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.

RESPONDENT'S BRIEF ON THE MERITS

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The symbol "PA" refers to the appendix attached to Petitioner Totura's brief. (That appendix included a compilation of the documents which accompanied the petition and response briefs filed in the district court. It does not, however, include the three (3) exhibits filed in the district court which accompanied the Willillams' Reply Brief. Where necessary, those exhibits will be referenced and attached to this response brief).

CERTIFICATE OF TYPE SIZE AND TYPE

The Respondent certifies that the font size and style of type used in this brief is 14 point proportionately spaced Times New Roman.

STATEMENT OF THE CASE

This case arose as a result of Williams, the Defendant and Third Party Plaintiff, below, being sued in March, 1994, in a foreclosure action by Midfirst Bank, the original Plaintiff, as a result of an alleged non-payment of his mortgage. (PA 1-28) Williams home had been destroyed by Hurricane Andrew on August 24, 1992. Williams' casualty insurance policy with the Prudential Insurance Company had been canceled as a result of non-payment of premium from his escrow account held by Midfirst Bank. (PA 29-43)

After the storm, Midfirst Bank obtained a replacement policy of insurance with The Balboa Life and Casualty Company, "Balboa," a California corporation, who then contracted with Garden City Claims of New York, "Garden City," a New York corporation. Garden City then contracted with Totura & Company, "Totura," a Florida corporation, to adjust Williams damages. (PA 29-43)

Upon arrival at Williams' house for the adjustment, Totura's agent, Mike Lucas, met Williams live in girlfriend, who is a white female, and advised her that the house was a total loss and that he would be returning to deliver her a check. Upon Lucas return to Williams' house, he met Williams for the first time, but advised Williams that he could not make a profit from the damages to your house and that Williams would have to repair his house. Williams is a black male. (PA 44-107)

Williams then contacted Midfirst Bank and informed its representative that he wished to pay off his mortgage balance with his insurance proceeds and obtain his deed. Midfirst Bank's agent then informed Williams that he could not make a profit from the damages to his house and that he could not pay off his house. Williams contends that Lucas never adjusted his house, but used the Prudential report to arrive at his adjustment. Whereupon, Lucas depreciated the value of the replacement cost of the house from $86,000 to $67,010.18. (PA 119-142) The balance on Williams mortgage to Midfirst Bank was $66,097.90.

Balboa then tendered the checks in three (3) installment payments to Williams and Midfirst Bank. The first check on October 2, 1992, and two (2) other checks of $11,484.92, each. The last check being delivered directly to Midfirst Bank on or about February 3, 1993. Then in June, 1993, Midfirst Bank assessed Williams $8,501.44 for 17 missed payments, from February 1, 1992, through June 1, 1993.

Midfirst Bank later sued Williams to foreclose upon his mortgage. Williams filed a counterclaim against Midfirst Bank and a Third Party Claim against Garden City. Williams later filed a motion to add necessary and indispensable parties to the litigation on August 14, 1996, and attached a copy of his proposed pleadings entitled, "Third Amended Counterclaim and Third Party Claim for Damages for Breach of Contract, Conspiracy and Discrimination," pursuant to Federal Statutes, 42 U.S.C. §§ 1981 and 1985 (3). (PA 119-142) That motion purported to add Balboa and Totura to the action. (PA 116-118)

The motion was heard and granted on October 17, 1996, but was not actually executed, adding the parties, until September 15, 1997, at a status conference. (PA 197-198) Totura was then served with process of September 18, 1997, and moved for dismissal of the action based upon the expiration of the statute of limitations and

Williams failure to serve it with the pleadings within 120 days of filing the complaint, i. e., August 14 1996, the filing date. (PA 200, 204-205)

The Court granted Totura's motion to dismiss with prejudice on May 8, 1998. (PA 230-232) Williams moved for rehearing, which was denied. Williams then filed an appeal with the Third District Court of Appeal, which reversed the decision and certified conflict with Frew v. Poole and Kent Co., 654 So. 2d 272 (Fla. 4th DCA, 1995), regarding Rule 1.070 (j), Fla. R. Civ. P., with respect to the service of and amended complaint within 120 days of filing. (PA 233-235)

This court is called upon to resolve the conflict regarding when the time begins to run after the filing of an amended complaint for purposes of Rule 1.070 (j), Fla. R. Civ. P.

STATEMENT OF THE FACTS

The litigation of this matter began when Midfirst Bank, State Savings Bank, "Midfirst Bank," an Oklahoma corporation, the original plaintiff, filed an action to foreclose upon Williams home as a result of an alleged default.{1}

The dispute began when Midfirst Bank permitted Williams' homeowners insurance policy to lapse and after Hurricane Andrew struck the South Florida, area on August 24, 1992. Midfirst Bank acquired a subsequent liability insurance policy (for $85,000) through Balboa Insurance Company, "Balboa," a California corporation,for approximately the same liability coverage that Williams had with the Prudential Insurance Company, "Prudential," ($86,000) which had lapsed.

