IN THE SUPREME COURT OF FLORIDA

_____

CASE No. SC05-868
5DCA No: 5D03-2857

_____

AMERICAN WALL SYSTEMS, INC.,
a Florida corporation,

Petitioner,

v.

MADISON INTERNATIONAL GROUP, INC.,
a Florida corporation,
WINDERMERE DEVELOPMENT GROUP, a Florida corporation,
S.K. FINANCIAL SERVICE AND DEVELOPMENT, INC.,
a Florida corporation, and FIRST UNION NATIONAL BANK,

Respondents.

_____

APPEAL FROM THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT, STATE OF FLORIDA

_____

PETITIONER'S INITIAL BRIEF

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SUMMARY OF THE ARGUMENT

AMERICAN WALL contends that the Trial Court and Fifth District Court of Appeals erred when it determined that the Notice of Hearing dated September 13, 2003 and Order on Motion to Withdraw did not constitute record activity per *Wilson v. Salamon, M.D.*, ___ So.2d ___ 2005 WL 2663432 (Fla.). The trial court and Fifth District relied upon *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706 (Fla. 1951) and the requirement that the activity in the record be affirmative, based upon the predecessor Florida Statute § 45.19(1) and the repealed version of Florida Rule of Civil Procedure 1.420. As explained infra, there is no requirement for this determination under the current Florida Rule of Civil Procedure 1.420(e). Moreover, *Wilson v. Salamon, M.D.*, ___ So.2d ___, 2005 WL 2663432 (Fla.), clarified the current law and overturned *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706 (Fla. 1951) and the line of cases following its law.

Further, the Fifth District affirmed the trial court's decision that the non-record activity argument is no longer applicable since the revision of Florida Rule of Civil Procedure 1.420. However, it is well established that non-record activity still can be considered to establish good cause. *American Eastern Corporation v. Blanton,* 382 So.2d 863 (Fla. 1980). As

such, action taken in similar cases did constitute non-record activity establishing good cause pursuant to *Insua v. Chantres*, 665 So.2d 288 (Fla. 3d DCA 1995); *Maler By and Through Maler v. Baptist Hospital of Miami, Inc.,* 532 So.2d 79 (Fla. 3d DCA 1988); and *Cox v. WIOD, Inc.*, 764 So.2d 671 (Fla. 4th DCA 2000).

Moreover, the lower courts erred when they ruled that the Notice of Service of Interrogatories which was not reflected as record activity in the court file for some unknown reason did not constitute non record activity and thus good cause. Pursuant to *Curtin v. Deluca* 886 So.2d 298 (Fla. 4th DCA 2004), a request for discovery, which for some unexplained reason is not reflected as record activity in the court file, is non-record activity that constitutes good cause to avoid dismissal.

As such, AMERICAN WALL respectfully requests reversal of the lower Court's ruling dismissing its action for lack of prosecution and reinstatement of the lawsuit.

STATEMENT OF THE CASE AND FACTS

THE PARTIES

The Petitioner/Appellant, AMERICAN WALL SYSTEMS, INC. (hereinafter referred to as "AMERICAN WALL"), was the Plaintiff in the underlying case and at all material times hereto, was a Florida corporation, having its principal place of business in Pompano Beach, Broward County, Florida. Petitioner, AMERICAN WALL, constructed a precast concrete privacy wall on the property at issue. [R. 6,7]

The Respondent/Appellee, MADISON INTERNATIONAL GROUP, INC. (hereinafter referred to as "MADISON"), was a Defendant in the underlying case, and during the relevant time period was a Florida corporation, having its principal place of business in Orange County, Florida, and was the owner of certain property at issue in Orange County, Florida. [R. 6]

The Respondent/Appellee, WINDERMERE DEVELOPMENT GROUP, INC. (hereinafter referred to as "WINDERMERE"), was a Defendant in the underlying case, and during the relevant time period, was a Florida corporation, having its principal place of business in Orange County, Florida, and is the OWNER'S agent. [R. 6,7]

The Respondent/Appellee, S.K. FINANCIAL SERVICE AND DEVELOPMENT, INC. (hereinafter referred to as "S.K. FINANCIAL"), was a Defendant in the underlying case, and during the relevant

time period was a Florida corporation, having its principal place of business in Orange County, Florida, and was the owner of certain property at issue located in Orange County, Florida. [R. 7]

