IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-868
5th DCA CASE 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

RESPONDENT, MADISON INTERNATIONAL GROUP, INC.'S RESPONSE BRIEF

PETER F. CARR, JR., ESQ.
Florida Bar No. 0046078
JAYSON T. ZORTMAN, ESQ.
Florida Bar No. 00462594
MILLER, SOUTH, MILHAUSEN & CARR, P.A.
2699 Lee Road; Suite 120
Winter Park, Florida 32801
Tel: (407) 539-1638 / Fax: (407) 539-2679
Attorneys for Respondent

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STATEMENT OF CASE AND FACTS

Respondent, MADISON INTERNATIONAL GROUP, INC. (hereinafter referred to as "MADISON"), is providing this restatement of the Statement of Case and Facts which it believes more accurately and succinctly presents this matter to the Court.

On May 7, 1998, Petitioner, AMERICAN WALL SYSTEMS, INC. (hereinafter referred to as "AMERICAN"), filed its Complaint against MADISON; Respondent, WINDERMERE DEVELOPMENT GROUP (hereinafter referred to as "WINDERMERE"); Respondent, S & K FINANCIAL SERVICE AND DEVELOPMENT, INC. (hereinafter referred to as "S&K"); and Respondent, FIRST UNION NATIONAL BANK n/k/a WACHOVIA BANK (hereinafter referred to as "WACHOVIA"), seeking (i) to enforce a claim of lien on property owned by MADISON for work performed by AMERICAN to construct a wall on MADISON's property under a construction contract with WINDERMERE as MADISON's agent, and (ii) a breach of contract action against WINDERMERE for non-payment under the construction contract. S&K was named a defendant as the purchaser of a portion of the property from MADISON. WACHOVIA was named as a defendant because of mortgages which it held on the S&K property.

From May, 1998 through October, 2001 there were various pleadings and actions of the parties not relevant to this appeal.

On November 26, 2001, WACHOVIA filed a Motion for Partial Summary Judgment. On December 6, 2001, AMERICAN filed a Memorandum of Law in Opposition to Motion for Partial Summary Judgment.

On February 18, 2002, WACHOVIA filed an Amended Motion for Partial Summary Judgment. On March 5, 2002, AMERICAN filed its Memorandum of Law in Opposition to the Amended Motion for Partial Summary Judgment.

On March 11, 2002, the Court entered its Order Denying the Amended Motion for Partial Summary Judgment.

On March 12, 2002, AMERICAN's Memorandum of Law in Opposition to the Amended Motion for Partial Summary Judgment that was filed on March 5, 2005, was re-filed.

On June 14, 2002, counsel for defendants MADISON and WINDERMERE filed his Motion to Withdraw as Counsel.

On September 13, 2002, AMERICAN filed a Notice of Hearing on the Motion to Withdraw as Counsel setting the matter for a September 19, 2002 hearing.

On September 19, 2002, the Trial Court entered its Order Granting Motion to Withdraw as Counsel in which it granted MADISON and WINDERMERE thirty days to obtain substitute counsel.

On October 31, 2002, Peter F. Carr, Jr. and the law firm of Miller, South, & Milhausen, P.A., filed a Notice of Appearance as counsel for MADISON.

On March 17, 2003, WACHOVIA filed its Motion to Dismiss for Failure to Prosecute.

On March 21, 2003, AMERICAN filed its Notice of Service of Interrogatories to WINDERMERE and MADISON. The Certificate of Service on the Notice of Service of Interrogatories states a service date of March 12, 2003. The envelope addressed to WACHOVIA's counsel which delivered the Notice of Service of Interrogatories had a metered postmark of March 12, 2003, a stamped postmark of March 18, 2003 and was stamped as received by WACHOVIA's counsel on March 30, 2003.

On May 16, 2003, AMERICAN filed its Memorandum of Law in Opposition to Motion to Dismiss for Failure to Prosecute as well as an Affidavit of Loreen I. Kreizinger. AMERICAN's position was that the Notice of Hearing on the Motion to Withdraw as Counsel was record activity within one year of the Motion to Dismiss, and that AMERICAN's Notice of Service of Interrogatories with a Certificate of Service date of March 12, 2003, pre-dated the Motion to Dismiss with a Certificate of Service date of March 14, 2003. Alternatively, AMERICAN alleged "good cause" for its failure to prosecute consisting of: (i)

clerical error by a paralegal failing to file a notice of trial; and (ii) the existence of two pending actions in the Circuit Court for Orange County for which AMERICAN alleged it was waiting to see the outcome of various motions.

Other than the docket for the two pending actions which was presented to the Trial Court by counsel for WACHOVIA at the hearing on the Motion to Dismiss, no other pleadings or proof were offered pertaining to the nature of the two pending actions.

On May 29, 2003, the Trial Court held a hearing on the Motion to Dismiss. On June 27, 2003, the Trial Court entered its Order Granting Motion to Dismiss for Failure to Prosecute which Order was filed June 30, 2003.

On July 7, 2003, AMERICAN filed its Motion for Rehearing of the Order Granting Motion to Dismiss which was denied by Order, dated July 10, 2003, and filed July 11, 2003.

On August 1, 2003, AMERICAN filed a timely Notice of Appeal seeking review of the Order Granting Motion to Dismiss and the Order Denying Rehearing.

On February 18, 2005, the Fifth District Court of Appeal issued its opinion affirming the Trial Court.

