IN THE SUPREME COURT OF FLORIDA

_____

CASE No. _____
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 JURISDICTIONAL BRIEF

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SUMMARY OF THE ARGUMENT

The Fifth District's decision expressly and directly conflicts with this Court's decision and/or other districts' decisions on three separate issues, which are as follows:

First, the Fifth District's decision in this matter conflicts with the Fourth District's decision in *Curtin v. Deluca*, 886 So.2d 298 (Fla. 4th DCA 2004). In *Curtin*, the Fourth District 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. Whereas, the Fifth District holds that such a situation is not sufficient to constitute good cause and that this argument is unpersuasive.

Second, the Fifth District's decision conflicts with well-settled law such as *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), which hold that the pendency of another related action provides justification for apparent non-activity, precluding dismissal.

Third, the Fifth District's decision conflicts with well-settled law by affirming the trial court's holding that the non-record activity argument is no longer an applicable argument since

the revision of *Fla. R. Civ. P. 1.420(e)* in 1977.

As such, this Honorable Court should exercise its discretionary jurisdiction to resolve these conflicts.

STATEMENT OF THE CASE AND FACTS

Petitioner, AMERICAN WALL SYSTEMS, INC. ("AMERICAN WALL"), invokes this Court's jurisdiction, pursuant to *Art. V, § 3(b)(3), Fla. Const.*, to resolve the conflict between *American Wall Systems, Inc. v. Madison International Group, Inc.,* 898 So.2d 111 (Fla. 5th DCA 2005) and *Curtin v. Deluca*, 886 So.2d 298 (Fla. 4th DCA 2004), concerning whether a request for written 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.

In addition, AMERICAN WALL invokes this Court's jurisdiction pursuant to *Art. V, § 3(b)(3), Fla. Const.,* to resolve a conflict between *American Wall Systems, Inc. v. Madison International Group, Inc.,* 898 So.2d 111 (Fla. 5th DCA 2005) and well-settled law that 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).

Finally, AMERICAN WALL invokes this Court's jurisdiction pursuant to *Art. V, § 3(b)(3), Fla. Const.*, to resolve a conflict between *American Wall Systems, Inc. v. Madison International Group,*

Inc., 898 So.2d 111 (Fla. 5th DCA 2005) and the Florida Supreme Court as well as other Districts, concerning whether trial courts are permitted to consider "non-record activity" as good cause to avoid dismissal for lack of prosecution. *American Eastern Corporation v. Blanton,* 382 So.2d 863 (Fla. 1980); *Curtin v. Deluca*, 886 So.2d 298 (Fla. 4th DCA 2004); *Insua v. Chantres*, 665 So.2d 288 (Fla. 3d DCA 1995). Here, the Fifth District affirmed the trial court's decision as it relates to the trial court's ruling that "non-record activity" was no longer a valid argument to establish good cause under *Fla. R. Civ. P. 1.420(e).* A conformed copy of the Fifth District's opinion is annexed.

This action was filed by AMERICAN WALL on May 27, 1998, to foreclose a Claim of Lien and for breach of contract. Thereafter, various motions were filed, including FIRST UNION NATIONAL BANK'S (FIRST UNION) Partial Motion for Summary Judgment. The Order Denying the Motion for Partial Summary

Judgment was entered on March 11, 2002.

Thereafter, on June 14, 2002, Respondents', MADISON INTERNATIONAL GROUP, INC. (MADISON), WINDERMERE DEVELOPMENT GROUP, INC.(WINDERMERE), S.K. FINANCIAL SERVICE AND DEVELOPMENT, INC.'S (S.K. FINANCIAL) counsel, W. Bruce Del Valle, P.A., filed a Motion to Withdraw, but did not set the Motion for Hearing. In order to move the case along, AMERICAN WALL filed a Notice of Hearing on the Motion to Withdraw. On September 19, 2002, the Court entered an Order granting the Motion to Withdraw as Counsel and gave the Defendants 30 days to obtain new counsel. A Notice of Appearance was not filed until October 31, 2002, by Peter Carr, Esquire.

Meanwhile, two related cases were also pending in Orange County. These cases and the instant case all concern foreclosures on the same property and required a determination as to the priority of AMERICAN WALL'S Claim of Lien. AMERICAN WALL, MADISON and S.K. FINANCIAL were parties in all three actions. In one of the related actions, FIRST UNION was attempting to foreclose on the subject property. FIRST UNION filed a motion to consolidate the instant case with its action when this case was still pending.

AMERICAN WALL filed a Notice of Service of Interrogatories dated March 12, 2003, sent from Fort Lauderdale to Orlando.

FIRST UNION filed a Motion to Dismiss the Case for Lack of Prosecution dated March 14, 2003, sent from St. Petersburg to Orlando. For reasons unknown, the Motion to Dismiss for Lack of Prosecution was filed in the Court prior to the Notice of Service of Interrogatories.

On May 29, 2003, the trial court heard argument as concerned FIRST UNION'S Motion to Dismiss for Lack of Prosecution and granted said motion. Thereafter, AMERICAN WALL'S Motion for Re-Hearing was denied.

