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SUPREME COURT OF FLORIDA
CASE NO. 94,229
District Court of Appeal
Third District No. 98-1470

TOTURA & COMPANY, INC.,

Petitioner,

vs.

JIMMIE E. WILLIAMS,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND TYPE

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STATEMENT OF THE CASE AND FACTS[1]

The Third District has certified that the instant case is in conflict with the Fourth District's decision in the case of *Frew v. Poole and Kent Co.*, 654 So.2d 272 (Fla. 4th DCA 1995) regarding the necessity for effecting service of process within 120 days following the filing of a motion to amend a complaint to add a new party. (A 233-235, 236) The instant case also involves the precise issue addressed by the Second District in the case of *Permenter v. Geico General Ins. Co.*, 712 So.2d 1178 (Fla. 2d DCA 1998) on the separate issue of whether the statute of limitations is tolled by the filing of a motion to amend a complaint to add a new party. (A 237-239) The Second District certified that its decision is also in conflict with the *Frew* case.

The instant case presents simple and straightforward facts. Williams was sued in 1994 by Midfirst Bank in a foreclosure suit for nonpayment of a mortgage. (PA 1-28) Williams responded with a counterclaim against

[1]The symbol "PA" refers to the appendix attached to Petitioner Totura's brief. (This appendix includes, *inter alia*, a compilation of the documents which accompanied the petition and response briefs filed in the district court.)

All emphasis is added unless noted to be in the original.

Midfirst and a third-party action against Garden City Claims, Inc. of New York which alleged discrimination in August, 1992, in the resolution of his post-Hurricane Andrew property damage claim. An amended counterclaim was served May 24, 1994. (PA 29-43) A second amended counterclaim and a third-party action adding "Casualty Insurance Co." (Balboa Life & Casualty Company) was served by Williams in December, 1994. (PA 44-107)

Approximately four years later, on August 14, 1996, Williams served a motion to amend his pleadings to add a claim against Totura. (PA 116-118) Williams made no effort to set this motion for hearing in a timely manner. Indeed, Williams did not want the matter considered by the trial court on its routine, easily accessible motion calendar and waited approximately six months (until February 19, 1997) to ask the trial court to consider the matter during a specially set status conference. (PA 169-170)[2]

[2]Williams' delay in pursuing his alleged claim against Totura was not unique. Williams was dilatory in responding to both court orders and to discovery. Two brief examples are demonstrative: (i) on September 28, 1995, the trial court ordered both Williams and Garden City to file supplementary memoranda regarding their pending motions for summary final judgment. Garden City properly complied (PA 108-112); Williams did not; and (ii) Williams' failure to respond to discovery led to a motion for sanctions and an order granting such motion. (PA 113-114, 115)

By order dated September 15, 1997, (more than five years after the alleged incident giving rise to the claims) the trial court permitted Williams to add Totura as an additional defendant. (PA 197-198) Thus, more than a year elapsed with no substantive effort by Williams to obtain a ruling by the trial court on his motion to add Totura as a party to the lawsuit, and without any attempt to effect service of process on Totura.

After service of process was finally accomplished, Totura served its motion to dismiss the third amended complaint and the third party claim. (PA 204-205) This motion asserted, *inter alia*, (a) no cause of action existed for count II (breach of contract), (b) the statute of limitations expired before Williams claim against Totura was either filed or served, and (c) service of process was untimely. This motion was set for hearing in a timely fashion, and the trial court entered an order granting Totura's motion to dismiss count II of Williams' third party complaint (the breach of contract claim). This same order reserved ruling on Totura's motion to dismiss counts III and IV of William's third party complaint. (PA 220)[3] Thereafter, the parties submitted

[3]During the time Totura's motion to dismiss was pending, the trial court granted co-third party defendant Balboa Life & Casualty Company's motion to dismiss with prejudice based upon the expiration of the statute of limitations. (PA 206) Balboa Life & Casualty Company had been joined

letters to the trial court regarding the chronology of events and providing further argument regarding Totura's motion to dismiss counts III and IV. (PA 221-225, 226-227, 228-229) Thereafter, the trial court granted Totura's motion to dismiss counts III and IV of the third amended counterclaim and the third party complaint with prejudice. (PA 231-232)

