IN THE SUPREME COURT OF FLORIDA

SAUL L. ZINER

Petitioner,

v.

NATIONSBANK, N.A.,

Respondent.

CASE NO.: 95,448
4TH DCA CASE NO.: 98-1049

PETITIONER'S INITIAL BRIEF

On Review from the District Court

of Appeal, Fourth District

State of Florida

STEVEN D. RUBIN, ESQ.
980 North Federal Highway,
Suite 434
Boca Raton, Florida 33432
(561) 391-7992
Florida Bar No. 329223
Attorney for the Petitioner, Saul L. Ziner

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PREFACE

1. The Petitioner, SAUL L. ZINER, one of two defendants in the trial court, is referred to herein as "Ziner". The Respondent, NATIONSBANK, N.A., plaintiff in the trial court, is referred to herein as "Nationsbank". MARK A. BEREZIN, the other defendant in the trial court and an appellee in the Fourth District Court of Appeal, is referred to herein as "Berezin".

2. The Record on Appeal is cited as "(R-page no.)."

3. The Fifteenth Judicial Circuit Court, in and for Palm Beach County, Florida, is referred to as the "trial court".

4. The Fourth District Court of Appeal is referred to as the "District Court".

5. Fla.R.Civ.P. 1.070(j) (1997) is referred to as "Rule 1.070(j)". However, Rule 1.070(j) was designated as Fla.R.Civ.P. 1.070(i) from January 1, 1993 (In re: Amendments to the Florida Rules of Civil Procedure, 604 So.2d 1110 (Fla. 1992)) to December 31, 1996 (In re: Amendments to the Florida Rules of Civil Procedure, 682 So.2d 105 (Fla. 1996)) and then redesignated as Rule 1.070(j) subsequent to December 31, 1996.

STATEMENT OF THE CASE AND THE FACTS

This case arises out of Nationsbank's prosecution of an action against Ziner and Berezin. The trial court exercised its discretion upon Ziner's motion for

reconsideration and dismissed the action for lack of prosecution. The District Court held that the trial court abused its discretion in dropping Berezin as a party under Fla.R.Civ.P. 1.070 (j) and dismissing the action for lack of prosecution under Fla.R.Civ.P. 1.420(e), because the statute of limitations had run on the underlying cause of action.

On November 24, 1992, Nationsbank filed a complaint for breach of a written guaranty agreement ("Guaranty") against Berezin and Ziner (R-1-28). The complaint did not allege any basis for "long arm" jurisdiction over or service of process on Ziner or Berezin outside the State of Florida. The trial court found that Berezin was a resident of Massachusetts. (R-509, lines 15-20).

On December 4, 1992, a summons and the complaint were served on Ziner (R-55-57) by substitute personal service on Rhonda Ziner, in Massachusetts.

On March 24, 1993, the 120 days allotted under Fla.R.Civ.P. 1.070 (j) for obtaining service of process on a party defendant expired. The Record shows that no affidavits or returns of service had been filed on or before this date with respect to either Ziner or Berezin, and Nationsbank had not filed a motion to extend time for service of process on Berezin.

On April 26, 1993 (33 days after expiration of the Rule 1.070(j) 120 day service period), the trial court sua sponte entered a Motion, Notice and Order of

Dismissal Without Prejudice (the "First Order of Dismissal") (R-30-31). In the First Order of Dismissal, the trial court directed Nationsbank to file a written showing of good cause as to why the action should not be dismissed as to any unserved defendant pursuant to Rule 1.070(j). Although Ziner had been served with the complaint five (5) months earlier, the First Order of Dismissal was not served on Ziner.

On May 14, 1993, the deadline for filing a good cause showing passed without any filing by Nationsbank.

On May 20, 1993 (without leave of court), Nationsbank filed an unsworn and unverified "Notice of Compliance with Court's Order to Show Good Cause" (the "First Notice of Compliance) (R-279-80). The First Notice of Compliance was not served on either Ziner or Berezin, and therefore they did not have the opportunity to contest the allegations made therein. In its First Notice of Compliance, Nationsbank stated in paragraph (4) that it had attempted to effect personal service of process on Berezin in Massachusetts, but had been unsuccessful because Berezin "appears to be avoiding service". (R-280). Nationsbank also stated:

> "2. Since this action is an in personam action for a breach of financial obligation, personal service on Defendants is required.
> 4. ... Plaintiff has hired a third process server to attempt service of the Complaint. The newly hired process server has a reputation for successfully locating Defendants." (R-279-280). (emphasis added).

Proceeding on an ex parte basis on May 20, 1993, the trial court entered an Order

Granting Extension of Time to Obtain Service (the "May 20, 1993 Order")(R-33). In the May 20, 1993 Order, the trial court granted Nationsbank an additional 90 days to obtain service on Berezin. If Nationsbank failed to obtain service within the 90 days, the case was to be dismissed "without further notice" (emphasis in original). (R-33).

Notwithstanding Nationsbank's acknowledgment in its First Notice of Compliance that personal service of process on Berezin was required and its representation that it had hired a third process server to personally serve the complaint on Berezin, Nationsbank made no further attempts to personally serve Berezin with a summons or the complaint. The Record does not show the issuance of an alias or pluries summons. The only action taken by Nationsbank to comply with the May 20, 1993 Order was to mail a letter dated June 10, 1993 addressed to Berezin in Massachusetts. (R-364-370). A summons and the complaint were supposedly included with the June 10, 1993 letter. On or about June 23, 1993, Berezin mailed a letter from Massachusetts addressed to John C. Strickroot, then counsel for Nationsbank, in response to the June 10, 1993 letter. (R-89). Although Nationsbank's June 10, 1993 letter is referenced in the Record, Nationsbank has never filed an affidavit or return of service referencing "service" of its June 10, 1993 letter or the summons or complaint on Berezin. At the time Nationsbank mailed its

June 10, 1993 letter to Berezin, Fla.R.Civ.P. 1.070 (i) (1997), which permits a defendant to waive personal service of process, had not yet been adopted by the Florida Supreme Court. All arguments by Nationsbank that it served process on Berezin within the 90 day extension period are founded upon the mailing of the June 10, 1993 letter.

On May 24, 1994, the trial court entered a second Motion, Notice and Order of Dismissal (the "Second Order of Dismissal") (R-34-35). The Second Order of Dismissal was based upon Nationsbank's failure to timely prosecute the action based upon Fla.R.Civ.P. 1.420 (e). The trial court found that "it does not affirmatively appear from filing of pleadings or order of court or otherwise for a period of one (1) year that this action is being prosecuted" and it required a written filing of "good cause" by Nationsbank by June 2, 1994 (R-34). As of the date of the Second Order of Dismissal, the face of the Record reveals no activity from May 21, 1993 to May 24, 1994 (R-33, 34). The Second Order of Dismissal indicates that it was mailed to Nationsbank's attorney, but it was not served on either Ziner or Berezin (R-34).

