SUPREME COURT OF FLORIDA

ELAINE FROHMAN, etc., et. al.

Petitioners,

vs. CASE NO. 84,038

JACOB BAR-OR,

Respondent,

_____/

PETITIONERS' INITIAL BRIEF ON THE MERITS

CERTIORARI PROCEEDING FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT
(DISTRICT COURT CASE NO. 93-0109

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INTRODUCTION

In this Brief, Elaine Frohman, as Ancillary Personal Representative of the Estate of Anna Frohman, deceased, and Sid Birken and Dorothy Birken, his wife, shall be referred to as "the mortgagees", or as the "Petitioners". Jacob Bar-Or shall be referred to by either his name, or as "the Respondent". Emphasis, unless otherwise noted, is supplied. The following symbols will be used herein; "R" for Record on Appeal; "T" for Transcript of proceedings taken on October 28, 1992; "A" for Petitioners' Appendix.

STATEMENT OF THE CASE AND FACTS

The case below commenced with the filing of Complaint for Mortgage Foreclosure of a second mortgage on real property owned by Mr. Bar-Or. A Second Amended Complaint for Foreclosure (R22-26) sought a foreclosure of the aforementioned second mortgage on Respondent's real property, and also, in a second count, sought a foreclosure of a certain concurrently executed Repurchase Agreement which contained a provision encumbering three other mortgages held by the Respondent on other property as collateral security for the Plaintiff's loan (R31-33, 36-41, A2). This count also alleged that the Respondent had executed absolute assignments of mortgages to the Petitioners and/or their predecessors, as to these mortgages (R34-35).

The Repurchase Agreement recited that the Petitioners were lending Mr. Bar-Or $55,000.00, and as Mr. Bar-Or was delivering to the Petitioners assignments for a total of three mortgages which named Mr. Bar-Or as mortgagee, that those mortgages would be:

> "collateral security for the full and prompt payment of the Note from Borrower to Lender and any fees expenses, attorney's fees or foreclosure costs expended by or on behalf of the Lender in the due and prompt collection of the moneys due pursuant to the Note as secured by the Mortgage aforesaid, which shall be secured by the collateral of the Mortgage aforesaid." (A1-2, R31-32).

Among other provisions, the Agreement provided:

> "Upon the full payment of all moneys due from Borrower to Lender pursuant to said Note and any cost and expenses incurred by Lender in connection with the same, then upon the written request of Borrower accompanied by a

> form of Assignment of Mortgage and the payment of one and no/100 dollar ($1.00) consideration, Lender will reassign to Borrower the Mortgage aforereferenced." (A2, R32).

The original Complaint for Foreclosure, filed on July 20, 1987, as well as the Second Amended Complaint for Foreclosure (R22-26) contained a prayer for a deficiency judgement against the Respondent.

A receiver was appointed to collect the rents on the mortgaged property, which was income-producing, for the purposes of paying the first mortgage payments. On January 6, 1989 the trial court entered an order extending the powers of the receiver, etc., which also ordered the mortgagors of the mortgages which Mr. Bar-Or assigned the Petitioners as collateral security, to remit those mortgage payments to the receiver. (R42-43) "until further order of court".

After a contested trial, the trial court entered its Final Judgment of Mortgage Foreclosure on April 10, 1989. (R44-48). After setting forth the amount due and owed by Mr. Bar-Or to the Petitioners, it also provided that Mr. Bar-Or's interest in two of the three mortgages which he had assigned to the Petitioners as collateral security would be foreclosed subject to the condition that the Respondent's interest would be sold only if the court later determined that there was a deficiency.

The lower court went on to state:

> "Said foreclosure (of the collateral mortgages) shall be conditioned upon a further determination that a deficiency exist between the Petitioners therein and Respondent, Jacob

Bar-Or. (A7, R47)."

The Judgement went on to specify in paragraph 14 that if the court found that there was no deficiency, that the mortgages would be free of any liens or claims of the Petitioners; or, if the court found that there was a deficiency, then Mr. Bar-Or's interest in these mortgages would be sold at a foreclosure sale for cash to satisfy the amount of said deficiency judgement.

The court reserved jurisdiction specifically for the purpose of making such orders as are just and equitable, and for purposes of "entry of a deficiency decree should such decree be required." (A7, R48).

As of the date of the sale, according to the Final Judgment, the Petitioners were "out of pocket"; 1/ The amount of the Final Judgement was $126,397.72 (R45). 2/ $40.56 in extra expenses of sale, 3/ $2,106.60 in post-judgement interest, and 4/ the amount of net advances by the Petitioners to the receiver from the date of Final Judgment to the date of sale, $3,540.00; for a total of $134,191.48. The Petitioners were the successful bidders at the sale and they took the property subject to a first mortgage on the property whose balance was $259,760.00. The appraised market value of the property at the time of the sale was approximately $315,000.00. Had the Mortgagees then applied for a deficiency, it would have arguably been approximately $78,950.00.

However, first the receiver, and later the Petitioners, after the receiver was discharged by virtue of the Final Judgment being entered, continued to collect mortgage payments on the mortgages

that Mr. Bar-Or assigned to the Petitioners by virtue of the Repurchase Agreement. The Petitioners, beside mortgage payments, received a net amount of $57,411.77 of principal payments on these mortgages as of April 10, 1992, when these mortgages were paid off prematurely due to the sale and refinance of the encumbered property (R61).

From the Date of the Final Judgement through April 10, 1992, the net amount "due" the Petitioners was accruing interest at the legal rate. This interest was being more than offset by payments that were assigned by Mr. Bar-Or under the Repurchase Agreement to reduce the balance still due. It was on this payoff date, for the first time, that the actual amount of any deficiency could be determined.

Six month later, on October 12, 1992, the Respondent filed a Motion to Dismiss for Failure to Prosecute (R49). Eight days later, the Petitioners filed a pleading which contained the Petitioners' Statement of Good Cause (R50-55). This Statement set forth good cause for non dismissal based on non-record activity that took place in the year prior to the filing of the Motion to Dismiss for Failure to Prosecute, to wit: from October 12, 1991, through October 12, 1992. These reasons were:

1. That it was impossible to determine the amount of the deficiency judgment for the first six months of this one-year period because mortgages assigned to the Petitioners as collateral which were "paying down" the amount still owed to the Petitioners

by the Respondent below and were not paid off until approximately April 10, 1992.

2. That one of the Petitioners, Elaine Frohman, as Personal Representative, could not take any action in this proceeding as the ancillary estate of her predecessor in title had been previously dismissed and her status was not reinstated until April 13, 1992.

In the interim, Petitioners' counsel learned that the Respondent was attempting to seek ownership of the mortgages he had collaterally assigned to the Petitioners by virtue of certain language contained in Paragraph 14 in the Final Judgment of Mortgage Foreclosure, above recited. (R4-8). Based upon this, on October 27, 1992, the Petitioners filed an Amended Motion for Relief pursuant to Fla.R.Civ.P. 1.540(b)(5), (R56-60). The Petitioners also then filed their Motion for a Deficiency Judgement against the Respondent (R61-62).

On October 28, 1992, a hearing was held upon the Respondent's Motion to Dismiss for Failure to Prosecute. The Petitioners' counsel argued to the trial court judge (not the original judge) that Rule 1.420(e) could not apply to dismiss the court's continuing jurisdiction to entertain a proceeding for a deficiency since no motion for deficiency had been filed as of the time the Motion to Dismiss for Lack of Prosecution had been filed. Alternatively, counsel argued that good cause existed via non-record activity within the one-year prior to the filing of the Motion to Dismiss for Failure to Prosecute because the matter was not ripe for the imposition of a deficiency as the amount owed by

the Respondent to the Petitioners was fluctuating during the first six months of the preceding year and only became crystallized approximately six months prior to the filing of the Respondent's Motion. It was also argued that until less than six months prior to that time, one of the Petitioners below could not proceed because in order to continue proceedings, she had to be reestablished in her status as personal representative of the estate of the Mortgagee's predecessor in title. (T12-13).

