resolution.

Not only does this ignore the fact that Fla. R. Civ. P. 1.420(e) was already applicable by February 9, 1990; but also erroneously holds that a request by the court and a response by one (1) of the parties (not the plaintiffs) has the effect of moving the case toward resolution.

This is simply not the case and is contrary to the well-reasoned opinions cited above.

The "record activity" identified by the Fourth District Court of Appeal was not an affirmative act by a party directed toward the disposition of the cause. It was merely an inquiry and

a response by one (1) of the parties to the direction by the trial court that the status of the case be provided, and the status of the case as provided clearly indicated that more than one (1) year had passed without any attempt by the plaintiffs to move the case toward resolution.

Respondents are mindful of the decision in Miami Beach Awning Company v. Heart of the City, Inc., 565 So.2d 739 (Fla. 3rd DCA 1990), wherein the Third District Court of Appeal held that "the court's order setting the cause for a status conference was, almost by definition, reasonably calculated to advance the cause toward resolution." Id. at 739. The court went on to point out that the order setting the case for status conference occurred within a year prior to the motion to dismiss.

Respondents submit to the court that the Norflor Construction Corporation v. City of Gainesville opinion states the better reasoned and proper rule and respondents would further point out that review was denied. The subsequent holding in Caldwell v. Mantei is not only consistent with Norflor, but also is consistent with the intent and purpose of the rule and the mandate of this court toward the early resolution of cases. Fishe and Kleeman v. Aquarius Condominium Association, 524 So.2d 1012 (Fla. 1988).

Moreover, the dismissal for failure to prosecute an action is subject to attack only on the ground that the dismissal constituted an abuse of discretion, Popkin v. Crispen, 213 So.2d 445 (Fla. 4th DCA 1968), and the trial court's determination of

lack of good cause is entitled to the presumption of correctness. Douglas v. Eriksson, 347 So.2d 1074 (Fla. 1st DCA 1977).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should resolve the conflict in favor of the Petitioners and consistently with the opinions of the First District Court of Appeal in Norflor Construction Corporation v. City of Gainesville and with the Second District Court of Appeal opinion in Caldwell v. Mantei.

The Respondents respectfully request that the opinion of the Fourth District Court of Appeal be reversed and remanded with instructions that the order of the trial judge dismissing the case be reinstated.

Respectfully submitted,

BY _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: GARY MARKS, ESQUIRE, Attorney for Appellants, 303 Southwest 6th Street, Fort Lauderdale, Florida 33315, this 23rd day of December, 1991.

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