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By

SUPREME COURT OF FLORIDA

Case No.: 95,448

SAUL ZINER,

Petitioner,

v.

NATIONSBANK, N.A.,

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

ON APPEAL FROM THE DISTRICT
COURT OF APPEAL, FOURTH DISTRICT
STATE OF FLORIDA

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PREFACE

The Petitioner, Saul L. Ziner, will be referred to herein as "ZINER". The Respondent, NationsBank, N.A., will be referred to herein as "NATIONSBANK". The party defendant at the trial court level and appellee at the lower appellate level, Mark A. Berezin, will be referred to as "BEREZIN".

STATEMENT OF CASE AND FACTS

A. Trial Proceedings

On November, 23, 1992 NATIONSBANK filed a complaint against the Petitioner and BEREZIN, based upon a breach of a Guaranty executed by ZINER and BEREZIN. On December 4, 1992 ZINER was served with a summons and a copy of the complaint. In early 1993, NATIONSBANK attempted to personally serve BEREZIN with process. On March 10, 1993 Deputy Sheriff Kennedy of the Middlesex Deputy Sheriff's Office executed an affidavit in conjunction with NATIONSBANK's attempts to serve BEREZIN. In the month of April 1993, NATIONSBANK attempted service again upon Mark Berezin. Over a two week period, the process server attempted to contact BEREZIN in person and over the phone to serve him with process. As the proof of service indicates, NATIONSBANK, on four separate occasions, attempted to serve BEREZIN at his

residence at 250 Hammond Pond Parkway, Chestnut Hill, Mass. In NATIONSBANK's response to the trial court's Motion, Notice, and Order of Dismissal dated April 26, 1993 NATIONSBANK advised the court of its numerous attempts to serve BEREZIN. In response thereto, the trial court entered an order granting NATIONSBANK an additional 90 days to serve BEREZIN. Within that 90 day deadline under the trial court's order, NATIONSBANK served BEREZIN by mail.

On June 23, 1993, BEREZIN received a June 10, 1993 letter from NATIONSBANK's counsel together with a copy of the summons and complaint filed in the trial court. NATIONSBANK's June 10, 1993 letter was submitted to the trial court at oral argument on BEREZIN's Motion to Strike NATIONSBANK's Motion for Summary Judgment held on January 6, 1997. In the June 10, 1993 letter, BEREZIN was informed that he had 20 days to file a written response to the attached complaint and summons. On June 23, 1993, BEREZIN responded to NATIONSBANK's June 10, 1993 letter, specifically referenced his receipt of the June 10, 1993 letter.

The trial court on May 24, 1994 entered a Motion, Notice and Order of Dismissal for lack of prosecution. In response, NATIONSBANK advised the court in its Notice of Compliance filed with the trial court in response to the court's order

to show cause that service was effectuated on BEREZIN within the one year time period. In response, the trial court did not dismiss the action. ZINER, on May 21, 1996 filed his Answer in Response to NATIONSBANK's Complaint.

On the eve of the hearing on NATIONSBANK's Motion for Summary Judgment, BEREZIN served and filed his Motion to Strike NATIONSBANK's Motion for Summary Judgment ("BEREZIN'S Motion to Strike"). Based upon the contents of NATIONSBANK's June 10, 1993 letter and the corresponding June 23, 1993 letter from BEREZIN, the trial court made a factual determination at the January 6, 1997 hearing that BEREZIN, did in fact receive a copy of the complaint and summons. As a result thereof, the trial court found personal jurisdiction over BEREZIN and entered an order on February 13, 1997 accordingly. Thereafter, on February 24, 1997 BEREZIN filed his Motion for Rehearing and Reconsideration, which was denied by the trial court. On January 15, 1998, BEREZIN filed another Motion for Reconsideration and Motion for Summary Judgment, which were again premised on the validity of the service on BEREZIN. A hearing was held on February 13, 1998 upon BEREZIN's Motion for Reconsideration and Motion for Summary Judgment. The trial court on February 25, 1998 entered an order granting BEREZIN's Motion for Reconsideration, upon which NATIONSBANK appealed the

ruling to the District Court of Appeal of Florida for the Fourth District ("Fourth District Court of Appeal").

ZINER thereafter filed a Motion to Dismiss and an Amended Motion to Dismiss for lack of subject matter jurisdiction ("ZINER'S Motions to Dismiss") and based upon the trial court's May 20, 1993 order. ZINER's Motions to Dismiss was also premised upon the validity of the service of process on BEREZIN. On February 11, 1998 the trial court entered an order denying ZINER's Amended Motion to Dismiss. On February 16, 1998 ZINER filed a Motion to Continue, for Reconsideration and to Add Party Defendant ("ZINER's Motion for Reconsideration"). The trial court granted ZINER's Motion for Reconsideration and entered an order on February 25, 1998, dismissing the action, from which NATIONSBANK appealed to the Fourth District Court of Appeal.

B. Appeal by NATIONSBANK

On March 17, 1998, NATIONSBANK filed an appeal to the Fourth District Court of Appeal as to the Order on BEREZIN's Motion for Summary Judgment and Motion for Reconsideration and Order Dropping Party Defendant ("Order on BEREZIN's Motions") entered by the trial court on February 25, 1998 and the Order on ZINER's Motion to Continue, for Reconsideration, to Add Party Defendant and to Dismiss for Failure to Join Indispensable Party and Final Order of Dismissal

("Order on ZINER's Motions") entered by the trial court on February 25, 1998. In its opinion filed on February 3, 1999, the Fourth District Court of Appeal reversed the Order on BEREZIN's Motions and reversed the Order on ZINER's Motions.

