THE SUPREME COURT OF FLORIDA

MICHAEL THOMAS, et al.,

Petitioners,

vs.

JAMES F. SILVERS, et al,

Respondents.
_____/

CASE NO. 91,860

DISTRICT COURT OF APPEAL

3RD DISTRICT NO. 97-2617

INITIAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS

1. Thomas F. Luken, Attorney for Defendants/Appellants

2. Michael Thomas, Defendant/Appellant

3. Lola Bohn Thomas, Defendant/Appellant

4. James F. Silvers, Plaintiff/Appellee

5. Zack, Sparber, Kosnitzky, Spratt & Brooks, P.A., Attorneys for Plaintiff/Appellee

6. John Arrastia, Attorney for Plaintiff/Appellee

7. Jill Anderson, Attorney for Plaintiff/Appellee

8. The Honorable Juan Ramirez, Jr., Eleventh Judicial Circuit Court Judge

9. The Honorable Joseph Nesbitt, Florida Third District Court of Appeal

10. The Honorable David L. Levy, Florida Third District Court of Appeal

11. The Honorable John G. Fletcher, Florida Third District Court of Appeal

12. All parties in Hertz Claims v. Perry, 22 Fla. L. Weekly D2674, (Fla. 3d DCA November 26, 1997) certifying conflict to this Court of one of the issues involved in this case.

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

STATEMENT OF THE CASE

This is a mechanic's lien foreclosure case filed by the plaintiff, JAMES F. SILVERS, an architect, who claims monies due for architectural services. The action was filed by the plaintiff on October 3, 1996 (Appendix 10). On October 3, 1996 a process server attempted to serve the defendants, MICHAEL THOMAS and LOLA BOHN THOMAS, by serving a person named Gloria Miller, at defendants' residence (Appendix 8 and 9). The defendants, MICHAEL THOMAS and LOLA BOHN THOMAS, filed a motion to dismiss[1] based upon the fact that Gloria Miller did not reside at the defendants' residence (Appendix 6). The motion further points out that §48.031(1) Fla. Stat. authorizes service only upon the defendants or at their residence upon "any person residing therein who is fifteen years of age or older." e.s. (Appendix 6). This motion to dismiss was supported by an affidavit indicating that the defendants resided at 77 North Hibiscus Drive, Miami Beach, Florida and that no individuals other than the defendants resided at that address but Mr. and Mrs. Thomas' two minor children who were then ages six and ten (Appendix 7).

The plaintiff scheduled a hearing on defendants' motion for February 27, 1997 (some 147 days after filing suit) but the hearing did not take place (Appendix 5).

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[1]Defective service may be attacked by either a motion to quash or a motion to dismiss, see State ex rel.Gore vs. Chillingworth, 171 So. 649 (Fla. 1936).

The plaintiff took no further action with respect to attempting to serve the defendants until June 24, 1997, some 264 days after the case was filed when service was again attempted on the defendants (Appendix 4). This service was met by the defendants' motion to dismiss for failure to timely serve the defendants pursuant to Fla. R. Civ. P. 1.070(j) pointing out that the plaintiff had not shown good cause why service had not been made within the time prescribed by the rule (Appendix 2). Defendants further supported the motion with an affidavit affirmatively showing that the defendants had not been evading service and that the defendants were personally and socially known by the plaintiff for more than ten years (Appendix 3). Indeed, the plaintiff and the defendants were neighbors having lived across the street from one another for many years before January of 1993 and since January of 1993 living down the street from each other (Appendix 3). This affidavit demonstrates that the plaintiff was knowledgeable about who resided with the defendants and that the plaintiff knew on October 3, 1996 that service was defective. Plaintiff made no motion to extend the 120 day time period.

At a hearing upon the defendants' motion to dismiss for failure to serve timely the Court denied the defendants' motion to dismiss (Appendix 11). At the hearing good cause was not advanced by the plaintiff for failure to serve within the 120 day time period (Appendix 11, page 6) nor was any attempt made to show "excusable neglect." The Court accepted the proposition that any attempt

(even though known to be defective) to serve within the 120 day period was sufficient to avoid dismissal based upon Bankers Insurance vs. Thomas, 684 So. 2d 246 (Fla. 2d DCA 1996) (Appendix 11, page 5 and Appendix 1) despite the language of the rule requiring service to be "made" e.s. with 120 days, not just attempted. An appeal of the non-final order denying the defendants' motion to dismiss was made to the Third District Court of Appeal. That Court dismissed the appeal finding that the order was not an appealable order under Fla. R. App. P. 9.130 but certified conflict with Mid-Florida Associates, Ltd. vs. Taylor, 641 So. 2d 182 (Fla. 5th DCA 1994) and Comisky vs. Rosen Management Services, Inc., 630 So. 2d 628 (Fla. 4th DCA 1994) holding such an order appealable.

