IN THE SUPREME COURT OF FLORIDA

SAUL L. ZINER

CASE NO.: 95,448

4TH DCA CASE NO.: 98-1049

Petitioner,

v.

NATIONSBANK, N.A.,

Respondent.

PETITIONER'S REPLY BRIEF

On Review from the District Court

of Appeal, Fourth District

State of Florida

STEVEN D. RUBIN, ESQ.

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FLORIDA RULES OF CIVIL PROCEDURE

OTHER AUTHORITIES

ARGUMENT

I.

Whether Berezin was evading service of process within the initial 120 days of Nationsbank's filing of the complaint which purportedly justified Judge Fine's finding of good cause to extend the time for service on Berezin is irrelevant to whether Nationsbank complied with Rule 1.070(j); the relevant time period is between May 20, 1993 and August 18, 1993, the ninety (90) day extension period. The failure of the plaintiff in Morales v. Sperry Rand Corporation, 601 So.2d 538 (Fla. 1992) to take any action to personally serve the defendant within the initial 120 day period is comparable to the lack of any action Nationsbank took to personally serve Berezin within the ninety (90) day extension period. Nationsbank represented to Judge Fine that personal service of process on Berezin was required and therefore it was granted an additional ninety (90) days to effect personal service. Yet, the Record does not reflect the issuance of a summons, the service of a summons, the filing of a served summons, or any sworn proof of service with respect to Berezin. Thus, contrary to Nationsbank's argument, Morales is not distinguishable from the instant case.

II.

Judge Wennet, as the successor trial court judge, had the right to reconsider and set aside Judge Fine's and his own non-final orders (see Ziner's Initial Brief, page 21,

footnote 2). It was entirely appropriate for Judge Wennet to reconsider Judge Fine's orders because Nationsbank proceeded in response to the First and Second Orders of Dismissal on an ex parte basis. Ziner did not have the opportunity to present any argument to Judge Fine, a fact which Judge Wennet recognized when he considered Ziner's Motion for Reconsideration (R-401, lines 15-25; R-402, lines 1-24). Although Nationsbank states that Judge Fine made correct decisions based upon the "evidence" (Answer Brief at page 14), the Record, as of June 10, 1994, is devoid of any sworn statements or testimony, or other admitted evidence to support his finding of good cause for the lack of any record activity.

III.

Nationsbank misstates the law to the extent it implies that any non-record contact between opposing parties constitutes sufficient activity to avoid a dismissal for lack of prosecution. Ace Delivery Service Inc., v. Pickett, 274 So.2d 15 (Fla. 2d DCA 1974), Bakewell v. Shepard, 310 So.2d 765 (Fla. 2d DCA 1975), Daurelle v. Beach Aircraft Corp., 341 So.2d 204 (Fla. 4th DCA 1976), and Waldman v. Frankel, 343 So.2d 1325 (Fla. 3d DCA 1977), not only do not stand for that proposition, but were decided on the basis of the former version of Rule 1.420(e). In 1976, this Court amended Rule 1.420(e) to add that the activity must appear on the face of the record. In re: Florida Bar, Rules of Civil Procedure, 339 So.2d 626 (Fla. 1976); and Sainer Constructors v. Pasco County

School Board, 349 So.2d 1212 (Fla. 2d DCA 1987). Indeed, Levine v. Kaplan, 687 So.2d 863 (Fla. 5th DCA 1987), cited by Nationsbank, holds that even the plaintiff's deposition of the defendant does not constitute record activity. Levine, 687 So.2d at 865. Moreover, non-record written or telephonic settlement negotiations between parties, even if they are continuous, as a matter of law, are not sufficient to avoid a dismissal for lack of prosecution. Allstate Insurance Co. v. Bucelo, 650 So.2d 1128 (Fla. 3d DCA 1995). There is no record evidence of any settlement negotiations (or anything else) between Nationsbank and Ziner between May 20, 1993 and May 24, 1994. The only communication from either Berezin or Ziner is Berezin's June 23, 1993 letter, one non-record settlement offer made by Berezin to Nationsbank during the one year period.[1]

Nationsbank's assertion that Berezin's alleged evasion of service of process was sufficient to show that Nationsbank was hindered or prevented from prosecuting the action between May 20, 1993 and May 24, 1994 is incorrect because the evasion, if any, occurred prior to May 20, 1993. Even if there was any proof that Berezin had attempted

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[1] Nationsbank states that Berezin's June 23, 1993 letter constituted a "response" to the complaint (Answer Brief at page 4). Even the District Court agreed with the trial court's finding that Berezin's June 23, 1993 letter was not a formal pleading in response to the complaint. Nationsbank v. Ziner, 726 So2d 364 (Fla. 4th DCA 1999) at 367, n.2. Moreover, before Nationsbank's compliance with Rule 1.070 (j) became a contested issue in this case, Nationsbank had stated that Berezin's letter was not an answer, a pleading, or "any paper" (R-36, para. 12; R-42; R-48).

to evade service between May 20, 1993 and May 24, 1994 (an impossibility since Nationsbank never attempted personal service of process of Berezin during that time period), nothing hindered or prevented Nationsbank from prosecuting the action against Ziner.

IV.

Ziner submits that Nationsbank's non-record mailing of its June 10, 1993 letter cannot constitute service of process in compliance with Rule 1.070(j). In 1996, this Court amended Rule 1.070 to permit service of a complaint and summons by mail, but only if a defendant waives personal service of process by filing an acknowledgment form and if the plaintiff complies with the other requirements of the Rule. See Fla.R.Civ.P. 1.070(i) and Form 1.902(c) (based upon Fed.R.Civ.P. 4(d)). If a defendant does not return the waiver acknowledgment form, a plaintiff's only option is to personally serve the defendant with the initial process and pleading within 120 days of the filing of the complaint (or in some other manner permitted by law). A plaintiff does not comply even if the plaintiff mails the complaint and summons by certified mail, return receipt requested and the defendant actually receives the complaint and summons. Schnabel v. Wells, 922 F.2d 762 (11th Cir. 1991) (based upon Fed.R.Civ.P. 4 (j), now designated as Fed.R.Civ.P. 4(m)).

As explained in Schnabel, id. at 728, if a defendant fails to return the waiver form,

the defendant will have to pay for the cost of personal service of process. The failure of the defendant to return the waiver form does not relieve the plaintiff from its obligation to personally serve the defendant within the initial 120 day period. If Nationsbank's mailing of its June 10, 1993 letter would not constitute service of process in compliance with Rule 1.070(j) if Rule 1.070 (i) had been adopted, then the mailing should not constitute service of process in compliance with Rule 1.070 (j) before Rule 1.070 (i) was adopted. Based upon the District Court's decision, every plaintiff will automatically comply with Rule 1.070(j) by merely mailing a copy of the complaint and summons by certified mail to the defendant within the first 120 days of the date the action is filed; no further service of process attempts would be required. This would defeat the purpose of Rule 1.070 (j) and Rule 1.420 (e), which require a plaintiff to diligently prosecute an action.

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FONT CERTIFICATION

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

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 ____ day of November, 1999.

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