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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2263
FIRST DCA CASE NO. 1D08-4895
LT NO. 02-3323-CA

CHEMROCK CORPORATION,
Appellant,

v.

TAMPA ELECTRIC COMPANY d/b/a
TECO PEOPLES GAS COMPANY
Appellee.

ANSWER BRIEF OF APPELLEE

PEDRO F. BAJO, JR.
Florida Bar No. 966029
ANTHONY J. CUVA
Florida Bar No.896251
BAJO CUVA, P.A.
100 North Tampa Street
Suite 1900
Tampa, Florida 33602
Telephone: 813-443-2199
Telecopier: 813-443-2193
pedro.bajo@bajocuva.com
Attorneys for Tampa Electric Company
d/b/a TECO Peoples Gas Co.

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STATEMENT OF THE CASE AND THE FACTS[1]

Chemrock's Initial Brief contains statements which are not found in the 1st District's opinion ("Opinion") and which are not borne out by the record. PGS submits this Statement of the Case and Facts to clarify and narrow the uncontroverted facts and history in the record relevant to the issue on appeal.

This action has been pending over 7 years, since May 7, 2002 when Chemrock filed its original Complaint against PGS. (A. V1-1-7). On October 31, 2002, the trial court entered an Order Setting Case for Jury Trial on July 7, 2003. (A. V1-31-34, 39-42).

On June 10, 2003, the parties filed a Joint Motion for Continuance. (A. V1-71-72; A. Appx. A). As grounds for the continuance, the parties jointly stated that there was "substantial discovery yet to be undertaken" which could not be completed by the trial date. (A. V1-71-72; A. Appx. A). An Order was entered on June 10, 2003 granting the joint motion for continuance and indefinitely continuing the trial. (A. V1-73; A. Appx. B). The Order provided the specific procedure to be followed by the

[1] Appellant, Chemrock Corporation is referenced as "Chemrock," and Appellee, Tampa Electric Company d/b/a TECO Peoples Gas Co. is referenced as "PGS." Unless otherwise stated, all references to the record are to the appellate record by volume and page (e.g., (A. V1-1-7) references volume 1, pages 1 through 7). All references to the appendix are to the appellate appendix by tab (e.g., "A. Appx.. A" references tab A).

parties to reset the matter by requiring that [t]he matter shall be reset upon proper motion by either party." (A. V1-73; A. Appx. B).

After the matter was continued indefinitely, the parties continued to conduct discovery. (A. V1-74-125, 129-224). After being ordered to produce its expert for deposition following PGS's successful Motion to Compel, Chemrock's expert was deposed in July 2004. (A. V1-74-91, 124-125; A. Appx. C).

However, in order for PGS's expert to finalize his opinions and issue his report, additional information was required. (A. V1-175-176; A. Appx. D). For example, PGS made clear that it still needed to take some key depositions (including Chemrock's former plant manager and a representative from Yown's Boiler & Furnace Service, who performed service on the equipment at Chemrock's plant), as well as obtain additional documents from Chemrock relating to the engineering, installation, maintenance and repair of equipment using the flow of gas originating from PGS's transmission lines. (A. V1-81-82, 87-88, 122-123, 129-136, 146-147, 148, 175-176, 180; A. V2-214-215; A. Appx. D). PGS repeatedly requested dates from Chemrock for its former plant manager's deposition and was advised that it was improper for PGS to communicate with the witness directly, only to be advised later that Chemrock had been unable to contact the witness itself. (A. V2-240-241, 243, 282-283, 285, 312-313, 315; A. Appx. E).

Additionally, Chemrock failed to designate for deposition its corporate representative with the most knowledge of certain areas of inquiry. (A. V1-146-147; A. Appx. D). As a result, PGS served a Third Request for Production of Documents on Chemrock relating to the engineering, installation, maintenance and repair of Chemrock's equipment which used the flow of gas from PGS's transmission lines through Chemrock's gas lines and related equipment. (A. V1-135-136, 140-144; A. V2-208-213). Chemrock failed to timely respond to the request and failed to cooperate in scheduling any other fact witnesses for deposition despite PGS's request to do so. (A. V1-137-152; A. Appx. D; V2-216). Consequently, PGS again had to file a Motion to Compel on January 20, 2005 because PGS still lacked the necessary information required by its expert to finalize his opinions and issue a report. (A. V1-137-152; A. Appx. D). Throughout, Chemrock steadfastly refused to participate in the required discovery, including answering written discovery and in scheduling fact witness depositions. (A. V1-137-152; A. Appx. D).

Instead, on January 31, 2005, Chemrock filed a Motion to Preclude PGS's disclosed expert because PGS had not yet provided its expert's report. (A. V1-177-201). A March 8, 2005 hearing date was set on PGS's Motion to Compel and Chemrock's Motion to Preclude; however the parties resolved the issues set forth in their respective motions prior to the hearing based on both parties recognizing the need for additional discovery before PGS could provide its expert report. (A. V2-221-223,

282-283, 293, 312-313, 322; A. Appx. F). An Order on those motions was entered on September 14, 2005 mooting PGS's Motion to Compel and denying Chemrock's Motion to Preclude. (A. V2-224; A. Appx. G).

Over the course of this case, while local counsel for Chemrock remained the same, three additional attorneys and different law firms, made formal *pro hac vice* appearances for Chemrock at various times.[2] (A. V1-49-54, 126-128; A. V2-225). Conversely, PGS was consistently represented by the same law firm in this action with the only change of responsible attorney coming at the Notice and Motion to Dismiss for Failure to Prosecute stage, not during the entire course of discovery.[3] (A. V2-226; A. Appx. H).

