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 REPLY BRIEF

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PRELIMINARY STATEMENT - ABBREVIATIONS

The Petitioner/Appellant, AMERICAN WALL SYSTEMS, INC., will hereinafter be referred to as “AMERICAN WALL”.

The Respondent/Appellee, MADISON INTERNATIONAL GROUP, INC., will hereinafter be referred to as “MADISON”.

The Respondent/Appellee, WINDERMERE DEVELOPMENT GROUP, INC., Will hereinafter be referred to as “WINDERMERE”.

The Respondent/Appellee, S.K. FINANCIAL SERVICE AND DEVELOPMENT, INC., will hereinafter be referred to as “S.K. FINANCIAL”.

The Respondent/Appellee, FIRST UNION NATIONAL BANK will hereinafter be referred to as “FIRST UNION”.

Counsel for MADISON, The Law Offices of W. Bruce DelValle, P.A., will hereinafter be referred to as DELVALLE, and was the original attorney for MADISON in the underlying case. DELVALLE withdrew from the case on September 19, 2002, and filed a Notice of Appearance again in this matter on December 15, 2005, which was not received by Loreen I. Kreizinger, P.A., until January 19, 2006, because DELVALLE sent the Notice to Loreen I. Kreizinger, P.A.’s prior address.

T = Transcript; R = Record on Appeal; IB = Petitioner’s Initial Brief; AB = Respondent’s Answer Brief.

ARGUMENT

Initially, in response to counsel for MADISON's allegation in the Answer Brief's Statement of Case and Facts, and worth brief mention, is that counsel for AMERICAN WALL only came in receipt of DELVALLE'S Notice of Appearance on January 19, 2006.

DELVALLE had sent the Notice to Loreen I. Kreizinger, P.A.'s prior address. The firm moved from that address in October, 2004. Loreen I. Kreizinger, P.A.'s current address was on AMERICA WALL'S Initial Brief as well as prior counsel's Amended Motion for Leave to Withdraw as Counsel for Respondent, Madison International Group, Inc., filed November 1, 2005, with this Court. When DELVALLE filed his Notice of Appearance, it was he who had a duty to send it to the correct address contained in the record on appeal or to check the address with The Florida Bar. It was only DELVALLE'S failure to send the Notice to the correct address of Loreen I. Kreizinger, P.A., that prevented him from being served with the Initial Brief.

Furthermore, contrary to DELVALLE'S statement that "Ms. Kreizinger's refusal to provide valid service when requested should not be condoned," at no time did Ms. Kreizinger or anyone from this firm refuse to provide service to DELVALLE, nor did DELVALLE ever request service. The only contact with this firm

was receipt of DELVALLE'S Notice of Appearance that was received on January 19, 2006.

I. AMERICAN WALL'S REPLY TO RESPONDENTS' ISSUE I., THAT THERE IS NO DIRECT FACIAL CONFLICT BETWEEN THE 5TH DCA DECISION IN AMERICAN WALL SYSTEMS, INC. v. MADISON INTERNATIONAL GROUP, INC., ET AL., 898 SO.2D 111 (5TH DCA 2005) AND THE SALAMON DECISION OR THE DEL DUCA OR DELUCA DECISIONS OR ANY OTHER DISTRICT COURT OR SUPREME COURT DECISION, THEREFORE, THERE IS NO JURISDICTION TO HEAR THIS APPEAL.

In response to Respondents' Argument I., 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. As such, it is clear that this Honorable Court has already considered the jurisdictional issue in this matter and made the decision to hear the parties out on the merits of the inherent conflicts surrounding these issues. To once again attempt to argue what should have been argued in Respondent's June 24, 2005, Response Brief on jurisdiction is inappropriate.

However, in response to Respondents' argument that the conflict must appear within the four corners of the majority decision, AMERICAN WALL asserts that such is the case here. The Fifth District Court of Appeal specifically cited to *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706 (Fla. 1951),

as the controlling authority for its decision in this case. Now, *Wilson v. Salamon*, ___ So.2d ___, 2005 WL 2663432 (Fla.), has clarified the true intent of the 1976 revision of Fla. R. Civ. P. 1.420(e) and held that *Gulf Appliance Distributors, Inc. v. Long* is no longer good law.