Counsel for the Respondent below argued the effect of case law authority as well. He concluded his argument by stating, in relevant part as follows:

> "If this court... does not dismiss this for failure to prosecute this case, it will go on forever...
>
> * * *
>
> This case has been lying idle for three and one-half years and it is time to dismiss." (T16).

Thereafter, the court ruled:

> "I agree with what he's saying with regard to the argument at the end (quoted above)...
>
> We have a finite period of time for the resolution of cases that are called for in the spirit of those rules and I think there is much that you could have done in that period of time." (T16-17)

The following colloquy then took place between Petitioners' counsel and the court:

> "MR. SOLOMON: Even though the collateral security that beard [sic] on the amount was

not satisfied until April of this year, Judge?

THE COURT: Yes, sir. What happened in May, June, July, August, September, October?

MR. SOLOMON: We have a year from that time." (T18).

The court thereafter entered its Order granting the Respondent's Motion to Dismiss for Failure to Prosecute. (R63) (Clerk's Index indicates date of 10/20/92 which is erroneous/See Record).

Accordingly, the Petitioners' Motion for Deficiency was not entertained by the court. On November 9, 1992 the Petitioners filed their Motion for Rehearing from this Order (R64-67), which was denied on December 9, 1992 (R70).

The lower court also considered the Petitioners' aforementioned Amended Motion for Relief, which requested that Paragraph 14, or portions thereof in the alternative, of the Final Judgment, referred to above, be set aside in that it was no longer equitable that those provisions remain in effect. The Petitioners argued that if the court granted the Respondent's Motion to Dismiss for Failure to Prosecute (which it did) then the court could not consider the matter of the deficiency. They argued that if this were the case, then all language in the paragraph of the Final Judgment relating to foreclosure and ownership of the mortgages which the Respondent assigned to the Plaintiff as collateral was moot as the "deficiency determination by the Court" as required in the subject paragraph, could not be made. They also additionally argued that in any event, because the collateral

mortgages had now been paid off and satisfied, it would be impossible to implement the provisions contained in that paragraph, which provided that if it was determined that there was no deficiency, then the Respondent below would resume all right, title, and interest to the mortgages. It was pointed out that the Respondent would attempt to seize upon a single sentence in said Paragraph 14 in an attempt to somehow create a cause of action against the Petitioners for their satisfaction of these mortgages. That sentence stated:

> "In the event that no deficiency is adjudged, then in that event, the effect of this Order shall be that said mortgage just shall be free of any liens or claims of Plaintiffs." (A4)

Although the Respondent had filed no motion or pleading as of this date concerning his claim to ownership of these mortgages and accordingly, his claim that the Petitioners wrongfully satisfied these mortgages, his position, and the motivation for the Petitioners' request to delete this paragraph from the Amended Final Judgment on the grounds that it was not equitable for it to prospectively apply is found in part of the argument of the Respondent's counsel at the prior hearing upon his Motion to Dismiss for Failure to Prosecute:

> "[T]hey satisfied these mortgages, these assigned mortgages in April of this year. I would like the Court to understand that the final judgment in this case in Paragraph 14 recites... that the interest of the assigned mortgages as collateral are foreclosed. That's subject to conditions. Paragraph 14 says, <u>foreclosure shall be conditioned</u> upon further determination that a deficiency exists between the plaintiffs herein and the defendant. In the event that no deficiency is

> adjudged, then in that event, the effect of this order shall be that the mortgages should be free of any liens or claims from plaintiffs."
>
> "Plaintiffs in this case are guilty of egregious wrong relative to this defendant. Those mortgages were on the custodia legis of this court. They were subject totally to the jurisdiction of this court. The Plaintiff is now asking that this court go back and amend its final judgment so as to relieve them of their unlawful misconduct..." (T15-16).

The Petitioners argued not only was it inequitable for this paragraph to prospectively apply because of the conduct of the Respondent - he did nothing for more than three and a half years to attempt to claim interest in his former mortgages - and was therefore barred by laches and acquiescence; but that because of the unexpected premature pay-off and satisfaction of these mortgages, which deprived all parties of any right title and ownership in the mortgages, it was likewise inequitable to even consider enforcing the Respondent's wrongful interpretation of this paragraph whereby he sought to somehow regain an ownership interest in mortgages which have now been satisfied with funds owed to, pledged to, and owned by the Petitioners. Finally, the Petitioners argued that the proper interpretation was via resort to all of the provisions of Paragraph 14 which disclosed nothing more than the court's ruling that the Respondent's ownership rights to these collateralized mortgages vel non depended upon a "deficiency determination by the court" as stated in this paragraph (A4) (R59).

The lower court denied the Petitioners' Amended Motion for Relief on December 16, 1992 (R71).

Thereafter, an appeal was timely filed (R72-73) in the District Court of Appeal, Fourth District. On June 1, 1994, the Fourth District entered its per curiam opinion affirming the trial court and citing as authority its decision in Financial Security Savings & Loan Ass'n v. Espana River Partnership, 537 So.2d 683 (Fla. 4th DCA 1989); also citing to Rule 1.420(e).

The Fourth District, however, also certified conflict with the holdings in Riesgo v. Weinstein, 523 So.2d 752 (Fla. 2d DCA 1988) and Ravel v. Ravel, 326 So.2d 223 (Fla. 2d DCA 1976) and certified the following question as one of the great public importance, as was earlier certified in the Financial Security case:

> "DOES FLORIDA RULE OF CIVIL PROCEDURE 1.420(e) APPLY TO A POST-TRIAL PROCEEDING SUCH AS A MOTION FOR A DEFICIENCY JUDGMENT IN A MORTGAGE FORECLOSURE SUIT?"

On June 14, 1994, the Petitioners filed their Motion for Rehearing and/or Clarification which pointed out that the Fourth District erred in the factual portion of its opinion when it stated that "the trial court dismissed appellants' Petition for a deficiency decree solely because the petition was filed more than one year after the final judgement of foreclosure was entered". It was also noted out that the Motion for a Deficiency Judgement was never "dismissed" as no motion was directed to it; the Motion for Dismiss for Lack of Prosecution filed by the Respondent was filed prior to the Motion for a Deficiency Judgement. The Motion to Dismiss was filed during the latent period of reservation of jurisdiction following the Final Judgement. The Court was advised that the Motion to Dismiss only sought to dismiss the lower court's "reservation of

jurisdiction".(R49). It was further pointed out that by contrast, Financial Security, the decision upon which the Fourth District decision hereinbelow was based, was factually distinct; there, the motion to dismiss was filed after the petition for a deficiency had been applied for. It was finally pointed out that in at least one of the cases cited as conflict, Riesgo v. Weinstein, supra, the Second District ruled a dismissal improper in a "pure" reservation of jurisdiction case, where no post-judgement proceeding had been initiated.

It was therefore requested that the Fourth District revise the factual recitation portion of its opinion, indicating that the dismissal was of the court's reservation of jurisdiction, and it was asked to reframe the question certified as follows:

> "DOES FLA.R.Civ.P. 1.420(e) APPLY TO A POST-JUDGEMENT RESERVATION OF JURISDICTION OR TO A POST-TRIAL PROCEEDING SUCH AS A MOTION FOR A DEFICIENCY JUDGEMENT IN A MORTGAGE FORECLOSURE SUIT?"

On June 27, 1994, the Fourth District denied the Motion for Rehearing and/or Clarification.

Thereafter, this proceeding was timely brought.

SUMMARY OF ARGUMENT

The trial court erred in granting the Respondent's Motion to Dismiss for Failure to Prosecute since that court had reserved jurisdiction for purposes of the entry of a number of possible post-judgement orders, including an order imposing a deficiency. Fla.R.Civ.P. 1.420(e) does not apply post-judgement, or, if it does

apply post-judgement, it only applies once supplemental proceedings were brought to establish a deficiency against the Respondent below. Notwithstanding the above, there was sufficient of non-record activity during the one-year prior to the lower court's dismissal, so as to preclude a dismissal for lack of prosecution.