Williams filed a petition for certiorari to the Third District to review the dismissal of his action against Totura. The Third District accepted certiorari (and considered the petition as a notice of appeal) and issued a decision which reversed the trial court's order and remanded the case for further proceedings. (PA 233-235) The court's opinion stated that (i) the statute of limitations did not bar the claim against Totura because an amended complaint relates back to the date the motion to amend is filed, and the timely filing of such motion will defeat a statute of limitations defense, and (ii) the 120 day period for service of process commences when the trial court grants the motion to amend rather than at the time the motion is filed. The Third District also certified a conflict between its decision on point (ii) and the

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as a party to this lawsuit long before Totura. (PA 44-107, 116-118, 197-198) This order was never challenged by Williams, and Williams specifically asked the District Court to disregard this fact when considering his petition for certiorari/appeal.

contrary decision reached by the Fourth District in the *Frew, supra,* case. This appeal follows.

ISSUES ON APPEAL

I. WHETHER THIS HONORABLE COURT SHOULD RESOLVE THE CERTIFIED CONFLICT BETWEEN THE INSTANT CASE AND THE CASE OF *FREW v. POOLE AND KENT CO.*, 654 SO.2D 272 (FLA. 4TH DCA 1995) BY ADOPTING THE DECISION OF THE FOURTH DISTRICT.

II. WHETHER THIS HONORABLE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE INSTANT CASE AND THE CASE OF *PERMENTER V. GEICO GENERAL INS. CO.*, 712 SO.2D 1178 (FLA. 2D DCA 1998) BY ADOPTING THE DECISION OF THE SECOND DISTRICT.

ARGUMENT SUMMARY

The decision of the Fourth District in the case of *Frew v. Poole and Kent Co.* properly interprets and follows the provisions of Florida Rule of Civil Procedure 1.070(j), which requires service of process within 120 days of the filing of the initial pleading. If, indeed, Williams complaint is properly deemed filed (i.e. for purposes of meeting statute of limitations deadlines) when the motion for leave to amend is filed, "it necessarily follows that [he] has to comply with rule 1.070(j), the purpose of which is to assure the `diligent prosecution of law suits once a complaint is filed.'" *Frew,* 654 So.2d at 275. Any other interpretation is patently unfair and allows a plaintiff to sit on his legal rights until a claim is stale and the defense is prejudiced by lost evidence and faded memories. The Fourth District's interpretation provides ample time for the plaintiff to serve the defendants with notice of the claim (the original four years allowed under the statute of limitations, plus an additional 120 days), and there is no legally supportable reason for any further extension of this time. The certified conflict between the instant case and the *Frew* decision should be resolved in favor of the Fourth District's decision.

This case is also factually identical to the *Permenter v. Geico General Ins. Co.* case (in which conflict was also cited with the *Frew* decision),

because the trial court entered its order permitting Williams to amend his complaint to add Totura after the expiration of the statute of limitations. The *Permenter* court ruled that "there is no statutory basis to support a tolling of the statute of limitations by the filing of a motion to amend," especially where the amendment adds an entirely new party. *Permenter,* 712 So.2d at 1179. The conflict between the instant case and the *Permenter* case should be resolved in favor of the decision of the Second District.

ARGUMENT

I. THIS HONORABLE COURT SHOULD RESOLVE THE CERTIFIED CONFLICT BETWEEN THE INSTANT CASE AND THE CASE OF *FREW v. POOLE AND KENT CO.*, 654 SO.2D 272 (FLA. 4TH DCA 1995) BY ADOPTING THE DECISION OF THE FOURTH DISTRICT.

Florida Rule Civil Procedure 1.070(j) (formerly 1.070(i)) requires a plaintiff to obtain service of process within 120 days of the filing of the complaint:

> Summons: Time Limit: If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading and the party on whose behalf service is required does not show good cause why service was not made within that time, the action shall be dismissed without prejudice or that defendant dropped as a party on the court's own initiative after notice or on motion. A dismissal under this subdivision shall not be considered a voluntary dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).

