SUPREME COURT OF FLORIDA

Case No.: 98,448

SAUL ZINER,

Petitioner,

v.

NATIONSBANK, N.A.,

Respondent.

# RESPONDENT'S ANSWER BRIEF

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

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**FLORIDA RULES OF CIVIL PROCEDURE**

## 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". The Record on appeal will be cited as "(R. page no.)." The Fifteenth Judicial Circuit Court, in and for Palm Beach County, Florida, will be referred to as the "trial court." The Court of Appeal of Florida for the Fourth District will be referred to as the "Fourth District Court of Appeal."

## STATEMENT OF CASE AND FACTS

### A. Trial Proceedings

On November, 4, 1992 NATIONSBANK filed a complaint against the Petitioner and BEREZIN, based upon a breach of a Guaranty executed by ZINER and BEREZIN. (R. 1-28). On December 4, 1992 ZINER was served with a summons and a copy of the complaint. (R. 55-57). Three weeks later, on December 30, 1992, ZINER and BEREZIN, in response to NATIONSBANK's demand letter to them (R. 267-268), sent to NATIONSBANK a written proposal in an effort to settle their outstanding obligation with NATIONSBANK. (R. 269).

Thereafter, 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 of non-service in conjunction with NATIONSBANK's attempts to serve BEREZIN. (R. 270-271). In the month of April of 1993, NATIONSBANK again attempted service upon BEREZIN by using a national process server, APS International Group. (R. 272-273). Over a two week period, the process server attempted to contact BEREZIN in person and over the phone to serve him with process. (R. 272). 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. (R. 272). NATIONSBANK, in response to the trial court's Motion, Notice, and Order of Dismissal for failure to comply with the FRCP 1.070 (j), dated April 26, 1993 (R. 30-32), filed a Notice of Compliance with the Court's Order To Show Good Cause and advised the trial court of its numerous attempts to serve BEREZIN. (R. 279-280).

In response thereto, the trial court on May 20, 1993 entered an order granting NATIONSBANK an additional 90 days to serve BEREZIN. (R. 33). Within the 90 day deadline imposed by the trial court's order, NATIONSBANK served a summons and copy of the Complaint on BEREZIN by mail. (R. 274). This was accomplished on June 23, 1993, when 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. (R. 274). 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. (R. 359-381). In the June 10, 1993 letter, BEREZIN was informed that he had 20 days to file a written response to the enclosed complaint and summons. (R. 369) As read into the record by the trial court at the hearing held on January 6, 1997, the June 10, 1993 letter reads in full:

> This firm has been retained by NATIONSBANK of Florida, N.A. ("NationsBank") to represent it in connection with the above-captioned matter. Enclosed please find a Summons issued by the Clerk of the Court and a copy of

> the Complaint, pursuant to paragraph 15 of the Mortgage and Note Modification and Future Advance Agreement. Please note that you have 20 calendar days from the date you receive this letter to file a written response to the attached Complaint with the Clerk of the Court. (R. 369)

On June 23, 1993, BEREZIN responded to NATIONSBANK's June 10, 1993 letter and specifically referenced his receipt of the June 10, 1993 letter. (R. 62). Additionally, BEREZIN made an offer to settle the claim with NATIONSBANK in order to avoid entry of a judgment. (R. 62).

Thereafter, the trial court, on May 24, 1994 prior to the expiration of one year from the BEREZIN letter of June 23, 1993, entered a Motion, Notice and Order of Dismissal for lack of prosecution and scheduled a hearing for June 7, 1994. (R. 34-35). In response, NATIONSBANK advised the trial court in its Notice of Compliance with the Court's Order to show good cause, which was filed with the trial court in response to the trial court's order to show cause, that service of process was effectuated on BEREZIN within the one year time period and that, within the prior year, there were settlement negotiations between the parties. (R. 285). The trial court accepted NATIONSBANK's good cause showing pursuant to its Order of June 10, 1994 and did not dismiss the action. (R. 44).

Thereafter, ZINER, on May 21, 1996 filed his Answer in Response to NATIONSBANK's Complaint. (R.72-73). Similarly, BEREZIN's response to the Complaint, contained within his correspondence dated June 23, 1993, was filed with the trial court on March 4, 1996. (R. 62).