On December 27, 2006, after more than a year passed with no activity, record or otherwise, PGS filed and served its Notice of Lack of Prosecution pursuant to Florida Rule of Civil Procedure 1.420(e) (the "Rule"), which provided Chemrock with 60-days notice of its lack of prosecution for more than 10 months. (A. V2-226; A. Appx. H).

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[2] This does not count the appearance of another out-of-state attorney who, without *pro hac vice* admission, filed an affidavit in support of Chemrock's Opposition to the Motion to Dismiss for Failure to Prosecute and made an in-court appearance by arguing on behalf of Chemrock at the hearing on same. (A. V2-259-333). This is the same attorney representing Chemrock in this appeal.

[3] Within the last month, the undersigned counsel resigned from his former law firm to form his own law firm with another partner and PGS chose to transfer the file to the undersigned, necessitating the need to request an extension of time to serve the Answer Brief.

As of the date of the filing of the Notice, there were no record attempts made by Chemrock to reset the case for trial in accordance with the June 2003 Order of continuance.[4]

Instead of taking any meaningful steps to prosecute its lawsuit, Chemrock responded to PGS's Notice of Lack of Prosecution by filing an Opposition on February 22, 2007 blaming the trial court and PGS for Chemrock's failure to prosecute to attempt to assert good cause why the action should not be dismissed. (A. V2-227-252). Despite the Opposition being filed in response to a motion to dismiss, PGS had only filed the requisite Notice of Lack of Prosecution at that point.

Sixteen more months passed during which not a single bit of record activity took place, *i.e.*, no motion to reset for trial was filed as required by the June 10, 2003 Order of continuance, no discovery-related motions or notices were filed, and no hearing was sought or noticed on any issue. On June 24, 2008, PGS filed its Motion to Dismiss for Failure to Prosecute ("Motion to Dismiss") asserting, in part, that Chemrock failed to demonstrate good cause for its failure to prosecute and arguing that the filing of yet another notice under the Rule would render the Rule meaningless since the cycle could

[4] While Chemrock argues in its Brief at page 3 that it is "undisputed" that it sent a letter to the trial court on March 8, 2005 requesting a trial date, even Chemrock admits the letter is not part of the trial court's file except as part of its response to the Notice of Failure to Prosecute. Most of what Chemrock claims is "undisputed" in its Initial Brief is supported only by a self-serving affidavit of its counsel, replete with hearsay, other inadmissible evidence, and much of which is certainly disputed. (A. V2-259-331).

continue indefinitely. (A. V2-253-258; A. Appx. I). In response, Chemrock filed an affidavit in support of its Opposition to PGS's Motion to Dismiss blaming the trial court and PGS for Chemrock's failure to do anything for yet another 16 months to prosecute its case. (A. V2-259-331).

A hearing on PGS's Motion to Dismiss was held on August 26, 2008. (A. V2-332; A. Appx. J). The trial court, after considering the filings of record and arguments of counsel presented at the hearing,[5] found Chemrock failed to engage in record activity since February 22, 2007, failed to demonstrate good cause for its failure to prosecute, and dismissed the case for failure to prosecute. (A. V2-332; A. Appx. J).

As a result of the dismissal Order, Chemrock filed its Notice of Appeal. (A. V2-336-339). The 1st District filed its Opinion on November 17, 2009 affirming the trial court order dismissing Chemrock's complaint for failure to prosecute. On December 9, 2009, Chemrock filed its Notice to Invoke Discretionary Jurisdiction and on February 25, 2010, this Court accepted jurisdiction.

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[5] While Chemrock makes the incorrect statement on pages 5, 6 of its Initial Brief (without any record support) that its counsel "was not given an opportunity to argue" during the hearing on the Motion to Dismiss, the dismissal Order indicates otherwise. (A. V2-332-333). Such a statement is astonishing in light of the fact that Chemrock admits the trial court accommodated its counsel's request to appear at the hearing telephonically, and counsel did, in fact, appear at the hearing telephonically, despite counsel's failure to be admitted *pro hac vice*. Chemrock's representation that its counsel was not given an opportunity to argue is false and is clearly contrary to the record as reflected by the trial court's dismissal Order. The trial court simply disagreed with Chemrock's position.

SUMMARY OF THE ARGUMENT

The 1st District correctly affirmed the trial court decision. The 1st District found that the grace period in the amended Rule requires more than just a mere filing. The 1st District's analysis included consideration of the Rule's history, how its interpretation is consistent with the purpose for creating the grace period and how its interpretation is necessary to give effect to each provision of the amended Rule.

Under the new provisions of the Rule, a notice of lack of prosecution may be sent when there has been no record activity-by filing of pleadings, order of court, or otherwise-for a period of ten months. It is undisputed such a Notice was sent in this case after more than a year passed with no record or nonrecord activity. The amended Rule then provides a sixty-day period in which a party must act in order to avoid a dismissal for failure to prosecute. PGS complied with the requirements of the Rule, however, Chemrock did not meet its burden to avoid dismissal.

Despite the fact that Chemrock argues that it did not abandon its case, a closer look at the record suggests otherwise. Chemrock filed its complaint in 2002, did not depose PGS' expert, stymied PGS' discovery efforts requiring PGS to file multiple Motions to Compel, engaged in no activity for over one year requiring PGS to file a Notice of Intent to Dismiss for Failure to Prosecute and then engaged in no activity for an additional sixteen months. Throughout this time period, Chemrock took no action to advance the case or have it re-set for trial as required by the trial court order.

