W00A

IN THE SUPREME COURT OF FLORIDA

KEITH LEROY TONEY and ORKIN EXTERMINATING COMPANY, INC.

Petitioners,

vs.

NEBUCHADNEZZAR FREEMAN, and HELEN FREEMAN,

Respondents.

Case No. 78,503

DCA-4 90-2201

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON THE MERITS

LAW OFFICES OF GARY MARKS
Attorney for Respondents
303 Southwest 6th Street
Fort Lauderdale, FL 33315
Broward: (305) 524-1571
Dade : (305) 945-0379
Palm : (305) 655-0509
FLA. BAR NO. 331112

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules of Court:

PRELIMINARY STATEMENT

Respondent (plaintiff in the trial court) will be referred to as "FREEMAN" and Petitioner (defendant in the trial court will be referred to as "ORKIN." References to the record on appeal will be made by the designation "R."

STATEMENT OF THE CASE AND FACTS

FREEMAN was a plaintiff in a personal injury action. His amended complaint was filed on October 10, 1988 and ORKIN filed its answer and affirmative defenses on November 3, 1988. Discovery commenced and continued through February 8, 1989, on which date FREEMAN was noticed for deposition. (R34-36; 4-6; 7-9) On March 10, 1989, a month later, the law firm representing FREEMAN, was temporarily suspended from the practice of law without notice, necessitating an unexpected change of attorneys. (R21-24) With the court's permission, the law firm of John Fowler,[1] became FREEMAN's attorney of record and a stipulation for substitution of counsel was filed on June 26, 1989. (R10-11). Approximately seven months later, on February 9, 1990, the trial court issued an order concerning case status and management. The order directed the parties to evaluate the time for scheduling the trial, evaluate the progress of discovery, and estimate the number of days the case would take to try. The order specifically directed the parties to

[1] Shortly after the temporary suspension, the undersigned was reinstated to the practice of law nunc pro tunc, and commenced practicing law with Fowler. Fowler and the undersigned subsequently underwent a split and the undersigned began his own firm.

answer, in writing, the following questions:

> 1. Reason case has exceeded time standards:
> 2. If case has not been noticed for trial, what is the reason:
> 3. I expect discovery to be substantially completed by:
> 4. How many days will this case take to try: (R14)

On February 22, 1990, ORKIN's attorney filed a written response to the court's case management order, which answered the questions as follows:

> 1. The Plaintiff is deceased.[2]
> 2. The Plaintiff is deceased.
> 3. Unknown.
> 4. 2-1/2 (R15-16)

At this time the Fowler law firm, which represented FREEMAN, was undergoing a split. Through mistake or inadvertence, the pleadings and mail regarding FREEMAN's case was going to Fowler who was leaving. In reality, FREEMAN was remaining with the undersigned's law firm and the Court's Order was not received by the undersigned's law firm until almost two months later. (R21-27)

On March 6, 1990, the court entered a notice of hearing and motion to dismiss for failure to prosecute. (R17) FREEMAN filed a response and affidavits of good cause prior to the hearing, advising the court of the difficulties in the change of attorneys. (R21-27) After the hearing, the trial court entered an order of involuntarily dismissal, and later denied FREEMAN's motion for

---

[2] FREEMAN's death was not related to the personal injuries which are the subject of his suit. His estate and widow are entitled to pursue an action for damages suffered as a result of his injuries, prior to his death.

rehearing.[3] (R28, 42)

FREEMAN appealed and the Fourth District Court of Appeal reversed in his favor, holding the trial court's order to advise of status and ORKIN's responsive pleading were record activity. The appellate court did not reach the issue of whether FREEMAN showed sufficient "good cause" to prevent the dismissal.[4] ORKIN petitioned this Court for discretionary review and this court accepted conflict jurisdiction.

POINT ON APPEAL

THE TRIAL COURT'S ORDER TO ADVISE OF STATUS WAS CASE MANAGEMENT ACTIVITY AND IS RECORD ACTIVITY WITHIN THE MEANING OF RULE 1.420(e), Fla.R.Civ.P.

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE DISMISSAL FOR LACK OF PROSECUTION

SUMMARY OF THE ARGUMENT

A case may only be dismissed for lack of prosecution when no activity has occurred within one year. Rule 1.420(e), Fla.R.Civ.P., does not require action by the plaintiff, but merely the "occurrence" of some "activity." The activity may be by the filing of pleadings, order of the court, or otherwise. The rule, which is a restriction on the Florida Constitutional right of

---

[3] Because the statute of limitations had already expired at the time of the dismissal, its affect was a final adjudication of FREEMAN's claim.