The Respondent/Appellee, FIRST UNION NATIONAL BANK (hereinafter referred to as "FIRST UNION"), is a national banking association, licensed to do business in Orange County, Florida, who is claiming some interest in the property subject to this action. [R. 7]

THE UNDERLYING FACTS AND PRETRIAL PROCEEDINGS

This action was filed by AMERICAN WALL in the Circuit Court, in and for Orange County, Florida, on May 27, 1998, to enforce a Claim of Lien and for breach of contract for failure to pay the balance on the contract for the completed construction (labor, services and materials) of a wall on and/or around the subject property owned by MADISON. [R.1-5, 6-36]

The case was originally set for trial on the court's January 2001 docket, but was taken off to allow AMERICAN WALL an opportunity to amend the complaint based upon new information obtained through discovery. [R.243-247, 476]

Thereafter, on November 26, 2001, FIRST UNION filed a Motion for Partial Summary Judgment, which was amended on February 18, 2002. [R.324-329] [R.347-353] On December 6, 2001, AMERICAN

WALL filed a Memorandum of Law in Opposition to the Motion for Partial Summary Judgment, and on March 1, 2002, AMERICAN WALL filed a Memorandum of Law in Opposition to the Defendant's Amended Partial Motion for Summary Judgment. [R.330-346, 354-374, 376-396] The Order Denying the Amended Motion for Partial Summary Judgment was entered on March 11, 2002. [R. 375]

Thereafter, on May 24, 2002, the Law Offices of W. Bruce Del Valle, P.A., filed a Motion to Withdraw as counsel on behalf of MADISON and WINDERMERE. [R. 397-398] Because Mr. Del Valle did not set his Motion for hearing, AMERICAN WALL filed a Notice of Hearing for September 19, 2003, with a certificate of service date of September 13, 2002. [R. 477-478] On September 19, 2002, the Court entered an Order granting the Motion to Withdraw as Counsel and gave MADISON and WINDERMERE 30 days to obtain new counsel. [R. 399-400] A Notice of Appearance was filed on October 30, 2002, by Peter Carr, Esquire. [R. 479]

AMERICAN WALL then filed a Notice of Service of Interrogatories with a certificate of service date of March 12, 2003, but which was not filed in the court until March 21, 2003. [R. 480] On March 14, 2003, FIRST UNION filed a Motion to Dismiss the case for Lack of Prosecution. [R. 401-404]

Meanwhile, during the pendency of this suit, two other lawsuits concerning the same property, parties and attorneys were filed, namely, First Union National Bank nka Wachovia v. Totaram

Singh, individually an as trustee of S.K. Financial Service and Development, Inc., a dissolved Florida Corporation; Madison International Group., a Florida Corporation, et al ., Case #CI-00-5232, Division 33; and Republic Bank v. Madison International Group,

Inc., a Florida Corporation; Savitri Singh; Mohan Singh, et al., Case #CI-98-10048 Division 35. There were motions pending in those actions that could have had an impact on the case at bar.

On May 29, 2003, the Honorable Donald E. Grincewicz, Circuit Court Judge in Orange County, Florida, heard argument of counsel as concerns FIRST UNION'S, Motion to Dismiss for Lack of Prosecution and granted said motion in an Order dated June 27, 2003. [R. 418-420] AMERICAN WALL then filed a Motion for Re-Hearing which was summarily denied by the trial Court. [R. 421-467, 468]

Thereafter, AMERICAN WALL timely appealed to the Fifth District Court of Appeals who rendered its opinion on February 18, 2005, affirming the trial court's dismissal of the action, relying on *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706 (Fla. 1951) for its decision. AMERICAN WALL filed a Motion for Re-Hearing on March 4, 2005, which the Fifth District Court of Appeals denied on April 15, 2005.

AMERICAN WALL then timely invoked the Supreme Court's

discretionary jurisdiction and served a jurisdictional brief.

This Honorable Court issued an Order dated November 30, 2005, accepting jurisdiction and requiring AMERICAN WALL to serve an Initial Brief on the merits on or before December 28, 2005.

ARGUMENT

I. WHETHER THE LOWER COURTS ERRED IN DISMISSING THE LAWSUIT BASED UPON *GULF APPLIANCE DISTRIBUTORS, INC. v. LONG,* 53 So.2d 706 (Fla. 1951) WHICH WAS OVERTURNED BY *WILSON v. SALAMON*, ___ So.2d. ___, 2005 WL 2663432 (Fla.) AND THE REPEALED VERSION OF FLORIDA RULE OF CIVIL PROCEDURE 1.420(e), WHEN THERE WAS ACTIVITY ON THE FACE OF THE RECORD IN THE FORM OF A PROPER MOTION, NOTICE OF HEARING AND COURT ORDER IN THE ONE YEAR PERIOD PRIOR TO DISMISSAL?