SUMMARY OF ARGUMENT

The substance of Petitioner's argument is that the decision of the Fifth District Court of Appeal is in direct conflict with either the opinions of other Florida District Court opinions or previous opinions of the Florida Supreme Court. Specifically, Petitioner points out the following three findings which it attributes to the Fifth District Court of Appeal opinion and alleges are in conflict with the aforementioned courts; 1) non-record written discovery does not constitute good cause for apparent non-activity under Florida Rule of Civil Procedure, Rule 1.420(e); 2) the pendency of another related action does not provide good cause for apparent non-activity under Florida Rule of Civil Procedure, Rule 1.420(e); and 3) non-record activity should not be considered in making a determination regarding good cause under Florida Rule of Civil Procedure, Rule 1.420(e).

Petitioner appears to have misinterpreted the opinion of the Fifth District Court of Appeal and the Trial Court in many respects and additionally has failed to recognize important distinctions between the Fifth District Court of Appeal's opinion and the opinions certified by the Petitioner as being in conflict with the Fifth District Court of Appeal. As a result, this Honorable Court should not exercise its discretionary jurisdiction because no actual conflicts are present.

ARGUMENT

I. THE DECISION OF THE FIFTH DISTRICT THAT A REQUEST FOR WRITTEN DISCOVERY WHICH IS FILED WITH THE COURT AFTER A MOTION TO DISMISS DOES NOT CONSTITUTE GOOD CAUSE TO AVOID DISMISSAL IS NOT IN CONFLICT WITH *CURTAIN V. DELUCA, 886 SO.2D 298 (FLA. 4TH DCA 2004).*

Petitioner is correct in stating that the court in Theresa Curtain v. Helena A. Deluca, M.D., 886 So.2d 298 (Fla. 4TH DCA 2004) established a two part test to apply when considering whether a dismissal for failure to prosecute is proper. Both Curtain and Michael Del Duca v. Paul E. Anthony, 587 So.2d 1306 (Fla. 1991) have recognized that once it is established that no record activity has occurred in the year prior to the motion to dismiss the burden then shifts to the non-moving party to establish good cause why the action should not be dismissed.

The Trial Court in the instant case determined that no affirmative activity occurred for a period of one (1) year preceding the filing of the Motion to Dismiss for Lack of Prosecution, thus shifting the burden to the Petitioner to establish good cause. The Trial Court then determined that the Petitioner failed to establish good cause and that any evidence presented indicated negligence or inadvertence on Petitioner's part.

Petitioner misinterprets the Fifth District Court of Appeal's ruling on this issue because the Fifth District Court of Appeal did not state that the filing of a Notice of Service of Interrogatories would not be good cause to avoid dismissal,

rather they simply acknowledge that the written discovery request was not filed until after the Motion to Dismiss for Lack of Prosecution. It is impossible to determine whether in fact the Fifth District Court of Appeal even considered Petitioner's filing of its Notice of Service of Interrogatories as record or non-record activity because it was established that the written discovery request was not filed until after the Motion to Dismiss for Lack of Prosecution was filed.

The Fifth District Court of Appeal's reasoning did not reach the issue of whether the filing of written discovery constitutes good cause because it was determined at the Trial Court level that the written discovery was not filed until after the Motion to Dismiss for Lack of Prosecution was filed. The Fifth District Court of Appeal did not determine that the two step process established in Del Duca v. Anthony, was invalid as alleged by the Petitioner, rather the court simply determined that based upon cases including Ace Delivery Service, Inc. v. Pauline Pickett and State Automobile Mutual Insurance Company, 274 So.2d 15 (Fla. 2nd DCA 1973) Petitioner's written discovery request did not qualify as record activity. Based on this determination, it is unlikely that the Trial Court evaluated Petitioner's written discovery request under the second step of the test laid out in Curtain.

The facts in the instant case and the facts from Curtain are distinguishable in that in Curtain the non-record written discovery request was made prior to the

filing of the Motion to Dismiss for Lack of Prosecution. In fact, the defendant in Curtain acknowledged receiving a copy of the written discovery requests prior to filing its Motion to Dismiss for Lack of Prosecution, however defendant argued that the written request did not constitute good cause to avoid dismissal because the requests did not ask any meaningful questions designed to move the case forward and was initiated solely to create record activity. Id at 299.

Petitioner has failed to establish irreconcilable conflict because it is apparent from the record that Petitioner's written discovery requests were neither record or non-record activity and all additional evidence of activity presented to the Trial Court was simply dismissed as failing to establish good cause. The Fifth District Court of Appeal in its discretion then affirmed the Trial Court's decision by simply stating that it found the Petitioner's arguments regarding good cause to be unpersuasive.

CONCLUSION

Based upon the forgoing arguments and citations of authority, Respondent would assert that the decision of the Trial Court and the Fifth District Court of Appeal are consistent with decisions previously rendered by Florida's District Courts and the Florida Supreme Court. Petitioner's Jurisdictional Brief requests that this Honorable Court exercise its discretionary jurisdiction under Article V,

3(b)(3) of the Florida Constitution, however, Petitioner has failed to demonstrate any express and direct conflicts and accordingly Respondent would ask that Petitioner's request be denied.

Respectfully submitted,

PETER F. CARR, JR., ESQ.
Florida Bar No. 0046078
JAYSON T. ZORTMAN, ESQ.
Florida Bar No. 00462594
Miller, South, Milhausen & Carr, P.A.
2699 Lee Road, Suite 120
Winter Park, Florida 32789
(407) 539-1638 – Telephone
(407) 539-2679 – Facsimile
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Justine S. Anagnos, Esq., Loreen I. Kreizinger, P.A., SunTrust Center, Suite 1150, 515 East Las Olas Boulevard, Fort Lauderdale, FL 33301; and Stephen C. Chumbris, Esq., Holland & Knight, L.L.P., 200 Central Avenue, Suite 1600, St. Petersburg, FL 33701, this ____ day of June, 2005.

JAYSON T. ZORTMAN, ESQ.

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, this _____ day of June, 2005.

_____

JAYSON T. ZORTMAN, ESQ.