C. Appeal taken by Saul Ziner

Petitioner subsequently moved for a rehearing of the reversal by the Fourth District Court of Appeal, which the court denied, thereby resulting in this appeal.

SUMMARY OF ARGUMENT

This Court should decline to exercise jurisdiction over this matter pursuant to Article V, Section 3(b)(3), Florida Constitution (1980) and Florida Rules of Appellate Procedure 9.030 (a)(2)(A)(vi). Petitioner is in error in arguing that the Fourth District Court of Appeal's ruling below is contrary to and in conflict with the decision of this Court in **Morales v. Sperry Rand Corporation**, 601 So. 2d 538 (Fla. 1992) and the decision of the Third District Court of Appeal in **McPherson v. Scher Rental and Leasing Enterprises, Inc.**, 541 So. 2d 1356 (Fla. 3d DCA 1989). Respondent submits that the Fourth District Court of Appeal's ruling below is distinguishable from this Court's ruling in **Morales** and the Third District Court's ruling in **McPherson** and presents no conflict. Therefore, this Court has no jurisdiction to entertain the present appeal, and the appeal should be dismissed.

ARGUMENT

The Fourth District of Appeal properly interpreted the purpose and intent of Rule 1.070(j) of the Florida Rules of Civil Procedure and properly found that the requirements of that Rule were met. Specifically, the Fourth District Court of Appeal in its opinion below pointed out that the dropping of BEREZIN as a party to the proceedings was erroneous under the decision of **Bice v. Metz Construction Company, Inc.**, 699 So. 2d 745 (Fla. 4th DCA 1997). In its reliance upon **Bice**, the Fourth District Court of Appeal stated:

> **Bice** explains that, where a Plaintiff serves process, even when invalid, within 120 days of filing the complaint, the rule accomplishes its objective. **Id.** Thus, dismissal of an action is improper where service, albeit invalid, is affected within the 120 day period. **Id.**

Slip opinion, at page 2. Therefore, based upon the record before it, the Fourth District Court of Appeal found that the service of process on BEREZIN by mail, even though invalid, within the 120 days met the requirements of Rule 1.070(j) of the Florida Rules of Civil Procedure. As such, the Fourth District Court of Appeal held that the receipt by BEREZIN of the summons and complaint "assures that NATIONSBANK met the purposes of Rule 1.070(j), precluding dismissal." Slip Opinion, at page 3.

In **Morales**, the plaintiff, David Morales, filed suit and had a summons issued by the clerk of the court for service upon the defendant, Sperry Rand Corporation.

Plaintiff's counsel did not make any effort to obtain service on the Defendant for 110 days after filing the complaint. In fact, the Plaintiff did not even have the summonses issued by the clerk until seven days before the expiration of the 120 day period for service required by Rule 1.070 (j). Therefore, this Court upheld the trial court's and the Fourth District Court of Appeal's dismissal of the Plaintiff's case because there was no acceptable explanation for the delay nor no evidence of diligence or good cause shown for the delay. In so holding, this Court stated as follows:

> We recognize that the rule exacts a harsh sanction in cases where the limitations period may have expired. Certainly the rule need not be imposed inflexibly where the Plaintiff does meet the burden of demonstrating diligence and good cause.

601 So. 2d 538, 539 (Fla. 1992).

Unlike in **Morales**, NATIONSBANK in this action not only made numerous efforts and attempts to effectuate service upon BEREZIN, it also established good cause to the trial court as to its inability to obtain service over BEREZIN within the 120 day limit under Rule 1.070(j) as recognized by the Fourth District Court of Appeal.

Morever, the Fourth District Court of Appeal's decision reversing the trial court's dismissal of the action for lack of prosecution by finding that significant record activity occurred during the one year period before the order dismissing the

action was entered does not conflict with the decision by the Third District Court of Appeal in **McPherson v. Scher Rental and Leasing Enterprises, Inc.**, 541 So. 2d 1356 (Fla. 3d DCA 1989). As indicated by the Third District Court of Appeal's decision in **Glassalum Engineering Company v. 392208 Ontario Ltd.**, 487 So. 2d 87 (Fla. 3d DCA 1986), service of process constitutes sufficient record activity to preclude a dismissal for want of prosecution. In the instant action, even if the service of process was defective, it still was sufficient to constitute record activity to avoid a dismissal for want of prosecution. Unlike in **McPherson**, the Third District Court of Appeal found that there was insufficient record activity to establish service or attempts at service on the corporate defendant. In so holding, the Third District Court of Appeal stated that plaintiff's attempts at service on the corporate defendant was not reflected in the record. Therefore the court found that there was no record activity to support the reversal of the dismissal for lack of prosecution. Unlike in **McPherson**, the Fourth District Court of Appeal in this action below has properly found significant record activity has occurred in compliance with the trial court's May 20, 1993 order and in compliance with Rule 1.420(e). Consequently, the non-record activity holding in **McPherson** is inapplicable and certainly not inconsistent with the Court's finding below of record activity.

CONCLUSION

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June 4, 1999

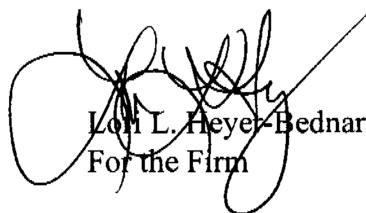
VIA OVERNIGHT MAIL

Clerk of the Court
The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, Fl 32399-1925

Dear Sir/Madam:

Enclosed please find Respondent's Jurisdictional Brief and a courtesy copy to be stamped and mailed to our office in the enclosed self addressed stamped envelope.

Sincerely,



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