The Third and Fourth Districts' decisions have determined that the "better rule" allows a motion for leave to amend "with the amended complaint attached joining additional defendants filed within the statutory period [to stand] in the place of the actual amendment which is filed with leave of court subsequent to the running of the statute of limitations." *Frew v. Poole and*

Kent Co., 654 So.2d 272, 274 (Fla. 4th DCA 1995). The cases cited by these courts have reasoned that where the motion for leave to join additional defendants is filed prior to the expiration of the statute of limitations, the ultimate amendment of the complaint must necessarily relate back to that earlier date so as to defeat a defense based on the statute of limitations.

With a "sauce for the goose is sauce for the gander" analysis, the Fourth District then explained in the *Frew* case that if a plaintiff is permitted to treat the proposed amended complaint as a shield or *fait accompli* to avoid a statute of limitations defense, the plaintiff must necessarily be subject to the service of process requirements of Rule 1.070(j) which are triggered by the filing of the initial pleading. As the Fourth District explains, the plaintiff "cannot have it both ways." *Frew*, 654 So.2d at 275. Any other interpretation would permit a plaintiff to avoid the "diligent prosecution of law suits once a complaint is filed" which is mandated by this Court's decision in the case of *Morales v. Sperry Rand Corp.,* 601 So.2d 538, 540 (Fla. 1992).

Williams has never proffered any explanation or claim of good cause for allowing a delay of over one year between the time he sought leave to amend his complaint and the time he asked the court to rule on his motion. Indeed, the record shows that his dilatory efforts in this matter are repeated in

his actions during the rest of this lawsuit. The instant trial court correctly recognized that Totura should not be prejudiced in its ability to defend itself in this case by Williams' apparent lack of interest in his own case. As this Court has long held, public policy requires limitations on a plaintiff's right to pursue a claim:

> Parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are not usually left to gather dust or remain dormant for long periods of time.

Frew, 654 So.2d at 276, *citing Nardone v. Reynolds*, 333 So.2d 25, 36 (Fla. 1976); *quoting from Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 19 L.Ed. 257 (1868).

If one adopts the rationale that the plaintiff's claim relates back to the filing of the motion to amend and is therefore timely, it must be noted that the plaintiff has already had far more than four years (because of the additional 120 days permitted by the Rule) in which to serve Totura and notify it of the

claims. To extend this time even further simply adds to the prejudice to Totura and increases the difficulty in marshalling the witnesses and documents that are necessary for its defense. Indeed, the decision of the Third District has permitted Williams to effectively circumvent both the statute of limitations as well as Rule 1.070(j) by allowing him to wait months -- in fact more than a year -- to seek a ruling on his motion to amend, then allowing an additional four months (120 days) once the trial court ruled on the motion. Williams has never filed any pleading explaining his lengthy delays in this case. It was a simple matter to notice a hearing on the motion to amend for a routine motion calendar and obtaining a ruling by the trial court. It is also highly unlikely that any trial judge would have denied Williams' motion, thus obviating any possible reason for the delay.

The instant decision of the Third District allows Williams to have his cake and eat it too. Williams has been able to successfully avoid the time-bar of the statute of limitations because the opinion holds that Williams' complaint is deemed filed under a "relation back" doctrine as of the time he filed his motion for leave to amend to add Totura as an additional party. However, the Third District has also given Williams a no-strings-attached, free ride to delay asking the trial court to rule on the motion to amend or for perfecting service

of process by its additional decision that Williams' 120 day service obligation is not triggered until such time as he ultimately seeks and obtains a ruling from the trial court on his motion to amend. This opinion does not harmonize with either the plain wording of Rule 1.070(j), other appellate decisions, public policy, or the interests of fair play. *See, for example: Frew, supra*, *Hodges v. Noel*, 675 So.2d 248 (Fla. 4th DCA 1996); *Sirianni v. Kiehne*, 608 So.2d 936 (Fla. 4th DCA 1992); *Austin v. Gaylord*, 603 So.2d 66 (Fla. 1st DCA 1992); *Partin v. Flagler Hosp. Inc.*, 581 So.2d 240 (Fla. 5th DCA 1991).

