IN THE SUPREME COURT OF FLORIDA
Case No.: SC09-2263
First DCA Case No.: 1DO8-4895
LT No.: 02-3323-CA

CHEMROCK CORPORATION,
a foreign corporation,

Petitioner,

v.

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

Respondent.

PETITIONER CHEMROCK CORPORATION'S INITIAL BRIEF ON THE MERITS

Jamie P. Yadgaroff, Esquire (Pro Hac Vice)
PA Attorney ID #70217
1 Bala Avenue, Suite 310
Bala Cynwyd, PA 19004
Telephone: (610) 660-8814
Facsimile: (610) 660-8817

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PETITIONER'S INITIAL BRIEF ON THE MERITS

I. STATEMENT OF THE CASE AND FACTS

This is an appeal of the First District Court of Appeal's decision affirming the Fourth Judicial Circuit Court's August 26, 2008 Order granting TECO's *Motion to Dismiss for Failure to Prosecute and Directing Clerk to Close The Case* in *Chemrock Corporation v. Tampa Electric Company, d/b/a Teco Peoples Gas Co.*, Case No. 02-3323-CA. The Court accepted jurisdiction of this case on February 25, 2010. (See Order attached as Appendix A). The history and facts of the case are set forth below.

The nature of the action is as follows. Beginning in 1967, TECO supplied natural gas to Chemrock's facility in Jacksonville, Florida. Chemrock is in the business of processing perlite for use, primarily in horticultural and construction industries and as a filter aid. The process is mostly the heating of the perlite in a furnace, which is fueled by natural gas supplied by TECO. Beginning in the middle of April, 2000, the gas supplied by TECO contained particles and debris, and the particles and debris in the gas line caused Chemrock to experience damages. These included excessive, rapid high and low gas spikes that damaged Chemrock's perlite

expansion furnaces and other equipment, as well as causing decreased production and incurring higher operation costs. The problems also impacted Chemrock's perlite product, which caused it to be rejected by some customers.

On May 7, 2002, Petitioner Chemrock Corporation ("Chemrock") filed a Complaint against Tampa Electric Company d/b/a TECO Peoples Gas Co. ("TECO") in the Circuit Court of Florida, 4th Judicial District. (App Rec, Vol. I, 001-007.) On August 7, 2002, Chemrock filed an Amended Complaint against TECO in the Circuit Court of Florida, 4th Judicial District alleging breach of contract, negligence, breach of implied warranty of fitness for particular purpose, and breach of implied warranty of merchantability, and seeking damages in excess of $200,000. (App Rec, Vol. I, 015-022.) Chemrock completed its discovery and was even then prepared to proceed to trial. (App Rec, Vol. II, 260, paragraph 5.) The case was set for trial on July 7, 2003, by an Amended Order Setting Case for Jury Trial dated November 7, 2002. (App Rec, Vol. I, 039-042.)

Thereafter, TECO propounded additional discovery and sought to postpone the trial date. (App Rec, Vol. II, 260, paragraph 7.) Counsel for

TECO indicated that TECO wanted the continuance in order to be able to conduct additional discovery. (App Rec, Vol. II, 260, paragraph 8.) Chemrock only agreed to the continuance in order to be able to obtain discovery of TECO's expert, which TECO refused to provide until it completed its discovery. (App Rec, Vol. II, 260, paragraph 8.) An Amended Order was entered on June 10, 2003 by Judge Carithers, which continued this matter with no set trial date or discovery deadline. (App Rec, Vol. I, 073.)

Chemrock's discovery was complete, and it requested a trial date in its March 8, 2005 letter to the Honorable Peter J. Fryefield, on which TECO was copied. (App Rec, Vol. II, 261, paragraph 10, and Vol. II, 280.) Although this letter was not placed in the court file, it is undisputed that it was sent. Judge Fryefield did not set the case for trial.

It is undisputed that Chemrock was ready for trial. To cause delay, TECO sought to take the deposition of witness Paul Mulholland, the former plant manager of Chemrock, and of a corporate representative of Yown's Boiler and Furnace. (App Rec, Vol. II, 282.) At least as early as August 2005, Chemrock informed TECO in writing that witness Paul Mulholland

was not under Chemrock's control. (App Rec, Vol. II, 261, paragraph 12, and Vol. II, 282, 285.) Counsel for the parties discussed scheduling those depositions for the fall of 2005. (App Rec, Vol. II, 261-262, paragraphs 12 & 14) However, TECO never subpoenaed Paul Mulholland to take his deposition, nor did it proceed to take the deposition of a corporate representative of Yown's Boiler and Furnace. (App Rec, Vol. II, 261, paragraph 12.) Furthermore, TECO failed to provide Chemrock with Mr. Coble's expert report, which Chemrock requested numerous times in writing since as early as June 2003, and which TECO had agreed to provide. (App Rec, Vol. II, 261, paragraph 13, and Vol. II, 287-293.) Chemrock filed a Motion to Exclude Expert Witness, which was denied on September 14, 2005. (App Rec, Vol. I, 177-181.)