On June 2, 1994, Nationsbank filed an unsworn and unverified "Notice of Compliance with Court's Order to Show Good Cause" (R-328)(the "Second Notice of Compliance"). The Second Notice of Compliance reflects that it was not served on either Berezin or Ziner, and therefore they did not have the opportunity to contest

the allegations contained therein. Nationsbank alleged in the Second Notice of Compliance, as good cause to avoid dismissal for lack of prosecution, the following:

> "4. On or about June 22, 1993, service was effectuated on Defendant, Mark A. Berezin, via Registered and Regular Mail.
>
> 5. Since the service of process of the Complaint on both Defendants, the parties have been involved in settlement negotiations with Defendants in order to avoid the entry of a judgment against Defendants.
>
> 6. Settlement negotiations have fallen through and this file is now ready to be scheduled for final hearing." (R-328-329).

After a June 7, 1994, ex parte hearing, the trial court entered an Order Finding Good Cause on June 10, 1994 (hereinafter referred to as the "June 10, 1994 Order") (R-44). The June 10, 1994 Order does not indicate that a copy of it was served on either Berezin or Ziner. As of the date of the hearing on June 7, 1994, and the date of the entry of the June 10, 1994 Order, the Record did not contain returns or proofs of service of a summons or the complaint on Berezin, a sworn statement of ongoing settlement negotiations, the letters allegedly sent by Ziner and Berezin to Nationsbank's attorney on December 30, 1992 and June 23, 1993 (R-269 and R-275), and the letter Nationsbank sent to Berezin on June 10, 1993. (In a document entitled "Notice of Filing", filed on March 4, 1996, Nationsbank filed Berezin's June 23, 1993 letter and a letter dated December 30, 1992 as "Answer of Defendants." (R-

60-63). Paradoxically, Nationsbank also characterized the December 30, 1992 letter as a "Settlement Offer", not an answer (R-258).)

On June 9, 1994, Nationsbank filed a motion for a clerk's default against Ziner and Berezin. The clerk refused to enter the defaults because there was no proof of service in the court file (R-42-43).

On June 6, 1995, Nationsbank filed a second motion for a clerk's default against Ziner and Berezin. Again, the clerk refused to enter the defaults because there was no proof of service in the court file and the issued summons had not been returned. (R-48-49). On June 6, 1995, Nationsbank's action had been pending for 924 days.

On February 16, 1996, Ziner served a motion to dismiss. (R-58-59). This was Ziner's first filing of any pleading, motion or other paper in the case.

On December 20, 1996, Berezin filed a Motion to Strike (Nationsbank's) Motion for Summary Judgment and an Affidavit describing the lack of any attempt by Nationsbank to effect personal service of process on Berezin (R-85-91). This was the first filing by Berezin of any pleading, motion or other paper in connection with the complaint filed by Nationsbank more than four years earlier. Berezin stated under oath that he had never been served with a copy of the complaint and he had never

sought to evade any process server. (R-90-91).

On February 13, 1997, the trial court entered an Order Denying Berezin's Motion to Strike Motion for Summary Judgment. In this February 13, 1997 Order, the trial court found that it had personal jurisdiction over Berezin (R-144).

On January 12, 1998, Ziner served an Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction, to Dismiss for Lack of Prosecution and to Reconsider the Court's Orders dated May 20, 1993 and June 10, 1994 ("Amended Motion"). (R-223-224). Paragraph (6) of the Amended Motion stated in part:

> "6. The Court Orders dated May 20, 1993 and June 10, 1994, should be vacated and set aside for the reason that Defendant, Ziner, did not receive notice of any of the Court's sua sponte Motions to Dismiss for Lack of Prosecution or the Notice of Hearing thereon, did not receive copies of pleadings in opposition to the Motions and the Plaintiff failed to establish good cause at each hearing and therefore, this case should have been dismissed for lack of prosecution either on May 20, 1993 or June 10, 1994." (R-224). (emphasis added).

Ziner also filed a memorandum of law in support of his Amended Motion (R-322-329). Paragraphs (2) and (8) of Ziner's memorandum of law stated:

> "2. This Memorandum of Law shall address Defendant Ziner's Motion for Reconsideration of the Court's order dated June 10, 1994) (Docket Entry No. 14), attached hereto as Exhibit "1"."
>
> 8. Thus, Judge Fine's Order of June 10, 1994 finding good cause based upon the non-record "settlement negotiations" were clearly error as a matter of law. This court should reconsider the Order and enter an Order of Dismissal for Lack of Prosecution pursuant to Fla.R.Civ.P.

1.420 (e) since there was no record activity within the one (1) year period preceding the filing of the Court's original Motion (one year prior to May 24, 1994)" (emphasis added) (R-324).

The only part of Ziner's Amended Motion heard by the trial court on February 5, 1998, concerned the reconsideration of the trial court's June 10, 1994 Order. (R-382-409). All other issues raised in the Amended Motion were abandoned by Ziner (R-384-386). On February 11, 1998, the trial court entered an order denying Ziner's Amended Motion (R-351).

On January 20, 1998, Berezin filed a Motion for Reconsideration requesting that the trial court reconsider its June 10, 1994 Order (R-225-40), and a Motion for Summary Judgment relating to improper service of process, lack of personal jurisdiction and other issues ("Berezin's Motions") (R-241-256).

On February 13, 1998, a hearing was held on Berezin's Motions (R-465-524). The trial court orally announced at the hearing that Berezin never waived his objections that the trial court lacked personal jurisdiction over him and it ordered him dropped as a party because the court had no personal jurisdiction over him.

On February 17, 1998, Ziner filed his Motion to Continue, for Reconsideration and to Add Party Defendant ("Motion for Reconsideration") (R-354-358). Ziner requested that the trial court, in part, reconsider its order of February 11, 1998, which denied Ziner's Amended Motion (which had sought the reconsideration of the June

10, 1994 Order). Ziner argued in his Motion for Reconsideration that Nationsbank's June 10, 1993 letter which was mailed to Berezin was not service of process on Berezin or that it was so lacking in compliance with any rule or law that service of process was void. Ziner's Motion for Reconsideration was heard on February 17, 1998 (R-441-464). As of February 17, 1998, the Record did not contain any sworn affidavits or returns of service of Nationsbank's June 10, 1993 letter, a summons or the complaint on Berezin, or any sworn statements regarding the "ongoing settlement negotiations" as alleged by Nationsbank in its Second Notice of Compliance.

On February 25, 1998, the trial court entered two Orders based upon Berezin's Motions and Ziner's Motion for Reconsideration. With respect to Berezin's Motions, the trial court set aside the May 20, 1993 Order and concluded it did not have personal jurisdiction over Berezin, and dropped him as a party (R-411-412). With respect to Ziner's Motion for Reconsideration of the June 10, 1994 Order, the trial court granted reconsideration, set aside the February 11, 1998 Order and the June 10, 1994 Order, and dismissed the action pursuant to Fla.R.Civ.P. 1.420 (e), without prejudice, for lack of prosecution for the period from May 24, 1993 through May 24, 1994 (R-413-415). In this Order, the trial court specifically found that Nationsbank's letter dated June 10, 1993 which was mailed to Berezin in Massachusetts by Nationsbank did not constitute service of process (R-414). The February 25, 1998

Order also incorporated the trial court's findings made on the record at the February 17, 1998 hearing (R-455-461).