Further, the dismissal had the effect of nullifying provisions of the Final Judgement.

Once the trial court had dismissed the Petitioners' suit, post-judgement, for failure to prosecute, even though it has reserved jurisdiction, it was an abuse of discretion for the court not to modify the Final Judgement by either eliminating or amending a provision in it which would prospectively foreclosed ownership rights in mortgages assigned as additional collateral to the Petitioners, tying this foreclosure to an adjudication of a deficiency against the Respondent, as this was no longer possible. Accordingly, it was "no longer equitable that (this provision of) the Judgement... should have prospective application", which is a ground for relief contained in Fla.R.Civ.P. 1.540(b)(5).

Accordingly, the District Court of Appeal's affirmance, based upon its holding in Financial Security Savings & Loan Assc. v. Espana River Partnership is misplaced, for all of the above reasons, and especially for the reason that the dismissal rule does not apply either post-judgement, or during a post-judgement period of reservation of jurisdiction. The Second District's holdings in Ravel v. Ravel, in Riesgo v. Weinstein should be adopted by this

Court for purposes of interpreting the application of Rule 1.420(e).

POINT I

THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY HELD THAT RULE 1.420(e) APPLIES POST JUDGEMENT.

A. BACKGROUND

Striped to its very essentials, these are the relevant facts concerning this and the following three points on appeal:
The Petitioners sued the Respondent to foreclose a second mortgage on apartment buildings, and for a deficiency, if warranted, alleging a breach of the promissory note secured by said mortgage. The case finally resulted in a Final Judgement of Foreclosure almost two years later, on April 11, 1989, whereby the lower court reserved jurisdiction for a number of purposes, including for purposes of determining a deficiency, if any.

At the time the Respondent signed the Mortgage, he also signed a Repurchase Agreement whereby he pledged three mortgages he owned as collateral security for this loan. Shortly before the Final Judgement, the court ordered and the mortgagors on two of the three of those mortgages to make payments to the court-appointed receiver. Those payments were utilized to defray the operating expenses, etc., of the apartment buildings. During the course of the foreclosure proceedings, the Petitioners' amended their Complaint in an attempt to foreclose out the Respondent's rights in

these mortgages, relying on the Repurchase Agreement. However, based on the terms of the Repurchase Agreement, which provided that the Petitioners would own these mortgages and receive the proceeds from the same until such time as the total amount owed them, including the outstanding loan balance, expenses of foreclosure, etc., was satisfied, and since it was impossible yet to determine whether there would be a deficiency vel non after the foreclosure sale was held, the lower court postponed the foreclosure of the Respondent's interest in these mortgages until when or if it was later determined that a deficiency did exist in favor of the Petitioners. Conversely, if it was determined that there was no deficiency, then any remaining interests should revert back to the Respondent. However, it should be pointed out that it was specified under the terms of the Repurchase Agreement that the Petitioners would retain all residuary rights and interest in these mortgages.

After the foreclosure sale, when title to the property was transferred (to the Petitioners) and the receiver was no longer needed to collect the rent and pay the expenses in the property, the Petitioners called upon the mortgagees to honor the terms of the Repurchase Agreement and continue to remit the mortgage payments to them. At this juncture, the difference between the amount due to the Petitioners in the Final Judgment, plus the first mortgage they assumed, less the appraised value of the buildings on the date of the foreclosure sale, left the Petitioners with a "deficiency" in an approximate amount of approximately $80,000.00. This is an especially significant figure when viewed with the

perspective that the amount which the Petitioners originally loaned to the Respondent was only $55,000.00 and the Petitioners had taken the second position (a second mortgage) on this commercial property, realizing that should the first mortgage go into default as well, as it did here, the Petitioners, in order to protect their security, would have to advance many thousands of dollars in first mortgage payments before they could complete the foreclosure of their mortgage against the Respondent.

The foreclosure took close to two years, during which time the Respondent had at least four attorneys and also represented himself. In fact, the Final Judgement reflects that as of that date, even with the receiver having received the rents and having paid some of the first mortgage payment during the pendency of the initial portion of this suit, the Petitioners still had to advance approximately $26,000.00 before the receiver was in place in order to keep the first mortgage current, etc., and had to advance almost $4,000.00 to make up shortages of receiver's revenue thereafter. This explains how the Final Judgement was $126,397.72 on an original $55,000.00 loan.

The Respondent appealed the Final Judgement and other orders to the Fourth District. The appeal was decided adversely to him at the end of 1989 (Case No. 89-1018). During the appeal and thereafter, for the next two and one-quarter years, Mr. Bar-Or's erstwhile mortgagors continued to pay the Petitioners, the assignees of these mortgages. From the date of transfer of title to the Petitioners after the sale, interest was running on the

amount of the "deficiency" until the payoff of these mortgages in April, 1992, said interest being in the approximate amount $28,000.00. During the same period, the Mortgagors paid a similar amount in principal and interest payments which more than offset the interest accruing on the Petitioners' "deficiency". In March, 1992, these mortgages were prematurely and unexpectedly paid off because of the sale of the encumbered properties and their refinancing. The proceeds of approximately $57,000.00 were paid to the Petitioners, as assignees, and they satisfied the mortgages, crediting this amount to the outstanding balance of what was owed to them by the Respondent. The remaining balance owed totaled more than $20,000.00 and it too, continued to draw interest after April, 1992, at the legal rate.

After the appeal terminated unsuccessfully for Mr. Bar-Or, he made no attempt, from the end of 1989, until October of 1992 to petition the court or take any other action whatsoever in an attempt to regain any right, title or interest in these mortgages. It is thought that, Mr. Bar-Or, being armed with a copy of the Final Judgement, his knowledge of the outstanding balance on the first mortgage on the property, his knowledge of the actual value of the property at the time of the sale, and his knowledge of the amounts owed on the collateralized mortgages, did not take any steps to regain ownership because they would be fruitless.

However, he knew that the Petitioners had made no attempt to secure a deficiency against him as of October, 1992. Seizing upon one sentence, and not the entire paragraph 14 of the Final Judgment

of Mortgage Foreclosure, the Respondent took the first step whereby he hoped that he could gain some type of monetary remuneration from the Petitioners -against whom he had complained so bitterly against in the foreclosure action, and in the previous appeal he brought pro se. On October 12, 1992, he first filed a Motion to Dismiss for Failure to Prosecute. This Motion specifically mentioned that the court had retained jurisdiction for the purposes of, among other things, entering a deficiency decree, and alleged that there have been no record of activity for more than one year prior to the filing of the Motion. In argument on the Motion, thereafter (T15), he argued that a single sentence of the Final Judgment, according to his interpretation, mandated that he would receive somehow receive back ownership of these now satisfied mortgages if no deficiency was decreed against him. He told the court that the Petitioners had satisfied these mortgages, called the Petitioners, accordingly, "guilty of egregious wrong" and indicated forthcoming legal action against the Petitioners "seeking equity against these Petitioners because of... their"... unlawful misconduct". The plan was to eliminate any chance at seeking a deficiency and then attempting to have another judge, the original chancellor who dealt with this complicated and difficult foreclosure having since been transferred to a different division, interpret several words in the Final Judgement in a manner favorable to the Respondent so as to give him a windfall.

In granting the Respondent's Motion, the lower court cut off the Petitioners' right to a deficiency. This action was clearly

erroneous.

B. IF RULE 1.420(e) APPLIES AT ALL POST-JUDGEMENT, IT APPLIES ONLY AFTER AN APPLICATION FOR POST-JUDGEMENT RELIEF.

A mandatory jumping off point in any discussion of the Fourth District and the lower court's errors must be this Court's decision in Financial Security Savings & Loan Assoc. v. Espana River Partnership, 537 So.2d 683 (Fla. 4th DCA 1989). Initially, it is pointed out that the decision in this case was not reported in advance sheets until after the court below issued its Final Judgement of Mortgage Foreclosure on April 11, 1989.

