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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 REPLY BRIEF

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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

Williams' brief begins with a lengthy recitation of facts on liability and/or damage matters which are irrelevant to the legal issues before this Court. This appeal focuses only on (1) whether the time to effect service of process is triggered by the filing of a motion to amend a complaint as a *quid pro quo* to the plaintiff's protection from a statute of limitations defense (because the effective date of the amended complaint relates back to the time the motion to amend and the proposed amended complaint are filed), and (2) whether the statute of limitations is, in fact, tolled by filing a motion to amend to add new parties or a new cause of action.

The only relevant facts for the issues raised in this appeal relate to the time of various pleadings and orders:

3/15/94	Midfirst Bank's complaint against Williams for foreclosure (PA 1-28).
08/94	Williams' answer in third party suit against Garden City.
5/24/94	Williams' amended counterclaim (P.S. 29-43).
12/94	Williams' second amended counterclaim adding "Casualty

	Insurance Co. (Balboa Life)" (PA 44-107).
8/14/96	Williams' motion to amend to add Totura (PA 116-118).
2/5/97	Williams' motion to reset hearing on motion to amend (PA 169-170).
9/15/97	Order granting Williams' motion to add necessary and indispensable parties (PA 198-199).
9/15/97	Summons to Totura (PA 200).
10/8/97	Totura's motion to dismiss (PA 204-205).
12/15/97	Order dismissing Count II against Totura (PA 220).
5/8/97	Order dismissing remaining counts against Totura (PA 231-202).
11/97	Order dismissing Balboa Life with prejudice (Statute of Limitations) (PA 206).

The position espoused by Williams sets up a decidedly unlevel playing field. Under Williams' theory, a plaintiff can protect himself from statute of limitations considerations by the mere filing of a motion to amend to add new parties, then keep these potential defendants in his "hip pocket" to pull out only if needed. This strategy allows a plaintiff

to decide whether he wishes to go forward against these additional known parties if, for example, discovery shows that the existing defendants have no liability, the plaintiff learns that the existing defendants have limited financial abilities, or if a plaintiff needs to "put the brakes" on a trial date by bringing in new defendants who will then need to conduct discovery. Such tactics avoid the timely joinder of all defendants so that the plaintiff does not face opposition from multiple parties, the plaintiff avoids defending against multiple legal theories, and the plaintiff potentially limits the depositions and discovery necessary to prepare a case for trial.

Williams' position also gives him the advantage of delaying notice to all potential defendants until sufficient time has passed so that their ability to defend is compromised because of possible destruction of documents, faded memories, or employees moving away -- which are the precise reasons for the establishment of statutes of limitations in the first place. The law should not allow a plaintiff such as Williams to have this considerable advantage.

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.

There is no prejudice to a plaintiff to affirm the decision in the case of *Frew v. Poole and Kent Co.*, 654 So.2d 272 (Fla. 4th DCA 1995) and hold that a plaintiff's obligation to effect service of process is triggered by the filing of a motion to amend the complaint. A plaintiff has ample opportunity and time within the four months after filing a motion to amend his complaint to then obtain a ruling from the trial court on this motion or to otherwise seek an extension of time for service of process under the rules. Fla. R. Civ. P. 1.070(j). A plaintiff certainly would have good cause for an extension of time to effect service of process if the trial court, through oversight, failed to enter an order on the request for amendment of the pleadings. This same one hundred twenty day period is more than sufficient for a plaintiff to set a hearing on the motion to amend.

Williams filed his proposed amendment to his counterclaim/third party complaint with his motion to amend. This constitutes

commencement of the action that is sufficient to trigger the obligation to effect service of process. Fla. R. Civ. P. 1.050 ("every action of a civil nature shall be commenced when the complaint or petition is filed. . . "); *Mayes v. AT&T Information System, Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989); *Rosenberg v. Martin*, 478 F.2d 520 (2nd Cir. 1973). Like the case of *Pearson v. Niagara Machine and Tool Works*, 701 F.Supp. 198 (N.D. Ok. 1988) there was no reason that Williams could not attach the summons to his motion to amend the pleadings.

The rule of law announced in the *Frew* decision is fair and reasonable. Affirming the *Frew* case establishes a uniform, solitary date for resolution of all deadlines, whether determining if a plaintiff may avoid a statute of limitations defense or deciding whether the plaintiff has timely effected service of process. Such a rule of law also provides an impetus to a plaintiff to advance the litigation in a timely and complete fashion through the joinder of all potential defendants. Such a rule of law is far less onerous to the plaintiff -- who has already had the benefit of the full statute of limitations period to investigate the case and determine the identity of all defendants -- than the law which requires a defendant (who oftentimes receives his first notice of an

incident at the time he is served with the complaint) to specifically identify all potential tort-feasors within a mere twenty days. *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262, 1264 (Fla. 1996). Affirmance of the *Frew* decision would comport with all cases cited by Williams where the date of filing a complaint was effective to avoid expiration of the statute of limitations.

Williams next argues that he should not have an obligation to diligently seek entry of an order on the motion to add Totura as a defendant because his counsel was not close to the courthouse. There is no basis whatsoever for this position. While the courts should certainly afford every courtesy and consideration to counsel, a plaintiff's unforced and personal decision to retain a "long distance" attorney should not avoid the operation of appropriate rules of law. Further, there was no reason that Williams' attorney could not use the telephone to argue this simple (and apparently unopposed) motion to add Totura as a defendant. Williams' reference to opposition to a motion to amend at a May 14, 1997, hearing relate only to Garden City's objection to the joinder of Balboa Insurance and not to Williams' separate motion to add Totura as a defendant. (PA 195)

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 Third District's decision in the case of *Permenter v. Geico General Ins. Co.*, 712 So.2d 1178 (Fla. 2d DCA 1998) stands as a separate and independent reason to reverse the instant appellate decision and reinstate the ruling of the trial court. Florida law has consistently held that one cannot add new parties or theories of law after the expiration of the statute of limitations. *See, for example, R.O. Holton & Co. v. Hull*, 192 So. 229 (Fla. 1939). The addition of Totura, a distinct and separate defendant, is not a correction of a misnomer or of a defect in the description of a party (such as erroneously identifying a defendant as a corporation rather than an individual) that would relate back to earlier pleadings filed before the statute of limitations expired. *See, for example, Green v. Peters*, 140 So.2d 601 (Fla. 2d DCA 1962); *Cabot v. Clearwater Construction Co.*, 89 So.2d 662 (Fla. 1956); *School Board of Broward County v. Surette*, 394 So.2d 147 (Fla. 4th

DCA 1981); *West Volusia Hospital Authority v. Jones*, 668 So.2d 635 (Fla. 5th DCA 1996).

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

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