STATEMENT OF THE FACTS

The plaintiff is an architect claiming fees for architectural services concerning a proposed hotel and restaurant at 19100 N.E. West Country Club Drive, Aventura, Florida (Appendix 10). The plaintiff, JAMES F. SILVERS, and the defendants, MICHAEL THOMAS and LOLA BOHN THOMAS, have been neighbors for many years living across the street from one another since the 1980's, the plaintiff at 279 N. Hibiscus Drive and the defendants at 280 N. Hibiscus Drive (Appendix 3). In January of 1993 the defendants moved down the street to 77 N. Hibiscus Drive and have lived there ever since (Appendix 3). The plaintiff knows the defendants personally and socially and the plaintiff had been to the defendants' home on occasion, both the current home at 77 N. Hibiscus Drive and the prior home of 280 N. Hibiscus Drive (Appendix 3). The plaintiff has known for approximately ten years where the defendants live (Appendix 3). The defendants live together at their residence with their children now aged seven and eleven (Appendix 3). No one else resides at the defendants' residence other than the defendants and their two young children (Appendix 3 and 7), a fact well known to the plaintiff because the plaintiff and defendants socialized together over the last ten years.

The plaintiff commenced this action on October 3, 1996 and the plaintiff's process server claimed to have served one Gloria Miller at the defendants' residence at 77 N. Hibiscus Drive, Miami Beach, Florida (Appendix 8 and 9).

This claimed service was immediately met with a motion to dismiss (Appendix 6) and a supporting affidavit demonstrating conclusively that Gloria Miller did not "reside" at the defendants' residence (Appendix 7), a fact well known to the plaintiff because of his social acquaintance with the defendants for more than ten years. The plaintiff took NO further action with respect to attempting service of process on the defendants until June 24, 1997 (Appendix 4) some 264 days after this action was commenced, more than twice the time limit for service of process spelled out in Fla. R. Civ. P. 1.070(j).

SUMMARY OF ARGUMENT

The plaintiff attempted service on the defendants at their home by serving Gloria Miller, a person who did not reside at the defendants' residence. The plaintiff was fully aware of who resided at the defendants' residence as the plaintiff was a long term neighbor of the defendants and also socialized with the defendants over the past ten years. The plaintiff knew immediately that the first attempted service of process was invalid and defective yet the plaintiff made no further attempt to serve the defendants until 264 days after the case was filed.

Fla. R. Civ. P. 1.070(j) requires a service of process within 120 days of filing of the complaint. A motion to dismiss based upon Fla. R. Civ. P. 1.070(j) was denied as the trial court took the position that any service, even though known to be defective, would avoid dismissal under Fla. R. Civ. P. 1.070(j) despite the language of the rule requiring service to be made, not just attempted. In the present case plaintiff did not make a motion to enlarge the time for service, furthermore, there was no proffer or finding of "excusable neglect" or "good cause."

Federal cases are persuasive concerning the interpretation of Fla. R. Civ. P. 1.070(j)[2], and these cases uniformly hold that defective service of process does not toll the time periods required by the rule, see Systems Signs Supplies

[2]See Morales vs. Sperry Rand, 601 So. 2d 538, 539 (Fla 1992) "the Florida rule is patterned after Federal Rules of Civil Procedure 4(j). Therefore the federal decisions under that rule are pertinent."

vs. U.S. Department of Justice, 903 F.2d 1011 (5th Cir. 1990), Traina vs. United States, 911 F. 2d 1155 (5th Cir. 1990), Benjamin vs. Grosnick, 999 F. 2d 590 (1st Cir. 1993) and Adams vs. AlliedSignal General Aviation Avionics, 74 F. 3d 882 (8th Cir. 1996).