On September 8, 1998, the trial court entered a Final Judgment ("Final Judgment") based upon its February 25, 1998 Orders, specifying therein that Ziner's and Berezin's motions for reconsideration of the May 20, 1993 Order and the June 10, 1994 Order were granted. Nationsbank timely appealed the two February 25, 1998 Orders and the Final Judgment to the District Court. On February 3, 1999, the District Court reversed the two February 25, 1998 Orders. The District Court held that Nationsbank's mailing of the June 10, 1993 letter, complaint and summons to Berezin in June, 1993 constituted service of process, albeit invalid, thereby meeting the mandates of the May 20, 1993 Order, and the trial court abused its discretion in dropping Berezin as a party and dismissing the action for lack of prosecution because the statute of limitations "had long expired" on the underlying cause of action. Nationsbank v. Ziner, 726 So.2d 364 (Fla. 4th DCA 1999).

Ziner timely served a motion for rehearing of the District Court's opinion which was denied on March 19, 1999. Ziner's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on April 16, 1999.

SUMMARY OF ARGUMENT

In Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla. 1992), this Court expressly held that an action can be dismissed pursuant to Fla.R.Civ.P. 1.070(j) even though it may produce a harsh result because the statute of limitations may have expired on the underlying cause of action. If service of process is not effected within the 120 day limit (or any extension thereof), Morales mandates that the action must be dismissed. The District Court's decision expressly and directly conflicts with Morales because it held that a trial court abuses its discretion if it drops a party or dismisses an action pursuant to Rule 1.070(j) if the statute of limitations has long expired because Rule 1.070(j) prohibits dismissals from operating as an adjudication on the merits. As a matter of law, the District Court's decision misconstrued Rule 1.070(j) contrary to the holding in Morales.

The mailing of Nationsbank's June 10, 1993 letter to Berezin in Massachusetts did not satisfy the mandates of the trial court's May 20, 1993 Order, which extended the time within which Nationsbank had to serve process on Berezin. Nationsbank acknowledged that personal service of process was required on Berezin and yet it made no attempts to personally serve Berezin subsequent to May 20, 1993. Since Nationsbank never filed or could have filed a facially valid return or affidavit of service on Berezin, Berezin did not have to respond to the complaint and Nationsbank

could not obtain a default against him. The case could not and did not move forward as a result of the mailing of the letter. The clerk of the court on two separate occasions refused to enter a default against Berezin because no proof of service and the original summons were not on file. Berezin's first limited appearance in the action to contest service of process and personal jurisdiction over him came more than three (3) years after Nationsbank mailed its letter. Under the correct interpretation of Bice v. Metz Const. Co., 699 So.2d 745 (Fla. 4th DCA 1997), rev. den. sub. nom, James Young & Co. v. Bice, 705 So.2d 901 (Fla. 1998) ("Bice") Nationsbank's June 10, 1993 letter, even if it constituted invalid service of process, was not the type of invalid service that satisfies the objectives of Rule 1.070(j).

Since Nationsbank did not serve Berezin with process within the 90 day extension period required by the trial court's May 20, 1993 Order, or alternatively, because service of process was a nullity, the action should have been dismissed for lack of prosecution in June, 1994. The trial court reconsidered and set aside the June 10, 1994 Order finding good cause because there was no record activity from May 24, 1993 to May 24, 1994. The law of "self actuation" does not apply to the dismissal for lack of prosecution in the instant case because the dismissal was based upon the reconsideration of the 1994 trial court Orders. At most, Nationsbank made non-record attempts at service of process on Berezin which did not preclude a dismissal for lack

of prosecution pursuant to Rule 1.420(e). When the District Court reversed the dismissal for lack of prosecution based upon Nationsbank's non-record mailing of its June 10, 1993 letter, its decision directly and expressly conflicted with the decision in McPherson v. Sher Rental and Leasing Enterprises, Inc., 541 So2d 1356 (Fla. 3d DCA 1989). The trial court did not abuse its discretion when it reconsidered the June 10, 1994 Order and dismissed the action for lack of prosecution.

ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DROPPED BEREZIN AS A PARTY AND DISMISSED THE ACTION FOR LACK OF PROSECUTION, EVEN THOUGH THE STATUTE OF LIMITATIONS ON THE UNDERLYING CAUSE OF ACTION MAY HAVE LONG EXPIRED.

A. RULE 1.070(j) AND RULE 1.420(e) REQUIRE A PLAINTIFF TO DILIGENTLY PROSECUTE AN ACTION.

This appeal involves the interrelationship between two Florida Rules of Civil Procedure, both of which require a plaintiff to use due diligence in prosecuting its cause of action; a plaintiff in a civil action has a duty to move its case forward. Under Fla.R.Civ.P. 1.070(j), a plaintiff must serve a defendant with the complaint within 120 days afer the filing of the complaint; otherwise the court may dismiss the

action as to the unserved defendant or drop the unserved defendant as a party.[1] Because an action cannot be set for trial and disposed of on the merits in a factually disputed case until all defendants in the action have been served with process and have pled (Fla.R.Civ.P. 1.441), a defendant who has been served with process and has pled cannot have its case heard at a trial until all other co-defendants have been served with process and have pled or have been dismissed from the action. Thus, even though Rule 1.070(j) may require the dismissal of an unserved defendant, a co-defendant who has been served is affected by the non-dismissal of the unserved defendant.

Under Fla.R.Civ.P. 1.420(e)(1992), a court may dismiss an entire action for lack of prosecution if there is no activity on the face of the record for a least one (1) year prior to the motion to dismiss and no "good cause" is shown by the plaintiff why the action should remain pending.

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[1]In Amendment to Florida Rule of Civil Procedure Rule 1.070 (j) - Time Limit for Service, 720 So.2d 505 (Fla. 1999), this Court amended Rule 1.070 (j) by eliminating the "not made within that time" language of the Rule and also added an "excusable neglect" ground as a reason the court can extend time for service.

B. THE STANDARD OF REVIEW OF A DISMISSAL PURSUANT TO RULE 1.070(j) OR RULE 1.420(e) IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION.

When a trial court dismisses an action or drops a party defendant based upon Rule 1.070 (j) or dismisses an action for lack of prosecution under Rule 1.420(e), the dismissals are "without prejudice" and upon dismissal, a plaintiff is put in the same position he or she would have been in if the action had never been filed. Under both Rules, the standard of review on appeal is whether the trial court abused its discretion in dismissing the party or the action. Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla. 1992); Freeman v. Toney, 608 So.2d 863 (Fla. 4th DCA 1992). When an appellate court reviews an order to determine whether there has been an "abuse of discretion" by a judge:

> "the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness". Mercer v. Raine, 443 So.2d 944, 946 (Fla. 1983).