Chemrock has done nothing except attempt to blame the trial court and PGS for its failure to prosecute its case. Trial courts have broad discretion and are in the best position to control their own dockets. In the instant case, the trial court did just that by establishing the specific procedure to be followed to reset the case for trial as part of its June 2003 continuance Order. In the seven years since the court entered its Order indefinitely continuing the trial, Chemrock has not followed that procedure; it has never filed a proper motion to reset the case for trial as expressly required by the trial court. Chemrock cannot avoid dismissal by blaming the trial court when the continuance Order required the filing of a proper motion to reset. Chemrock cannot rely on a letter purportedly sent to the trial court and not reflected on the docket as having been received. An alleged letter forwarded to the judge is not a proper motion to reset. The procedure to be followed was clear and unambiguous, yet it was disregarded by Chemrock.

Additionally, Chemrock's post-notice filings were not record activity or recommencement of the action as intended by the Rule, but instead were filed in an attempt to demonstrate good cause barring dismissal. Even if Chemrock's February 2007 attempt to demonstrate good cause is record activity, the trial court did not abuse its discretion in finding that dismissal was wholly consistent with the purpose of the Rule given the additional 16-month delay in prosecution or recommencement. To hold otherwise would result in a cycle of notice and response under the Rule that could

continue indefinitely without meaningful results, frustrating the purpose of the Rule. There were many things Chemrock could have done to avoid a dismissal for lack of prosecution, yet Chemrock did nothing and instead blames everyone but itself for its omissions.

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW REQUIRES AFFIRMANCE OF THE ORDER OF DISMISSAL.

A trial court's determination that a plaintiff has failed to show good cause in dismissing an action for failure to prosecute is reviewed using an abuse of discretion standard. *Swait v. Swait*, 958 So. 2d 552, 553 (Fla. 4th DCA 2007). The burden of showing abuse of discretion is borne by Chemrock. *Barton-Malow Co. v. Gorman Co. of Ocala*, Inc., 558 So. 2d 519 (Fla. 5th DCA 1990). As set forth below, Chemrock has failed to demonstrate that the trial court abused its discretion when it dismissed the case, and the 1st District's Opinion affirming the trial court's ruling should be affirmed.

II. CHEMROCK'S INTERPRETATION OF RULE 1.420(e) DISREGARDS THE PURPOSE OF THIS COURT'S AMENDMENT TO THE RULE AND RENDERS THE AMENDMENT MEANINGLESS.

As noted correctly by the 1st District, in order to give effect to the Rule, as amended, this Court cannot hold that Chemrock's filing during the 60-day grace period constitutes requisite record activity to avoid dismissal. *Chemrock Corporation v.*

Tampa Electric Company, 23 So.3d 759 (Fla. 1st DCA 2009). The 1st District Opinion provides analysis of the history of the Rule, a discussion of how the 1st District's interpretation is the only interpretation consistent with the purpose for creating the 60-day grace period and an explanation of how the 1st District's interpretation is necessary to give effect to each provision of the Rule, as amended. *Id. at 760.*

A. HISTORY OF THE RULE

The Opinion details the background of the Rule and the basis for this Court's amendment to the Rule effective January 1, 2006. A bright-line test for record activity was established by this Court for what constitutes record activity under the old Rule by defining it as **any** document filed in the record. *Id. at 760, 761*. *See, Wilson v. Salamon*, 923 So.2d 363, 368 (Fla. 2005). The old Rule required that good cause be shown for the lack of prosecution in order to avoid dismissal. *Chemrock* at 761. The 1st District concluded that the passage of time was the sole consideration for a trial court prior to dismissing a case under the old Rule. *Id at 761*.

The amended Rule, adopted by this Court following *Wilson* integrated 2 elements of import: 1) it shortened the time period before a party could file a Motion to Dismiss for Failure to Prosecute, and 2) it established a 60-day grace period for a party to take some action to avoid dismissal. *Id.at 761* .The effect of these changes afforded a party notice and an opportunity to recommence prosecution of the litigation

to avoid dismissal and provided the trial court with additional considerations other than the mere passage of time. *Id. at 761, 762.*

In focusing on the 60-day grace period, the 1st District found that in order to avoid dismissal, a party could do 1 of 3 things: 1) seek and obtain a stay, 2) establish good cause to maintain the litigation, or 3) recommence prosecution by acting to advance the case toward final resolution. *Id. at 761*. Chemrock did none of the above.

B. INTENT OF THE AMENDMENT

The Opinion cited to the Committee Notes explaining that the purpose of the amendment to the Rule was "to provide that an action may not be dismissed for lack of prosecution without prior notice to the claimant to recommence prosecution of the action to avert dismissal." *Id. at 762.* PGS did just that by filing the requisite Notice and then waiting an additional 16 months before finally filing its Motion to Dismiss. Chemrock was given multiple opportunities and ample time to recommence prosecution, yet it did nothing other than attempting to shift the blame for its inaction to the trial court and PGS. The 1st District found that Chemrock's failure to recommence prosecution after receiving the requisite notice did not meet with the purpose of the Rule, as amended.

C. THE PROVISIONS OF THE RULE, AS AMENDED

The Rule itself provides examples of methods to avoid dismissal for failure to prosecute which contradict Chemrock's argument that any filing during the 60-day

grace period will suffice. *Id. at 762*. The Rule provides that dismissal can be avoided on obtaining a stay. *Fla. R. Civ. P. 1.420(e)*. If all that is required is a filing, no matter what that filing constitutes, then the mere filing of a motion to stay would be sufficient. *Id. at 762*. It is clear from the plain meaning of the Rule, that more than a mere filing is required. A stay must be issued or approved.