Cases such as Bice vs. Metz, 22 Fla. L. Weekly D1988 (Fla. 4th DCA August 10, 1997), Smith vs. Sanders, 653 So. 2d 1137 (Fla. 2d DCA 1995), Cabin vs. Skinner, 648 So. 2d 251(Fla. 3d DCA 1994), Stoeffler vs. Castagliola, 629 So. 2d 196 (Fla. 2d DCA 1993), Snead vs. H.B. Daniel, 674 So. 2d 158 (Fla. 5th DCA 1996) and Bankers Insurance vs. Thomas, 684 So. 2d 246 (Fla. 2d DCA 1996) all permitted the plaintiff to proceed despite not having perfected service within the 120 day period due to defective service, however, none of these cases stand for the proposition that a plaintiff may ignore defective service and still avoid dismissal under Fla. R. Civ. P. 1.070(j).

An order regarding compliance with Fla. R. Civ. P. 1.070 (j) is an appealable non-final order (see Fla. R. App. P. 9.130(a)(3)(C)(i) as an order determining jurisdiction over the defendants' person. The District Courts of Appeal have allowed appeals of orders granting dismissal for failure to comply with Fla. R. Civ. P. 1.070(j) but only the Fourth and Fifth Districts allow an appeal of an order denying Fla. R. Civ. P. 1.070(j) motions. This court in Morales vs. Sperry Rand Corp., 601 So. 2d 538 (Fla. 1992) reviewed an order under Fla. R. Civ. P. 1.070(j). Subsequent to Morales the Fourth District in Comisky vs. Rosen

Management Services, Inc., 630 So.2d 628 (Fla. 4th DCA 1994) held this "failure to serve process with the 120-day time limit goes to the sufficiency of the service of process, and thus the validity of the process to subject the defendant to the jurisdiction of the court" at 630, thus "an order denying a motion to dismiss on those grounds determines the jurisdiction of the person and is appealable," at 630. No fair reading of Fla. R. Civ. P. 1.070(j) supports the proposition that a dismissal under the rule is a final order as the rule specifically states that a dismissal is "without prejudice." The fact that a dismissal without prejudice may operate as a bar to the maintenance of a further lawsuit because of the statute of limitations is not a matter which makes the dismissal under Rule 1.070(j) a final order. If indeed a dismissal under 1.070(j) is such that the period of limitations expires the claimant may still commence their action and if the defendant raises the statute of limitations as an affirmative defense (see Fla. R. Civ. P. 1.110(d)) the plaintiff may then advance such avoidance as the plaintiff may have to the statute of limitations argument by a reply (Fla. R. Civ. P. 1.110(a)).

ARGUMENT

ISSUE I

THE DETERMINATION OF A CHALLENGE TO JURISDICTION OVER THE PERSON OF A DEFENDANT FOR FAILURE OF THE PLAINTIFF TO COMPLY WITH FLA. R. CIV. P. 1.070(j) IS AN APPEALABLE NON-FINAL ORDER PURSUANT TO FLA. R. APP. P. 9.130(a)(3)(C)(i)

This is an appeal of a non-final order made by the trial court denying the defendants' motion to dismiss for failure of the plaintiff to comply with Fla. R. Civ. P. 1.070(j). This court has discretionary jurisdiction to review the ruling of the Third District Court of Appeal[3] pursuant to Fla. R. App. P. 9.030(a)(2)(A)(vi).

This court should exercise jurisdiction over this case to resolve the conflict amongst the districts. The Fourth and Fifth districts rule[4] that the subject order is appealable and the First, Second and Third Districts rule[5] that the trial court order is not appealable.

The genesis of the controversy among the districts is this court's decision in Morales vs. Sperry Rand Corp., 601 So. 2d 538 (Fla. 1992)[6] Both Morales vs.

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[3]Thomas v. Silvers, _____ So. 2d _____ (Fla. 3d DCA 1997) (Case No. 97-2617, 22 Fla. L. Weekly D 2532, Nov. 5, 1997)

[4]Comisky vs. Rosen Management Services, Inc., 630 So.2d 628 (Fla. 4th DCA 1994) and Sheriff of Brevard County vs. Lampman-Prusky, 634 So.2d 660 (Fla. 5th DCA 1994)

[5]Nowry vs. Collyar, 666 So. 2d 555 (Fla. 2d DCA 1995), Khandjian vs. Compagnie Financiere Mediterranee Cofimed, S.A., 619 So. 2d 348 (Fla. 2d DCA 1983) and McMillian vs. Brown, 667 So. 2d 277 (Fla. 1st DCA 1995)

[6]Reviewing Morales vs. Sperry Rand Corp., 578 So. 2d 1143 (Fla. 4th DCA 1991) because of conflict with Berdeaux vs. Eagle-Picher Industries, Inc., 575 So. 2d 1295 (Fla. 3d DCA 1990).