Nationsbank has the burden to demonstrate that no reasonable person could

differ as to the propriety of the action taken by the trial court.[2]

C. THE DISTRICT COURT'S DECISION WAS NOT BASED UPON NATIONSBANK'S SHOWING OR LACK OF SHOWING OF GOOD CAUSE, BUT RATHER ON ITS ERRONEOUS FINDING THAT NATIONSBANK SERVED BEREZIN WITH PROCESS WITHIN THE 90 DAY EXTENSION PERIOD.

The trial court found that the June 10, 1993 letter did not constitute service of process. (R-414, 455-461).The reversal of the two February 25, 1998 trial court Orders by the District Court was not based upon whether Nationsbank had shown "good cause". It was based upon the District Court's substitution of its own judgment for the trial court's factual finding that Nationsbank's mailing of its June 10, 1993 letter to Berezin in Massachusetts constituted service of process, albeit invalid, and, therefore, Nationsbank met the mandates of the trial court's May 20, 1993 Order, which required Nationsbank to serve Berezin by August 18, 1993. Using what effectively was its own finding of fact, the District Court then held that the trial court abused its discretion when it reconsidered the June 10, 1994 Order and dismissed the action for lack of prosecution pursuant to Rule 1.420(e) because Nationsbank

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[2]A trial court has the inherent authority to reconsider any of its interlocutory rulings prior to final judgment, and a successor judge has the same authority to vacate or vary an interlocutory order as the original judge. Whitlock v. Drazinic, 622 So.2d 142 (Fla. 5th DCA 1993) (en banc), rev. den. 630 So.2d 1103 (Fla. 1993).

complied with Rule 1.070(j) when it mailed its June 10, 1993 letter to Berezin.

The District Court further held, based upon its finding of fact set forth above, that the trial court abused its discretion in dropping Berezin as a party pursuant to Rule 1.070(j) because the statute of limitations had long expired, hence the dismissal of Berezin and the action was tantamount to an adjudication on the merits prohibited by Rule 1.070(j). Thus, the propriety of the trial court's dismissal of the action for lack of prosecution depends upon whether Nationsbank complied with Rule 1.070 (j) during the 90 day extended period for service of process on Berezin, which in turn depends upon whether a dismissal pursuant to Rule 1.070(j) is precluded when the statute of limitations on the underlying cause of action has expired.

The 120 day time period for serving the complaint on Berezin as required by Rule 1.070(j) was extended an additional 90 days by the trial court's May 20, 1993 Order. There is no dispute that Berezin was not served with process from November 24, 1992 to May 20, 1993 (177 days from the date of the filing of the complaint). Between May 20, 1993 and August 18,1993 (the 90 day extension period), the Record shows no attempts by Nationsbank at personal service of process on Berezin, and no return or affidavit of service, whether for personal service or any other method. The Record does not show that an alias or pluries summons was issued for service on Berezin after May 20, 1993. The first Record reference to the status of

service of process on Berezin subsequent to May 20, 1993 appears in Nationsbank's Second Notice of Compliance filed on June 2, 1994, 555 days after the complaint was filed. (R-328). Nationsbank did not seek, either within the 90 day extension period or at anytime thereafter, a further extension of time under Rule 1.070(j) for service of process on Berezin.

Nationsbank's Second Notice of Compliance was unsworn and unverified and alleged that Berezin was served on or about June 22, 1993 "via Registered and Regular Mail" (that is, by mailing the June 10, 1993 letter). (R-328-329). Nationsbank's June 10, 1993 letter, Berezin's June 23, 1993 letter and the original summons for service on Berezin were not attached to the Second Notice of Compliance and were not otherwise of Record. Berezin attests that he was never served with a copy of the complaint. (R-90).

Despite Nationsbank's characterization of the mailing of its June 10, 1993 letter as service of process on Berezin, Nationsbank did not file a motion for a clerk's default against Berezin until June 9, 1994. (R-42-43). The clerk would not enter a default. Approximately one year after that, Nationsbank filed a second motion for a clerk's default against Berezin (R-48) and again the clerk would not enter a default. Instead, the clerk informed Nationsbank that a default cannot be entered against Berezin because the "issued summons have not been returned to the court file. Must

have proof of service to enter default." (R-49). It was then 919 days after Nationsbank filed the complaint.

It was not until January 6, 1997, 1,503 days after Nationsbank filed the complaint, at the hearing on Berezin's motion to strike Nationsbank's motion for summary judgment, that Nationsbank first makes record reference to Nationsbank's June 10, 1993 letter. (R-365, lines 6-25). Nationsbank's counsel argued to the trial court that its June 10, 1993 letter constituted service of process in compliance with the Rules of procedure, despite the complete absence of Record support and Nationsbank's previous representation to the trial court that personal service of process was required. The trial court based its initial finding that Berezin received a copy of the complaint and summons from reading the June 10, 1993 letter at this hearing, even though there was no record that the complaint and summons were included with the letter. (R-368, lines 21-25, R-369, lines 1-24). The letter was never offered into evidence, filed with the court or the clerk, or admitted into evidence, and a copy of it does not appear in the Record. Ultimately, the trial court correctly found that the June 10, 1993 letter did not constitute service of process. (R-455-561, 414).

D. THE DISTRICT COURT'S DECISION, WHICH HOLDS THAT A DISMISSAL PURSUANT TO RULE 1.070(j) IS PROHIBITED IF THE STATUTE OF LIMITATIONS HAS RUN ON THE UNDERLYING CAUSE OF ACTION, EXPRESSLY AND DIRECTLY CONFLICTS WITH MORALES.

In Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla. 1992), citing Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir. 1987), cert. denied, 484 U.S. 965, 108 S.Ct. 455, 98 L.Ed.2d 395 (1987), and relying upon the interpretation of Fed.R.Civ.P. 4(j), the federal counterpart to Rule 1.070(j), this Court stated:

> "The 120 day - limit to effect service of process established by Fed.R.Civ.P. 4 (j) is to be strictly applied, and if service of the summons and complaint is not made in time and the plaintiff fails to demonstrate good cause for the delay, "the court must dismiss the action as to the unserved defendant". ...'Half-hearted' efforts by counsel to effect service of process prior to the deadline do not necessarily excuse a delay, even when a dismissal results in the plaintiff's case being time-barred due to the fact that the statute of limitations on the plaintiff's cause of action has run (emphasis in original, citations omitted)." Morales, supra, 601 So.2d at 539.

In Morales, this Court approved the lower court's dismissal of the action based upon Rule 1.070(j), even though the statute of limitations on the underlying personal injury action may have expired. This Court "recognize[d] that the rule exacts a harsh sanction in cases where the limitations period may have expired ... [but a dismissal] based upon rule 1.070(j) [in such circumstances is necessary] to fulfill its mission of

assuring diligent prosecution of lawsuits once a complaint is filed." Morales, 601 So.2d at 539-40.