Additionally, the Rule permits a party to show good cause in writing at least 5 days before a hearing on the motion why the action should remain pending. A hearing on a good cause filing is unnecessary if Chemrock's assertion that a mere filing of any kind is sufficient to avoid dismissal. *Id. at 762*. The plain language of the Rule requires Chemrock to establish good cause, not merely file something stating it has good cause, and contemplates a hearing during which the trial court will make a determination on whether good cause has been established. The trial court held such a hearing and based on the Order dismissing Chemrock's complaint, clearly determined that Chemrock did not establish good cause.

III. THE REQUIREMENTS OF A RULE 1.420(e) DISMISSAL

Under the Rule, a notice of lack of prosecution may be served where there has been no record activity-by filing of pleadings, order of court, or otherwise-for a period of ten months. Fla. R. Civ. P. 1.420(e). It is undisputed such a Notice was served in this case after more than a year of no record or nonrecord activity.

The Rule then provides a sixty-day period in which a party must act in order to avoid a dismissal for failure to prosecute. Fla. R. Civ. P. 1.420(e). "[A]n action may not be dismissed for lack of prosecution without prior notice to the claimant and adequate opportunity for the claimant to re-commence prosecution of the action to avert dismissal." Fla. R. Civ. P. 1.420(e) committee notes (2005 amend.).

PGS has complied with the requirements of the Rule as set forth above, however, Chemrock has not met its burden to avoid dismissal and no abuse of discretion has been shown. Chemrock was afforded an adequate opportunity to re-commence prosecution of the action to avert dismissal and instead chose to do nothing.

IV. CHEMROCK ABANDONED ITS LITIGATION

As Chemrock aptly stated in its Brief, the stated purpose of the Rule is "to encourage prompt and efficient prosecution of cases and to clear trial dockets of litigation that has essentially been abandoned." (Appellant's Initial Brief, p. 12), *citing, Barnett Bank of East Polk County v. Fleming*, 508 So. 2d 718, 720 (Fla. 1987); *Elegele v. Halbert*, 890 So.2d 1272, 1273 (Fla. 5th DCA 2005). Chemrock argues that it did not abandon this case. (Appellant's Initial Brief, p. 12). The record suggests otherwise.

Chemrock apparently contends in its Brief that it was ready to proceed to trial within 3 months of filing its Complaint. (Appellant's Initial Brief, p. 2). Chemrock states that its discovery was completed and that it is undisputed that it was ready for

trial. (Appellant's Initial Brief, p. 3). During the same time frame that Chemrock indicates that its discovery was complete and it was ready for trial, Chemrock executed a Joint Motion for Continuance representing to the trial court that the parties believe there is substantial discovery yet to be undertaken. (A. V1-71-72; A. Appx. A). Chemrock admits in its Brief that it still needed to obtain discovery of PGS' expert (Appellant's Initial Brief, p. 3). While Chemrock represents to this Court that it had completed its discovery and was ready to proceed to trial, it had not even deposed PGS' expert and had jointly filed a Motion for Continuance representing to the trial court that substantial discovery had yet to be undertaken.

Chemrock attempts to shift the blame for other depositions not being scheduled to PGS. (Appellant's Initial Brief, p. 3, 4). What Chemrock fails to explain is why, after a period of years of PGS allegedly stymieing discovery, did it not seek judicial intervention to address PGS' alleged delay tactics or otherwise act to advance the case toward resolution. Conversely, it is PGS that filed Motions to Compel which the trial court granted, not Chemrock. When Chemrock filed its Motion to Exclude PGS' expert, the trial court entered an order denying that motion.

Chemrock suggests that PGS could have requested a trial date or the trial court could have set this case for trial. (Appellant's Initial Brief, p. 13). The simple fact is that the case was not and is not ready for trial as fundamental discovery required for PGS' expert to render an opinion remains to be done. Under those circumstances, why

would PGS request a trial date. The trial court, Chemrock and PGS seem to have recognized at the operative time that discovery remained to be done as a Joint Motion for Continuance was filed, an order was entered continuing the trial indefinitely and the issues giving rise to the Joint Motion for Continuance remained outstanding. The case was not ready to be set for trial and it makes no sense for Chemrock to suggest that PGS and the trial court are at fault for failing to schedule it for trial.

In an effort to shift the blame for its inaction, Chemrock then argues that PGS should have filed a Notice for Case Management Conference instead of a Motion to Dismiss. While that was a possibility, it is not a requirement, and is a further example of Chemrock attempting to shift the blame for its own omissions onto PGS. It is somewhat questionable whether a case management conference would have made a difference in a case where Chemrock did nothing for over a year, responded to PGS' Notice by filing its opposition attempting to establish good cause, and then did nothing for another 16 months before finally PGS filed its Motion to Dismiss. Chemrock suggests that somehow a dismissal of this case would constitute a "surprise" that would violate the "denial" portion of Article 1, Section 21 of the Florida Constitution. (Initial Brief, p.12, n.1). It is unfathomable how Chemrock could feign "surprise" at dismissal of this case when it was previously served with PGS' Notice and chose to respond by doing nothing more for an additional 16 months.

The record shows that Chemrock filed its lawsuit in 2002, went over a year without record activity culminating in PGS filing its Notice of Lack of Prosecution on December 27, 2006, then went another sixteen months without record activity culminating in PGS filing its Motion to Dismiss. The trial court and PGS could reach no other conclusion other than Chemrock had abandoned its litigation.