Although the Petitioners here do not agree with the Fourth District's holding in Financial Security, supra; they likewise state that the decision does not control here. The Respondent argued below that it was controlling before the lower court and before the Fourth District. It is clear that the lower court took it into account in so ruling since Financial Security was the only case involving the issue of failure to prosecute a post-judgement proceeding for a deficiency in the Fourth District.

The facts of Financial Security, are summarized as follows: In August 1985, the mortgagee obtained an amended final judgement of foreclosure. Thereafter, the opinion discloses that the mortgagee filed a motion for a deficiency decree sometime between August and December 1985. The hearing on this motion was set for December of 1985, but was canceled. This Court then observed:

> "When no record activity took place thereafter for over one year, Heaton moved for dismissal for lack of prosecution under Florida Rule of

Civil Procedure 1.420(e)" (at 684).

The Fourth District then went on to consider two issues;, one of good cause for non-record activity during this period, and the second issue, which this Court termed "the applicability vel non of rule 1.420(e) to post-judgement proceedings to recover a deficiency decree." The Fourth District then cited four opinions from the First, Second and Third Districts (discussed infra) which dealt with the applicability, vel non of rule 1.420(e) to post-judgement proceedings. It then continued with a discussion of the applicability of the rule which ended with its conclusion that prior authority that maintained that the rule only applied pre-judgement, (since other authority had recognized that the record activity had to be "toward judgement") applied in that case as well because procuring a deficiency "also references post-judgement activity that moves the case toward its ultimate conclusion..." (at 684).

The Fourth District then held, limiting its holding to the facts in that case:

> "In the present case, passage of a period of one year without record activity after the final judgement of foreclosure rendered Financial Security's application for the deficiency subject to dismissal without prejudice." (at 685).

This holding was dissented to by Judge Walden. The majority thought it of such importance as to certify the following question:

> "DOES FLA.R.CIV.P. 1.420(e) APPLY TO A POST JUDGEMENT PROCEEDING SUCH AS A MOTION FOR A DEFICIENCY JUDGEMENT IN A MORTGAGE FORECLOSURE

SUIT."

the same question certified in this case. The unsuccessful appellant bank there, unfortunately choose not to bring this certified question before this Court. Although the Fourth District used the language in its holding that "passage of a period of one without record activity after the final judgement", it is submitted that because of the balance of the holding, as well as the formation of the language of the certified question, the Fourth District did not literally intend to measure the period as such. The court there, in its opinion, measured the requisite one-year period as beginning one year after, ("thereafter") (at 648) either; 1) the date of the notice of hearing on Financial Security's motion for a deficiency, or 2) from the motion itself; not from the date of the final judgement of mortgage foreclosure entered in August, 1985. Although a period of more than one year "after the final judgment did pass " the requisite period, more importantly, passed after the date of the motion/notice for a deficiency.

In the case below, the Petitioners had not filed a motion for deficiency decree at the time the Respondent moved to dismiss. Hence, there was no "post-judgement proceeding" as the Fourth District had termed the deficiency proceedings in Financial Security. It is argued that since there was only a reservation of jurisdiction, and not any post-judgement proceeding, by which action could and should be taken, as the Fourth District put it "that moves the case toward its ultimate conclusion...", there was no "proceeding" within the purview of the subject rule to which a

motion to dismiss for lack of prosecution would be applicable. The Fourth District measured the time from the commencement of post-judgement proceedings, and not during the period of latent reservation of jurisdiction. It likewise made much of the rationale of applying the rule to post-judgement proceedings as well as to pre-judgement proceedings. It never once mentioned applying it to periods of repose, especially when the period of repose continued for good reason.

Does then there exist any good authority to support the lower court's decision which dismissed a "non-proceeding" and dismissed only a reservation of jurisdiction? In Financial Security, the court first mentions the thirty-three old decision in Colmes v. Hoco, Inc. v. Dade County, 152 So.2nd 524 (Fla. 3rd DCA 1963), which held that an application for a deficiency decree should be commenced either within the limitation period for instituting the cause of action under the note or during the one-year period provided by then § 45.19, Florida Statutes. Initially, a careful reading of Colmes discloses that what the Fourth District stated was the holding of that case was merely dicta. In that case, eight months after the final decree, the chancellor entered an order denying a motion for deficiency which had been filed eight months post-judgment without "justification or reason". The Third District observed in dicta:

> "It appears from the authorities that a timely application for a deficiency would be either the period within the limitations statute for instituting a cause of action under the note and mortgage... or the one-year period within which the cause could have been abated

pursuant to §45.19 Fla.Stat., F.S.A. whichever ever period occurred first."

Since the motion was clearly within either of these periods, the lower court's ruling was reversed, but there was no discussion at all concerning the applicability of the one-year period, pre-motion, or of its running from the time of the final judgement.

A resort to the above portion of the opinion in Colmes, shows that the court there mentioned "authorities" for its dicta; but only cited one; and that "authority" was cited after the phrase "the period within this limitation statute for instituting a cause of action under the note and mortgage" [22 Fla.Jur. § 417]... No authority, however is mentioned, for the second part of the dicta where it is stated "or the one-year period within which cause could have been abated..." (at 525). The quoted section of Florida Jurisprudence reveals that the only limitation treated there is the statute of limitations, and not the one-year lack of prosecution period. Counsel has been unable to uncover any authority prior to Colmes in any way indicating that anything other than the statute of limitations should be apply to proceedings for a deficiency decree.

Colmes is clearly distinguishable for another reason. The one-year limitation recited by the court in Colmes, was more benign than the present rule provision. Former F.S.§45.19(1) provided that upon dismissal, "suit dismissed under the provisions hereof may be reinstated by petition upon a good cause showing to the court by a party in interest within one month after such order of dismissal." Under the cases interpreting this section, for

example, non-record activity was more freely allowable to demonstrate "good cause".

The Fourth District even took the time to observe in its opinion in Financial Security, supra, that F.S.§45.19, was, in fact, "repealed".

The Fourth District in Financial Security then discussed Barnes v. Escambia County Employees Credit Union, 488 So.2d. 879 (Fla. 1st DCA 1986). Barnes, was an appeal from a successful deficiency judgement by the aggrieved mortgagor. The mortgagor there, after a petition for assessment of deficiency judgement was applied for in September 1982, and after a more than two-year lapse of time, moved for a summary judgement on the petition for deficiency based upon the running of the statute of limitations. The First District, referring to Colmes v. Hoco, Inc., supra, ruled that the statute of limitations had not run, further holding that the one-year period of inactivity required by rule 1.420(e) had run during that two-year period, but that the mortgagor had not moved for a dismissal under that rule.

What is significant about the Barnes decision is the First District's treatment of the application of rule 1.420(e) to deficiency proceedings. A careful reading of that decision clearly shows that the First District would have measured the time of inactivity relating back, not to the date of the final judgement of foreclosure, but to September 7, 1982, when the petition for deficiency was filed.

This Fourth District then cited for authority Withers v.

Flaship People's Bank of Tallahassee, 473 So.2d 789 (Fla. 1st DCA 1985). This case also supports the Petitioners' position here that the rule applies only if it applies at all, to the period after the motion or the petition for a deficiency has been filed. The First District there set forth that the final judgement of foreclosure was dated August 21, 1979 and that the petition for deficiency was filed on September 12, 1979. The court there then declared that "between October 20, 1980 and October 21, 1981 there was no record activity in the deficiency suit." Although the court there reversed the granting of a deficiency on grounds dealing with the procedure by which good cause to avoid the rule need be established, the court further commented on the applicability of the rule by further stating as dicta only as follows:

> "Both parties admit there was no record activity during the critical one-year period;..." (at 790). (After the petition for deficiency had been filed).