The lower court's decisions conflict with the plain language of the current Florida Rule of Civil Procedure 1.420(e) and the Florida Supreme Court case *Wilson v. Salamon*, ___ So.2d ___, 2005 WL 2663432 (Fla.), which remedies the past errors and holds that *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706 (Fla. 1951), was decided based upon the statutory predecessor to Fla. R. Civ. P. 1.420 and the repealed Fla. R. Civ. P. 1.420(e), which is no longer good law. *Wilson* clarifies that the word "affirmatively" was removed when Fla. R. Civ. P. 1.420(e) was revised in 1976. As such, there is no requirement for activity on the face of the record to be "affirmative" or "active" as required by the lower courts in this case. See also *Lynch v. United Distributors, Inc.,* ___ So.2d ___, 2005 WL 3299713 (Fla. App.4 Dist.) and *State of Florida v. Chafin*, ___ So.2d ___, 2005 WL 3295658 (Fla. App.1 Dist.).

Based upon the plain language of Florida Rule of Civil Procedure 1.420(e), all that is required in order to avoid

dismissal for lack of prosecution is that a pleading, order of court or

otherwise has occurred for a period of one year. In the instant case, motions and amended motions for partial summary judgment and memorandums of law in opposition to partial summary judgment were filed from November 26, 2001 through March 1, 2002. [R. 324-397] Thereafter, the trial court heard argument of counsel, and, in an order dated March 11, 2002, denied the Amended Motion for Partial Summary Judgment. [R. 375]

Thereafter, MADISON and WINDERMERE's prior counsel, W. Bruce Del Valle, Esquire, and the Law Offices of W. Bruce Del Valle, P.A., filed a Motion to Withdraw as counsel of record on May, 24 2002. [R. 397-398] AMERICAN WALL was unable to contact Bruce Del Valle, Esquire, and as such, AMERICAN WALL filed a Notice of Hearing on Mr. Del Valle's motion on September 13, 2002. [R. 477-478] The court heard the motion and entered a Order granting same on September 19, 2002. [R. 399-400]

The general rule is that a Notice of Hearing is sufficient record activity to avoid dismissal for lack of prosecution. *Milu v. Duke*, 256 So.2d 83 (Fla. 3d DCA 1971). In addition, pursuant to the plain language of 1.420(e), a court order is also sufficient to avoid dismissal for lack of prosecution. "[T]rial court orders that are entered and filed to resolve motions that

have been properly filed in good faith should be treated as record activity precluding dismissal under rule 1.420(e) of the Florida Rules of Civil Procedure." *Wilson v. Salamon*, ___ So.2d ___, 2005 WL 2663432

(Fla.) In the case at bar, after the Order denying the Amended Motion for Partial Summary Judgment dated March 11, 2002, a Motion to Withdraw was filed on May 24, 2002; a Notice of Hearing was filed on September 13, 2002; an Order was entered on September 19, 2002, granting the motion to withdraw; and a Notice of Appearance was filed on October 30, 2002, by Peter Carr, Esquire. As such, there was consistent record activity throughout the year from March 12, 2002 to March 17, 2003, to preclude a Motion to Dismiss for Lack of Prosecution.

The trial court dismissed the case on June 27, 2003, holding that there was "no **affirmative** case activity for a period of one year proceeding the filing of the Motion to Dismiss for Lack of Prosecution". (Emphasis added) [R. 418-420] The Motion to Dismiss was filed March 17, 2003. [R. 420A-420D] The Fifth District held that "[t]he only activity of record that occurred within the year preceding March 17, 2003, was the withdrawal of a defense attorney and filing of an appearance by replacement counsel." *American Wall Systems, Inc. v. Madison International Group, Inc.,* 898 So.2d 111, 112 (Fla.5th DCA 2005). It then

affirmed the trial court relying upon *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706 (Fla. 1951).