AMERICAN WALL appealed to the Fifth District Court of Appeal, arguing, among other things, that (1) the trial court erred when it held that the "non-record activity argument fails because this rule has changed over the last 25 years" and that the "only way to keep a case before the court was with actual record activity"; (2) the trial court erred when it held that the Notice of Service of Interrogatories did not constitute "good cause" pursuant to *Fla. R. Civ. P. 1.420(e)*; and (3) the trial court erred when it held that the other related and pending actions did not provide justification and were not sufficient "good cause" to avoid dismissal.

The Fifth District affirmed the trial court's ruling that non-record activity was no longer a valid argument to establish good cause under *Fla. R. Civ. P. 1.420(e)*. It also affirmed the

trial court's decision and held that neither the filing of the Notice of Service of Interrogatories nor the filing of the Notice of Hearing was persuasive non-record activity. The Fifth District also rejected AMERICAN WALL'S argument concerning the related pending cases and specifically noted that no joinder was sought even though FIRST UNION had filed a Motion to Consolidate when the case was pending.

Petitioner filed a Motion for Re-Hearing which was denied by the Fifth District.

ARGUMENT

I. THE DECISION OF THE FIFTH DISTRICT THAT A REQUEST FOR WRITTEN DISCOVERY WHICH FOR SOME UNEXPLAINED REASON IS NOT REFLECTED AS RECORD ACTIVITY IN THE COURT FILE DOES NOT CONSTITUTE GOOD CAUSE TO AVOID DISMISSAL DIRECTLY AND EXPRESSLY CONFLICTS WITH *CURTIN V. DELUCA*, 886 SO.2D 298 (FLA. 4TH DCA 2004).

The Fifth District 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 *Rule 1.420(e)* and this Court should now reaffirm that interpretation by accepting discretionary review and quashing the contrary decision of the Fifth District below.

In *Del Duca v. Anthony*, 587 So.2d 1306 (Fla. 1991), this Court set forth a two-step process for trial court's 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)*.

If the Fifth District's opinion should be allowed to stand, trial courts will not be required to consider good cause in their analysis of a motion to dismiss for lack of prosecution.

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 the instant case, under an almost identical set of facts, the court held that the arguments were unpersuasive and affirmed the trial court's decision. This holding of law is in irreconcilable conflict with a holding of law in a majority opinion of another district court. There is an actual conflict with controlling binding precedent that needs to be resolved. As such, jurisdiction should be accepted in order to settle this conflict.

II. THE DECISION OF THE FIFTH DISTRICT REJECTING AMERICAN WALL'S ARGUMENT THAT ITS INACTION WAS JUSTIFIED BECAUSE IT

WAS AWAITING THE RESULTS OF TWO PENDING RELATED ACTIONS AND NOTING THERE WAS NO STAY OR JOINDER DIRECTLY AND EXPRESSLY CONFLICTS WITH OTHER DISTRICTS' DECISIONS.

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). 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.

With the current split of opinion between the Districts which the Fifth District's decision has created, there are now no clear guidelines for trial courts to follow. The Fifth District's decision cannot stand if the other conflicting cases are correct.

By accepting jurisdiction in this matter, the Supreme Court would avoid any potentially disparate resolutions of motions to dismiss for lack of prosecution that the Fifth District's opinion may cause in the future.

III. THE DECISION OF THE FIFTH DISTRICT TO AFFIRM THE FINDING OF THE TRIAL COURT THAT NON-RECORD ACTIVITY WAS NO LONGER A VALID ARGUMENT UNDER *FLORIDA RULE OF CIVIL PROCEDURE 1.420(e)*, DIRECTLY AND EXPRESSLY CONFLICTS WITH A FLORIDA SUPREME COURT DECISION AND OTHER DISTRICTS' DECISIONS.

The Fifth District affirmed a finding by the trial court that non-record activity was no longer a valid argument to establish good cause under *Fla. R. Civ. P. 1.420(e)*. It held that "AMERICAN'S remaining arguments in regard to nonrecord activity . . . are also unpersuasive". In doing this, the District Court of Appeal created express and direct conflict by 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). See also, *State v. Stacey,* 482 So.2d 1350 (Fla. 1986), where the Court accepted jurisdiction when the court below overlooked a relevant factual finding on application for review for misapplication of controlling case law).

The Fifth District's decision is in direct conflict with *American Eastern Corporation v. Blanton,* 382 So.2d 863 (Fla. 1980). Non-record activity in relation to good cause under *Fla. R. Civ. P. 1.420(e)*, was discussed in this opinion. This Court held 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).*

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. The conflict between the Fifth District and this Honorable Court, as well as other Districts on this significant point of law, requires specific resolution in this case by this Court in order to prevent a travesty of justice.

The Fifth District's affirmation of the trial court's decision on this issue exacerbates the conflict and heightens the need for the Supreme Court to resolve the uncertainty in the law that the Fifth District has created.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Petitioner asserts there is ample cause for this Court to accept jurisdiction for consideration on the merits or to remand to the Fifth District Court of Appeals for reconsideration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Jurisdictional Brief was mailed this 20th day of May, 2005, to **Steve Chumbris, Esquire**, *Attorney for Defendant/First Union*, Holland & Knight, LLP, 200 Central Avenue, Suite 1600, St. Petersburg, FL, 33701; and to **Peter F. Carr, Esquire**, *Attorney for Defendants/Madison, Windermere & S.K. Financial*, Miller, South, Milhausen & Carr P.A., 2699 Lee Road, Suite 120, Winter Park, FL, 32789.

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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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