Balboa then contracted with Garden City Claims of New York, "Garden City," a New York corporation, an apparent subsidiary of Balboa, since Jack Howlett was the president of both companies. Garden City then contracted with Totura & Company, "Totura," a local adjusting firm, located in South Florida, i. e., Ft. Lauderdale, Florida, to adjust Williams' damage claims.

Totura's representative, Mike Lucas, visited Williams' home in order to make an inspection of the damages to the property. Upon arriving at Williams' home, Lucas met Williams girlfriend, who is a white female, and advised her that the house was a total lost and that he (Lucas) would be paying the claim shortly. (PA 119-142) On Lucas' second trip to Williams' home, apparently to deliver the check representing the damage claims, Lucas met Williams for the first time.

Williams is a black male and, in his presence, without solicitation, Lucas uttered to Williams that, "you (Williams) can not make a profit from the damages to your house, and you'll have to repair the house." (PA 119-142)

Williams then contacted Midfirst Bank, in Oklahoma City, Oklahoma, by telephone, and advised Midfirst Bank's representative that he wished to use his insurance proceeds to pay off the balance of his mortgage and obtain the deed to his home. Midfirst Bank's representative then stated to Williams, without solicitation, that, "you can not make a profit from the damages to your house and you can not pay off your house." (PA 119-142)

Williams contends that Totura never adjusted Williams' home, but used an "adjustment report" prepared by an agent from Prudential.{2} (PA 119-142) Williams further alleged that Totura then modified the Prudential report downward from $86,000 (the estimated loss) to $67,010.18. (PA 119-142)

Balboa, and its agents, Totura and Garden City, refused to tender the entire amount of the damage loss claim, as adjusted by Totura, in one lump sum payment, but instead, paid the claim in three (3) installments totalling $67,010.18. The terms of the Balboa insurance policy did not call for an installment payment to Williams and Midfirst Bank collectively, but a lump sum payment. (PA 119-142)

Williams repaired his house out of his own personal finances and without any assistance from Midfirst Bank, or the insurance companies. After Williams completed a certain estimated percentage of the house, Lucas would inspect and recommend that a percentage of the damage claim payments be paid to Williams by Garden City and Balboa. (PA 119-142)

Balboa paid the first installment check to Williams on or about October 9,

1992, in the joint names of Williams and Midfirst Bank in the amount of $42,627.84. (PA 119-142) Williams endorsed the check and forwarded it to Midfirst Bank with instructions to apply the check towards the reduction of his mortgage principal balance. However, Midfirst Bank did not apply the funds to Williams' account as instructed, but placed the funds into a non-interest bearing account which it had already created for Williams' funds. (PA 119-142)

Balboa later forwarded two (2) identical checks in the amount of $11,484.92 to Midfirst Bank, which Midfirst Bank also placed into the non-interest bearing account. Williams completed renovations and never received any insurance proceeds from Midfirst Bank.

Midfirst Bank held the funds in a non-interest bearing account from about October 9, 1992, until June, 1993, then applied Williams' funds retroactively to February 1, 1992, thereby assessing Williams some $8,501.44 in alleged missed installment interest payments. (PA 119-142)

After protest by Williams regarding the handling of his mortgage payments and the refusal by Midfirst Bank to grant him a deed, Midfirst Bank then brought the instant suit to foreclose upon Williams' mortgage seeking to collect $16,661.17, as the principal balance, and other costs of $2,974.61, totaling $19,635.78, or Williams would lose his property which now had considerable equity therein. (PA 119-142)

The foreclosure action was filed on March 15, 1994. (PA 1-28) Williams filed an answer, an affirmative defense of payment, and a counterclaim against Midfirst Bank. After amending the counterclaim and third party complaint, Williams then filed a motion entitled, "Jimmie Williams' Motion To Add Necessary And Indispensable Parties," on or about August 14, 1996. (PA 116-118; 119-142)

Williams attached a copy of his proposed third amended pleadings to his motion to add necessary and indispensable parties and had previously provided counsel for Midfirst Bank and Garden City with same, seeking their objections, if any, prior to submitting the motion to the clerk's office. (PA 151-152) Williams also forwarded a courtesy copy of the proposed Motion to the trial judge. (PA 153)

The "Motion To Add Necessary And Indispensable Parties was heard on October 17, 1996, along with Midfirst Bank's "Plaintiff's Motion for Judgment on the Pleadings" and "Motion for Summary Judgment." the Court granted only Midfirst Bank's Motion for Summary Judgment as to Williams' Contract Claims and Williams' "Motion to Add Necessary and Indispensable Parties." (PA 160-162; 163-164, 175-196)

Counsel for Garden City made an ore tenus motion at the October 17, 1996, hearing, objecting to Williams' motion, but the court granted the motion over Garden City's objections. The trial court then instructed counsel for Midfirst Bank to prepare the order and submit same to opposing counsels for approval prior to submitting same to the court for execution.{3} (PA 175-196)

There was a great dispute as to whether the court also granted Garden City's Motion for Summary Judgment upon the issue of Williams' contract claims. On October 30, 1996, by facsimile, counsel for Midfirst Bank submitted a proposed order to Williams' counsel for approval. (PA 160-162) Upon review of the proposed Order, Williams' counsel wrote to counsel for Midfirst Bank, on