However, based upon the revised Fla. R. Civ. P. 1.420(e), and this Honorable Court's recent case of *Wilson v. Salamon*, ___ So.2d ___, 2005 WL 2663432 (Fla.), proof of **affirmative** case activity as

held in *Gulf Appliance Distributors, Inc. v. Long*, is no longer required under Florida law. Specifically, *Wilson v. Salamon*, clarifies any confusion over Fla. R. Civ. P. 1.420(e) and holds that *Gulf Appliance Distributors, Inc. v. Long* is no longer good law.

Wilson v. Salamon, ___ So.2d ___, 2005 WL 2663432 (Fla.), makes it clear that as long as there is record activity, then there can be no dismissal. As stated by Justice Wells in *Metropolitan Dade County v. Hall*, 784 So.2d 1087 (Fla. 2001), "[t]here is either activity on the face of the record or there is not." *Wilson v. Salamon*, ___ So.2d ___, 2005 WL 2663432 (Fla.).

Here, the trial court as well as the Fifth District conceded that there was activity of record during the one year period between March 12, 2002 and March 17, 2003. The Notice of Hearing on the Motion to Withdraw dated September 13, 2002, and trial court's Order on the Motion to Withdraw dated September 19, 2002,

constitute activity on the face of the record.

As such, strict application of Fla. R. Civ. P. 1.420(e) and *Wilson v. Salamon,* which overturned *Gulf Appliance Distributors, Inc. v. Long*, and all other case law requiring affirmative case activity, mandates reversal of the lower courts orders dismissing this action.

II. WHETHER THE LOWER COURTS ERRED IN DISMISSING THE LAWSUIT WHEN THEY HELD THAT NON-RECORD ACTIVITY TO ESTABLISH GOOD CAUSE IS NO LONGER APPLICABLE UNDER THE CURRENT FLORIDA RULE OF CIVIL PROCEDURE 1.420?

The lower courts' decisions in this case conflict with well-settled law such as *American Eastern Corporation v. Blanton,* 382 So.2d 863 (Fla. 1980), which holds that non-record activity may be used to establish good cause why a case should not be dismissed, even if nothing has been filed of record for a one-year period. Cases in other Districts, such as *Insua v. Chantres*, 665 So.2d 288 (Fla. 3d DCA 1995); *Curtin v. Deluca*, 886 So.2d 298 (Fla. 4th DCA 2004) and *Cox v. WIOD, Inc.*, 764 So.2d 671 (Fla. 4th DCA 2000), also establish that non-record activity is still a viable argument under Fla. R. Civ. P. 1.420(e).

In the instant case, the Fifth District agreed with the trial court's rejection of AMERICAN WALL'S argument that non-record activity was no longer a valid argument to establish good cause under *Fla. R. Civ. P. 1.420(e)*. *American Wall Systems, Inc. v. Madison International Group, Inc.,* 898 So.2d 111, 112 (Fla.5th DCA 2005). It held that "AMERICAN'S remaining arguments in regard to nonrecord activity . . . are also unpersuasive". *Id.* The lower court overlooked a relevant factual finding by a misapplication of Fla. R. Civ. P. 1.420(e). *Arab Termite and Pest Control of Florida, Inc. v. Jenkins,* 409 So.2d 1039 (Fla. 1982) and *State v. Stacey*, 482 So.2d 1350 (Fla. 1986).

At the hearing, the trial court cited to *Duggar v. Quality Development Corp.,* 350 So.2d 816 (Fla. 2d DCA 1977), in support of its decision, which was affirmed by the Fifth District. However, *Duggar* was superceded by the revised rule 1.420(e) as stated in *Weaver v. The Center Business*, 578 So.2d 427 (Fla. 5th DCA 1991). *Weaver* holds that "[n]onrecord activity may be used to establish 'good cause' why a case should not be dismissed, even though nothing has been filed of record for a one-year period." *Id*., at 429.

"[I]n *Bruns v. Jones*, 481 So.2d 544 (Fla. 5th DCA 1986), this court held that under rule 1.420(e) (as amended in 1976)

nonrecord activity could constitute 'good cause' under the rule so as to prevent a dismissal for failure to prosecute." *Weaver v. The Center Business*, 578 So.2d 427 (Fla. 5th DCA 1991). See also, *American Eastern Corporation v. Blanton,* 382 So.2d 863 (Fla. 1980). However, in the instant case, the trial Court ruled that AMERICAN WALL's "non-record argument fails because this rule has changed over the last 25 years," and that the non-record activity argument is just not applicable anymore since the revision of rule 1.420(e). [T. 27 -28].