In direct and express conflict with Morales, the District Court held:

> "By dropping Berezin as a party and then dismissing the case for lack of prosecution infra, the court effectively adjudicated the complaint on its merits since the statute of limitations had long expired. As Rule 1.070(j) specifically prohibits dismissals under the Rule from operating as a formal adjudication, we hold the court abused its discretion." Nationsbank v. Ziner, 766 So.2d 364 at 367.

The District Court misinterpreted the language contained in Rule 1.070(j). No rule or principle adopted by this Court holds that a dismissal under Rule 1.070(j) amounts to an adjudication on the merits prohibited by Rule 1.070(j). This Court expressly recognized that a dismissal of an action under Rule 1.070(j) is permitted even if the statute of limitations has expired. Indeed, the last sentence of Rule 1.070(j) means that an action dismissed under the Rule is not a dismissal on its merits. See, e.g., Forest v. Holland Distributors, Inc., 824 F.Supp. 87 (M.D. La. 1993) (dismissal for failure to serve invalidates filing of lawsuit, creating legal fiction that suit was never filed); Bankers Ins. Co. v. Thomas, 684 So.2d 246 (Fla. 2d DCA 1996). A Rule 1.070(j) dismissal does not impact the viability of the action if or when it is refiled, except the dismissal is not the equivalent of a dismissal under Rule 1.420 (a)(1). See also Gammie v. State Farm Mutual Automobile Insurance

Company,720 So.2d 1163 (Fla. 3d DCA 1998)(running of statute of limitations on an action voluntarily dismissed does not amount to an adjudication of no liability).

Rule 1.070(j) works in concert with Rule 1.420(e), and further demonstrates that Rule 1.070(j) dismissals are not on the merits, as a matter of law. Fla.R.Civ.P. 1.420(a)(1) prevents parties from filing and re-filing actions arising from the same claims against the same parties. However, the "two dismissal rule" does not come into play, that is, there is no dismissal with prejudice of an action, when there is a voluntary dismissal preceded by a court ordered dismissal for (a) lack of jurisdiction, (b) improper venue, or (c) failure to prosecute. Hughes Supply, Inc. v. Friendly City Elec. Fixture Co., 338 F.2d 329 (5th Cir. 1964); Hamilton v. Millnul Associates, 443 So.2d 485 (Fla. 2d DCA 1984). Similarly, the "two dismissal rule" does not apply if the action or party is dismissed by court order pursuant to Rule 1.070 (j).

There are two additional reasons why the District Court should not have considered the expiration of the statute of limitations as a reason for concluding that the trial court abused its discretion in dropping Berezin as a party and dismissing the action for lack of prosecution. First, Nationsbank waived the argument by failing to raise it before the trial court or on appeal below. Hillsborough County Aviation v.Walden, 196 So.2d 912 (Fla. 1967). Second, if the District Court's decision is

allowed to stand, trial courts, in considering whether to dismiss a case under either Fla.R.Civ.P. 1.070(j) or 1.420(e) where "good cause" is not an issue, will unnecessarily have to engage in a speculative review of the underlying cause of action to determine whether the statute of limitations has run, whether there are any legal defenses to the statute of limitations which may be raised in a refiled action, whether the dismissed action would ever be refiled, and if so, whether the statute of limitations would be raised therein as an affirmative defense. It is not an abuse of discretion to dismiss a case under Fla.R.Civ.P. 1.070(j) or Fla.R.Civ.P. 1.420(e) solely because the statute of limitations has run on the pending cause of action if it is refiled after the dismissal. F.M.C. Corp. v. Chatman, 368 So.2d 1307 (Fla. 4th DCA 1979).

E. THE DISTRICT COURT MISAPPLIED THE RATIONALE OF BICE; ONLY INVALID SERVICE WHICH REQUIRES A DEFENDANT TO RESPOND TO THE COMPLAINT SATISFIES THE OBJECTIVES OF RULE 1.070(j) AS ANNOUNCED IN MORALES.

Although the trial court found that Nationsbank's mailing of its June 10, 1993 letter to Berezin in Massachusetts did not constitute service of process (R-414, 455-461), the District Court concluded it did constitute service of process, albeit invalid. The District Court, relied on Bice v. Metz Const. Co., 699 So.2d 745 (Fla. 4th DCA 1997), rev. den. sub nom, James Young & Co. v. Bice, 705 So.2d 901 (Fla. 1998)

("Bice") in reaching this conclusion. The District Court specifically held:

> "Nevertheless, we hold that dropping Berezin as a party was erroneous under Bice. Although Nationsbank effected improper service, it is undisputed that Berezin received the summons and complaint. This receipt assures that Nationsbank met the purposes of Rule 1.070(j), precluding dismissal." Nationsbank, supra, 726 So.2d at 367.[3]

The District Court misapplied the rationale of Bice to the facts of the instant case. Bice is a qualification of Morales. Morales mandates the dismissal of a defendant under Rule 1.070(j) if the defendant is not served with process within 120 days of the filing of the complaint. Bice addresses the issue of whether invalid service of process within the 120 day time limit satisfies the objectives of Rule 1.070(j), thereby precluding a dismissal of the defendant. The determination of whether invalid service meets the objectives of rule 1.070(j) should be made by the trial court in the exercise of its broad discretion. Morales, 601 So.2d at 539.

In relying on Bice to support its conclusion that Nationsbank's mailing of its June 10, 1993 letter was invalid service of process but satisfied the objectives of Rule 1.070(j) in preventing an inordinate delay in the prosecution of an action, the District

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[3]The District Court mischaracterized the receipt of the summons and complaint by Berezin as "undisputed". In fact, Berezin's affidavit, the only sworn statement of record, expressly states that he was never served with a copy of the complaint. (R-90-91).

Court overlooked the most important part of Bice's rationale:

> "Appellant claims that permitting an invalid service to prevent dismissal under the rule, thwarts its purpose to assure diligent prosecution of lawsuits once a complaint is filed. See Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla. 1992). We disagree. When service is made, a defendant must respond within twenty days or suffer a default. If a motion to quash service is filed, then in securing a ruling the trial court can direct service to be made within some reasonable amount of time. Thus the trial court will have taken control of the case and can prevent inordinate delay in effectuating valid service. ... Where plaintiff serves process, even when invalid, the defendant must respond and the action progresses. Thus, the rule accomplishes its objective." Bice, 699 So.2d at 746. (emphasis added).

The holding of Bice is not that every invalid attempt at service of process satisfies the objectives of Rule 1.070(j); rather, only invalid service of process which requires a defendant to respond to the complaint satisfies its objectives. When, as here, a defendant is not required to respond to the complaint, the plaintiff cannot default the defendant when it fails to respond thereto. Moreover, the plaintiff cannot proceed against that defendant and the action cannot be set for trial with respect to a co-defendant who has been served and has pled. To meet the objectives of Rule 1.070(j), the plaintiff must file a prima facie valid affidavit or return of service and summons sufficient to permit the clerk of court or the court itself to enter a default against the non-responding defendant. In the instant case, this was not done.