V. CHEMROCK CANNOT AVOID DISMISSAL BY BLAMING THE TRIAL COURT FOR NOT SETTING THE CASE FOR TRIAL.

Chemrock implies, in part, that it had the right to rely on the trial court's control of the docket for purposes of setting a trial date when it allegedly forwarded a letter, in March 2005, to the trial court judge requesting a new trial date and, therefore, the trial court was barred from dismissing the case for lack of prosecution. (Appellant's Initial Brief, p. 3). Purportedly, Chemrock's position is that the letter relieved it of any burden to move the case forward and placed the burden squarely on the trial court. Moreover, Chemrock argues that it requested the trial court to set a trial date in its Motion in Opposition to Motion for Dismissal for Lack of Prosecution and Showing Good Cause Why Action Should Remain Pending filed in response to PGS' original Notice. Chemrock focuses on a few words tucked away in its WHEREFORE clause and ignores the fact that the trial court established a specific procedure for re-scheduling the case for trial. That procedure certainly made sense in this case as the case had been set for trial once and the trial court's schedule was already disturbed once by having to continue the trial indefinitely. The 1st District addressed this filing in

its Opinion by stating that "[i]t would be difficult to find it is a 'motion,' despite its label. The trial court's June 2003 Order mandated that either party shall file a proper motion to reset at the appropriate time. Chemrock's position disregards the requirements of that court Order.

There is an exception to the failure to prosecute rule where the Rule is suspended if a notice/motion to set for trial has been filed. *See Fishe & Kleeman, Inc. v. Aquarius Condo. Ass'n, Inc.*, 524 So. 2d 1012 (Fla. 1988). However, that exception does not apply if the case has been set for trial and thereafter continued indefinitely. *Id*. at 1014. In the event of an indefinite continuance, plaintiff has a duty to take some affirmative action to progress the case where the order granting the continuance contains a provision for specific procedures to be taken with regard to setting a new trial date. Id. at 1014-15, n.3. *See also Govayra v. Straubel*, 466 So. 2d 1065, 1067 (Fla. 1985)(court's continuance order containing specific procedures for resetting trial was clear and unambiguous).

Trial courts have broad discretion in determining how to handle their dockets. *See Condo. Owners Org. Of Century Village East, Inc.*, 428 So. 2d 384, 386 (Fla. 4th DCA 1983) ("[T]rial courts should be accorded maximum discretion, particularly in these litigious days when dockets in this area are uniformly overcrowded. The trial judges are truly on the firing line and so are in a much better position to determine how to handle their dockets.") In the instant case, the trial court exercised that discretion

when it established the specific procedure in the June 2003 continuance Order that a proper motion be filed by a party in order to reset the case for trial. In exercising its discretion in that Order, the trial court placed the burden to reset the trial squarely on the parties. In the seven years since June 2003 Order was entered, Chemrock has never filed any motion to reset as expressly required by the Order.

Nor did Chemrock file a notice for trial pursuant to Rule 1.440(b) after the continuance was granted. Rule 1.440(b) describes a notice for trial as something that is "filed and served." Fla. R. Civ. P. 1.440(b). Because the Court granted an indefinite continuance and Chemrock failed to file and serve either a proper motion as required by the June 2003 Order or a proper notice as required by Rule 1.440(b), the exception prohibiting dismissal for failure to prosecute where a notice/motion to set has been filed does not apply.

It was incumbent upon Chemrock to take action to progress the case either in the form of filing some motion or notice, particularly if it was completed with discovery and ready to proceed to trial. Of course, Chemrock could have avoided this scenario by simply complying with the trial court's June 2003 Order directing the parties to file a proper motion to reset trial at the appropriate time. Instead, Chemrock ignores its lack of activity to progress the case toward resolution and blames the trial court for its failures. Even after the December 27, 2006 Notice of Lack of Prosecution, Chemrock

failed to act for an additional 16 months and still did nothing to progress the case or file a proper motion to reset.

In the instant case, the burden to reset the trial was expressly placed on the parties, not the court, by the clear and unambiguous language of the June 2003 Order which granted the Joint Motion to Continue until either party filed a proper motion to set the case for trial.

VI. CHEMROCK'S ATTEMPTS TO DEMONSTRATE GOOD CAUSE ARE NOT RECORD ACTIVITY AS INTENDED BY THE RULE.

Chemrock argues that it engaged in record activity when it filed its opposition to PGS's Notice of Failure to Prosecute on February 22, 2007, and again, when it filed its affidavit in response to PGS's Motion to Dismiss for Failure to Prosecute on June 24, 2008, some 16 months later. (Initial Brief, pp. 12-13). Chemrock goes so far as to state that the trial court lacked the authority to dismiss this matter under the Rule based on its filings. (Initial Brief, p.13). The applicable Rule requires a notice after 10 months of record inactivity, followed by a 60-day window to recommence prosecution of a case before a motion to dismiss can be filed.

This is important because it establishes Chemrock never intended to recommence prosecution within the 60-day window. Instead, Chemrock jumped ahead to that portion of the Rule requiring a showing of "good cause in writing at least five days before the hearing on the motion why the action should remain pending." Fla. R. Civ. P. 1.420(e) and committee notes (2005 amend.) ("[A]n action may not be

dismissed for lack of prosecution without prior notice to the claimant and adequate opportunity for the claimant to re-commence prosecution of the action to avert dismissal.") While the "good cause" portion of the Rule appears in both the current and former versions, Chemrock completely disregarded the amendment requiring re-commencement of the prosecution of the action within a 60-day window and filed an opposition attempting to state good cause. Aside from a legally unsupportable argument attempting to demonstrate good cause, Chemrock filed nothing that demonstrates recommencement; no proper motion to reset trial as required by the June 2003 Order, no discovery-related motions or notices were filed, and no hearing was sought or noticed on any issue.