NATIONSBANK then moved for entry of Summary Judgment against both ZINER and BEREZIN on December 3, 1996. (R. 74 - 84). 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"). (R. 85-89). In response, NATIONSBANK

served and filed its Memorandum of Law in Opposition to BEREZIN's Motion to Strike NATIONSBANK's Motion for Summary Judgment (R. 114-143). 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. (R. 144) As a result thereof, the trial court found personal jurisdiction over BEREZIN and entered an order in this regard on February 13, 1997. (R.144) Thereafter, on February 24, 1997 BEREZIN filed his Motion for Rehearing and Reconsideration, which was denied by the trial court. (R. 145-155). In his Motion for Rehearing and Reconsideration, BEREZIN requested relief based upon the same factual and legal basis as asserted in BEREZIN's earlier Motion to Strike (R. 145-155). The only basis for BEREZIN's Motion for Rehearing and Reconsideration was the alleged misapplication of Florida law by the trial court. (R. 147). The trial court, after duly considering BEREZIN's Motion for Rehearing and Reconsideration, entered an Order on March 4, 1997 denying BEREZIN's Motion for Rehearing and Reconsideration (R. 156). Defendant BEREZIN did not appeal either of the lower court's rulings. Instead, 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 back in June of 1993. (R. 227 and 242). 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 (R.411-412), which NATIONSBANK appealed to the Fourth District Court of Appeal.

On August 28, 1997 ZINER filed a Motion to Dismiss and an Amended Motion to Dismiss for lack of subject matter jurisdiction ("ZINER'S Motions to Dismiss") based upon the trial court's May 20, 1993 order granting NATIONSBANK

an additional 90 days to serve BEREZIN. (R.211-212). ZINER's Motion to Dismiss was also premised upon the alleged invalidity of service of process on BEREZIN, despite the trial court's January 6, 1997 ruling to the contrary. (R. 211-212). On February 11, 1998 the trial court entered an order denying ZINER's Amended Motion to Dismiss. (R. 351).

On February 16, 1998 ZINER filed a Motion to Continue, for Reconsideration and to Add Party Defendant ("ZINER's Motion for Reconsideration"). (R.354-358). Despite its prior rulings to the contrary, the trial court granted ZINER's Motion for Reconsideration and entered an order on February 25, 1998, dismissing the action for lack of prosecution (R. 413-415), from which NATIONSBANK appealed to the Fourth District Court of Appeal.

### B. Appeal by NATIONSBANK to Fourth District Court of Appeal

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. The Fourth District Court of Appeal properly held that BEREZIN should not have been dropped as a party to the proceedings because he undisputably received the summons and complaint and therefore, service of process on BEREZIN, although improper, constituted service on BEREZIN in compliance with the trial court's May 20, 1993

order and within the 120 days as prescribed by Florida Rule of Civil Procedure 1.070(j). Moreover, the Fourth District Court of Appeal properly found that the trial court abused its discretion in dismissing the action for lack of prosecution because there was sufficient record activity during the one-year period of time from May of 1993 and June of 1994 and certainly within the one year period prior to the Order on ZINER's Motions to preclude dismissal on these grounds.

**C. Appeal taken by Saul Ziner**

Petitioner subsequently moved for a rehearing of the reversal by the Fourth District Court of Appeal, which the Fourth District Court of Appeal denied. Thus, Petitioner filed this appeal seeking a reversal of the decision rendered by the Fourth District Court of Appeal.

## SUMMARY OF ARGUMENT

The Fourth District Court of Appeal's ruling is proper and is not contrary to and is not 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 of Appeal's ruling in **McPherson** and presents no conflict. Therefore, this Court should affirm the decision of the Fourth District Court of Appeal.

## ARGUMENT

### I. THE FOURTH DISTRICT COURT OF APPEAL PROPERLY FOUND THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DROPPING BEREZIN AS A PARTY BECAUSE SERVICE BY MAIL ON BEREZIN TOOK PLACE WITHIN THE TIME FRAME REQUIRED BY RULE 1.070(j) AND THE TRIAL COURT'S MAY 20, 1993 ORDER

The Fourth District Court 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.**

**NationsBank v. Ziner**, 726 So.2d 364, 366 (Fla. 4th DCA 1999). Therefore, based upon the record before it, the Fourth District Court of Appeal properly found that the service of process on BEREZIN by mail, even though invalid, 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." **Id.** at 367.

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 any 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 presented 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. (R. 33).