[4] Should this Court reverse, the case should be remanded to the Fourth District Court of Appeal to address the issue of whether good cause was shown.

access to the courts for redress of injury, must be construed most liberally in favor of FREEMAN. There was activity in the case when the trial court issued its order, directed at case management, and ORKIN filed its responsive pleading. The Fourth District Court of Appeal properly reversed the dismissal for lack of prosecution.

ARGUMENT

THE TRIAL COURT'S ORDER TO ADVISE OF STATUS WAS CASE MANAGEMENT ACTIVITY AND IS RECORD ACTIVITY WITHIN THE MEANING OF RULE 1.420(e), Fla.R.Civ.P.

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE DISMISSAL FOR LACK OF PROSECUTION

The Florida Constitution "guarantees to every person the right to free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions. Any restrictions on such access to the courts must be liberally construed in favor of the constitutional right." G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899, 901 (Fla. 3d DCA 1977), see also Lehman v. Cloniger, 294 So.2d 344 (Fla. 1st DCA 1974). Rule 1.420(e), Fla.R.Civ.P., authorizing dismissals for lack of prosecution, is a restriction on access to the courts and must therefore be construed liberally in favor of FREEMAN. The rule provides:

> **Failure to Prosecute.** All 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 . . . unless . . . a party shows good cause in writing at least five days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less

> than one year shall not be sufficient cause for dismissal for failure to prosecute. (emphasis supplied)

The rule does not require action by the plaintiff, but merely the occurrence of some activity in the case. The defendant's filing of written interrogatories to the plaintiff, notwithstanding that plaintiff failed to answer them, is sufficient activity to preclude dismissal. Eastern Elevator, Inc. v. Page, 263 So.2d 218 (Fla. 1972). The mere filing of deposition transcripts by a court reporter, is sufficient activity. Musselman Steel Fabricators, Inc. v. Radziwon, 263 So.2d 221 (Fla. 1972).

The language of the rule provides for dismissal only when the record reveals that no activity has occurred for a one year period. The rule contains no language requiring an affirmative act by a party, as urged by the petitioners. To the contrary, the rule specifically provides the occurrence of activity may be (1) by filing of pleadings, (2) by order of court, or (3) otherwise. The rule contains no language authorizing the court to evaluate whether, or how well, the activity in the case moves the case toward resolution. Construing the rule in favor of the right of access to the courts, FREEMAN's case should not have been dismissed because activity by order of the court and pleadings filed by the defendant, had occurred within one year.

Longstanding precedent in this Court holds it is sufficient to avoid dismissal for lack of prosecution that there was some activity in the case which, in contrast to a "mere passive effort to keep the suit on the docket," such as a substitution of

counsel, is "for the purpose of moving the cause along." Eastern Elevator, Inc. v. Page, 263 So.2d 218, 220 (Fla. 1972) (the defendant's act in propounding interrogatories to the plaintiff was sufficient action, notwithstanding that the plaintiff did not answer.) (emphasis supplied) Similarly, in an opinion issued the same date, this Court found the mere filing of deposition transcripts by the court reporter to be sufficient activity. Musselman Steel Fabricators, Inc. v. Radziwon, 263 So.2d 221 (Fla. 1972).[5] After finding activity in these cases, the Court did not inquire further into whether, or how well, the activity advanced the case. The Eastern Elevator court specifically stated the fact that plaintiff did not answer the interrogatories was irrelevant. The filing of the interrogatories, itself, was sufficient activity. See also Rosenfeld v. Glickstein, 200 So.2d 242 (Fla. 1st DCA 1967) (plaintiff's filing of a notice of taking deposition is sufficient); Cypress Corp. of Fla. v. Smith, 218 So.2d 481 (Fla. 2d DCA 1969) (filing of an answer by a defendant is sufficient) (both cited with approval by this Court in Eastern Elevator, Inc. v. Page, 263 So.2d 218, 220 (Fla. 1972)).

Modern day trial courts have authority to manage cases. Activity and progress in a case are no longer dependent solely upon acts by the parties themselves, but are often the result of trial court directives. The rules of civil procedure authorize trial

---

[5] The Musselman and Eastern Elevator cases were constructions of the 1968 version of Rule 1.420(e) which provided, "(a)ll actions in which it affirmatively appears that no action has been taken by filing of pleadings, order of court or otherwise for a period of one year shall be dismissed . . . " Musselman, supra at 222.

courts to take more control over the progress of an action and expedite the resolution of cases through case management and pretrial conferences. The trial court's action in case management is, by definition, designed to move the case toward resolution. Matters which may be considered at case management conferences include, inter alia, scheduling or expediting discovery, coordinating the progress of the action, setting the time of trial and determining other matters that may aid in the disposition of the action. Rule 1.200, Fla.R.Civ.P.

