IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case Number SC00-1647
DCA Case Number 99-2794

METROPOLITAN DADE COUNTY,

Defendant/Petitioner,

v.

WALTER HALL,

Plaintiff/Respondent.

____/

ANSWER BRIEF OF WALTER HALL

HOFFMAN, LARIN & AGNETTI, P.A.
Attorneys for Plaintiff/Respondent
909 N. Miami Beach Blvd., Ste. 201
North Miami Beach, Florida 33162

By:
____
John B. Agnetti, Esq.
Florida Bar No. 359841
Telephone: (305) 653-5555
Telefax: (305) 940-0090

Case No. SC00-1647

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman for the body of the brief and for the argument headings.

TABLE OF CONTENTS

C E R T I F I C A T E O F T Y P E S I Z E A N D STYLE..i

T A B L E O F CONTENTS..ii

T A B L E O F AUTHORITIES...iii

S T A T E M E N T O F T H E CASE...1

S U M M A R Y O F ARGUMENT...3

ARGUMENT..5

I. THE THIRD DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT FOUND THE ACTUAL TAKING OF A DEPOSITION, INTER ALIA, CONSTITUTED RECORD ACTIVITY WHICH WILL DEFEAT A MOTION TO DISMISS FOR LACK OF PROSECUTION BECAUSE THE ACTUAL TAKING OF A DEPOSITION CONSTITUTES ACTIVITY DESIGNED TO A D V A N C E T H E C A S E T O W A R D CONCLUSION...4

CONCLUSION..

....12

C E R T I F I C A T E O F

SERVICE...13

TABLE OF AUTHORITIES

STATE CASES

Barnett Bank of East Polk County v. Fleming, 508 So. 2d 718 (Fla. 1987) 9

Burk v. Value Rent-a-Car, 697 So. 2d 986 (Fla. 4th DCA 1997) 8

Cravens v. Kulubis, 694 So. 2d 780, 781 (Fla. 2d DCA 1997) 6

Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991) . . . . *passim*

Eastern Elevator v. Page, 263 So. 2d 218 (Fla. 1972) 3, 7, 8

Edgecumbe v. American Gen. Corp., 613 So. 2d 123 (Fla. 1st DCA 1993) 10

Freeman v. Toney, 608 So. 2d 863 (Fla. 4th DCA 1992) 10

Hannon v. Nassr, 701 So. 2d 445 (Fla. 3d DCA 1997) 6

Harris v. Winn-Dixie Stores, Inc., 378 So. 2d 90, 94 (Fla. 1st DCA 1979) 6

Levine v. Kaplan, 687 So. 2d 863 (Fla. 5th DCA 1997) 3

Milligan v. Osborne, 682 So. 2d 706, 706 (Fla. 5th DCA 1996) 6

Norflor Constr. Corp. v. City of Gainesville, 512 So. 2d 266
(Fla. 1st DCA 1987) 10

Pollock v. Pollock, 110 So. 2d 474 (Fla. 1st DCA 1959) 9

Q.I.P. Corp. v. Berger, 547 So. 2d 1286, 1288 (Fla. 4th DCA 1989) 6

Reddish v. Forlines, 207 So. 2d 703 (Fla. 1st DCA 1968) 9

Silverman v. Equifax Services, Inc., 420 So. 2d 928, 929 (Fla. 3d DCA 1982) . . . 6

Smith v. DeLoach, 556 So. 2d 786 (Fla. 2d DCA 1990) 3

Utset v. Campos, 548 So. 2d 834, 837 (Fla. 3d DCA 1989) 6

FLORIDA RULES

Fla. R. Civ. P. 1.310(f)(1967), published in In re Florida Rules of Civil Procedure 1967 Revision, 187 So. 2d 598, 617 (Fla. 1966) 8

Fla. R. Civ. P. 1.420(e) . . . . *passim*

SECONDARY AUTHORITIES

In re Florida Rules of Civil Procedure, 403 So.2d 926, 929-30 (Fla. 1981) 1

ORDERS

Opinion of Third Circuit Court of Appeal in re Walter Hall v. Metropolitan Dade County, filed *June 21, 2000* 8

STATEMENT OF THE CASE

Walter Hall[1] filed suit in Circuit Court in 1995 against Metropolitan Dade County,[2] Insignia Management Group[3] and Gaither Ann Perkins to recover damages for stolen personal property valued at $13,500.00 and for emotional and psychological injuries sustained by him as a result of Metropolitan Dade's wrongful entry into his private home on or about July 30, 1995.