Petitioner overlooks the findings by the Fourth District Court of Appeal, which are supported by the record, that NATIONSBANK made attempts to serve BEREZIN within the 120 days and did in fact serve BEREZIN by mail within the additional 90 days provided by the trial court in its May 20, 1993. (R. 33). These findings in and of themselves substantiate the Fourth District Court of Appeal's reversal of the trial court's order granting BEREZIN's motion for reconsideration of its May 20, 1993 order and dropping BEREZIN as a party. **See Bice**, 690 So. 2d 745, 746 (Fla. 4th DCA 1997)(*quoting* **Stoeffler v. Castagliola**, 629 So. 2d 196 (Fla. 2nd DCA 1993)).

As stated by the Fourth District Court of Appeal, "this receipt [of the summons and complaint by BEREZIN] assures that NationsBank met the purposes of Rule 1.070(j), precluding dismissal." (**Id**. at 367). No further analysis is required to uphold the Fourth District Court of Appeal's ruling that the dismissal of the action and dropping BEREZIN as a party under Rule 1.070(j) was erroneous.[1]

Based upon the foregoing, it is apparent that reliance by ZINER upon the argument he is entitled to reversal of the Fourth District Court of Appeal opinion

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[1]Athough the District Court of Appeal recognized that the statute of limitations had expired on NATIONSBANK's claims at the time the trial court entered its February 25, 1998 orders, there is nothing in the decision to indicate that this is the basis for the Court's decision, contrary to Petitioner's argument.

because service was not made upon BEREZIN in accordance with Rule 1.070 (j) is unavailing.

## II. THE FOURTH DISTRICT COURT OF APPEAL PROPERLY FOUND THAT RECORD ACTIVITY EXISTED AND THAT GOOD CAUSE WAS SHOWN TO WARRANT A REVERSAL OF THE TRIAL COURT'S ORDER GRANTING ZINER'S MOTION TO DISMISS THE ACTION FOR LACK OF PROSECUTION

The Fourth District Court of Appeal held that the trial court substantively erred in vacating the orders finding good cause and dismissing the action for lack of prosecution on the eve of trial. The Fourth District Court of Appeal recognized that under Florida law a dismissal for want of prosecution can be overcome by good cause or record activity. **NationsBank v. Ziner**, 726 So.2d 364,367 (Fla. 4th DCA 1999) (citing **Del Duca v. Anthony**, 508 So.2d 1306, 1308-9 (Fla. 1991)). **See also Carter v. DeCarion**, 400 So.2d 521(Fla. 3rd DCA 1981); **Ace Delivery Service, Inc., v. Pickett**, 274 So.2d 15(Fla. 2nd DCA 1974).

Even assuming *arguendo* that record activity did not exist, NATIONSBANK clearly provided good cause to the trial court to preclude dismissal. On two (2) occasions, the trial court, *sua sponte*, requested NATIONSBANK to provide good cause as to why the action should not be dismissed based upon failure to serve BEREZIN within 120 days and failure to prosecute. On both occasions, the trial court found, upon submittal of pleadings by NATIONSBANK, that there was good cause to avoid dismissal pursuant to the 120 day rule and failure to prosecute. Despite this finding of good cause and the lack of new evidence to question that finding, the trial court, more than 3 years later, found those orders to be deficient and vacated said orders. Implicitly, NATIONSBANK was making every effort to prosecute the action and relied upon prior court orders in moving for Summary Judgment in December, 1996 against ZINER and BEREZIN (R 74-84); in moving for Summary Judgment against BEREZIN in July 1997 (R 164-168) and filing a notice to set the matter for trial on August 28, 1997 (R 206-207).

Florida law is clear that judicial restraint should be adhered to with regard to dismissing for want to prosecution so that parties may proceed with resolution upon the merits. **Waldman v. Frankel**, 343 So.2d 1325 (Fla. 3rd DCA 1977). Further, Florida law is also clear that the non-record activity which took place during 1993, including contact with the opposing party, is sufficient to overcome dismissal for lack of prosecution within one (1) year under Rule 1.420(e). **Daurelle v. Beech Aircraft Corp.**, 341 So.2d 204 (Fla. 4th DCA 1976). In **Daurelle**, this court held that Rule 1.420(e) contemplated non- record activity involving contact with an opposing party to overcome a dismissal for want of prosecution Id. at 205. Other courts in Florida have held similarly. **Palokonis v. EGR Enterprises, Inc.**, 652 So. 2d 482 (Fla. 5th DCA 1995); **Bakewell v. Shepard**, 310 So.2d 765 (Fla. 2nd DCA 1975); **SMC Corporation v. Chatman**, 368 So.2nd 1307 (Fla. 4th DCA 1979).