Chemrock relies on *Huertas v. Palm Beach County* in support of its argument that its February 2007 Opposition and the June 2008 affidavit attempting to show good cause are record activity sufficient to prohibit dismissal. 602 So. 2d 553, 554 (Fla. 4th DCA 1992). However, in *Huertas*, the Fourth District's reversal of the dismissal order was based on an actual showing of good cause, *i.e.*, record activity of two notices of hearing filed by plaintiff during the one year period prior to the filing of the motion to dismiss. *Id.*

In the instant case, it is undisputed there was no record activity in the 13-month period leading up to the filing of the Notice of Failure to Prosecute, and no record activity in the 16-month period leading up to the filing of the Motion to Dismiss for

Failure to Prosecute. Chemrock's reliance on *Huertas* is misplaced and Chemrock's attempts to demonstrate good cause are not record activity as intended by the Rule.

VII. EVEN IF THERE WAS RECORD ACTIVITY, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DISMISSAL WAS WHOLLY CONSISTENT WITH THE PURPOSE OF THE RULE GIVEN THE ADDITIONAL 16 MONTH DELAY IN PROSECUTION.

Even if Chemrock's February 22, 2007 response to the Notice of Lack of Prosecution constitutes record activity sufficient to restart the 10-month clock, the service of yet another 60-day notice on Chemrock under the Rule would engender yet another response to such notice purporting to demonstrate good cause for its failure to prosecute. Such notice and response would theoretically restart the 10-month clock ticking yet again. Under this scenario, this cycle could continue in perpetuity, rendering the Rule meaningless and permitting Chemrock to maintain its lawsuit without taking any meaningful activity to progress the case toward resolution.

The purpose of the Rule is "to require prompt and efficient prosecution of the case up to the point of submission for disposition or determination by the judge or the jury (and) to prevent the clogging of the dockets of the trial courts with litigation . . . " *Strader v. Morrill*, 360 So. 2d 1137, 1138 (Fla. 1st DCA 1978). The Rule was not intended to allow dormant cases to be kept on life support indefinitely. If Chemrock's interpretation of the Rule were to stand, then the old Rule would be more effective to accomplish the stated intent of the Rule, than the amended Rule adopted by this Court.

Plaintiff cites to opinions from other District Courts of Appeal in support of its contention that any filing whatsoever will constitute record activity sufficient to avoid dismissal. However, a close reading of those cases illustrates that what those opinions do not address is as important as what those opinions do address. Taken at face value, those opinions do not support the intent behind the Rule, as amended.

In *Pagan v.Facilicorp, Inc.*, 989 So. 2d 21 (Fla. 2d DCA 2008) the trial court, *sua sponte*, sent the *pro se* plaintiff a notice of intent to dismiss for lack of prosecution after over a year of record inactivity. *Pagan*, 989 So. 2d at 22. During the 60-day grace period, the plaintiff filed a motion to stay the proceedings. *Id.* The trial court dismissed the action for failure to prosecute. *Id*. at 23. On appeal, the 2nd District reversed stating that there was record activity during the applicable time period. *Id*. However, the opinion does not indicate whether the reversal was based on the 2nd District's simple misapplication of the Rule concerning record activity during the 60-day grace period or whether the 2nd District was convinced that the *pro se* plaintiff had made a showing of good cause by his grace period filing that was sufficient to avert dismissal and provided him with an additional opportunity to recommence prosecution.

Just as in *Pagan*, the trial court in *Edwards v. City of St. Petersburg*, 961 So.2d 1048 (Fla. 2d DCA 2007), *sua sponte*, sent the *pro se* plaintiff a notice of intent to dismiss for lack of prosecution after over a year of record inactivity. *Edwards*, 961 So.

2d at 1049. During the 60-day grace period, the plaintiff filed a motion for hearing and for witness attendance. *Id.* The trial court dismissed the action for failure to prosecute. *Id*. Again, it is unclear whether the 2nd District was convinced that the *pro se* plaintiff had made a showing of good cause by his grace period filing that was sufficient to avert dismissal.

The facts in *Padron* are also unclear except that it appears that there was some sort of record activity during the grace period. *Padron*, 970 So. 2d at 400. It is not known whether a stay was issued or approved, whether good cause was shown, or whether anything else was considered. Furthermore, the cases cited in *Padron* in support of the 3rd District's decision were all decided under the prior version of the Rule. *See, e.g., Norman v. Darville*, 964 So. 2d 864, 865 (Fla. 2d DCA 2007); *London v. Baxter Healthcare Corp.*, 965 So. 2d 307 (Fla. 3d DCA 2007); *Miami-Dade County v. Walker*, 948 So. 2d 68, 70 (Fla. 3d DCA 2007).