On December 27, 2006, TECO filed a *Notice of Lack of Prosecution* stating that Chemrock had sixty (60) days to respond and further stating that dismissal would follow in the event there was no record activity by pleadings, order of court or otherwise (in other words quoting Fla.R.C.P. 1.420(e)) (App Rec, Vol. II, 226.) On February 22, 2007, prior to the expiration of the sixty-day grace period under Rule 1.420 (e), Chemrock filed a *Motion in Opposition to Motion for Dismissal for Lack of Prosecution and Showing Good Cause Why*

Action Should Remain Pending. (App Rec, Vol. II, 227-252.) In Paragraph 12 of the *Motion in Opposition* and in Paragraph 24 of the accompanying *Affidavit in Support of the Motion in Opposition*, Chemrock stated that it was ready to proceed to trial. (App Rec, Vol. II, 229, 263). Moreover, in the "WHEREFORE" paragraph on Page 3 of its *Motion in Opposition*, Chemrock requested that the Court set a date for trial. (App Rec, Vol. II, 229.) This filing by Chemrock was within the sixty-day grace period created by amended Rule 1.420(e), but, contrary to Chemrock's expectation, no trial date was set by the lower court. *Fla. R. App. P. Rule 1.420(e).*

On June 24, 2008, Defendant filed its *Motion to Dismiss the Action for Failure to Prosecute*. (App Rec, Vol. II, 253-258.) On August 20, 2008, Chemrock filed its *Affidavit in Support of Opposition to Motion to Dismiss for Lack of Prosecution* and its *Supporting Memorandum of Law*. (App Rec, Vol. II, 227-252 and Vol. II, 259-331.)

On August 26, 2008, there was a hearing on TECO's *Motion to Dismiss Complaint for Failure to Prosecute* before Judge Skinner of the Circuit Court, Fourth Judicial Circuit, in and for Duval County. Chemrock's counsel participated via teleconference but was not given an opportunity to

argue. On August 26, 2008, the trial court granted the *Defendant's Motion to Dismiss for Failure to Prosecute and Directing Clerk to Close the Case*. (App Rec, Vol. II, 332.)

Thereafter, on September 24, 2008, Chemrock timely appealed to the First District Court of Appeal. (App Rec, Vol. II, 336-339.) The question presented to the First District Court of Appeal was whether Chemrock's filing of its *Motion in Opposition to Motion for Dismissal for Lack of Prosecution and Showing Good Cause Why Action Should Remain Pending* during the 60-day grace period was sufficient record activity to avoid dismissal under the amended version of Rule 1.420(e). In an opinion dated November 17, 2009 (See Appendix B), the First District Court affirmed the decision of the lower court and expressly certified direct conflict, holding, "We find the *Wilson* definition of "record activity" … inapplicable to the sixty-day grace period following service of the notice. To the extent that *Pagan*, *Padron*, and *Edwards* hold differently, we certify conflict." (Appendix B at Page 8.)

On December 9, 2009, Chemrock filed a *Notice to Invoke Discretionary Jurisdiction* seeking to invoke the discretionary jurisdiction of

the Supreme Court to review the decision of the First District Court of Appeal in *Chemrock Corporation v. Tampa Electric Company, d/b/a Teco People's Gas Company*, Case No. 1 D08-4895, --- So.3d ----, 2009 WL 3817896 (Fla.App. 1 Dist.), 34 Fla. L. Weekly D2362, and the Court accepted jurisdiction of this case on February 25, 2010. (See Appendix A.)

II. SUMMARY OF THE ARGUMENT

The First District Court of Appeal erred in affirming the decision of the lower court. It held, "We find the *Wilson* definition of "record activity" …inapplicable to the sixty-day grace period following service of the notice." (Appendix B at Page 8). The holding of the First District is contrary to the express text of Fla.R.C.P. 1.420(e) and the "bright-line" docket activity test set forth in *Wilson*. See *Wilson v. Salomon*, 923 So. 2d 363, 368 (Fla. 2005).