November 19, 1996, that the proposed Order did not comply with the Court's October 17, 1996, ruling in two (2) respects: (1) that the court did not grant Garden City's Motion on the contract claim because of the potential agency between Garden City and Balboa Insurance; and (2) the proposed Order was silent as to the court granting Williams' motion to add the third party defendants, i. e., Balboa and Totura. (PA 163-164)

December 10, 1996, Counsel for Midfirst Bank filed, a "Motion For Clarification And Obtain Order On Plaintiff's Motion For Summary Judgment," indicating that Williams' counsel, ". . . Appears to be objecting to the proposed order which was filed with the court." (PA 165-166) The motion was heard February 6, 1997. The court entered the proposed order prepared by counsel for Midfirst Bank, without any amendments thereto, which excluded its previous ruling permitting Williams to add Balboa and Totura as party defendants. (PA 171-174)

Williams then moved the court for relief from judgment to set aside the Order of February 10, 1997, pursuant to Rule 1.540 (b), Fla. R. Civ. P., alleging that counsels for Midfirst Bank and Garden City had misrepresented the court's ruling of October 17, 1996. The matter for hearing on May 14, 1997. (PA 175-196) There still remained a great dispute regarding the court's October 17, 1996, ruling, the court permitted same to stand over Williams' objections, but again clarified that it had granted Williams' motion. It was also acknowledged at that hearing that the court had not enter an order permitting Williams to serve the defendants, Balboa and Totura.{4}

On September 15, 1997, the set a status conference on and Williams' counsel personally appeared and informed the court that it had never entered an order permitting the new parties, Balboa and Totura, to be added to the lawsuit. In open court, the trial judge, for the first time, entered its order permitting Williams to add Balboa and Totura to the lawsuit. (PA 197-198) On that same day, Williams had Summons issued for Balboa and Totura at the clerk's office. (PA 199-200)

Totura was served with process on or about September 18, 1997.{5} Totura moved the court to dismiss the action against it alleging that the applicable statute of limitations had run and that Williams had failed to serve the summons and complaint upon it within 120 days after the filing of the complaint. (PA 204-205)

On December 15, 1997, the court granted Totura's motion as to Williams' contract claims (Count II), but reserved ruling upon the remaining claims of Totura's motion. (PA 200) Finally, after a status conference on May 7, 1998, the court issued its "Order Granting, With Prejudice, Third Party Defendant, Totura and Company's Motion To Dismiss Count III and IV of The Third Amended Counterclaim and Third Party Complaint."{6} (PA 230-232)

The Order did not delineate whether it dismissed the action due to the expiration of the applicable statute of limitations, or pursuant to Rule 1.070 (j), Fla. R. Civ. P.{7} (PA 230-232)

Williams filed a Motion For Rehearing which was denied. Williams filed a Petition for a Common Law Writ of Certiorari, in the Third District Court of Appeal. The Third District treated the Petition as an appeal and reversed the trial court's decision and certified conflict to this Court with Frew v. Poole and Kent Co., 654

So. 2d 272 (Fla. 4th DCA 1995), as to Rule 1.070 (j). (PA 230-232) 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 THIRD DISTRICT.

II. WHETHER THIS HONORABLE COURT SHOULD RESOLVE THE CERTIFIED CONFLICT BETWEEN THE INSTANT CASE AND THE CASE OF PERMENTER v. GEICO GENERAL INS. CO., 712 So. 2d 1178 (Fla. 2nd DCA, 1998) BY ADOPTING THE DECISION OF THE THIRD DISTRICT.

SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly followed established legal doctrine in reversing the trial court's dismissal with prejudice of Williams' third party amended complaint for failure to serve Totura within 120 days of the filing of the amended complaint.

Under Florida's Rules of Civil Procedures, a plaintiff may amend its pleadings once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party. Rule 1.190 (a), Fla. R. Civ. P. Thereafter, any amended complaint (supplemental pleadings) requires, first, a motion for leave to amend, followed by a court order permitting the amended complaint to become of record (Rule 1.190 (a), Fla. R. Civ. P.); and second, the amended complaint relates back to the date of filing the original pleading. Rule 1.190 (c), Fla. R. Civ. P.

Until the Court rules upon the motion to amend, a plaintiff is not at liberty to obtain a summons and serve it upon the defendant until the court orders the clerk of court to issue a summons. To do otherwise, the amended complaint becomes a nullity. Thus, only after the court grants the motion to file the amended complaint, then, and only then, is the plaintiff required to comply with the 120 day rule to serve the defendant with process.

This court should resolve the conflict according to established legal doctrines and disfavor the Fourth District's decision in Frew and approve the Third District's decision in Totura, which was the correct decision.

Prior to the Third District's decision in Totura, the Second District rendered the decision of Permenter v. GEICO General Ins. Co., 712 So. 2d 1178 (Fla. 2nd DCA, 1998), a case which is factually similar to the Totura facts. In the Permenter case, the Second District 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.