Petitioner also cites to *Mickens v. Damron*, 1 So. 3d 1160 (Fla. 2d DCA 2009). In *Mickens*, the plaintiffs filed a motion to amend complaint along with the proposed amended complaint within days of receiving the notice of dismissal for failure to prosecute. At the hearing on the plaintiffs' motion to amend, the trial court indicated that it was also "considering a 'motion to dismiss for failure to prosecute by the defense,' " and ultimately the court dismissed the case on that basis. *Id*. at 1161. However, the record reflected that the defense never filed a motion to dismiss for

failure to prosecute. *Id*. In reversing the trial court's dismissal, the 2nd District noted that the trial judge did not understand that the Rule had been amended and reversed the order dismissing the case because a motion to amend had been filed by plaintiffs and because there was no motion to dismiss pending. *Id*. Once again, it is unclear whether the 2nd District was convinced that the plaintiffs had made a showing of good cause by their grace period filing that was sufficient to avert dismissal.

In *Guerrero v. Miami-Dade County*, defendants moved to dismiss for failure to prosecute after more than a year of record inactivity had passed. 994 So. 2d 472 (Fla. 3d DCA 2008). Within days of being put on notice, plaintiff filed a notice requesting a ruling on an earlier filed motion for leave to amend complaint. *Id*. No action was taken on the plaintiff's notice, and a few months later, defendants again moved to dismiss for failure to prosecute. *Id*. at 473. Once again, plaintiff timely filed some type of response in an attempt to defeat dismissal. *Id*. Nonetheless, the trial court dismissed the case. *Id*. On appeal, the 3rd District reversed the dismissal order finding there was record activity. *Id*. The court recognized, however, that plaintiff's actions in "frustrating the rules of procedure" and in "fail[ing] to advance [the] action" may have justified dismissal but that these arguments were not raised at the trial court level. *Id.*

In contrast, PGS raised these same arguments at the trial court level; that the service of yet another notice under the Rule would render the Rule meaningless since

the cycle could continue indefinitely, particularly given that Chemrock had already demonstrated that it would do nothing to recommence prosecution of its case aside from attempting to assert good cause why the action should not be dismissed. The trial court considered this argument in dismissing Chemrock's case, and there has been no showing that that the trial court abused its discretion. Chemrock filed this lawsuit in 2002 and has allowed it to sit dormant for extended periods of time sufficient enough to permit the filing of both a Notice of Lack of Prosecution and a Motion to Dismiss for Failure to Prosecute. The record of inactivity supports a conclusion that Chemrock has had no interest in prosecuting its case and has merely allowed it to sit dormant and clog the trial court docket. Again, trial courts have broad discretion and are in the best position to control their own dockets. In this case, the trial court exercised that discretion in its June 2003 Order by setting a procedure to reset the case for trial, a procedure that admittedly was not followed by Chemrock. Moreover, under such a scenario, a defendant is helpless to conclude litigation that is not being pursued by a plaintiff and must carry potential loss contingencies on its books in perpetuity, an unjust and inequitable result form a plaintiff's failure to take affirmative action to progress its case.

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT ANY NONRECORD ACTIVITY WAS INSUFFICIENT TO DEMONSTRATE GOOD CAUSE.

"Good cause must include contact with the opposing party and some form of

excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines." *FMC Corp. v. Chatman,* 368 So. 2d 1307, 1308 (Fla. 4th DCA 1979). A plaintiff has a "heavy burden of establishing a compelling reason" why an action should not be dismissed for lack of prosecution when there has been no record activity. *Weitzel v. Hargrove,* 543 So. 2d 392, 393 (Fla. 3d DCA 1989) (citations omitted); *Am. E. Corp. v. Henry Blanton, Inc.*, 382 So. 2d 863 (Fla. 2d DCA 1980)(for a party to establish good cause, it must show a compelling reason to avoid dismissal where there has been no record activity).

The nonrecord activities proffered by Chemrock for its lack of prosecution fail to constitute good cause to avoid dismissal. Each of these alleged grounds is addressed in turn.

Chemrock inference with respect to the March 2005 letter allegedly forwarded to the judge asking to set the case for trial constitute non-record activity. Case law supports the proposition that such non-record activity is not sufficient to avoid a dismissal for failure to prosecute.

Unlike the instant case, trial in *Smith v. Broward County* had been continued several times, the latest one at the request of the defendant. 654 So. 2d 1297, 1298 (Fla. 4th DCA 1995). Plaintiff then forwarded the trial judge a letter, which was not placed in the court file, reminding him of his previous request to reset the trial for a date certain so that he could accommodate out-of-state witnesses. *Id.* While

acknowledging that the letter was not record evidence, the Fourth District reversed the trial court's order dismissing the case for failure to prosecute finding that the reminder letter from plaintiff constituted good cause where there had been a previous request and the last continuance has been requested by the other party. *Id*.

The holding in *Smith* is predicated on facts that are very different than the facts in the instant case. Here, Chemrock's letter to the court was not a reminder about a previous request. The Motion to Continue was a joint request by Chemrock and PGS, not just PGS and the June 2003 Order granting the Joint Motion clearly established the procedure for resetting the trial date. That procedure was not followed. Chemrock has never filed a proper motion to reset as required by the trial court's June 2003 Order. Under the facts of the instant case, any letter sent to the trial court is nonrecord activity, and does not constitute good cause barring dismissal.

Notably, despite *Smith's* ultimate holding, the court cautioned that the "better procedure in th[e] case would have been for the [plaintiffs] to have filed a motion to reset the cause for trial." *Id*. The court expressly warned that "[t]he fact that the letter was apparently not placed in the court file illustrates the danger in relying on a letter to the trial judge to move a case forward." *Id*.

