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

REPLY BRIEF OF PETITIONERS

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REPLY 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)

Respondent argues that this Court's decision in Morales vs. Sperry Rand Corp., 601 So. 2d 538 (Fla. 1992) was a review of a "final" order of dismissal (see Respondent's Corrected Answer Brief page 10). This is not the case as a dismissal under Fla. R. Civ. P. 1.070(j) is, pursuant to the terms of the rule, "without prejudice" and therefore not "final." (See Petitioner's Initial Brief pages 18-19, footnote 11). Implied in Respondent's argument is the inescapable conclusion that if an order granting a Fla. R. Civ. P. 1.070(j) motion is a "non-final" order then Morales authorized a "non-final" appeal. Respondent must establish that the appeal in Morales was a final order in order to prevail here. This he can not do.

Respondent's Corrected Answer Brief at page 7 argues that the order under review should not be appealable "because of the burden it would impose on both the litigants and the judiciary." This argument fails as a prompt and final determination of the validity of the service of process eases the burden on both the litigants and the judiciary by avoiding unnecessary discovery and trial.

Respondent argues that non-compliance with Fla. R. Civ. P. 1.070(j) is a "penalty" to be imposed for failure to prosecute (see Respondent's Corrected Answer Brief page 11). The Respondents then bootstraps this claim of "penalty" into a conclusion that the exercise of the claimed "penalty" accomplishes a withholding of the Court's "exercise of jurisdiction due to a violation of law." The Respondent then leaps to the conclusion that the Court had jurisdiction because it will be able to exercise jurisdiction over the defendant (Corrected Answer Brief page 12). All of the foregoing analysis was advanced without any citations of authority. Respondent also contends (without authority) that allowing the Court to extend the 120 day time period for good cause shows that the Rule does not effect jurisdiction and if it did it would be a "legal absurdity" (Corrected Answer Brief page 12). This entire convoluted analysis by the Respondent must be rejected as it ignores the fact that this Court has considered, on non-final appeal, the very question in Morales.

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)

Respondent concedes that the initial claimed service of process on October 3, 1996 was invalid.[1] The Respondent then argues vigorously that the

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[1]See Respondent's Corrected Answer Brief page 16. "The trial court did not abuse its discretion denying the motion to dismiss Respondent's complaint

issue is one of an abuse of discretion. The abuse of discretion standard goes to a determination of "good cause" such as to avoid the 120 day rule or extend the time. This Court in Morales stated that the trial court has discretion to determine whether or not "good cause" is shown, however, in this case the Trial Court did not reach the issue of good cause as none was proffered by the Respondent. The Trial Court erroneously held that any attempt at service of process (even though invalid) and known to be so was sufficient to avoid the 120 day rule.

The Respondent claims that he was not given "reasonable" notice that the October 3, 1996 service was defective (See Respondent's Corrected Answer Brief page 18). This argument is contrary to the Motion to Dismiss[2] pointing out the defective service. Respondent now concedes the service was defective (see footnote 1 above) and the Trial Court so found in its order of August 5, 1997 (Petition Appendix Exhibit 1). Respondent reserved Petitioner because he knew service was defective.

Respondents completely and utterly failed to offer any "good cause" to extend the 120 day time period. Nevertheless the Respondent in the Corrected Answer Brief (see pages 19-20) attempts to shift the burden of demonstrating

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because, as stated in the court's order, service, albeit invalid, was effected within the 120 day period described by Rule 1.070(j)" e.s.

[2]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).

what the Respondent knew or did not know about the occupants of the residence of the Petitioner's home. The Petitioner has demonstrated that the Petitioner and Respondent were social friends and close neighbors. The Respondent has never advanced the proposition that he was unaware of who resided at the Petitioner's home or that he believed the initial service to be valid. In fact, all the facts point to the contrary; that is, Respondent knew immediately service was bad. Under these circumstances it is no wonder that Respondent failed and (to this day) fails to offer any "good cause" for failure to comply with Fla. R. Civ. P. 1.070(j). There is none.

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 12 day of February 1998.

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