Wilson v. Salamon, ___ So.2d ___, 2005 WL 2663432 (Fla.), holds that as long as there is record activity, then there can be no dismissal. *Id.*

Here, the Fifth District conceded that there was activity of record during the one year period in question when it stated that "[t]he only **activity of record** that occurred within the year preceding March 17, 2003, was the withdrawal of a defense attorney and the filing of an appearance by replacement counsel." [Emphasis added] *American Wall Systems, Inc. v. Madison International Group, Inc.,* 898 So.2d 111, 112 (Fla. 5th DCA 2005).

As such, contrary to Respondent's argument in its Answer Brief, the Fifth District's opinion in *American Wall Systems, Inc. v. Madison International Group, Inc.,* which cites to the now overturned *Gulf Appliance Distributors, Inc. v. Long*, and other case law requiring affirmative case activity as authority, would be in direct conflict with the strict application of Fla. R. Civ. P. 1.420(e) and *Wilson v. Salamon.* Moreover, in *Frisbie*

v. Gardiner, ___ So.2d ___, 2006 WL 12950 (Fla. App.4 Dist.), 31 Fla. L. Weekly D157, ***Wilson v. Salamon*** is cited as authority in order to reverse and remand, reinstating the appellant's cause of action since there was activity on the face of the record, namely, a motion to withdraw as counsel and an order granting the motion, just as in the case at bar. 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.).

Appellee indicates there is no inter-district conflict or conflict with this Court and as such, this Court has no power to routinely review decisions of the DCA and cites to ***State v. Barnum,*** 2005 Fla. LEXIS 1780, *27, 30 Fla. Law Weekly, s63 (Fla. September 22, 2005) as authority. (AB 9-10). However, the Fifth District's opinion in this case clearly conflicts with the Florida Supreme Court case of ***Wilson v. Salamon***, ___ So.2d ___, 2005 WL 2663432 (Fla.), 30 Fla. L. Weekly S701, as well as ***American Eastern Corporation v. Blanton,*** 382 So.2d 863 (Fla. 1980). There is also an inter-district conflict with ***Curtin v. Deluca***, 886 So.2d 298 (Fla. 4th DCA 2004), ***and Insua v. Chantres***, 665 So.2d 288 (Fla. 3d DCA 1995).

Further, as explained in more detail below, the Fifth District did not expressly find that "AMERICAN WALL failed to

prove that it in fact served its discovery requests on the date referenced in the certificate of service and otherwise prior to the date of the motion to dismiss. . .” (AB 11) In relation to that issue, it merely cited to the trial court’s holding.

Moreover, *Curtin v. Deluca*, 886 So.2d 298 (Fla. 4th DCA 2004) specifically addresses a situation where, as here, for some unexplained reason, a request for written discovery is not reflected as record activity in the court file.

As such, based upon the foregoing, as well as the prior briefs filed in this case by AMERICAN WALL, this Court was correct in granting jurisdiction to hear this appeal. (IB)

II. AMERICAN WALL’S REPLY TO RESPONDENTS’ ISSUE II., THAT THE TRIAL COURT AND THE DISTRICT COURT OF APPEALS’ ORDERS DISMISSING THIS ACTION FOR LACK OF PROSECUTION ARE CORRECT AND SHOULD BE AFFIRMED.

Respondents suggest that this Honorable Court should ignore the clear language of Fla. R. Civ. P. 1.420(e) and ask for an exception to the rule finally clarified and applied as intended in *Wilson v. Salamon*. However, any modification of the law stated in *Wilson* would bring the law back in to a state of confusion as it was prior to *Wilson* and what this Honorable Court clearly intended to avoid in its detailed decision in that case, namely, an arbitrary application of Fla. R. Civ. P.