Resort to both authorities cited by the Fourth District in Financial Security in support of its position that the Rule was "applicable in post-judgment foreclosure proceedings..." (at 684) clearly demonstrates that those courts were measuring the one-year period as running, not from the date of the final judgement, but from the date of the application for a deficiency.

The District Court also discussed the two other cases from the Second District, both ruling that the Rule does not apply post-judgement. It rejected the rationale of those cases, discussed below.

In summary, it can be seen that there have been no Florida decisions dealing other than in dicta, with the precise point here, to wit: whether Rule 1.420(e) applies, post-judgement, to a period measured from the date of a final judgement. With one exception, it appears that those cases that have tangently dealt with deficiency decrees have, in all cases, measured the one-year period from the commencement of the post-judgement proceeding, and not from a final judgement, the date of sale, or any date prior to the application for post-judgement relief. Only a thirty-three year old decision under a prior, more liberal rule of dismissal, in dicta, so observed and said observation was not necessary to the holding there. By contrast, the two authorities cited by the Fourth District from the First District clearly suggest that had this issue been the issue in those decisions, those courts would have held consistently with the Petitioners' position here.

Conflict Cases

In it's opinion under review here, the Fourth District cited two cases as being in conflict with its decision. Ravel v. Ravel, 326 So.2d. 223 (Fla.2d DCA 1976) and Riesgo v. Weinstein, 523 So.2d 752 (Fla.2d DCA 1988).

In both of these unanimous decisions, several extremely interesting points are made which should be examined, especially in the context of the case below. Ravel involved a final judgement which established property rights in the appellant there. The judgement provided that post-judgement, the appellant had to submit

certain prcofs of payment which the appellee was to then pay to the appellant; after which the appellant there was directed to convey certain property interests to the appellee there. This is a situation not unlike the case below. Like the instant case, some four and a half years later, the appellant moved for dismissal based on lack of prosecution. In specifically ruling that the dismissal rule did not apply post-judgement, the court observed:

> "If appellant felt aggrieved because no further proceedings had transpired, he could have always brought matters to a head by setting down a hearing." (at 224).

So too in the instant case, had Respondent been aggrieved by the fact that he was not getting mortgage payments and had lost the ownership interest in his mortgages, he could have done the same. The court also observed that; "A contrary construction of the rule would appear to have the practical effect of nullifying an otherwise valid judgement." (At 224). When the Fourth District rejected the rationale of Ravel in Financial Security, it set forth the reasons that the facts in Financial Security would not mitigate in favor of the rationale applied in Ravel. In this case, they do. Therefore, it is not that the Fourth District rejected the holding in Ravel; it just distinguished it.

The Fourth District, in Financial Security, also clearly limited its ruling, in rejecting the rationale in Ravel, to:

> "A post-judgement proceeding to obtain a deficiency decree [where] no record activity has taken place for over one year." (At 684).

Likewise, some fifteen years later, in Riesgo, supra, the Second District again ruled that the rule did not apply post-judgement.

Riesgo was an automobile accident case which had been settled during trial upon the filing of a joint stipulation for dismissal with prejudice. The dismissal retained jurisdiction to resolve a prior discharged attorney's lien. Approximately one and a half years later, the discharged attorney's prior client filed a motion pursuant to the Rule to dismiss for lack of prosecution because there was no affirmative record activity for over one year. Citing Ravel, the Second District held that the rule does not apply post-judgement. It also made a finding that certain non-record activity would constitute good cause.

C. RULE 1.420(e) DOES AND SHOULD NOT APPLY POST JUDGEMENT.

There are a number of good reasons why the rule should not apply post-judgement at all. Many cases, such as the case below, involve loose ends and work-outs of complicated financial situations. The majority of the judicial labor is at a close at the final judgement stage. A case is then considered adjudicated for statistical purposes of reporting to the this Court. See Fla.R.Jud.Admin. 2.080, 2.085. Indeed, many cases are "worked out" or settled, resulting in final judgements reserving jurisdiction to enforce a settlement agreement. Alternatively, a trial is rendered shorter based upon certain agreements which result in a final judgement leaving certain matters to be performed post judgement. Thus, the objects of justice and the goal of swift

conclusion of cases is satisfied by the resort, in many cases, to a reservation of jurisdiction. Indeed, many cases could not be settled without stipulations of settlement and final judgements - executions withheld, reserving jurisdiction to enter final judgements with executions, should payment schedules not be kept, saving untold hours of judicial labor. This Court is asked to take judicial knowledge that, all over the state, in thousands of cases, there are, have been, and will be courts reserving jurisdiction to enforce settlements with payment schedules that long exceed one year from final judgement. Should the paying defendant be able to petition the court after one year of payments to dismiss the action for inactivity, thus rendering the other party's ability to get a final judgment upon default of payments void? Should an attorney, and hence a court, be forced to litigate the matter of attorney's fees to be assessed against one party for trial court proceedings, while the case is still upon appeal, even though the appellate results on remand may necessitate a later change in attorney's fees based upon the financial element being affected by the appellate decision? Attached hereto is part of the Petitioners' Appendix is an actual order of a circuit court and motion explaining it in this district clearly indicating how long courts are willing to reserve jurisdiction. (A9) In these cases, there is absolutely nothing that the litigants should or could do during the hiatus period, which can be one year or longer, to hasten a case to its ultimate end. Neither the litigants nor the courts are prejudiced by this. A court is not prejudiced as a case dismissed for statistical

purposes and the court may have no further judicial labor. The court has probably seen less judicial labor, because of the reservation of jurisdiction and the practice leading to it. The litigants are not prejudiced because either they settle this matter, agreeing to do things in a certain way post-judgement; alternatively, the court, in an attempt to do the most justice possible, settles, itself, as many matters in the final judgement as possible, but leaves other matters to a later determination.

None of these factors are present pre-judgement. Before the rendition of a final judgement, cases occupy the court's docket, are reported for statistical purposes, as well as for purposes of court administration in assigning case loads, etc. There is concededly a real need to prevent lengthy inactivity, pre-judgement, which is not present post-judgement.

Many rules of civil procedure are impliedly intended to apply either pre-judgement, post-judgement, or both. It is argued that rule 1.420(e) falls in the former category or, if it was not so originally intended, that this Court should so rule until such time as the matter is clarified. Indeed, even its numerical placement in the Rules of Civil Procedure, pre-trial and pre-judgement, fairly cries out for it to be applied only before the trial and before judgement. The "post-judgement" motions extend from rule 1.530 et. seq., with the exception of the medical malpractice, arbitration and mediation rules which form separate categories. Many cases reporting on its interpretation in the West Reporting System utilize key/name/number "Pretrial Procedure 587", etc.

This Court's aligning itself with the holdings of the Second District cases of Ravel and Riesgo, supra, and holding that in all cases the rule does not apply post-judgement, would have the effect of simplifying litigant's responsibilities post-judgement in a myriad of instances, a few of which were outlined above. It would also have the effect of more uniform conduct and results, as every litigant would know where it stood. It would be much simpler, it is submitted, for blanket rejection of a post-judgement application of the rule to obtain than, piecemeal, have appellate courts ad infinitum determine in what situations the rule should or should not apply post-judgement; and whether it should apply from date of final judgement or after the institution of post-judgement proceedings, etc. If needed, a new rule could be drafted for post judgement periods.

A reservation of jurisdiction only, prior to post-judgement proceedings, is not the type "action" to which the time limitations in the rule should apply. The very words of the rule demonstrate this. The rule begins:

> "All actions in which it appears on the face of the record..."