The Permenter case was also certified to this court as being in conflict with a Fourth District (Frew), as to the statute of limitations grounds, and the Third District cases of Smith v. Metropolitan Dade County, 338 So. 2d 878 (Fla. 2nd DCA, 1976), and the instant case, Totura.

The Second District decision has departed from Florida's sound established legal doctrines as to the Rules of Civil Procedures in determining when the statute of limitations period is tolled for purposes of adding new parties to the litigation.

The Second District's decision causes confusion with Rules 1.190 (a), (c) and (d); 10210 (a) (Parties); and 1.250 (c) (Adding Parties). Since a party is not at liberty to add another party to a lawsuit a will, but with leave of court, it stands to do otherwise is a nullity. Without leave of court, the new party can not be joined to the litigation at all and there would be no need for diligent service of process under Rule 1.070(j).

The Third District has followed sound established legal doctrines, as well as the logical mandates of the collective rules civil procedure, I. e., an amended complaint, purporting to add a party, can not stand of record until approved by the court. Hence, then, and only then, shall the plaintiff be permitted to serve a

summon upon the added party.

This court should resolve the conflict according to established legal doctrines and disfavor the Second District's decision in Permenter and approve the Third District's decisions in Smith and Totura, relative to when the statute of limitations period expires when adding new parties.

ARGUMENT

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 THIRD DISTRICT.

This court is being called upon to resolve the conflicts between the district courts regarding when a party must serve a new party, being added to existing litigation, and the operative date of Rule 1.070 (i){8} and the running of the 120-days.

The Third District, in reversing the trial court's dismissal against Totura, for Williams failing to serve the summons within 120 days of the filing amended complaint stated that:

[T]his result is illogical because the clerk will not issue process unless the court grants the motion for leave to amend. The Frew decision places the movant in the untenable position of attempting to perfect service before the clerk will issue process. We will not endorse this illogical interpretation. It is this court's view that the 120-day period begins to run on the day the order granting leave to amend is entered. (PA 233-235)

Rule 1.070 (i) is patterned after Federal Rule 4 (j){9} and is verbatim the Florida rule, and federal cases are routinely dismissed on rule 4 (j) motions made after untimely filings. Florida's rule 1.070 (j) was adopted in 1988, five (5) years after federal rule 4 (j).{10}

The Third District's opinion clearly follows the mandate of the federal and is the most logical approach, especially, where the Court has not specified an earlier date to serve the summons.

Had Williams simply filed the third amended complaint and gone to the clerk's office for a summons, he would not have been able to obtain a summons due to the fact that the clerk's office would have had nothing to authorize it to issue a summons, absent a court's directive. In addition, Totura would not even be called upon to respond to such action, on the part of Williams, because an amended pleading filed in violation of the Rules of Civil Procedure is considered a nullity. Warner-Lambert v. Patrick, 428 So. 2d 718 (Fla. 4th DCA 1983); Hodges v. Noel, 675 So. 2d 248, 249 (Fla. 4th DCA 1996) (Noel did not seek leave of court to file an amended complaint before attempting substituted service. For that reason alone, the complaint was fatally defective and subject to dismissal. Wyatt v. Haese, 649 So. 2d 905, 907 (Fla. 4th DCA 1995)).

Totura contends that Williams did not timely service it with process since the Motion to Add Necessary and Indispensable Parties, which was filed on August 14, 1996, and heard on October 15, 1996, but not actually granted until September 15, 1997, and served upon it on September 18, 1997. Rule 1.070 (i){11} requires a party to serve process within 120 days after the "initial process," and the 120 days also begin to run upon the filing of the "initial pleading." (emphasis added). However, the

troublesome dilemma is when does the 120 days began to run when an amended complaint is filed seeking to add a new party, which requires leave of court before the "supplemental pleadings,"{12} (emphasis added) becomes officially of record.

The Frew decision stands for the proposition that the 120 days began to run with the filing of the motion for leave to amend which in essence would require the litigant to attempt service of process upon the new party whether the court has ruled upon the motion or not.

Rule 1.070 (i) is clear as to an initial process which presumes that the complaint has been timely filed within the statute of limitations period. The questions becomes, if the applicable statute of limitations has expired, prior to the filing of the initial complaint, then the defendant merely moves the court to dismiss the action upon statute of limitations grounds. No one ever appears to have a problem with that scenario.

One the other hand, if the statute of limitations has not expired, prior to the filing of the amended complaint, and the defendant is served after the expiration of the statute of limitations, then the problems arise. The operative dates in this case are August 14, 1996, the filing date; October 17, 1996, the hearing date; September 15, 1997, the date the Order was entered; and September 18, 1997, the date of service.

Admittedly, Williams did not serve Totura within 120 days after he filed the Amended Complaint because he had no authority from the Court to do so. Since the Order granting the motion was not entered until September 15, 1997, the service of the summons would be in excess of the 120 days allowed, pursuant to Rule 1.070 (i).{13} Totura asserts that Williams' action should be dismissed because he has shown no good cause for the delays.