On June 9, 1994, Nationsbank filed a motion for a clerk's default against Ziner and Berezin. The clerk refused to enter the defaults because there was no proof of service in the court file (R-42-43). On June 6, 1995, over 900 days after the complaint was filed, Nationsbank filed a second motion for a clerk's default against Ziner and Berezin. The clerk refused to enter the defaults because there was no proof of service in the court file (R-48-49).

Even if Nationsbank's mailing of its June 10, 1993 letter constituted invalid service of process, because no return or proof of service has ever been filed, or could have been filed, the case against Berezin could not move forward. Since no return was ever filed, Berezin could not suffer a default when he failed to respond. Since Berezin did not have to respond, the action could not progress against him and the action could not be set for trial with respect to Ziner. The objectives of Rule 1.070(j) were not achieved and the trial court could have reasonably made this determination. See Gondal v. Martinez, 606 So.2d 490 (Fla. 3d DCA 1992) (filing of affidavit of diligent search and inquiry over 700 days after complaint was filed did not preclude dismissal based upon Rule 1.070(j)).

F. THE TRIAL COURT ACTED REASONABLY WHEN IT FOUND THAT NATIONSBANK'S JUNE 10, 1993 LETTER DID NOT CONSTITUTE SERVICE OF PROCESS.

1. NATIONSBANK DID NOT USE A METHOD OF SERVICE TO OBTAIN IN PERSONAM JURISDICTION OVER BEREZIN REASONABLY CALCULATED TO ACCOMPLISH THE OBJECTIVES OF RULE 1.070(j).

In response to the trial court's First Order of Dismissal, Nationsbank filed its First Notice of Compliance, and acknowledged that personal service of process on Berezin was required (an action on a guaranty is an in personam action). Bedford Computer Corp. v. Graphic Press, Inc., 484 So.2d 1225 (Fla. 1986). Nationsbank also informed the trial court in its First Notice of Compliance that it had retained another process server in Massachusetts to personally serve Berezin. (R-279-280). Based upon Nationsbank's First Notice of Compliance, the trial court entered the May 20, 1993 Order granting Nationsbank an additional ninety (90) days in which to serve Berezin. While the May 20, 1993 Order does not expressly state " ninety 90 days in which to personally serve Berezin", based upon the representations made in Nationsbank's First Notice of Compliance, it is logical to conclude that that is what the trial court meant. However, rather than follow through on its representation to the trial court to further attempt personal service of process on Berezin in Massachusetts, Nationsbank merely mailed Berezin its June 10, 1993 letter (which it easily could

have done within the first 120 days of the filing of the complaint). Since Nationsbank had purportedly hired a third process server to effectuate personal service of process on Berezin, and as it obviously had Berezin's address, the mailing of Nationsbank's June 10, 1993 letter was not reasonably intended as service of process. The trial court could have reasonably concluded that Nationsbank should not reasonably have expected to accomplish timely service by the method utilized. Morales, 601 So.2d at 539.

2. THE FAILURE OF NATIONSBANK TO ALLEGE LONG ARM JURISDICTION IN THE COMPLAINT ALSO RENDERS ITS PURPORTED SERVICE OF PROCESS VOID.

The complaint fails to allege that Berezin is engaged in business in Florida and that the cause of action upon which he was sued arose from these business activities. (R-1-28). If these jurisdictional allegations are not made, service is not perfected and the trial court lacks jurisdiction over the defendant. Pelycado Onroerend Goed v. Ruthenberg, 635 So. 2d 1001, 1003 (Fla. 5th DCA 1994). Nationsbank's complaint is devoid of any of the jurisdictional allegations required when suing a non-resident and it is deficient on its face, which renders Nationsbank's letter of June 10, 1993 a nullity, even if it could be construed as some sort of service of process. See City Contract Bus Services, Inc. v. H.E. Woody, 515 So.2d 1354 (Fla. 1st DCA 1987); Committee Notes to the 1996 Amendment to Rule 1.070(j). "Service of process"

which is a nullity should not be considered as satisfying the objectives of Rule 1.070(j).

3. NATIONSBANK UTILIZED NO FLORIDA RECOGNIZED METHOD OF SERVICE TO OBTAIN IN PERSONAM JURISDICTION OVER BEREZIN WITHIN THE 90 DAY EXTENSION PERIOD.

Sections 48.161 and 48.181, Florida Statutes, were the only statutes in Florida in June 1993 that contemplated the service of a complaint on a non-resident defendant by mail, and then only to obtain in rem, not personal jurisdiction over a defendant.[4] The only requirement under Section 48.161 with which Nationsbank may have complied is the requirement of sending a copy of the process and the complaint to Berezin by registered mail. Nationsbank's mailing of the June 10, 1993 letter to Berezin, if it constituted service of process at all, was so defective and contrary to any then permitted method of service as to render it void. Cohen v. Drucker, 677 So.2d 953 (Fla. 4th DCA 1996); see also Hodges v. Noel, 675 So.2d 248 (Fla. 4th DCA 1996).

The Florida Rules of Civil Procedure that were in place in 1993 did not contemplate service of process by mail. Effective January 1, 1997, the Florida

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[4]F. S. § 48.194 (1993), which permits service of process by registered mail on a non-resident defendant to obtain in rem jurisdiction was not yet effective.

Supreme Court revised Rule 1.070(i) . Under the *new* Rule 1.070(i), waiver of personal service of process by registered mail is acceptable under certain limited conditions. Even if this Rule could be said to apply in this case, Nationsbank did not comply with any of the conditions imposed by the Rule.

A letter request (even when accompanied by the complaint and summons) by a plaintiff to a defendant to waive service of process does not constitute the service of the complaint under Rule 1.070(j). If a defendant refuses to sign the waiver, the plaintiff has the remainder of the 120 day period to serve the complaint on the defendant as required by law. When in personam jurisdiction is required, as here, to comply with Rule 1.070(j), service of process must be made by personally serving a defendant with a copy of the complaint and the summons by a duly authorized process server, even if the defendant receives and obtains actual knowledge of the complaint. With respect to Fed. R. Civ. P. 4(j), see Schnabel v. Wells, 922 F.2d 726 (11th Cir. 1991); Tso v. Delaney, 969 F.2d 373 (7th Cir. 1992). Even if Florida had adopted the mailing rule (Fla.R.Civ.P. 1.070(i)(1997)), when Nationsbank mailed its June 10, 1993 letter, the mailing would not have satisfied the objectives of Rule 1.070(j).

G. BASED UPON RULE 1.420(e) (EVEN WITHOUT REGARD TO RULE 1.070(j)), THE DISMISSAL FOR LACK OF PROSECUTION WAS NOT AN ABUSE OF DISCRETION BECAUSE THERE WAS NO RECORD ACTIVITY DURING THE RELEVANT ONE YEAR PERIOD.