1.420(e). In addition, the rule, as revised in 1976, does not allow for such an exception. *Wilson* clearly states the law as intended when it was revised in 1976. This Honorable Court carefully reviewed the history of Fla. R. Civ. P. 1.420(e), including the committee notes published with the 1976 revision of the rule. With the word "affirmatively" being removed in the 1976 revision, this Honorable Court determined that the analysis in *Gulf Appliance Distributors, Inc. v. Long,* 53 So.2d 706 (Fla. 1951), was "inconsistent with the plain language of the current rule and the commentary that accompanied the 1976 amendment." Wilson v. Salamon, ___ So.2d ___, 2005 WL 2663432 (Fla.), 30 Fla. L. Weekly S701. "The plain language of the rule contemplates that an action cannot be dismissed under the rule for failure to prosecute if some 'action has been taken by filing of pleadings, order of the court or otherwise' within the past year. *In Re Fla. Rules of Civil Procedure,* 211 So.206, 207 (Fla. 1968)." *Id.*

In lieu of *Wilson,* and the clarification of the 1976 revision of Fla. R. Civ. P. 1.420(e) in the instant case, with clear and uncontested activity on the face of the record in the form of the Motion to Withdraw, AMERICAN WALL's Notice of Hearing and the Court Order granting the Motion to Withdraw, the Fifth District should be reversed.

Respondents state "Fla. R. Civ. P. 1.420(e) can thus be seen as the 'price of admission' to the court system." (AB 14) However, this statement flies in the face of our constitution. "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." *Id.* Surely, having to pay a "'price of admission' to the court system" is not what was intended when the rule was enacted.

Respondents state that AMERICAN WALL was somehow directly at fault. (AB 14-16) However, 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). Respondents also bring up the 2005 amendment to Rule 1.420(e). However, that amendment is not at issue here, it is not addressed in the record on appeal and is not relevant. *Williams v. Winn Dixie Stores, Inc.,* 548 So.2d 829 (Fla. 1st DCA 1989). As such, it should not be considered by this Honorable Court in this matter. *Miller v. Miller*, 709 So.2d 644 (Fla. 2nd DCA 1998).

Wilson, on the other hand, has already proved to be easily applied and a necessary clarification of the 1976 revision of Fla. R. Civ. P. 1.420 (e) on at least three occasions since October, 2005. *Frisbie v. Gardiner,* ___ So.2d ___, 2006 WL

12950 (Fla. App.4 Dist.), 31 Fla. L. Weekly D157; *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.).

In footnote 1, Respondents state that the interests sought by AMERICAN WALL's lien have been previously foreclosed by default in one of the cases AMERICAN WALL claims it was awaiting the outcome. However, as Respondents should know, there were in fact five lots on the property in question which were subject to the AMERICAN WALL lien and it was its alleged priority over which held up the foreclosure of same. In fact, the Motion for Partial Summary Judgment filed by FIRST UNION and denied by the trial court on March 11, 2002, attempted to establish its priority over the property in question.

As concerns DELVALLE'S statements concerning AMERICAN WALL'S efforts to move the case toward trial as well as the comments concerning the motions to amend the complaint, they are not part of the record on appeal. *Miller v. Miller*, 709 So.2d 644 (Fla. 2nd DCA 1998); *Kozich v. Hartford Insurance Company of Midwest*, 609 So.2d 147 (Fla. 4th DCA 1992). Moreover, these comments contain matters which are immaterial and impertinent to the current controversy between the parties and should be stricken from the record. *Williams v. Winn Dixie Stores, Inc.*

548 So.2d 829 (Fla. 1st DCA 1989); *Easton v. Weir*, 228 So.2d 396 (Fla. 2nd DCA 1969).

III. AMERICAN WALL'S REPLY TO RESPONDENT'S ISSUE III., THAT THE REMAINING GROUNDS FOR AMERICAN WALL'S APPEAL SHOULD BE DISREGARDED.

A. NON-RECORD ACTIVITY AND GOOD CAUSE

Respondents argue that "the trial court and the Fifth District Court of Appeal did not refuse to consider non-record activity despite AMERICAN WALL's unsupported claims to the contrary. . .." (AB 17) However, the trial court specifically stated that AMERICAN WALL'S "non-record argument fails because this rule has changed over the last 25 years." Therefore, the trial court held that the non-record activity argument is just not applicable anymore since the revision of rule 1.420(e). (T. 27-28) Moreover, 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.* As stated in AMERICAN WALL'S Initial Brief, 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 Fla. R. Civ. P. 1.420(e). *Weaver v. The Center Business*, 578 So.2d 427 (Fla. 5th DCA 1991).