In the instant case, on two separate occasions, NATIONSBANK presented to the trial court evidence of its continuing contact with BEREZIN during 1993 with aims towards disposition of the matter. On both occasions, the trial court found the actions of NATIONSBANK to constitute sufficient good cause to warrant denial of dismissal based upon want of prosecution and failure to serve within 120 days. Despite the finding of good cause on both occasions and despite continuous record activity thereafter, the Honorable Richard Wennett, more than 3 years after those orders were entered, found there to be insufficient good cause, based upon motions for reconsideration, without any new evidence being presented.

Even if the trial court could revisit its ruling three years earlier, which Respondent contends it could not, it is clear from the evidence presented to both Judge Fine and Judge Wennett that NATIONSBANK was in contact with BEREZIN in June of 1993 and BEREZIN was in contact with NATIONSBANK in June of 1993. The contact initiated by NATIONSBANK was service of the initial Summons and Complaint to BEREZIN,

along with a cover letter directing him to serve pleadings in the matter. The actions of NATIONSBANK were intended to move the matter along towards final disposition on the merits. Further, under the precedent previously cited, it is abundantly clear that such contact with BEREZIN is sufficient good cause to warrant denial of a motion to dismiss for failure to prosecute. That is exactly what the original trial judge previously did upon written submittal of good cause by NATIONSBANK. However, the trial court later, without any supporting law or new evidence, chose to vacate those orders and thereby committed reversible error, as held by the Fourth District Court of Appeal.

Further, as presented to the trial court, BEREZIN had evaded the efforts of NATIONSBANK to serve him with the initial process. That very information was presented to the trial court upon its *sua sponte* motion to dismiss for failure to serve within 120 days. The trial court found the attempts by NATIONSBANK to serve BEREZIN, and BEREZIN's apparent attempt to evade service, sufficient to warrant a finding of good cause in denying the Motion to Dismiss for Failure to Serve within 120 days. The attempts by BEREZIN to evade service which contributed to the delay resulting in the trial court's *sua sponte* motion to dismiss for want of prosecution is sufficient to overcome a motion or order for dismissal for lack of prosecution. **Waldman v. Frankel**, 343 So.2nd 1325 (Fla. 3rd DCA 1977). In **Levine v. Kaplan**, 687 So.2nd 863(Fla. 5th DCA 1987), the Fifth District Court of Appeals for Florida addressed the state of the law regarding good cause or dismissal pursuant to Rule 1.420(e). In **Levine**, the court stated:

> "Good cause is excusable conduct other than negligence or inattention to deadlines. It has been defined by our courts as proof of some compelling reason why the suit was not prosecuted. (Citations omitted.) For example, showing of good cause may include proof of a calamity or proof of an opposing parties actions which prevented the Plaintiff in prosecuting the cause."

**Id.** at 865.

In the instant case, NATIONSBANK presented evidence to the trial court on two (2) separate occasions that the Defendant, BEREZIN was evading service and, upon becoming aware of the suit, failed to file a responsive pleading. In either instance, the actions of BEREZIN constituted dilatory tactics thereby impeding the efforts of NATIONSBANK to resolve the issue on its merits. Based upon the actions of BEREZIN, the showing by NATIONSBANK of good cause, the attempted service by NATIONSBANK, and the complete failure of either ZINER or BEREZIN to establish proof which would warrant the vacating of Judge Fine's prior orders finding good cause, it was reversible error for the trial court to vacate the May 1993 or May 1994 orders entered by Judge Fine finding good cause. The trial court clearly committed reversible error and the Fourth District Court decision remanding this matter to the trial court for proceedings on the merits should be affirmed.

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

The Fourth District Court's of Appeal's reversal of the trial court's orders is correct and is not contrary to any decisions rendered by this Court or the District Courts of Appeal. The Fourth District Court of Appeal's decision should be affirmed.

## CERTIFICATE OF FONT COMPLIANCE

I certify that Respondent's Answer Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. This brief is typeset in 14 point proportionately spaced Times Roman.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

furnished this _____ day of October, 1999 by U.S. Mail to: Steven D. Rubin, Esquire, 980 North Federal Highway, Suite 434, Boca Raton, FL 33432.

By:_____

LORI L. HEYER-BEDNAR

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