Sperry Rand Corp., 578 So. 2d 1143 (Fla. 4th DCA 1991) and Berdeaux vs. Eagle-Picher Industries, Inc., 575 So. 2d 1295 (Fla. 3d DCA 1990) concern trial court orders granting motions to dismiss actions because of failure to comply with Fla. R. Civ. P. 1.070(j). Of course, the dismissals of the actions in the trial court in both Morales and Berdeaux were, pursuant to the express language of Rule 1.070(j) "without prejudice" thus the aggrieved parties were permitted to refile their action and timely serve the defendants[7]. In the event that they remain aggrieved when a final judgement is finally entered concerning their claims they would be entitled to a full review (Fla. R. App. P. 9.110). Although this court did not expressly hold the non-final orders under Fla. R. Civ. P. 1.070(j) appealable, such a determination must be implied in this courts' consideration of the issue in the first place.

Subsequent to this court's Morales decision all District Courts of Appeal have considered the appealability of an order rendered pursuant to Fla. R. Civ. P. 1.070(j). Your petitioners urge this court to adopt the well-reasoned en banc decision of the Fourth District Court of Appeal in Comisky vs. Rosen Management Services, Inc., 630 So.2d 628 (Fla. 4th DCA 1994) and Sheriff of Brevard County vs. Lampman-Prusky, 634 So.2d 660 (Fla. 5th DCA 1994)

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[7]The specific facts of Morales indicate that the dismissal of the plaintiff's claim for failure to timely serve was a significant detriment because it appears that the limitations may have run on Mr. Morales claim. This issue was never determined in the trial court nor did the parties have opportunities to argue the issue of statute of limitations, i.e., when does it commence? was it waived? was it properly raised as an affirmative defense?, etc.

holding a Fla. R. Civ. P. 1.070(j) order appealable and citing this court's decision in Morales. See also Mid-Florida Associates, Ltd. vs. Taylor, 641 So. 2d 182 (Fla. 5th DCA 1994) specifically holding an order denying a Fla. R. Civ. P. 1.070(i) appealable. The conclusions and analysis of Comisky will need not be repeated here but are incorporated by reference.

Contrary to the aforementioned decisions of the Fourth and Fifth Districts the Second District in Nowry vs. Collyar, 666 So. 2d 555 (Fla. 2d DCA 1995) held a rule Fla. R. Civ. P. 1.070(i) order non-appealable and certified the question to this court, following Khandjian vs. Compagnie Financiere Mediterranee Cofimed, S.A., 619 So. 2d 348 (Fla. 2d DCA 1983). The First District in McMillian vs. Brown, 667 So. 2d 277 (Fla. 1st DCA 1995)[8] held an order denying a Fla. R. Civ. P. 1.070(j) was not an appealable order. Similarly the Third District has generally held an order under Fla. R. Civ. P. 1.070(j) not appealable. See Rosenthal vs. Watkins, 623 So. 2d 855 (Fla. 3rd DCA 1993), and R.D.&.G. Leasing, Inc. vs. Stebnicki, 626 So. 2d 1002 (Fla. 3d DCA 1993), however, the Third District opinions appear to be in conflict with their own decision in Gondal vs. Martinez, 606 So. 2d 490 (Fla. 3d DCA 1992) wherein the Third District reversed the trial court order denying a motion to dismiss for failure to serve the defendant withing 120 days pursuant to Fla. R. Civ. P. 1.070(j).

[8]Receding from its prior holding to the contrary in Austin vs. Gaylord, 603 So. 2d 66 (Fla 1st DCA 1992)

Thus all the districts have reported on the issue, the Fourth and Fifth Districts holding that a Fla. R. Civ. P. 1.070(j) order is appealable and the First, Second and Third Districts (except Gondal vs. Martinez, 606 So. 2d 490 (Fla. 3d DCA 1992) that such an order is not.