II. THIS HONORABLE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE INSTANT CASE AND THE CASE OF *PERMENTER v. GEICO GENERAL INS. CO.*, 712 SO.2D 1178 (FLA. 2D DCA 1998) BY ADOPTING THE DECISION OF THE SECOND DISTRICT.

The trial court's decision to dismiss Williams' complaint against Totura is supported, in the alternative, by the ruling of the Second District in the case of *Permenter v. Geico General Ins. Co.*, 712 So.2d 1178 (Fla. 2d DCA 1998). In *Permenter,* as in the instant case, the plaintiff filed a motion to amend to add an additional party prior to the running of the statute of limitations, but did not secure a ruling on the motion until after the statute had expired. The *Permenter* court held that "there is no statutory basis to support a tolling of the statute of limitations by the filing of a motion to amend. *Permenter,* 712 So.2d at 1179. The Second District explained its ruling as follows:

> Because the legislature has expressly provided for the instances that shall toll the running of any statute of limitations and has excluded any "other reason," we are not free to create an exception to that determination. [citations omitted] Accordingly, we decline to create a tolling period for a statute of limitations as is propounded in this case.
>
> Furthermore, the rules of civil procedure to not authorize the relation back of the amended complaint in this case to the

> date the original complaint was fined. Florida Rule of Civil Procedure 1.190(c) provides that an amended complaint relates back to the date of the original complaint (*not the date of the motion to amend*) when the claim in the amended complaint arose out of the same conduct, transaction or occurrence set forth in the original pleading. This court has held that "the rule which permits the relation back of amended pleadings does not apply where an entirely new party is added." [citation omitted] Because Permenter is attempting to add Geico as an entirely new party to his pending action against the other driver, the amended complaint does not relate back to the date of the original complaint.

Permenter, 712 So.2d at 1179.

The instant case presents precisely the same facts and should be subject to the same reasoning. The addition of Totura to the pending action adds an entirely new party and claim, and therefore cannot relate back to the original complaint. Because there is no statutory basis to support a tolling of the statute of limitations by the mere filing of a motion to amend the pleadings, it necessarily follows that the complaint against Totura was not filed until after the statute of limitations expired, and the dismissal should be affirmed.

CONCLUSION

For the reasons set forth herein, it is respectfully suggested that this Honorable Court resolve the conflict in the decisional law by adopting the reasoning of the Fourth and Second Districts in the cases of *Frew v. Poole and Kent Co.*, 654 So.2d 272 (Fla. 4th DCA 1995) and *Permenter v. Geico General Ins. Co.*, 712 So.2d 1178 (Fla. 2d DCA 1998) and disapproving the decision of the Third District in the instant case.

It is respectfully suggested that either Williams failed to effect service of process within 120 days of the timely filing of his third party complaint against Totura, or the statute of limitations expired prior to the time that Totura was joined as a party to this lawsuit. Williams should not be allowed to "have it both ways." Either Williams' third party complaint was deemed filed at the time the motion for leave to amend was filed (in which case service of process was woefully untimely), or alternatively, the complaint was not deemed filed until the entry of the 1997 order granting the motion for leave to join Totura (in which case the statute of limitations had long expired).

It is respectfully requested that this Honorable Court disapprove of the decision by the Third District in this cause, approve the cited opinions as

announced by the Fourth and Second Districts and remand this cause for further proceedings consistent with such ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed February 18, 2000, to: G. Everett Burghardt Williams, I., G. E. B. Williams, I., P.A., P.O. Box 10293, Jacksonville, Florida 32247-0293, Attorney for Jimmie E. Williams; Glen Z. Goldberg, Esq., Goldberg and Vova, P.A., 1101 Brickell Avenue, Suite 900, Miami, Florida 33131, Attorney for Midfirst Bank; William G. Edwards, Esq., Marlow Connell Valerius Abrams Adler & Newman, 2950 Southwest 27th Avenue, 200 Grove Professional Building, Miami, Florida 33133, Attorneys for Garden City & Balboa.

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