On or about August 16, 1999, Metropolitan Dade filed its Motion to Dismiss for lack of prosecution under Fla. R. Civ. P. 1.420(e). The County's position was that since the transcript of the deposition taken of Plaintiff within the previous year had not been filed with the court, the taking of the deposition did not, in and of itself, constitute record activity. Although the transcript of the deposition was not filed because it is no longer required under the Florida Rules of Civil Procedure,[4] a notice of deposition was

---

[1]Walter Hall was the plaintiff in the 11th Judicial Circuit Court, Miami, Florida. In the Third Circuit Court of Appeal, Hall was the appellant. Hall has now assumed the role of the respondent in front of this Court.

[2]Metropolitan Dade County was one of three defendants at the trial level, the appellee at the appellate level, and is now the petitioner in front of this Court.

[3]Neither Insignia Management Group nor Perkins are a party to this appeal.

[4]The Florida Supreme Court amended the Rules of Civil Procedure effective in 1982 to delete the requirement that deposition transcripts be automatically filed by the court report. *See* In re Florida Rules of Civil Procedure, 403 So. 2d 926, 929-30 (Fla. 1981). This was done "[i]n an effort to relieve the document storage burden now experienced by all segments of Florida's court system

filed on August 3, 1998 – more than a year prior to the motion to dismiss for lack of prosecution. The trial court granted the motion to dismiss for lack of prosecution of a personal injury action. The Third District Court of Appeal reversed the dismissal order. Metropolitan Dade County then invoked the discretionary jurisdiction of this Court.

. . ." *Id.* at 926.

SUMMARY OF ARGUMENT

The trial court erred when it granted the County's Motion to Dismiss pursuant to Fla. R. Civ. P. 1.420(e) because it abused its discretion when it ignored the activity reflected in the record that should have precluded the granting of the Motion to Dismiss. The Third District Court of Appeals rejected two decisions[5] from other circuits which supported the trial judge's dismissal in favor of this Court's holding in *Eastern Elevator, Inc. v. Page* that the taking of a deposition precluded dismissal for lack of prosecution. 263 So. 2d 218 (Fla. 1972).

This rejection was based upon **common sense**. How can a bare notice of taking a "deposition" – even if the deposition is never taken – be sufficient to preclude dismissal pursuant to Fla. R. Civ. P. 1.420(e), while the actual taking of the deposition is neither satisfactory record activity or a good faith effort to advance the case and, thus, is insufficient to preclude dismissal pursuant to Fla. R. Civ. P. 1.420(e)?

It is well established that Fla. R. Civ. P. 1.420(e) requires the activity to be an affirmative act of record designed to progress the suit to judgment to survive dismissal for failure to prosecute. Plaintiff's deposition had, in fact, been taken with the aim of

[5]The two cases rejected by the Third District Court of Appeal are *Levine v. Kaplan*, 687 So. 2d 863 (Fla. 5th DCA 1997) and *Smith v. DeLoach*, 556 So. 2d 786 (Fla. 2d DCA 1990).

advancing the case toward its conclusion on the merits. This Court has held in *Del Duca v. Anthony*, that dismissal under Rule 1.420 is proper only if discovery was undertaken in bad faith and without any design to move the case toward a conclusion on the merits. 587 So. 2d 1306 (Fla. 1991).

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT FOUND THE ACTUAL TAKING OF A DEPOSITION, INTER ALIA, CONSTITUTED RECORD ACTIVITY WHICH WILL DEFEAT A MOTION TO DISMISS FOR LACK OF PROSECUTION BECAUSE THE ACTUAL TAKING OF A DEPOSITION CONSTITUTES ACTIVITY DESIGNED TO ADVANCE THE CASE TOWARD CONCLUSION.

The Plaintiff/Respondent presented as evidence of activity the taking of his deposition, the exchange of Offers of Judgment and Proposals for Settlement, and his Notice of Readiness for Trial as proof of the activity that took place within that year in question.