The argument that only orders granting motions to dismiss made under Fla. R. Civ. P. 1.070(j) are appealable has no support in the language of the rule[9]. Either the appellate court has jurisdiction to consider the ruling or it does not. No matter which way the court rules on a 1.070(j) motion the result is still directed to the same question, that is, was service in compliance with Fla. R. Civ. P. 1.070(j)? Contrary to the position advanced by some courts[10] is clear that these orders granting motions to dismiss based on Fla. R. Civ. P. 1.070(j) were not final orders specifically because of the language of the rule holding that such orders are "without prejudice." It goes without saying that final order is exactly that, one

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[9]This is precisely the position that has been taken by the Third District, see Hernandez vs. Page 580 So. 2d. 793 (Fla. 3d DCA 1991) (decided before the Supreme Court's decision in Morales vs. Sperry Rand Corp., 578 So. 2d 1143 (Fla. 4th DCA 1991) and lest there be any mistake about the Third District's position today see Onett vs. Ahla, 683 So. 2d 593 (Fla. 3d DCA 1996) reversing an order granting a dismissal for failure to timely serve despite the Third District's litany of cases determining that there is no jurisdiction for such review. See also Crews vs. Shadburne, 637 So. 2d 979 (Fla. 1st DCA 1994) reversing a dismissal for failure to timely serve despite the First District's position that such orders are not reviewable.

[10]See Khandjian vs. Compagnie, Supra at 349, "In fact, the orders of the trial courts in the two district court cases reviewed in Morales were final orders of dismissal."

which completes the judicial labor with respect to an issue. If a matter can be refiled, there has been no final order[11].

[11]In Doe vs. Young, 656 So. 2d 569 (Fla. 5th DCA 1995), an order dismissing a case without prejudice for failure to comply with a medical malpractice pre-suit requirements was not reviewable despite the fact that the plaintiff maintained that they did not have a medical malpractice case in the first place. Also see EIR, Inc. v. Electronic Molding, 540 So. 2d 260 (Fla. 5th DCA 1989) holding that a dismissal without prejudice is not appealable.

ISSUE II

AN ATTEMPTED SERVICE OF PROCESS, KNOWN BY PLAINTIFF TO BE DEFECTIVE, DOES NOT TOLL THE TIME FOR SERVICE REQUIRED BY FLA. R. CIV. P. 1.070(j).

The Trial Court entered its order denying the defendant/appellant's motion to dismiss because defective service of process was accomplished within the 120 day time period, despite the fact that no "good cause" was shown by the plaintiff. In this determination the trial court erred. The court relied upon Bankers Insurance Company vs.. Thomas, 684 So. 2nd 246 (Fla. 2d DCA 1996) holding that improper service of process on a corporation (Bankers Insurance Company) was timely because process was served on the wrong person. The facts in Bankers are not clearly articulated however, it is likely that the "invalid service on the wrong person" refers to service of process on the wrong corporate representative. An unknown error such as that may be "good cause" authorizing the court to extend the time period. The opinion does not articulate the facts surrounding the "wrong person" issue but your writer doubts that the defective aspect of the service was clearly known to the plaintiffs at the time of service. In our case the plaintiff knew immediately that his attempted service of process was invalid as he personally knows the defendants and who resides at the defendants' home.[12] Accordingly, there has been no showing of "good cause"

[12]Nor can the plaintiff ever show that the defendants were evading service of process, indeed, the plaintiff has seen the defendant in the neighborhood since the commencement of this action (Appendix 3).

and indeed there can be none. Bankers is also factually distinguishable as it involved service on a corporation, not individual service as in our case.

This Court in Morales vs. Sperry Rand Corp, 601 So. 2nd 538, 539 (Fla. 1992) recognized "that Florida rules pattern after Fed. R. Civ. P. Therefore, the federal decisions under that rule are pertinent." The federal cases teach that defective process does not excuse a plaintiff from failure to serve his process within the time period required in the rule even when the defect is unknown to the plaintiff. In our case the defect in service was known immediately to the plaintiff.

In Systems Signs Supplies v. U.S. Department of Justice, 903 F.2d 1011 (5th Cir. 1990) the pro se litigant attempted to serve the United States either by mail or personal service. They served the DEA and the FBI personally rather by registered or certified mail as required by Fed. R. Civ. P. 4. The United States objected to the service and advised the plaintiff that service was defective. Pro se plaintiff did not attempt to cure his defective service and the action was dismissed for failure to comply with the 120 day time limitation in Fed. R. Civ. P.