It is submitted that for purposes of this rule, the word "actions" speaks of the "action" filed prior to final judgement. Indeed, many of the "pre-judgement" rules of civil procedures use the word "action", while none of the post-judgement's rules contain the word. The reservation of jurisdiction by a court in a final judgement means exactly that. Once the court has jurisdiction over the subject matter and the parties, it has terminated the matter

while reserving jurisdiction over the person and the subject matter, which includes causes of action timely filed within the statute of limitations. After the termination of the "action" by final judgement, where jurisdiction is reserved, the case no longer remains a "action". The parties retain the rights conferred by that reservation of jurisdiction, nothing more. See e.g. NCNB National Bank of Florida v. Pyramid Corp., 497 So.2d 1353 (Fla. 4th DCA 1986) Compare, Jessup v. Cowger & Miller Mortgage Co., 505 So.2d 687 (Fla.3rd DCA 1987). No affirmative relief is sought or at issue during that reservation period. Once supplemental proceedings have been invoked by motions, petition, etc., the case may become "an action" again. In the interim, as was stated in the preceding section, in Skekette v. Ballance Homes, Inc. and Ravel, supra, if a party felt aggrieved, it could initiate action. A perusal of a number of appellate decisions show numerous instances of post-judgement reservation of jurisdiction for long periods post-judgement. These reservations are for sound judicial reasons, like in the instant case. No proceedings were instituted during the long period of times between final judgement and the enforcement of provisions in the final judgements for which reservation was reserved. It would not be consistent with the theory of "final judgement", the rules of procedure and justice, that during the periods of reservation of jurisdiction only, this jurisdiction could be nullified by a potentially defaulting party, or obligor, utilizing rule 1.420(e) to cut off jurisdiction. See e.g. Clem v. Clem, 183 So.2d 742 (Fla.3rd DCA 1966) (apparently a

five or six year hiatus during a reservation of jurisdiction) Buckley Towers Condominium, Inc., v. Buchwald, 321 So.2d 628 (Fla.3rd DCA 1975) (three years), Broadband Engineering, Inc. v. Quality RF. Services, Inc., 450 So.2d 600 (Fla. 4th DCA 1984) and Hopwood v. Ravitz, 312 So.2d 516 (Fla. 3rd DCA 1975).

Because our Rules of Civil Procedures are modeled after the Federal Rules of Civil Procedures, Federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of state rules. Wilson v. Clark, 414 So.2d 526 (Fla. 1st DCA 1982). Also see Savage v. Rowell Distributing Corp., 95 So.2d 415 (Fla. 1957). Federal rule 41(b) contains the failure to prosecute dismissal rule. Although not identical to the instant rule, a review of the cases construing this rule discloses many similarities to Florida cases construing Rule 1.420(e). An intensive, but not exhaustive search of federal caselaw construing the federal rule fails to disclose a single case either applying that rule in a post-judgement setting or discussing it's applicability vel non amongst the hundreds of reported cases. Indeed, a number of cases, in deciding whether or not the provisions of the rule had been providently applied, used as a rationale or speak in terms of the philosophy of "moving the case to trial", as used, e.g. in Finley v. Parvin/Dohrmann Co., 520 F.2d 386, 392 (U.S.D.C. 2d Cir. 1975). This "moving the case to trial" discourse contained in so many decisions, leads to the inescapable conclusion that in a federal context at least, the assumed and accepted application is solely pre-judgement.

This would seem to dovetail with the reasoning employed by this Court in a decision cited by the Fourth District in Financial Security, supra, but distinguished, Golf Appliance Distributors, Inc. v. Long, 53 So.2d 706 (Fla. 1951). This Court in Golf Appliance affirmed a lower court's denial of a petition for reinstatement after a dismissal under former §45.19, Florida Statutes 1949, a forerunner of the current rule under consideration. What is significant about this case, however, is, in reaching its decision, this Court quoted a Louisiana court in Augusta Sugar Company Ltd. v. Haley, 112 So. 731, 732 in construing its similar statute. This Court used the standard employed in that case as it's standard in deciding the case before it. The Louisiana court said:

> "We think that a step in the prosecution of the suit means something more than a mere passive effort to keep the suit on the docket of the court; it means some active measure taken by plaintiff, intended and calculated to hasten the suit to judgement.***". (Emphasis is supplied) (At 707).

The Fourth District, in Financial Security, supra, "suggests" that the reference "toward judgement" in the contacts of this Court's decision in Golf Appliance and in one of its own cases, Bair v. Palm Beach Newspapers, Inc., 387 So.2d 517 (Fla. 4th DCA 1980) is:

> "Simply to demonstrate that not all activity suffices to preclude dismissal, but record activity that moves toward its ultimate conclusion, and is not a ruling or holding that the lack of prosecution rule only applies to proceedings that predate the judgement. ..." (At 684).

While this may be true in the context of it's own prior decision in Bair, supra, the Fourth District, it is submitted, has

no basis for it's assertion that this Court in Golf Appliance was really saying what is quoted above when it and other courts said "toward judgement". The Louisiana court, as noted above, spoke in terms of keeping a suit on the docket of the court prior to judgement. This Court adopted that reasoning with approval and this decision has stood as the basis for many subsequent decisions. Not only should this Court continue this reasoning by rejecting the Fourth District' decision, but it should not penalize the Petitioners here for relying upon decisions spanning 15 years coming out of the Second District and expressions, such as stated in Golf Appliance originating with this Court.

D. THE EFFECT OF THE DISMISSAL NULLIFIED PROVISIONS OF THE FINAL JUDGEMENT.

The application of the Rule post judgement also creates the problem of potential, or here actual nullification of provisions of a final judgement. As previously discussed, this mortgage foreclosure was of quite an unusual nature. All of the parties, as well as the trial court, knew that there would be a deficiency amount based upon prior testimony taken as to the value of the property (which in this case was the net value computed by taking the appraised value less the outstanding first mortgage) and then deducting the remainder from the amount due the Petitioners as of the Final Judgement. The trial court also knew that these mortgages had years to run or, like any mortgages, could be paid off prematurely and that therefore, there potentially could be a

great lapse of time until an ultimate deficiency amount could be established against Mr. Bar-Or.

The trial court further specifically recognized this unique situation in Paragraphs 13 and 14 (A4) of the Final Judgement.

The trial court went on, in Paragraph 14 to state that "said foreclosure shall be conditioned upon a further determination that a deficiency exists between the Plaintiffs and the Defendant, Jacob Bar-or." In the following sentences, the trial court set forth what the effect would be in these deficiency proceedings; in the proceedings upon the "deficiency determination", if the court found that there was no deficiency, then the ownership rights in this mortgages would revert back to Respondent, with appropriate credits and debits being taken and given. If however, there was still a deficiency, then the ownership rights in the mortgages would be sold at a foreclosure's sale.

Below, it was the goal of the Petitioners that they would not have to resort to further court proceedings, and incur additional attorney's fees and court costs, thus adding to their deficiency, which at one point, was almost double the amount of their loan. This would obtain if the combined interest and principal payments, as well as late charges, etc., eventually overtook the amount Petitioners were due based upon a deficiency calculation. Then, further court proceedings and expense could be obviated by the mere reassignment of the mortgages to Mr. Bar-Or. By the same token, if the mortgages were prematurely paid off (as here), or were paid to their terms, with any extensions granted, and the amount remaining

due the Petitioners was de minimums, they could avoid further court proceedings at their option.

What is important here to remember is that there was a mechanism in place, at the behest of the Petitioners, whereby the court could determine, if necessary, the ultimate ownership rights in these mortgages, apart from the Repurchase Agreement. The Repurchase Agreement, however, required no judicial action in order for the Petitioners to retain their interest in these mortgages. However, in an abundance of caution, and since there was a pending foreclosure action related to the second mortgage in any event, they urged that the Final Judgement provide for a optional judicial ratification of the effect of the Repurchase Agreement. It did.

However, over protests that the dismissal of the case, which consisted only of a reservation of jurisdiction at the time the Respondent filed his Motion to Dismiss for Failure to Prosecute, would have the effect of nullifying Paragraphs 13 and 14 of the Final Judgement, thus causing other difficulties, including the Respondent's interpretation of one sentence of those paragraphs, the trial court nevertheless dismissed the case, and refused to either amend or remove the aforementioned-provisions.