The taking of Plaintiff/Respondent's deposition was designed to progress the suit to judgment. This Court has held in *Del Duca v. Anthony*, that dismissal under Rule 1.420 is proper only if discovery was undertaken in bad faith and without any design to move the case toward a conclusion on the merits. 587 So. 2d 1306 (Fla. 1991).

In *Del Duca*, this Court developed a two-step inquiry before a court can exercise its power to dismiss actions for lack of prosecution. "First, the defendant is required to show there has been no record activity for the year preceding the motion. Second, if there has been no record activity, the plaintiff has an opportunity to establish good cause why the action should not be dismissed." *See* Del Duca v. Anthony, 587 So. 2d

1306, 308-09 (Fla. 1991).

The taking of Plaintiff/Respondent's deposition within the year of Defendant, Metropolitan Dade's motion is, without a doubt, designed to progress the suit to judgment. In fact, the testimony at Plaintiff/Respondent's deposition was critical and indispensable in that the statements elicited from the Plaintiff unquestionably were essential to both parties' future witnesses, offers of judgment, settlement proposals, and even legal strategy throughout litigation.

The Third District Court of Appeal has held in earlier cases that the filing of a notice of deposition constitutes record activity which will defeat a motion to dismiss for lack of prosecution. *See* Hannon v. Nassr, 701 So. 2d 445 (Fla. 3d DCA 1997); Utset v. Campos, 548 So. 2d 834, 837 (Fla. 3d DCA 1989); Silverman v. Equifax Services, Inc., 420 So. 2d 928, 929 (Fla. 3d DCA 1982); *accord* Cravens v. Kulubis, 694 So. 2d 780, 781 (Fla. 2d DCA 1997); Milligan v. Osborne, 682 So. 2d 706, 706 (Fla. 5th DCA 1996); Q.I.P. Corp. v. Berger, 547 So. 2d 1286, 1288 (Fla. 4th DCA 1989); Harris v. Winn-Dixie Stores, Inc., 378 So. 2d 90, 94 (Fla. 1st DCA 1979), *disapproved on other grounds;* Del Duca v. Anthony, 587 So. 2d 1306,
1309 (Fla. 1991).

With a procedural posture that mirrors that of the case at bar, the defendant in

Del Duca also moved to dismiss the action for lack of prosecution, asserting that the discovery, i.e. the filing of plaintiff's Request to Produce and Notice of Service of Interrogatories, were not meaningful acts of prosecution filed within the preceding year. *See* Del Duca v. Anthony, 587 So. 2d at 1308. The *Del Duca* trial court also dismissed the action and the *Del Duca* district court of appeal reversed the trial court's dismissal. Del Duca v. Anthony, 587 So. 2d at 1309. Upon defendant's appeal to this Court, this Court agreed with the *Del Duca* district court of appeal that the trial court's dismissal despite the existence of discovery could not be sustained. *Id.*

Applying these facts to the case at bar, the taking of Walter Halls's deposition, the exchange of Offers of Judgment and Proposals for Settlement, and his Notice of Readiness for Trial are acts that undoubtedly move the case to its conclusion on the merits. *See* Eastern Elevator, Inc. v. Page, 263 So. 2d 218, 220 (Fla. 1972) ("In the case of depositions . . . we view such an affirmative move as a positive step 'calculated to hasten the suit to judgment' . . . Certainly it was for the purpose of moving the cause along."). The discovery devices used in *Del Duca* and the discovery device used in the case at bar all involve the eliciting of evidence and/or testimony that clearly assisted in moving the case to its conclusion on the merits. The Fourth Circuit held that "[w]ith legally sufficient activity appearing on the face of the record, there is no need to

examine whether [plaintiff] established good cause, as mere inactivity for a period less than one year is not grounds for dismissal for lack of prosecution." Burk v. Value Rent-a-Car, 697 So. 2d 986 (Fla. 4th DCA 1997).