In Traina vs. United States, 911 F.2d 1155 (5th Cir. 1990) the plaintiff was represented by counsel. The plaintiff went to the United States Marshall Service to have the complaint served on the Attorney General of the United States and the Marshall Service mailed the complaint by Certified Mail, however, due to some error apparently in the Marshall's Service the complaint was not delivered to the Attorney General but went to an address in New Orleans. The United

States in its answer asserted that process was insufficient approximately 90 days after the case was filed. The plaintiff did not attempt to cure any defects with the process and the case was dismissed for failure to comply with the 120 day rule. The Court pointed out at 1157:

> From the holding in Systems Signs Supplies, that it was not an abuse of discretion to dismiss the suit of a pro se plaintiff for erroneous reliance on invalid service after receiving notice of the defect, it necessarily follows that it is not an abuse of discretion to dismiss the suit of a represented party on the same grounds.

In Benjamin vs. Grosnick, 999 F. 2d 590 (1st Cir. 1993) the court discussed the interplay between a challenge to service of process by the defendant and the plaintiff's action thereafter. They stated at 592, "by implication, the District Court found that where defendant clearly alleges insufficient service within the 120 day limit, the plaintiff is on notice of some defect, and therefore must inquire into the nature of that defect." In our case the defect in the service of process was clear and the plaintiff was immediately placed on notice by the motion filed by defendants. The plaintiff was also armed with knowledge that he had as a social friend and long time neighbor of the defendants, and thus was placed on inquiry as to what action needed to be taken in order to comply within the 120 day rule after the defective service.

Finally, in Adams vs. AlliedSignal General Aviation Avionics, 74 F.3d 882 (8th Cir. 1996) plaintiffs attempted to serve a defendant by serving one Craig Christie on behalf of the defendant corporation. The defendant filed a motion to

dismiss supported by affidavits identifying Christie and spelling out the various corporate structures involved. This case was dismissed for failure to serve process within the 120 day time period. The Court pointed out, "the Christie affidavits identified King Radio and AlliedSignal, Inc. and told plaintiffs where to serve them," at 886. These facts are on all fours with this case. The defendants pointed out the defect in the service to the plaintiff promptly. The plaintiff knew from other sources (as a neighbor and a social friend of the defendants) that the service was defective yet the plaintiff took no further action until 264 days after this lawsuit was filed, more than two times the time limit provided in Rule 1.070(j).

Rule 1.070(j) authorizes service after the 120 day rule provided "good cause" is shown. A number of Florida cases have permitted the plaintiff to proceed despite the 120 day rule in Fla. R. Civ. P. 1.070(j).[13] However, in none of the decided cases is there any indication that the plaintiff was aware that service was defective when it was made. Surely, the non-action by the plaintiff under the circumstances of this case (where plaintiff knew that initial service was defective) cannot meet the requirement that the plaintiff be "diligent in attempting service," Morales at 539 nor did plaintiff "meet the burden of demonstrating diligence and good cause," Morales at 539.

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[13] Bice vs. Metz, 22 Fla. L. Weekly D1988 (4th DCA August 20, 1997), Smith vs. Sanders, 653 So. 2d 1137 (Fla. 2d DCA 1995), Caban vs. Skinner, 648 So. 2d 251 (Fla. 3d DCA 1994), Stoeffler vs. Castagliola, 629 So. 2d 196 (Fla. 2d DCA 1993), Snead vs. H.B. Daniel, 674 So. 2d 158 (Fla. 5th DCA 1996) and Bankers Insurance vs. Thomas, 684 So. 2d 246 (Fla. 2d DCA 1996).

CONCLUSION

This court should accept jurisdiction of this matter to resolve the conflict among the District Courts of Appeal and determine that an order deciding a Fla. R. Civ. P. 1.070(j) matter is an order determining jurisdiction of the person.

The order denying the defendants' motion to dismiss for failure to comply with Fla. R. Civ. P. 1.070(j) should be reversed with instructions to the trial court to enter an order dismissing this action against the defendants/appellants, without prejudice as the plaintiff failed to secure jurisdiction over the defendants within the time permitted by Fla. R. Civ. P. 1.070(j).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and the attached Appendix were furnished by U.S. Mail to John Arrastia, Esquire at Zack, Sparber, Kosnitzky, Spratt & Brooks, P.A. at One International Place, Suite 2800, Miami, FL 33131-2144 this 19th day of December, 1997.

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