Totura's assertions, however, are misplaced herein. The Court only authorized the Clerk of Court to issue the Summons and Third Amended Complaint on September 15, 1997. Although the Court granted Williams' Motion to add Totura on October 17, 1996, there was considerable disagreement as to the wording of the proposed order, as well as counsels for Midfirst Bank and Garden City, later agreeing that the Court had granted Williams' motion subsequent to October 17, 1996, and February 10, 1997. (PA 163-164; 174-196).

The record is replete with Williams' efforts to have the Order entered adversely to Totura. Williams' motion was before the Court, i. e., Motion to Add Necessary and Indispensable Parties, filed on August 14, 1996, and Garden City had not submitted any opposition to the motion and the court had the liberty to enter the order.

At the October 17, 1996, hearing, Williams requested to remit his own order, but the court only wished to have one order in the record for ease of reference. (PA 175-196). The trial court had considerable latitude and discretion to determine what constituted good cause for the delay in the service of the summons and complaint upon Totura. Upon executing the Order in open Court permitting Williams to add Totura, the court was surprised (from his expression) that the Order had not been entered. (PA 226-227).

On several occasions during the pendency of the proceedings below, the trial

court entered a one (1) page form Order granting several orders and the same could have been done in the instance case, since the Court was unable to locate the proposed orders submitted by Williams.{14}

In this case, an Order was entered by the Court on February 10, 1997, regarding the October 17, 1996, hearing which did not refer at all to the Court's granting of Williams' motion to add parties. (PA 171-174). Upon Williams notice to set aside the Order, the Court again granted Williams' motion and permitted Williams to add Balboa and Totura. However, an Order was already within the file, but the court did not execute it until at the September 15, 1997, status conference when Williams' counsel personally appeared in open court. Williams can not be held at fault if the trial court did not act upon the motion. The Court explained its position on proposed Orders placed before it, that it doesn't mean that he will sign it. (PA 175-196).

Totura relies upon the case of Frew v. Poole and Kent Co., 654 So. 2d 272 (Fla 4th DCA, 1995), to support its position that Williams was dilatory. Although Frew is strikingly similar to the case at bar, but it is clearly distinguishable from Williams' case. In Frew an agreed upon order to amend her complaint had been submitted to the court, but not executed. In Williams' case, there was no such agreed upon, or consented to, order before the Court to be executed because Midfirst Bank and Garden City, agreed that their order was the court's ruling and did not include language permitting the adding of Totura.

Contrary to Frew, Williams' counsel did not reside in the same city of the situs of the trial court and it was not as simple as Totura suggest that Williams' counsel could have set a hearing and presented the order to the court for execution. Williams' counsel resides and practices in the City of Jacksonville, greater than 350 miles from the trial court which makes Totura's suggestion infeasible.

In this case, Williams' counsel had done perhaps all that could be done under the circumstances of this case, to get his motion before the court for execution.

Williams' counsel had no control over the court's docket, or the ability to force the court to enter the order. The court noted at the May 14, 1997, hearing that " . . . Lawyers . . . send in orders all the time thinking that the judge . . . has an order in front of him . . . they are going to sign it." (PA 175-196). Thus, Williams had remitted his order before the court, on more than two occasions, which did not require a hearing prior to its execution since no party had objected to the motion to amend. Williams fought to have the order entered, with or without the consent of Garden City's counsel.{15}

After the matter was made clear, Williams believed that the court had an order to execute, but did not do so until September 15, 1997, and that should be the operative date for initiating the 120 days based upon the overall circumstances of this case. This Court must make a determination as to whether the above efforts by Williams' Counsel, as well as the documented record, rises to the level of good cause, or whether the September 15, 1997, date was the effective date for purposes of Rule 1.070 (i).

As soon as Williams received the court's order, the summons were immediately obtained from the clerk's office. (PA 199-200). Totura was then

served with the summons and complaint on September 18, 1997, within three (3) days of the court's order permitting it to be added as a party.

In Morales v. Sperry Rand Corp., 601 So. 2d 538 (Fla. 1992), this Court addressed the issue of a plaintiff's efforts to serve initial pleadings and held that, "unless the plaintiff shows good cause why service was not made within 120 days of filing the complaint, the action should be dismissed without prejudice." Contrary to the facts in Morales, Williams did not sit on his rights and do nothing. However, he could not do anything until he had an order in his hand which is clearly supported by the record.

In Mid-Florida Associates, Ltd., v. Taylor, 641 So. 2d 182 (Fla. 5th DCA, 1994), plaintiff's counsel was able to demonstrate, through an affidavit from a private investigator, that he had made efforts to serve the defendant, but was unsuccessful, due to an apparent address change by the defendant. Although there was no problem with the defendant's address in this case, Williams clearly documented his efforts, in open court, to get his order entered by the court and to preserve all of his rights in the case. Accord, Hodges v. Noel, 675 So. 2d 248 (Fla. 4th DCA, 1996) (counsel attempted substituted service on the day before the statute expired).