In the case at bar, the trial court's order, directed at case management, was not merely a passive matter, such as a name change or a substitution of counsel, but was certainly for the purpose of moving the cause along. It required the parties to evaluate the progress of the case, evaluate the scheduling of the trial, determine how many days the case would take to try, and evaluate discovery. As the Third District Court of Appeal noted, such case management efforts are "almost by definition, reasonably calculated to advance the cause toward resolution." Miami Beach Awning v. Heart of the City, 565 So.2d 739 (Fla. 3d DCA 1990) (order setting status conference is sufficient activity). Contra Caldwell v. Mantei, 544 So.2d 252 (Fla. 2d DCA 1989)(request for status report not sufficient activity); Norflor Constr. v. City of Gainesville, 512 So.2d 266 (Fla. 1st DCA 1987)(status order not sufficient activity).

In the case at bar, the Fourth District Court of Appeal declined to address the issue of whether a status order/order

setting status conference is, itself, sufficient activity. Instead it inquired into whether the contents of the particular order in this case, and ORKIN's reply actually had the effect of advancing the cause toward resolution, and concluded they did. Thus, the court reversed on the specific facts of the case, distinguishing it from the conflicting cases cited above.

FREEMAN submits that adoption of the third district's position in Miami Beach Awning v. Heart of the City,[6] is sound, consistent with this Court's precedent,[7] required by a construction most favorable to preserving the right of access to courts, the most efficient and easily applied "bright line" rule,[8] and

---

[6] 565 So.2d 739 (Fla. 3d DCA 1990)

[7] Eastern Elevator, Inc. v. Page, 263 So.2d 218 (Fla. 1972) (the defendant's act in propounding interrogatories to the plaintiff was sufficient action, notwithstanding that the plaintiff did not answer.) (emphasis supplied); Musselman Steel Fabricators, Inc. v. Radziwon, 263 So.2d 221 (Fla. 1972) (mere filing of deposition transcripts by the court reporter is sufficient activity.) After finding activity in these cases, the Court did not inquire further into whether, or how well, the activity advanced the case. The Eastern Elevator court specifically stated the fact that plaintiff did not answer the interrogatories was irrelevant. The filing of the interrogatories, itself, was sufficient activity.

[8] See Philips v. Marshall Berwick Chevrolet, Inc., 467 So.2d 1068 (Fla. 4th DCA 1985) where the court declined to examine the quality of discovery efforts to determine whether they advanced the cause, stating, "(w)here activity is facially sufficient, as opposed to merely passive, e.g., a name change (citation omitted); substitution of counsel (citation omitted); 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.**" (at 1070)

consistent with a 1976 amendment to Rule 1.420(e).[9] However, whichever position this Court adopts, the reversal of the dismissal of FREEMAN's action must stand because even if the Court inquires into the effectiveness of the activity in advancing the cause, in this case, as the fourth district noted, the activity was designed to and did have the effect of advancing the case.[10]

CONCLUSION

This Court, in construing rule 1.420(e) most liberally in favor of the right of access to courts, should affirm the decision of the Fourth District Court of Appeal, that the trial court's "Order to Advise of Status" and ORKIN's responsive pleading constitute activity within the meaning of the rule, precluding a dismissal for lack of prosecution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was mailed to Robert H. Schwarts, Gunther & Whitaker, P.A., attorneys for petitioners, Post Office Box 14608, Fort Lauderdale,

---

[9] In 1976, the following sentence was added: "Mere inaction for a period of less than one year shall not be sufficient cause for dismissal for failure to prosecute." The court in Philips v. Marshall Berwick Chevrolet, Inc., 467 So.2d 1068 (Fla. 4th DCA 1985), reasoned, "the effect of the 1976 amendment is to lay down a bright line rule with respect to discovery efforts. . . (w)here activity is facially sufficient, . . . a court cannot inquire further as to how well the activity advances the cause." (1069-1070)

[10] The fourth district reasoned that the status order in this particular case asked counsel to respond to questions which were designed to advance the case toward resolution, and Orkin's response indicated Mr. Freeman had died which further advanced the case toward resolution.

Florida 33302, this 12 day of February, 1992.

LAW OFFICES OF GARY MARKS
Attorney for Respondents
303 Southwest 6th Street
Fort Lauderdale, FL 33315
Broward: (305) 524-1571
Dade : (305) 945-0379
Palm : (305) 655-0509

By: _____
Gary H. Marks
FLA. BAR NO. 331112