This conflict between the Fifth District and this Honorable Court, as well as other Districts, is significant. AMERICAN WALL contends that it had sufficient non-record activity to preclude a Motion to Dismiss for Lack of Prosecution including but not limited to awaiting the results of two related pending actions and a request

for written discovery that, for some unexplained reason, was not reflected as record activity in the court file, as discussed infra.

As such, since courts are still referring to non-activity within the scope of "good cause," the lower Courts erred in ruling that non-record activity precluding dismissal for failure to prosecute under Fla. R. Civ. P. 1.420(e) is no longer a valid argument.

"Florida's Constitution provides that the courts will be open and accessible to our citizens to address all legitimate grievances. Art. I, § 21, Fla. Const. Hence, a primary concern of the courts is to see that cases are resolved on there merits." *Wilson v. Salamon*, ___ So.2d ___, 2005 WL 2663432 (Fla.), 30 Fla. L. Weekly S701.

As such every opportunity must be given with in the scope of the law for AMERICAN WALL to be heard on the merits of their claim.

A. WHETHER THE LOWER COURTS ERRED IN DISMISSING THE LAWSUIT WHEN THEY HELD THAT AWAITING THE RESULTS OF TWO PENDING RELATED ACTIONS WAS NOT GOOD CAUSE?

The lower court's decisions conflict with well-settled law that the non-record activity argument is an applicable argument since the revision of Fla. R. Civ. P. 1.420(e) in 1977.

Pendency of another related action provides justification for apparent non-activity precluding dismissal. *Insua v. Chantres*, 665 So.2d 288 (Fla. 3d DCA 1995); *Maler By and Through Maler v. Baptist*

Hospital of Miami, Inc., 532 So.2d 79 (Fla. 3d DCA 1988); and *Cox v. WIOD, Inc.*, 764 So.2d 671 (Fla. 4th DCA 2000). "It's well settled that the pendency of another related action provides

justification for apparent non-activity precluding dismissal for failure to prosecute under Rule 1.420(e)." *Insua v. Chantres*, 665 So.2d 288 (Fla. 3d DCA 1995). In addition, in *Cox v. WIOD, Inc.*, the court held that: "[w]here there is no record activity, **nonrecord activity** may be used to establish 'good cause' why a case should not be dismissed, even though nothing has been filed of record for a one-year period." (Emphasis added) *Cox v. WIOD, Inc.*, 764 So.2d 671 (Fla, 4th DCA 2000).

However, the Fifth District in the instant case affirmed the trial court's rejection of AMERICAN WALL'S argument that its inaction was justified because it was awaiting the results of two related pending actions.

MADISON and S.K. FINANCIAL, were Defendants in two other actions at the time of and prior to the Motion to Dismiss and FIRST UNION was a Plaintiff in one of those actions, namely, First Union National Bank nka Wachovia v. Totaram Singh, individually an as trustee of S.K. Financial Service and Development, Inc., a dissolved Florida Corporation; Madison International Group., a Florida Corporation, et al., Case #CI-00-5232, Division 33 and Republic Bank v. Madison International Group, Inc., a Florida Corporation; Savitri Singh; Mohan Singh, et al., Case #CI-98-10048 Division 35.

In addition, AMERICAN WALL was also a Defendant in both of the above mentioned cases. The attorneys in the instant action, prior and present, were all also involved in these other cases and all cases related to the same property.

At the time of the Motion to Dismiss for Lack of Prosecution, FIRST UNION had a pending Motion for Summary Judgment in the related case of First Union National Bank nka Wachovia v. Totaram Singh, individually and as trustee of S.K. Financial Service and Development, Inc., a dissolved Florida Corporation; Madison International Group., a Florida Corporation, et al., Case #CI-00-5232, Division 33, regarding reestablishing the lost notes and mortgages. AMERICAN WALL was awaiting the determination of that motion since it would have an impact on the case at bar because one of the main issues concerned the priority of AMERICAN WALL's lien over FIRST UNION's lien on the same property.