1. THE TWO STEP TEST FOR DISMISSAL

In determining whether to dismiss an action for lack of prosecution under Fla.R.Civ.P. 1.420 (e), the trial court must employ a two (2) step analysis. It must first find that there has been no activity by filing of pleadings, order of court, or otherwise appearing on the face of the record for a period of one (1) year. Del Duca v. Anthony, 587 So.2d 1306 (Fla. 1991); Konstand v. Bivens Center, Inc., 512 So.2d 1148 (Fla. 1st DCA 1987). If it finds that there has been no such activity on the face of the record during the required one (1) year period, then the court must determine whether the plaintiff establishes "good cause" why the action should remain pending. Establishing good cause "requires some contact with the opposing party and some form of excusable conduct or occurrence which arose other than through negligence or inattention to pleading deadlines." Freeman v. Tony, 608 So.2d at 863; Modellista DeEurpa (Corp.) v. Redpath Investment Corporation, 714 So.2d 1098 (Fla. 4th DCA 1998). The excusable conduct or happening must prevent or hinder a party's compliance with the rules of procedure. F.M.C. Corporation v Chatman, 368 So.2d 1307 (Fla. 4th DCA 1979). The District Court did not base its decision on any finding

of "good cause".

The trial court found (R-457) and the face of the Record reflects that there was no activity by filing of pleadings, order of court, or otherwise for a period of one (1) year prior to the filing of the trial court's sua sponte Second Order of Dismissal. The relevant one (1) year period was from May 24, 1993 to May 24, 1994. The trial court did not abuse its discretion in making this undisputed finding.

2. NATIONSBANK'S NON-RECORD MAILING OF ITS JUNE 10, 1993 LETTER, EVEN IF CHARACTERIZED AS "RECORD ACTIVITY", WAS NOT THE TYPE OF RECORD ACTIVITY THAT WOULD PRECLUDE A DISMISSAL FOR LACK OF PROSECUTION.

Even assuming, arguendo, that the non-record mailing of Nationsbank's June 10, 1993 letter constituted "activity on the face of the record", the mailing of Nationsbank's June 10, 1993 letter was not the type of record activity which hastened the case to judgment or moved the case forward. Rule 1.420(e), case law and the rationale of Bice, decided under Rule 1.070(j), support this conclusion.

Not all activity appearing on the face of the record is sufficient to preclude a dismissal for lack of prosecution. A plaintiff must do something affirmative and something of substance. Toney v. Freeman, 600 So.2d 1099, 1100 (Fla. 1992). This Court has held that status orders and responses do not constitute sufficient record activity to preclude a dismissal for lack of prosecution, Toney, supra; likewise,

frivolous or useless discovery does not constitute record activity. DelDuca v. Anthony, 587 So.2d 1306 (Fla. 1991). Even a motion for summary judgment, if not supported by affidavits or argument and not scheduled for hearing, does not constitute record activity sufficient to preclude a dismissal. Ezell v. Century 21 of the Southeast, Inc., 615 So.2d 273 (Fla. 5th DCA 1993).

In the instant case, Nationsbank acknowledged that personal service of the complaint on Berezin was required. Therefore, it can not now argue that its June 10, 1993 letter could possibly have hastened the case to judgment or moved it forward because Nationsbank knew that it could not obtain a default against Berezin if he failed to respond to the letter with a pleading or a motion. A fair reading of Nationsbank's June 10, 1993 letter indicates that it was nothing more than an attempt by Nationsbank to induce a waiver of service of process and personal jurisdiction by Berezin[5]. In short, Nationsbank's case against Berezin could not and did not move forward for more than three years after June 10, 1993 as a result of the mailing of Nationsbank's June 10,1993 letter.

Even if Nationsbank's mailing of its June 10, 1993 letter was "service of process," albeit invalid, and constituted record activity during the relevant one (1)

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[5]Berezin never waived his objections to service of process or personal jurisdiction. Nationsbank, supra, 726 So.2d at 367.

year lack of prosecution period, the rationale set forth in Bice is equally applicable to a dismissal under Rule 1.420(e). If a plaintiff serves a defendant with the complaint within the one (1) year lack of prosecution period, as evidenced by the filing of a facially valid return or affidavit of service and the summons (even if service is later found to be invalid), a defendant must respond to the complaint. Otherwise, the defendant can be defaulted. A return or affidavit of service filed with the clerk evidences the service of the complaint and therefore allows the clerk or the court to enter a default against the non-responding defendant. This obviously hastens the case to judgment or moves it forward. In the instance case, since Nationsbank never filed or could have filed a sworn affidavit or return or service of the complaint or the summons on Berezin (and Berezin's affidavit attests that the complaint was never served on him), there was no possibility for Nationsbank to obtain a default against Berezin. On two occasions Nationsbank requested the clerk of the trial court to enter a default against Berezin, but the clerk refused because there was no proof of service or summons in the file (R-42-43 and R-48-49). Moreover, as stated above, Nationsbank acknowledged that personal service of the complaint on Berezin was required and yet the Record reflects no proof of personal service of the complaint on Berezin at any time, whether valid or invalid.

3. NON-RECORD ATTEMPTS AT SERVICE OF PROCESS DO NOT CONSTITUTE RECORD ACTIVITY AND THE DISTRICT COURT'S HOLDING TO THE CONTRARY DIRECTLY AND EXPRESSLY CONFLICTS WITH THE McPHERSON DECISION.

Nationsbank's June 10, 1993 letter itself was never filed with the clerk and it was not referenced in the Record until 3½ years after it was mailed. The Record was devoid of any attempts at service of process on Berezin during the one year period immediately preceding the Second Order of Dismissal. In McPherson v. Sher Rental and Leasing Enterprises, Inc., 541 So.2d 1356 (Fla. 3d DCA 1989), the court found that the trial court did not abuse its discretion when it failed to reinstate the action after it had dismissed it for failure to prosecute. The plaintiff's motion in that case alleged that the plaintiff was attempting to serve the corporate defendant during the relevant one year lack of prosecution period. The holding by the District Court in the instant case directly and expressly conflicts with McPherson since the most Nationsbank has shown was that it had made non-record attempts at contact with Berezin. The trial court did not abuse its discretion when it dismissed the action for lack of prosecution notwithstanding the purported non-record attempts at communication with Berezin.

Nationsbank argues, relying upon Glassalum Engineering Co. v. 392208 Ontario Ltd., 487 So.2d 87 (Fla. 3d DCA 1986) and Rivera v. A.I.M.F., Inc., 417

So.2d 304 (Fla. 3d DCA 1982), that when it mailed Berezin its June 10, 1993 letter, the service of the letter constituted "service of process" within the relevant one (1) year lack of prosecution period sufficient to preclude a dismissal for lack of prosecution. Those two cases, however, are distinguishable from the instant case.