Before 1982, the Rules of Civil Procedure provided that whenever a deposition was transcribed, the court report would automatically file it with the court. *See* Fla. R. Civ. P. 1.310(f)(1967), published in In re Florida Rules of Civil Procedure 1967 Revision, 187 So. 2d 598, 617 (Fla. 1966). Effective 1982, however, this court amended the Rules of Civil Procedure to delete the requirement that depositions be routinely filed. *See* In re Florida Rules of Civil Procedure, 403 So. 2d 926, 926, 929-30 (Fla. 1981). Despite this amendment, the Third District Court of Appeal found *Eastern Elevator*, an early case construing Rule 1.420, remained good law since the taking of a deposition is a step calculated to hasten the suit to judgment and that the taking of a deposition within the preceding year, not unlike the facts of the case at bar, is an activity which will defeat a motion to dismiss for lack of prosecution. *Opinion of Third Circuit Court of Appeal in re Walter Hall v. Metropolitan Dade County,* filed *June 21, 2000* at 3; Eastern Elevator, 263 So. 2d at 220.

This Court has concluded that the discovery which was the subject of *Del Duca*'s appeal was neither "frivolous or clearly useless" nor "any activity taken in bad

faith." Del Duca v. Anthony, 587 So. 2d at 1309 (quoting Barnett Bank, 508 So. 2d at 720). Metropolitan Dade has failed to show that the activity aforementioned was either "frivolous or clearly useless" or was "any activity taken in bad faith" since there were at least five separate occasions where there was good faith activity that assisted in moving the case to its conclusion on the merits within the one year preceding Metropolitan Dade's Motion to Dismiss. Indeed, as the Third District Court of Appeal stated, the taking of the deposition alone establishes good cause.

In light of the activity aforementioned within the past one (1) year, Metropolitan Dade County, then, prematurely served its motion to dismiss. This Court has held that "a prematurely served motion is ineffective and must be denied unless the one year runs before a hearing on the motion and the opposing party has not filed a *paper of record prosecuting the action* in the interim." *See* Barnett Bank of East Polk County v. Fleming, 508 So. 2d 718 (Fla. 1987) (emphasis added). *See also* Pollock v. Pollock, 110 So. 2d 474 (Fla. 1st DCA 1959); Reddish v. Forlines, 207 So. 2d 703 (Fla. 1st DCA 1968).

In the alternative, assuming Metropolitan Dade had met its burden and shown the activity aforementioned was either frivolous or taken in bad faith, the Plaintiff/Appellee argues he has shown good cause to preclude this action from being

dismissed. The First and Fourth Circuit have set forth requirements to show good cause: the Plaintiff is required to show (1) both contact with the opposing party; and (2) excusable conduct. *See* Edgecumbe v. American Gen. Corp., 613 So. 2d 123 (Fla. 1st DCA 1993); Freeman v. Toney, 608 So. 2d 863 (Fla. 4th DCA 1992); Norflor Constr. Corp. v. City of Gainesville, 512 So. 2d 266 (Fla. 1st DCA 1987).

As briefly mentioned, Walter Hall's deposition was taken, with all attorneys for Plaintiff and both Defendants present, on or about August 28, 1998. The Offer of Judgment was served by the Plaintiff upon Defendants, Metropolitan Dade County and Insignia Management Group, L.P., on September 4, 1998. Proposal for Settlement was served upon the Plaintiff/Respondent by Defendant, Insignia Management Group, L.P., on September 18, 1998. Metropolitan Dade County served its Proposal for Settlement upon Plaintiff on October 6, 1998. Further, the Plaintiff/Respondent filed his Notice of Readiness for Trial on August 13, 1999. It should be noted Plaintiff filed his notice PRIOR to Defendant, Metropolitan Dade County's notice of its Motion to Dismiss filed on August 17, 1998.

It is abundantly clear that there was contact between Plaintiff's counsel and counsel for both Defendants.

CONCLUSION

For all the above and foregoing reasons, Walter Hall prays this Court AFFIRM the Third District Court of Appeal's finding that the actual taking of a deposition, among other things, constituted record activity which will defeat a motion to dismiss for lack of prosecution, whether it be labeled as record activity or good cause to preclude dismissal. The testimony of Plaintiff/Appellee was shown to have significantly advanced the case toward conclusion by providing information affecting both parties' future witnesses, offers of judgment, settlement proposals, and even legal strategy throughout the litigation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on Friday, October 13, 2000, upon: James J. Allen, Esquire, Assistant County Attorney, Counsel for Defendant/Appellant, Metropolitan Dade County, 111 Northwest First Street, Miami, Florida 33128-1993.

____

John B. Agnetti, Esq.
Attorney for the Plaintiff/Respondent