The above had the effect of nullifying provisions of an otherwise valid judgement.

This point was argued to the Fourth District in Financial Security Savings & Loan Association v. Espana River Partnership, supra, as a reason for not affirming the denial of the mortgagee's

rights to proceed to a deficiency's determination. This Court's offered the rationale that such an argument was "not compelling in a mortgage foreclosure" because:

> "[T]he judgement therein is simply an adjudication of the amount of the debt and a direction to sell the mortgaged property. It is not a personal judgement against the defendant; it is not a lien in any other property, nor can it be used for an execution against any other property. (authority cited). Thus, since the property has been sold, the foreclosure judgement is of no effect except to set forth the amount of the debt. Therefore, the problem envisaged in nullifying a judgement in a mortgage foreclosure simply does not pertain." (at 684-85).

Nothing could be further from the situation in the instant case. The mortgage foreclosure in the case below did far more than adjudicate the amount of the debt and direct the property to be sold. It envisioned a personal judgement, the court being aware of the facts and figures, at that point, by virtue of numerous hearings being held on the value of the property, including motions for continuance base upon the Respondent's repeated alleged attempts to sell the property, and other proceedings. The Judgement here was a lien on other property. It established the lien on the Respondent's mortgages assigned as collateral to the Petitioners. Unlike the judgement in Financial Security, it could "be used for executing against... other property." (Financial Security, at 684) because Paragraph 14 of the Final Judgement did provide a device which, if needed, could be used to sell at foreclosure sale the collateralized mortgages. In summary then, this is the opposite situation to that in Financial Security were

the Fourth District observed that the final judgement was "of no effect except to set forth the amount of the debt."

Compounding the above is the Respondents' avowed intention to litigate his rights concerning his alleged interest in these mortgages in another forum. (See transcript of hearing excerpts, page 9 herein). Authorities have cautioned against proceeding as the lower court did here:

> "The court must be careful not to disturb the final judgement by dismissing post-judgement deficiency proceedings, or to dismiss enforcement proceedings that are supplementary..." Trawick, Florida Practice & Procedures, 1993 Ed.§21.7 ff.4.

At least one authority, concerning a similar factual situation, clearly recognizes that it is improper to dismiss for lack of prosecution when the effect of same is to affect the prior final judgement of foreclosure. In Hanson v. Poteet, 556 So.2d 828 (Fla.2nd DCA 1990) the mortgagee "foreclosed" her mortgage to a partial summary final judgement. The "foreclosure" was, as stated by the court there, "contingent upon the issues raised in the [mortgagor's] affirmative defenses and counterclaim." (At 829). The mortgagor later moved to dismiss the action for failure to prosecute. The mortgagee filed a response indicating that she believed that she "had no obligation to prosecute and that [she] was entitled to a judgement if the [mortgagor] did not pursue... [it]..." (At 829). The lower court denied the motion to dismiss for lack of prosecution, struck the counterclaim and affirmative defenses, and granted foreclosure. The Second District affirmed

the final judgement denying the motion to dismiss; however observing that the earlier judgement "did not shift the burden of going forward..." to the mortgagor. The court deemed the order confusing and misleading and deemed it "an adequate reason to permit the action to remain pending". That a similar scenario demonstrates good cause to continue prosecution in the instant case, will be argued supra. What the important point in that case for our purposes here is the court's reversal of the lower court's granting of the mortgagee's motion to dismiss for failure to prosecute directed at the mortgagor's affirmative defenses and counterclaim. In addition to ruling that there could not be such a "piecemeal" dismissal, the court further held:

> "This is not a case in which an action could be dismissed while a prior final judgement remained intact. The prior partial final judgement did not resolve all of the issues on the claim of foreclosure..." (ff1 at 830).

The court further observed that, "... rule 1.420(e) allows the trial court to merely dismiss an action... when the action has not been litigated to final judgement... The rule does not permit a trial court to award affirmative relief upon unlitigated claims." (at 830). Here, we have yet another case which expresses the view that the dismissal rule is not available post-judgement or, in the alternative, when there remain issues to be litigated post judgement. The immediately above-quoted portion clearly demonstrates that the court there was condemning any dismissal action that has the effect of "awarding affirmative relief upon unliquidated claims." By seizing upon certain language of

Paragraph 14 of the Final Judgement here, the Respondent has expressed his intent to convince some court that he should automatically have the affirmative relief of re-gaining ownership's rights in the assigned collateralized mortgages, or in the alternative, receiving such rights so as to permit damages based upon not receiving those rights. Were this to be successful, the trial court's actions would clearly have the effect of "awarding affirmative relief on unlitigated claims", since the successor judge who ruled here took away both the power and the procedure reserved by the predecessor trial judge to complete the entire foreclosure, if necessary, contained in a final judgement which was not final with respect to the collateralized mortgages.

This Court is also reminded that Ravel v. Ravel, supra, one of the cases cited by the Fourth District as being in conflict with its decision(s) held that applying the rule post judgement "would have the practical effect of nullifying an otherwise valid judgement." (at 224).

POINT II

THE LOWER COURT ERRED IN DISMISSING THE CAUSE BELOW FOR FAILURE TO PROSECUTE IN THAT THE PETITIONERS PROVIDED GOOD CAUSE TO PREVENT DISMISSAL.

This point was not mentioned in the Fourth District's per curiam affirmance. Within the time required by the rule, the Petitioners here filed their Statement of Good Cause to continue prosecution (R50-51). The Respondent's Motion to Dismiss for

Failure to Prosecute was filed on October 20, 1992. The Petitioners, in their Statement, set forth that in the relevant one-year period of time prior to the Respondent's Motion, and before, there had been non-record activity leading toward bringing the case below to a final resolution which involved the establishment of a deficiency decree. The Petitioners contended that the Repurchase Agreement between the parties was such that if the foreclosed upon real property failed to leave the Petitioners whole with regard to all amounts owed them, including costs of foreclosure, that they were entitled to retain the interests assigned by the Respondent in collateralized mortgages until all amounts had been repaid in full. The Petitioners advised the lower court that post-sale, they continued to do exactly that. They recited that the amount they were owed out of pocket on the date of the foreclosure sale (based upon the formula for establishing a deficiency) continued to get larger based on interest on that amount, but that the mortgage payment they were receiving conversely reduced that amount. They further stated that until those mortgages were unexpectedly paid off in April, 1992, they had no way of being able to establish a deficiency which was fair to the Respondent. They also advised that they had been powerless to act until a personal representative had been re-appointed. This alone is sufficient cause to toll the one-year period and preclude dismissal. See Gregory v. Circuit Court, etc., 56 So.2d 529 (Fla. 1952).

The funds were collected from October 20, 1991 until

April 10, 1992. Indeed, it would have been inequitable to move for a deficiency during this period until the amount was susceptible of ascertainment. Under these circumstances, this non-record activity precludes dismissal of an action for failure to prosecute, if good cause is shown to avoid dismissal, Riesgo v. Weinstein, supra.

The Respondent will argue that based upon this Court's holding in Financial Security, supra, the Petitioners did not demonstrate sufficient non-record activity good cause. In Financial Security, the mortgagee contended that it had demonstrated good cause, after it had commenced deficiency proceedings, for the several years hiatus by "attempting to market and sell the units foreclosed upon" and because it was suing the mortgagors in Canada in a separate lawsuit. The Fourth District remarked (at 684) that "none of the record activity referred to here has been held sufficient to preclude operation of rule 1.420(e)..." The Fourth District's ruling there appears correct as it is not seen how the actions of the mortgagee, after it had assumedly obtained title to the subject property at a foreclosure sale, would have any effect on the deficiency decree. Also, it was not shown how the Canadian suit would have any effect either. However, the facts here lead to an opposite conclusion.