Notwithstanding Respondents' misrepresentation to the contrary, the lower courts did overlook 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). As such, 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.

"In view of the heavy work load of this and other appellate courts it is essential that those who present cases for appellate review accurately portray the state of the record as it developed in the trial court." *Seaboard Air Line Railroad Co. v. Hawes*, 269 So.2d 392, 394 (Fla. 4th DCA 1972).

B. OTHER PENDING RELATED ACTIONS

Respondents' argument in relation to the pendency of two similar cases to establish good cause is flawed. Respondents fail to mention that MADISON had filed a Motion to Dismiss/Abate which was only withdrawn in January 2003, and that FIRST UNION

was attempting to re-establish lost notes and mortgages on the subject property in case number CI-00-5232. In fact, in this case, based upon FIRST UNION'S Motion to Consolidate, FIRST UNION sought to "foreclose any interest that AMERICAN WALL may have" on the subject property. FIRST UNION also stated that the two actions "involve common questions of law and fact inasmuch as both suits allege that the respective Plaintiff's liens are superior to any of the Defendant's liens"; and that consolidation would "provide for uniformity with respect to the determination of the lien priority issue." (R. 285-288). All of the aforementioned non-record activity taken in connection with a related action would have tended to advance the instant action toward disposition since all of these cases and parties concern the same property owned by MADISON at all material times hereto. Once the motions were disposed of, AMERICAN WALL would have had a better understanding of where it stood in relation to the priority of its claim of lien and whether it held priority status over the FIRST UNION on the entire property or over five lots on the subject property. *Barns v. Ross*, 386 So.2d 812 (Fla. 3d DCA 1980); *Insua v. Chantres*, 665 So.2d 288 (Fla. 3d DCA 1995).

Moreover, the fact that AMERICAN WALL opposed FIRST UNION's 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, is not relevant. What is important is that the motion in and of itself is undisputed evidence that the cases were sufficiently connected so that what may occur in one case may impact the other as argued by AMERICAN WALL in this case. As such, the lower courts' decisions cannot stand if the other conflicting cases are correct.

As concerns the Case No. 98-10048 Div. 35, AMERICA WALL's rights concerning the five lots upon which it had a lien, was not foreclosed upon and a Notice of Voluntary Dismissal with Prejudice and Discharge of Lis Pendens was only filed on November 16, 2004.

C. REQUEST FOR WRITTEN DISCOVERY NOT REFLECTED AS RECORD ACTIVITY IS GOOD CAUSE

The Fourth District's decision in *Curtin v. Deluca*, 886 So.2d 298 (Fla. 4th DCA 2004) 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.

Respondents misread *Curtin* in that AMERICAN WALL acknowledges that for some unexplained reason, the interrogatories were not filed prior to the Motion to Dismiss in this case. As mentioned at the hearing on the Motion to Dismiss, AMERICAN WALL was handling this case with jurisdiction in Orange County from Broward County and could not explain the discrepancy. However, just as in *Curtin*, this still should have been considered non-record activity constituting good cause to avoid dismissal. Respondent states, "AMERICAN WALL ignores the obvious fact that in determining record activity, the activity must be on the record, e.g., filed." This is the complete opposite analysis of the *Curtin* case. *Curtin* stands for the proposition that even if there is **no** record activity, *e.g.,* **not** filed, the written discovery is still non-record activity constituting good cause to avoid dismissal.

CONCLUSION

As such, AMERICAN WALL respectfully requests reversal of the lower Courts' rulings dismissing this action for lack of prosecution and reinstatement of the lawsuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief was mailed this 3rd day of February, 2006, to **Steve**

Chumbris, Esquire, *Attorney for Defendant/First Union*, Holland & Knight, LLP, 200 Central Avenue, Suite 1600, St. Petersburg, FL, 33701; and to **W. Bruce DelValle, Esquire**, DelValle Law Group, P.A., 1122 N Main Street, Suite A, Kissimmee, FL, 34744.

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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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