In *Lucaya Beach Hotel Corp v. MLT Mgt. Corp.*, although the court held that a letter from a plaintiff requesting that the court set a hearing was sufficient to show good cause regarding why the action should remain pending, the case is also

distinguishable. 898 So. 2d 1118, 1120 (Fla. 4th DCA 2005). The holding in *Lucaya* was based on the "judge's announced procedure" of requiring parties to apply to it for special setting of hearings, which the plaintiff had done by letter, after which the court would set the hearing and notify the parties. *Id*. at 1119. In *Lucaya*, the burden to set the trial rested with the trial court, not with the parties as in the instant case. Under the facts of instant case, the March 2005 letter to the judge does not constitute nonrecord activity establishing good cause and avoiding dismissal.

Chemrock blames PGS for its lack of prosecution and asserts various discovery-related deficiencies from 3 or 4 years ago as good cause to avoid dismissal. However, over the last 3 years, the record does not reflect any attempt by Chemrock to involve the Court to enforce any alleged discovery violation. Tellingly, Chemrock does not cite a single case in support of the proposition that this would constitute good cause. In contrast, the case law is clear that such nonrecord activity is insufficient as a matter of law. *See Eisen v. Fink*, 511 So. 2d 1092 (Fla. 2d DCA 1987)(settlement negotiations between parties, and defendants' delays in filing answers to plaintiff's first set of interrogatories did not constitute good cause for plaintiff's failure to actively prosecute claims for a period of one and one-half years; therefore, dismissal was warranted); *Appraisal Group, Inc. v. Visual Comm., Inc.*, 426 So. 2d 1155 (Fla. 3d DCA 1983)(settlement negotiations which fail to reach fruition do not constitute good cause); *Thomas v. Winn-Dixie Stores, Inc.*, 379 So. 2d 419 (Fla. 4th DCA

1980)(dismissal was proper where plaintiff thought settlement might be forthcoming); *Steisel v. Birnholz,* 313 So. 2d 125 (Fla. 3d DCA 1975) (settlement negotiation within one-year period in which no proceedings were taken was not good cause for denying motion); *Laug v. Murphy,* 205 So. 2d 695 (Fla. 4th DCA 1968) (no good cause shown where parties were negotiating but had yet to reach a settlement).

Chemrock's argument that either the trial court or PGS are to blame for its own inaction, as a matter of law, does not relieve Chemrock of its obligation to prosecute its case. Chemrock's argument is a thinly-veiled attempt to shift the blame for failing to prosecute its seven year old lawsuit from itself, first to the trial court, and second, to PGS's counsel.

As a matter of law, Chemrock failed to meet its burden of demonstrating good cause for its dilatory conduct and the trial court did not abuse its discretion in dismissing the case.

CONCLUSION

Chemrock argues that the *Wilson* broad definition of any filing should apply to the grace period. The 1st District correctly declined to do so. Its sound basis for doing so is that such an application would render the Rule meaningless and be contrary to the intent of the amendment to the Rule. *Id. at 761.* Chemrock's interpretation of the Rule voids any impact on litigation, moots the intent of the Rule to promote prosecution of an action and hinders a trial court's ability to effectively manage its docket. *Id. At 762.*

As the 1st District correctly noted, Chemrock's position, if applied, would result in a case never being able to be dismissed for failure to prosecute absent a party simply failing to file any paper whatsoever. That simply cannot be the intent of the Rule, as amended, because if that is the intent, then there would be no reason to amend the Rule in the first place. The old Rule would me more effective to achieve the sated purposed of advancing cases and not unnecessarily clogging a trial court's docket.

For the reasons set forth herein, Appellee respectfully requests that this Court affirm the 1st District Court of Appeal opinion and dismiss this case for lack of prosecution and for such other relief as this Court deems just and proper.

Respectfully submitted,

PEDRO F. BAJO, JR.
Florida Bar No. 966029
ANTHONY J. CUVA
Florida Bar No. 896251
BAJO CUVA, P.A.
100 North Tampa Street
Suite 1900
Tampa, Florida 33602
Telephone: 813-443-2199
Telecopier: 813-443-2193
pedro.bajo@bajocuva.com

ATTORNEYS FOR APPELLEE
TAMPA ELECTRIC COMPANY d/b/a
TECO PEOPLES GAS CO.

CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that a copy of the foregoing ANSWER BRIEF OF APPELLEE, was furnished by Federal Express Overnight Delivery to: Jamie P. Yadgaroff, Esq., 1 Bala Avenue, Suite 310, Bala Cynwyd, Pennsylvania 19004, and Norwood S. Wilner, Esq., Wilner Block, P.A., 444 East Duval St., 3rd Floor, Jacksonville, FL 32202 on this 12th day of May, 2010.

PEDRO F. BAJO, JR.
Florida Bar No. 966029
ANTHONY J.CUVA
Florida Bar No. 896251
BAJO CUVA, P.A.
100 North Tampa Street
Suite 1900
Tampa, Florida 33602
Telephone: 813-443-2199
Telecopier: 813-443-2193
pedro.bajo@bajocuva.com

ATTORNEYS FOR APPELLEE
TAMPA ELECTRIC COMPANY d/b/a
TECO PEOPLES GAS CO.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Answer Brief of Appellee was prepared using Times New Roman font, size 14 and that the Brief meets the font requirements of Fla. R. App. P. 9.210(a)(2).

PEDRO F. BAJO, JR.
Florida Bar No. 966029
ANTHONY J.CUVA
Florida Bar No. 896251
BAJO CUVA, P.A.
100 North Tampa Street
Suite 1900
Tampa, Florida 33602
Telephone: 813-443-2199
Telecopier: 813-443-2193
pedro.bajo@bajocuva.com

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TAMPA ELECTRIC COMPANY d/b/a
TECO PEOPLES GAS CO.