First, in both Glassalum and Rivera, there was nothing to indicate that the defendants therein were not personally served with a copy of the complaint within the relevant one (1) year period or that returns of service were not filed with the clerk which would have enabled the plaintiffs to obtain defaults against the defendants. In the instant case, there is no sworn statement that Berezin actually received a copy of the summons or complaint. Second, as argued supra, since no long arm jurisdiction allegations were made in the complaint, if Nationsbank's June 10, 1993 letter is characterized as service of process, it was a nullity. Third, as argued supra, since no return of service or affidavit of service was ever filed or could have been filed by Nationsbank, Nationsbank could not have obtained and it did not obtain a default against Berezin and the case could not move forward. It did not move forward for more than four years.

Nationsbank's own characterization of its June 10, 1993 letter to Berezin was inconsistent. Nationsbank claimed that Berezin "answered" the complaint when Berezin and Ziner sent Nationsbank's attorney a letter in December 1992 (R-60-63).

If this Court takes as true that Berezin answered the complaint in December 1992, as Nationsbank states, then clearly there was no record activity during the relevant one (1) year period and Nationsbank's mailing of its June 10, 1993 letter to Berezin had no service of process purpose. Nationsbank knew that personal service of process of the complaint and summons on Berezin was required. If all Nationsbank had to do to serve process on Berezin was mail him a letter with the summons and complaint, there is no reason it could not have done so within the first 120 days of the date of filing the complaint. The trial court did not abuse its discretion when it found that the June 10, 1993 letter did not constitute service of process.

4. THE DISTRICT COURT ERRED WHEN IT HELD THAT THE YEAR PRECEDING THE FEBRUARY 25, 1998 ORDER WAS THE RELEVANT YEAR FOR DETERMINING WHETHER THERE WAS ANY RECORD ACTIVITY.

The District Court erred when it sua sponte raised the issue of "self-actuation". "Self-actuation" was not argued by Nationsbank either before the trial court or on appeal before the District Court, and therefore it was waived as basis for reversal. Hillsborough County Aviation v.Walden, supra. The District Court stated:

> "In any event, during the one year period before the order dismissing the action was entered, significant record activity occurred. Because the provisions of Rule 1.420(e) are not self-actuating, the court should not have dismissed the case for failure to prosecute in 1998, even though it arguably could have done so in 1994. (citations omitted)."

Nationsbank, 726 So.2d at 368.

Paragraph (6) of Ziner's Amended Motion (R-223-224) specifically requested the trial court to vacate and set aside the June 10, 1994 Order. Similarly, Ziner's memorandum of law in support of the Amended Motion requested the vacating and setting aside of the June 10, 1994 Order (R-324, paragraphs (2) and (8)). Moreover, the only part of Ziner's Amended Motion heard by the trial court on February 5, 1998, related to the reconsideration of the trial court's June 10, 1994 Order. All other issues raised in Ziner's Amended Motion were abandoned by Ziner at the hearing (R-384-386).

The trial court's basis for its order dismissing the action for lack of prosecution was Ziner's February 17, 1998 Motion for Reconsideration (R-413-415, paragraph (3)). The February 25, 1998 Order(R-413-415) vacated and set aside the February 11, 1998 order denying reconsideration of the June 10, 1994 Order, and vacated and set aside the June 10, 1994 Order itself. The Final Judgment entered by the trial court on September 8, 1998 also confirms this fact. The trial court did not grant Ziner's motion to dismiss for lack of prosecution. Instead, the trial court entered an Order pursuant to Judge Fine's May 24, 1994 sua sponte Second Order of Dismissal.

The one year period immediately preceding the entry of the February 25, 1998 Order dismissing the action for lack of prosecution (i.e. February 25, 1997 to

February 25, 1998) is not relevant to the reconsideration of the June 10, 1994 Order. Knowles v. Gilbert, 208 So.2d 660 (Fla. 3d DCA 1968) and Dolan v. Hartford Ins. Co. of the Southeast, 566 So.2d 316 (Fla. 4th DCA 1990), rev. den., 577 So.2d 1326 (Fla. 1991), relied on by the District Court in its opinion, correctly state the law with respect to self- actuation. However, the basis of the trial court's February 25, 1998 Order was the reconsideration of the June 10, 1994 Order, not the granting of Ziner's motion to dismiss for lack of prosecution. The one (1) year period immediately preceding the trial court's May 24, 1994 Second Order of Dismissal is the relevant time period for determining whether there was record activity.

Had Ziner not elected to challenge the propriety of the trial court's June 10, 1994 non-final, non-appealable order with a motion for reconsideration, he could have challenged it on appeal from a final judgment. Clearly, in that instance, the relevant one (1) year period would have been May 24, 1993 to May 24, 1994, the year immediately preceding the trial court's Second Order of Dismissal of May 24, 1994. Palokonis v. EGR Enterprises, Inc., 652 So.2d 482 (Fla. 5th DCA 1995). Record activity occurring after the filing of the trial court's Second Order of Dismissal is irrelevant, whether Ziner filed an appeal of the June 10, 1994 Order after entry of a final judgment or whether he filed a motion for reconsideration of that order prior to the entry of a final judgment. Fallchase Development Corp. v. Sheard,

655 So.2d 214 (Fla. 1st DCA 1995). Ziner elected to file a motion for reconsideration.

The issue of self-actuation aside, the District Court apparently agreed with Ziner that the action should have been dismissed in 1994. If the trial court "arguably" could have dismissed the case in 1994, then the trial court could have done so when it reconsidered the June 10, 1994 Order in February, 1998. In February 1998, Judge Wennet had the authority to reconsider Judge Fine's Order of June 10, 1994. Ziner submits that a decision which is "arguably" correct should not be reversed on appeal for "abuse of discretion". A reasonable person could agree with the trial court's decision to dismiss Nationsbank's action for lack of prosecution and the trial court's decision should have been upheld and should be reinstated.

CONCLUSION

For the foregoing reasons, the Petitioner, Saul L. Ziner, respectfully requests this Court to reverse the Fourth District Court of Appeal's opinion and remand the case with instructions to reinstate the trial court's Final Judgment dismissing the action for lack of prosecution, and for such other relief as this Court deems appropriate.

FONT CERTIFICATION

I HEREBY CERTIFY that the following Petitioner's Initial Brief was typed in Times New Roman size 14 font.

Respectfully submitted,

STEVEN D. RUBIN, ESQ.
Attorney for Petitioner, Saul L. Ziner
980 North Federal Highway, Suite 434
Boca Raton, Florida 33432
(561) 391-7992
Florida Bar No. 329223

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U. S. Mail to Lori L. Heyer-Bednar, Haley, Sinagra & Perez, P.A., One Financial Plaza, Suite 1900, 100 Southeast Third Avenue, Fort Lauderdale, Florida 33394 and Melody E. Altman, Esq., Solomon & Benedict, P.A., 3000 Nationsbank Plaza, 400 North Ashley Drive, Tampa, Florida 33602-4033 on this 7th day of September, 1999.

STEVEN D. RUBIN, ESQ.
Attorney for Petitioner, Saul L. Ziner
980 North Federal Highway, Suite 434
Boca Raton, Florida 33432
(561) 391-7992
Florida Bar No. 329223