Subsequent to the October 17, 1996, hearing, Midfirst Bank did not remit the proposed order to Williams until twenty three (23) days later (PA 160-162) and the order did not reach the court until 107 days after the hearing. (PA 169-170). After the dispute regarding the court's granting Williams' motion to add parties, the matter was not finally settled until May 14, 1997, after Mr. Cruz-Alvarez wanted his objection noted in the record. (PA 195). The Order was not entered until September 15, 1997, when summons and complaints were obtained for Balboa and Totura. There has been no showing of prejudice inuring to any party during the delays and the record is replete with Williams' efforts to obtain his order and serve the added parties.

In U.S. v. Ayers, 857 F. 2d 881 (1st Cir. 1988), the court stated that:

> We have examined the record in this case with care, and find no misuse of the district judge's substantial discretion. There is nothing to suggest that the delay in service was intentional or that the government stood to benefit from it. On the opposite hand, there has been no meaningful demonstration of any cognizable prejudice resulting from the passage of additional time. Nor are we aware of any "aggravating factors," See Fournier v. Textron, Inc., 776 F. 2d 532, 534 (5th Cir. 1985), or of any affront to the district court's control over its own docket.

Based upon the overall facts of this case, Williams has demonstrated good cause for the delay in serving Totura after the August 14, 1996, filing of the amended complaint.

This Court has recently held that a trial court should not dismiss a case for failing to serve the complaint within 120 days "with prejudice" without first considering the factors enunciated in Kozel v. Ostendorf, 629 So. 2d 817 (Fla.

1993).{16} None of the Kozel factors apply to Williams' case.

In Gaines v. Placilla, 634 So. 2d 711 (Fla. 1st DCA, 1994), a medical malpractice case, which was dismissed for failing to serve the complaint within 120 days from the date of filing, the trial court dismissed the action "with prejudice." The appellate court reversed based upon the plain language of the rule and directed the trial court to reconsider the motion to dismiss in light of the six-factor test laid down in Kozel.{17}

Where, as in this case, the Court does not act in executing an Order, which was before it, to permit the Clerk of Court to issue the Summons, should constitute "good cause" for the delay in serving Totura. Once the Order was executed, Williams served Totura within the 120-day time limitations period as authorized by Rule 1.070 (i), Fla. Stat. (1995).

Therefore, Williams' claims should not have been dismissed based upon a failure to serve Totura within the 120-day limitations period which was indeed accomplished by Williams.

Williams respectfully urges this Honorable Court to approve the Third District's holding in Totura and disapprove the Frew decision with respect to the appropriate date when the 120-day rule becomes operative.

II. WHETHER THIS HONORABLE COURT SHOULD RESOLVE THE CERTIFIED CONFLICT BETWEEN THE INSTANT CASE AND THE CASE OF PERMENTER v. GEICO GENERAL INS. CO., 712 So. 2d 1178 (Fla. 2nd DCA, 1998) BY ADOPTING THE DECISION OF THE THIRD DISTRICT.

Prior to the Third District's decision in Totura, the Second District rendered the decision of Permenter v. GEICO General Ins. Co., 712 So. 2d 1178 (Fla. 2nd DCA, 1998), a case which is factually similar to the Totura facts. In the Permenter case, the Second District 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.

The Permenter case was also certified to this court as being in conflict with a Fourth District (Frew), as to the statute of limitations grounds, and the Third District cases of Smith v. Metropolitan Dade County, 338 So. 2d 878 (Fla. 2nd DCA, 1976), and the instant case, Totura.

The Second District decision has departed from Florida's sound established legal doctrines as to the Rules of Civil Procedures in determining when the statute of limitations period is tolled for purposes of adding new parties to the litigation.

The Second District's decision causes confusion with Rules 1.190 (a), (c) and (d); 1.210 (a) (Parties); and 1.250 (c) (Adding Parties). Since a party is not at liberty to add another party to a lawsuit a will, but with leave of court, it stands to do otherwise is a nullity. Without leave of court, the new party can not be joined to the litigation at all and there would be no need for diligent service of process under Rule 1.070 (i).

The Third District has followed sound established legal doctrines, as well as the logical mandates of the collective rules of civil procedure, i. e., an amended complaint, purporting to add a party, can not stand of record until approved by the court. Hence, then, and only then, shall the plaintiff be permitted to serve a summon upon the added party.

The general philosophy of the pleading rules is that they should give fair notice, should be liberally construed, be subject to liberal amendment, and that decisions should be on the merits and not on technical niceties of pleadings. E.G. Welch v. Louisiana Power & Light Co., 466 F. 2D 1344 (5th Cir. 1972). Federal Rule 15 (c) furthers these principles.{18}

In Eldridge v. Multi-Resources, Inc., 695 So. 2d 1320, 1321 (Fla. 4th DCA, 1997), the Court held for statute of limitations purposes, the date of filing the amended complaint tolls the statute, if timely filed, quoting from Frew v. Poole and Kent Co., 654 So. 2d 272, 273 (Fla. 4th DCA, 1995). Hence, Williams timely filed his third amended pleadings.

Florida's rules of civil procedure were modeled after the federal rules of civil procedure and this court may review those cases for some guidance in resolving the conflict between the Florida district courts.