In fact, these two cases were so intertwined that FIRST UNION who is represented by the same attorneys in both cases, even went so far as to file a motion to attempt to consolidate this action and First Union National Bank nka Wachovia v. Totaram Singh, individually an as trustee of S.K. Financial Service and Development, Inc., a dissolved Florida Corporation; Madison International Group., a Florida Corporation, et al., Case #CI-00-5232, Division 33, as mentioned by Mr. Gerald Davis, Esquire,

at the hearing on the Motion to Dismiss. [T. 12] [R. 285-288]

The Fifth District's decision in this case has created confusion from what used to be clear guidelines. As such, this decision cannot stand if the other conflicting cases are correct. Moreover, by resolving the conflict and reversing the Fifth District, the Supreme Court would avoid any potentially disparate resolutions of motions to dismiss for lack of prosecution based upon the influence of the Fifth District's opinion in this case.

III. WHETHER THE LOWER COURTS ERRED IN DISMISSING THE LAWSUIT WHEN *CURTIN v. DELUCA*, 886 So.2d 298 (FLA. 4TH DCA 2004) HOLDS THAT A REQUEST FOR WRITTEN DISCOVERY WHICH IS NOT REFLECTED AS RECORD ACTIVITY IS NONRECORD ACTIVITY CONSTITUTING GOOD CAUSE?

The lower court's decisions in this case conflict with the Fourth District's decision in *Curtin v. Deluca*, 886 So.2d 298 (Fla. 4th DCA 2004).

Curtin holds that a request for written discovery that, for some unexplained reason, is not reflected as record activity in the court file, is non-record activity constituting good cause to avoid dismissal. However, the lower courts in this case held under an almost identical set of facts, that such a situation is not sufficient to constitute good cause and that this argument is

unpersuasive. *American Wall Systems, Inc. v. Madison International Group, Inc.*, 898 So.2d 111, 112 (Fla. 5th DCA 2005).

The lower courts rejected AMERICAN WALL'S argument that the Notice of Service of Interrogatories, which was filed after the Motion to Dismiss for some unknown reason, constituted good cause to avoid dismissal under Fla. R. Civ. P. 1.420(e). The Fourth District in *Curtin v. Deluca*, 886 So.2d 298 (Fla. 4th DCA 2004), correctly interpreted Fla. R. Civ. P. 1.420(e). The court in *Curtin* held in pertinent part that:

> The question that must be resolved is whether the Request [for admissions] which for some unexplained reason is not reflected as record activity in the court file, is non-record activity that constitutes good cause to avoid dismissal. We answer the question in the affirmative. *Id.*, at 300.

In *Del Duca v. Anthony*, 587 So.2d 1306 (Fla. 1991), this Court set forth a two-step process for trial courts to apply when considering whether a dismissal for failure to prosecute is proper. The second step, which is at issue here, allows the plaintiff to establish good cause why the action should not be dismissed. See also Fla. R. Civ. P. 1.420(e).

As such, the lower courts erred when it determined that the filing of the Notice of Service of Interrogatories did not fall within the scope of good cause under Fla. R. Civ. P. 1.420(e). AMERICAN WALL urges reversal of the Court's ruling in order to

have the law on this issue be consistent and prevent trial courts in the future from citing to *American Wall v. Madison* for the proposition that they are not required to consider good cause in their analysis of a motion to dismiss for lack of prosecution.

CONCLUSION

Based upon the foregoing arguments and citations of authority, AMERICAN WALL asserts there is ample cause for this Court to consider these issues on the merits and reverse the lower courts on each issue and to remand to the trial court.

To punish AMERICAN WALL, when it did nothing to contribute to its case being dismissed, is inappropriate. *Dixon v. City of Riviera Beach*, 662 So.2d 424 (Fla. 4th DCA 1995).

It is AMERICAN WALL's position that it has demonstrated activity on the record which is no longer required to be affirmative activity and/or good cause to avoid this harsh sanction, and that the lower Courts erred when they dismissed this case for lack of prosecution. AMERICAN WALL respectfully requests that the Orders granting FIRST UNION's Motion to Dismiss for Lack of Prosecution and affirming same be reversed and the lawsuit be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief was mailed this 23rd day of December, 2005, to **Steve Chumbris, Esquire**, *Attorney for Defendant/First Union*, Holland & Knight, LLP, 200 Central Avenue, Suite 1600, St. Petersburg, FL, 33701; and to **Madison International Group**, **Inc.**, **Windermere & S.K. Financial**, Klosteracker 10, 4108 Bennigen, Switzerland.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the undersigned has fully complied with Florida Rules of Appellate Procedure, Rule 9.210(a)(2), setting forth the font requirements for preparing computer generated briefs, as well as Administrator Order AO04-84 regarding Mandatory Submission of Electronic Copies of Documents, dated September 13, 2004.

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