In Steketee v. Ballance Homes, Inc. 376 So.2d 873 (Fla. 2nd DCA 1979) there is found a substantially similar fact pattern to the case below. The mortgagee foreclosed, initially requesting a deficiency at the beginning of 1975. Approximately four months later, it is gleaned from the opinion, a foreclosure sale was held.

More than two and a half years later, the mortgagee filed a motion for a deficiency and the mortgagors moved to dismiss same under the provisions of the rule, which was granted. The Second District there, in reversing the lower court's action as an abuse of discretion, considered two factors; whether there was a showing of good cause on the part of the mortgagee, and whether the mortgagors had demonstrated in any way that they were prejudiced by the delay. The court first determined that the mortgagors had failed to demonstrate that they were prejudiced by the delay. In the case below, this is clearly also the case. Then the court considered two grounds for the mortgagees, alleged good cause; the pendency of other litigation concerning the property, and the mortgagees "serious and substantial efforts to... mitigate their loss by seeking recovery from other sources..." While those "efforts" apparently referred to their actions against other parties concerning priority of the subject mortgage, the principle is the same as here. In the case below, the irrefutable actions of the Petitioners were to pursue and recover mortgage payments, including a later a pay-off of the mortgages collaterally assigned to them which had the effect of reducing the Respondent's debt. In Steketee, the court commented as to those efforts:

> "Success in the first of those endeavors would have been of undeniable benefit to [the mortgagors]." (At 875).

Also see Hanson v. Poteet, discussed supra, for another example of similar, approved non-record good cause.

The collateralized mortgages paid off on April 10, 1992. This

was the first date when the deficiency amount could be established with any accuracy and without resort to conjecture. This date was the last date of sufficient non-record activity to preclude dismissal. Once a date of non-record activity has been established, the one-year period, if it is applicable at all, runs from that date. See e.g. Johnson v. Mortgage Investment of Washington, 410 So.2d 541 (Fla. 2nd DCA 1982). The lower court's observations that "we have a finite period of time for resolution of cases" and that nothing had been done from the payoff month (April) until October (T18) are besides the point. This Court's determination of whether good cause exists should be influenced and tempered by this Court's recent decision in Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993) where this Court set forth a set of six new factors which must be considered before another type of involuntary dismissal under the rule is sanctioned. This Court held that a court's decision to dismiss a case based solely on attorney's neglect unduly punishes the litigant and espouses a policy that this Court did not wish to promote. Space does not permit a recital of the factors in this decision, but suffice to say that the facts of this case clearly mitigate against dismissal based upon the employment of those factors. Not only was there no attorney's neglect; counsel was following law long ago made by the Second District and which was the only recent law on the point through and including the Final Judgement in this case. Financial Security, was published after the Final Judgement.

In summary then, the only discovered appellate case dealing

with the issue of sufficient non-record activity to preclude the post-judgement dismissal for failure to prosecute a deficiency proceeding clearly indicates that it is an abuse of discretion to so dismiss where the mortgagor has made no showing of prejudice, or where the mortgagee has made serious and substantial efforts to mitigate its damages, post-judgement, thus reducing the mortgagor's liability for a deficiency, or where other cogent reasons are shown. This Court's recent pronouncements, cited above, also mitigate in favor of a more equitable approach being employed with reference to the issues of good cause and sufficient non-record activity.

This Court should adopt the principles utilized by the Second District in Steketee, and reverse the dismissal for failure to prosecute for the reasons argued in this point, as well.

POINT III

THE LOWER COURT ERRED IN FAILING TO GRANT THE PETITIONERS' MOTION FOR RELIEF.

The Motion for Relief was filed prior to the court dismissing the case for failure to prosecute, but was heard thereafter. The Motion sought to excise the provisions dealing with the foreclosure, etc. of the Respondent's rights in the collateralized mortgages.

Since the trial court dismissed the case for failure to prosecute, regardless of the interpretation of paragraph 14, commented on, infra, it was clearly inequitable to allow the

provision to continue because; 1/ as ruled by the lower court, there was no jurisdiction to continue deficiency proceedings or 2/under the Respondent's interpretation, even though he may owe the Petitioners substantial moneys, he would claim and try to obtain a windfall against the Petitioners based on their inability to obtain a deficiency.

Fla.R.Civ.Pro. 1.540(b)(5) provides that on motion, the court may relief a party from a final judgement, or a portion thereof, for the reason that:

> "... it is no longer equitable that the judgement... should have prospective application."

The factual scenario is clear; on the date of dismissal of the action below for failure to prosecute, the Respondent allegedly owed the Petitioners more than a third of the original amount they loaned him, even after all of the other collateral had been marshalled to apply to the total amount owed. However, the Respondent argues that language of the Final Judgement nevertheless gives him a right to somehow regain some right in the previously assigned mortgages, the collateral of which has been used to pay on his loan. The effect of this would be, according to the Respondent's arguments, that while continuing to owe the Petitioners more than $20,000.00, he should also receive back the value of the collateralized mortgages, (more than $57,000.00), plus three years interest payments on same, or some portion thereof. The trial court, by failing to grant the motion, left the parties in limbo and left this scenario where in a separate lawsuit, a

different court would be called upon to interpret the intent of paragraph 14 which was not drafted by the judge denying the Motion for Relief, but by his predecessor, etc.

There are a dearth of cases interpreting the above quoted provision of this rule, except as it applies to the issue of prospective application in light of subsequent statutes, court decisions, unconstitutionality determinations, etc. However, the Author's Comments to this portion of the rule reads as follows:

> "Subsection (b) is applicable to obtain relief from an unjust prior decree or judgement and has been liberally construed to provide such remedy."

Judicial interpretation is found in interpretation of its federal counterpart, Fed.R.Civ.P. 60(b)(5). Under that Rule, one seeking relief from a judgement must show that 1/the judgement has prospective application and 2/it is no longer equitable that it should so operate. Kirksey v. City of Jacksonville, 714 F.2d 243 (5th Cir. 1983).

In summary, there were overwhelming equitable circumstances which constituted an abuse of discretion for the lower court not to grant the Petitioners' Motion for Relief once it had dismissed the action below. Under the correct interpretation of paragraph 14, the court's action in dismissing the case eliminated the ability of the court to make a judicial determination of a deficiency and hence the provisions of that paragraph could not and should not have a prospective application. Under the Respondent's interpretation, the only thing that would happen would be that

there would be subsequent litigation which, if successful, would allow the Respondent to receive a windfall, which would be clearly inequitable.

CONCLUSION

For the reasons argued above, it is clear that both the lower court and the Fourth District were erroneous in concluding that the involuntary dismissal rule was operative during a latent period of reservation of jurisdiction before any post-judgement proceedings had been initiated. The Fourth District's decisions in this case and in Financial Security are also misplaced in holding that the rule applies to a post-judgement proceeding, since many other factors are present, post judgement, that are simply not involved while a case is being prosecuted to judgement. The rule was not intended to operate post judgement, and there are no discoverable federal or state decisions involving similar rules that so hold. If this Court, however, ratifies the applicability of the rule even during a post-judgement latent reservation of jurisdiction, then it is urged to reverse the lower court's decision that good cause to preclude dismissal was not shown, based upon the unique circumstances in this case and upon other authorities so holding in similar circumstances. This Court is also urged to reverse the lower court's abuse of discretion in denying the Motion for Relief, based upon the clear equitable grounds mandating that relief be granted from the language of the Final Judgement which has potentially raised controversy concerning its meaning.

Alternatively, even if this Court were to reject Petitioners' arguments as set forth above, and argued in this Brief, it is urged that this Court apply its ruling prospectively, remanding the case with instructions that the Motion for Deficiency be considered. E.g. Lawrence v. Fla. East Coast R.R. Co., 346 So.2d 1012, 1017 (Fla. 1977).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing main Brief was furnished by mail to H. Taylor White, Esq., Eighth S.E. 8th St., Fort Lauderdale, Florida, this 14th day of September, 1994.

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