Federal courts have frequently addressed the issue of pleadings relating back

to a specific date for purposes of tolling the statute of limitations. Rule 1.190, Fla. R. Civ. P., is modeled after Rule 15, Fed. R. Civ. P., the introductory case interpreting Rule 15 was Rademaker v. E. D. Flynn Export Co., 17 F. 2d 15 (5th Cir. 1927).

In Rademaker, the plaintiff filed a motion to amend his complaint just before the statute of limitations expired and the court granted the motion. The amended complaint was then filed, but after the limitations period had expired. The circuit court held that a motion to amend that seeks to add a party, . . . stands as the amendment, and that a later filed amended complaint relates back to the date the motion was filed. Id. at 17.

In Eaton Corp. v. Appliance Valves Co., 634 F. Supp. 974, (N. D. Ind. 1984), the court reasoned by analogy that this is a situation to the filing of a complaint accompanied by a petition for leave to proceed is an in forma pauperis proceeding. The Court stated that:

> Since complaints accompanied by in forma pauperis petitions may not technically be filed until the court has ruled on the petition, several cases have arisen where the complaint and petition were submitted prior to expiration of the statute of limitations, but no court action or technical filing of the complaint occurred until after expiration of the statutory period. In such cases, the complaint is deemed filed when submitted to the clerk although court action on the petition and the technical filing date may occur at a later time. Rosenberg v. Martin, 478 F. 2d 520, 522 & n. la (2d Cir.), cert denied, 94 S. Ct. 102 (1973).
>
> The same principle should apply with respect to the action on the proposed amended complaint . . . However, once leave was granted, the technical filing of the amended complaint did not occur until after expiration of the statute of limitations. The court rejected the defendant's statute of limitations defense and treated the proposed amendment as the amended complaint itself.

Thus, it is this court's position that once the plaintiff has filed its proposed amended complaint accompanied by a motion for leave to amend within the statutory period, the statute of limitations is tolled even thought the court order granting leave to amend and the technical filing of the amended complaint occur after the running of the statute of limitations.

This is the only just and proper result since once leave to amend has been requested and a proposed complaint is on file, the plaintiff has taken those steps within his power to toll the statute and must await the appropriate court order. See also, Pearson v. Niagara Machine & Tool Works, 701 F. Supp. 195 (N. D. Okl, 1988) (the application filed with the amended complaint was timely and within the statute of limitations);

Mayes v. AT&T Information Systems, Inc., 867 F. 2d 1172, 1173 (8th Cir. 1989) (where petition for leave to amend the complaint has been filed prior to expiration of the statute of limitations, while the entry of the court order and the filing of the amended complaint have occurred after the limitations period has expired. Held, the amended complaint is deemed filed within the limitations period).

The filing of an amended complaint is designed to toll the running of the statute of limitations in order to avoid a multiplicity of lawsuits involving the same parties. It would be much easier for the plaintiff to sue the new defendant in a separate action and at some stage of the proceedings join the cases, but that practice has been rejected by some courts. Moore v. Grossman, 824 P. 2d 7, 9 (Col. Ct. App. 1991), citing R. A. Jones & Sons, Inc. v. Holman, 470 So. 2d 60 (Fla. App. 1985); Mauney v. Morris, 316 N. c. 67, 340 S. E. 2d 397 (1986).

This court should resolve the conflict according to established legal doctrines and disfavor the Second District's decision in Permenter and approve the Third District's decisions in Smith and Totura, relative to when the statute of limitations period expires when adding new parties.

CONCLUSION

Based upon the above and foregoing reasoning, this Court should approve the decision as rendered by the Third District in the instant case and disapprove the Fourth District's decision in Frew v. Poole and Kent Co., 654 So. 2D 272 (4th DCA 1995). The decision is logical and follows the established law in Florida and the Federal decisional law.

In addition, the Second District's decision in Permenter v. GEICO General Ins. Co., 712 So. 2d 1178 (Fla. 2d DCA 1998), waivers from the long standing Florida case law regarding when an amended complaint relates back to the date of filing, particularly, when the statute of limitations has run upon the action. The long standing rule in this state adopts the rule of law which permits an amended complaint to relate back to the date a motion to amend is filed and not the date the court enters its order either granting or denying the motion.

This court should approve the Third District's decision in Totura and disapprove the Second District's decision in Permenter which departs from sound decisional case law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to RAFAEL CRUZ-ALVAREZ, ESQUIRE, 2950 S.W. 27th Avenue, Suite 200, Miami, Florida 33233-9075, GLEN GOLDBERG, ESQUIRE, 1101 Brickell Avenue, Miami, Florida 33130,and SHELLEY H. LEINICKE, ESQUIRE, One East Broward Blvd., Ste. 500, Ft. Lauderdale, Florida 33302, via U. S. Mail this 21th day of December, 1998.

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Attorney for Respondent Jimmie Williams

FOOTNOTES**********

{1} This was the second attempt by Midfirst Bank to foreclose upon Williams' property. The first foreclosure action was filed on July 15, 1992, case no. 92-15999-CA-22, Circuit Court, 11th Judicial Circuit, in and for Dade County, Florida, but was later voluntarily dismissed in 1993.

{2} Because the Prudential policy had lapsed, it did adjust Williams' home in the interim and permitted Williams to investigate the status of his policy.

{3} At the October 17, 1996, hearing, Williams' counsel inquired from the court whether it wanted separate orders prepared since there were two (2) rulings. The court refused the request and indicated that it would be easier to follow the record if only one (1) order was entered.

{4} It is undisputed that Williams submitted a proposed Order to the court on or about April 24, 1997, for execution. Counsel for Garden City indicated to the Court that the proposed order was attached to Williams' motion, but it (the motion) did not state therein that Garden City had objected to the motion and same was granted by the Court over his objections. (PA 175-196)

{5} See Totura's "Third Party Defendant, Totura & Company's Motion For Continuance Of Trial," filed October 20, 1997, at ¶2. (PA 201-203)

{6} It should be noted that the caption of Williams' pleadings which the court

acted upon was entitled "Third Amended Counterclaim and Third Party Claim For Damages For Breach Of Contract, Conspiracy and Discrimination." The Court Order of May 8, 1998, did not effect the status of the claims against Midfirst Bank, or Garden City, relative to the two (2) pending Counts, i. e., Counts III and Count IV, respectively.

{7} By separate Order on November 10, 1997, the Court granted a similar motion to dismiss filed by Balboa based upon statute of limitations and failure to service process within 120 days. (PA 206) At the May 7, 1998, hearing, the court explained that Totura should be treated like Balboa and be dismissed from the case. The court also opined that it believed that Williams' fight was with Midfirst Bank and Garden City and not Totura and Balboa. The May 7, 1998, hearing was not reported. (See, Mr. Fink's reference and comments regarding this Order, at PA 221-225; 228-229).

{8} Former rule 1.070 (j) was redesignated as rule 1.070 (i) in 1992. Taco Bell Corp. v. Costanza, 686 So. 2d 773 n. 1, (Fla. 4th DCA, 1997).

{9} Prior to 1983 there was no arbitrary time limit for summons service after the filing of the complaint. A kind of due diligence standard was applied, and it was applied flexibly. With the removal of the marshal as the general process server in the federal practice-the main purpose of Rule 4's 1983 amendment-it was thought advisable to put some kind of stated cap on the time for serving the summons. Subdivision (j) of the 1983 version of Rule 4 did that, adopting a 120-day time period, measured from the complaint's filing. The substance of that requirement is carried forward in subdivision (m) of the 1993 revision of Rule 4.

Rule 4 (j) was amended in April 22, 1993, and renumbered 4 (m) effective December 1, 1993. Upon overhauling the rule, the commentaries provides the intent and effect of the application of the revised rules.

Commentary C4-39 advises us that, [a]dditional persons may be ordered joined as parties even after litigation is under way. See, e. g., Rule 19 and 20. The court in directing such additional joinder should include directions about how and when service on the new party is to be made. Absent appropriate directions, the party effecting summons service on the new party-there being no clear-cut filing of a pleading from which to measure the 120 days-might do well to measure it from the entry of the court's order directing the joinder, if not some earlier time.

{10} In re Amendments to Florida Rules of Civil Procedure, 536 So. 2d 974 (Fla. 1988), with an effective date of January 1, 1989.

{11} 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.

{12} Upon motion of a party the court may permit that party, upon reasonable notice and upon such terms as are just, to serve a supplemental pleading . . . [i]f the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor. Rule 1.190 (d).

{13} 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.

{14} For example, see Order granting Garden City's Motion to Compel (PA 115); Order granting Totura's Motion to Continue (PA 207); and Order granting Totura's Motion to Dismiss Count II (the Contract Claim) (PA 220).

{15} Mr. Cruz-Alvarez, Counsel for Garden City and Balboa, wanted the record clear that he objected to the adding of parties. He stated at the May 14, 1997, hearing that:

> I hate to be nit-picking, but this is all on the record, the proposed order he sent in for his motion for partial relief, and to bring in Balboa, says that I didn't object to having Balboa brought in. I want it to be clear on the record that I object but the Court granted it anyway, it's just that his orders read there was no opposition. (PA 195).

{16} The six factors are: (1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; (2) whether the attorney has been previously sanctioned; (3) whether the client was personally involved in the act of disobedience; (4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; (5) whether the attorney offered reasonable justification for noncompliance; and (6) whether the delay created significant problems of judicial administration.

{17} The court concluded that the Kozel factors should be applied rests upon our firm conviction that to do otherwise in this case would result in a manifest injustice. Gaines v. Placilla, 634 So. 2d 711, 712 (Fla. 1st DCA, 1994); (See, Hernandez v. Page, 580 So. 2d 793, 795 (Fla. 3rd DCA, 1991).

{18} Florida Rules of Civil Procedures are patterned after Federal Rules of Civil Procedure 15 (c). Florida Rules of Civil Procedures 1.170 (h); 1.180 (a); 1.190 (a), (c), (e); and 1.250 (c), governs the adding of parties to existing pleadings.