Contrary to the holding of the courts below, Chemrock submits that any "record activity" by "pleading, order of court or otherwise" during the sixty-day grace period following a notice of Lack of Prosecution removes the authority of the court to enter a dismissal on an involuntary basis. This has been the interpretation of every other appellate court that has reviewed how Fla.R.C.P. 1.420(e) functions post *Wilson.* This includes the Second

Third, Fourth and Fifth District Courts. See *Pagan v. Facilicorp, Inc.*, 989 So.2d 21, 23 (Fla. 2d DCA 2008); *Edwards v. City of St. Petersburg*, 961 So. 2d 1048, 1049-50 (Fla. 2d DCA 2007); *Padron v. Alonso*, 970 So. 2d 399 at 401 (Fla. 3d DCA 2007); *Lingo Const. v. Pritts Inc.*, 990 So. 2d 705 at 706 (Fla. 4th DCA 2008); *Fuzzell v. E.I. DuPont De Nemours & Co.*, 987 So. 2d 1271 at 1274 (Fla. 5th DCA 2008), and *Mickens v. Damron*, 1 So. 3d 1160, 1161 (Fla. 2d DCA 2009).

Chemrock's February 20, 2007 *Motion in Opposition to Motion for Dismissal for Lack of Prosecution and Showing Good Cause Why Action Should Remain Pending* constituted "record activity" or a "record filing" filed within the sixty-day grace period created by the 2005 amendment to Rule 1.420(e). (App Rec, Vol. II, 227-252.) Simply stated, as each of these District Courts of Appeal have already held, a filing served during the 60-day grace period is sufficient to avoid dismissal under Rule 1.420 (e). The policy behind *Wilson's* reversal of years of confusing and misleading decisions has been explained as "receding from precedent that attempted to characterize the quality of record activity as passive or active and reverting to plain meaning of rule 1.420(e) to promote resolution of cases on the merits and to decrease litigation over rule's meaning." 923 So. 2d at 367.

III. LEGAL AUTHORITY AND ARGUMENT

A. Jurisdiction

This Court accepted discretionary jurisdiction to review the decision of the First District Court rendered on November 17, 2008, pursuant to Rule 9.030 (a) (2) (A) (vi) of the Florida Rules of Appellate Procedure and Article V, § 3 (b)(4), Florida Constitution (1980).

B. Standard of Review

The construction of a rule of civil procedure, here, Florida Rule of Civil Procedure 1.420(e), is reviewed using the de novo standard. The issue of whether a filing served during the sixty-day grace period is sufficient to avoid dismissal under Rule 1.420 (e) is a pure question of law that is subject to de novo review. *See Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1259 (Fla. 2006) (concluding that a de novo standard of review is proper for a question of law) (citing *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla.2003)).

C. Argument

1. The Definition Of "Record Activity" Applies To The Sixty-Day Grace Period Following Service Of Notice Of Lack Of Prosecution.

Florida Rule of Civil Procedure 1.420(e) expressly addresses the issue of record activity occurring during the sixty-day grace period following service of notice of lack of record activity. Rule 1.420 (e) provides,

> **(e) Failure to Prosecute.** In all actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred. If no such record activity has occurred within the 10 months immediately preceding the service of such notice, ***and*** **no record activity occurs within the 60 days immediately following the service of such notice**, ***and*** if no stay was issued or approved prior to the expiration of such 60-day period, the action shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

Fla. R. Civ. P. 1.420(e) (*Emphasis added*).

The language of the rule is clear and unambiguous and ***requires*** a court to take the drastic action of involuntarily dismissing an action where there is no record activity - but only if there is no activity for sixty (60) days

following the Notice of Lack of Prosecution. In *Wilson v. Salomon*, 923 So. 2d 363, 367-369 (Fla. 2005), in order to prevent the type of Motion before the Court, the Florida Supreme Court overruled its own confusing precedent from the last fifty years and held that Rule 1.420(e) would now be interpreted in accordance with its plain meaning - namely whether there was or was not docket activity. *Id*. In addition, and especially apt in this case, the concurring opinion of Chief Justice Pariente noted: "Although I agree that much of the burden of moving cases to conclusion should remain on the litigants, trial court judges have an obligation to ensure that cases do not languish on the docket…. Although the trial judge should not rush the parties to trial simply to remove the case from his or her docket, an awareness of the progress of the litigation will enable the judge to better take charge of the case. In the long run, this will best serve the goal of fair and effective administration of justice." *Wilson at 370.* The First District Court erred when it held that "record activity" in the sixty days following Notice of Lack of Prosecution was not enough to negate the notice. (Appendix B at Page 8.)

The *Wilson* Court acknowledged that the "primary concern of the court is to see that cases are resolved on their merits," thus keeping the

courts open as required by Article I, Section 21 of the Florida constitution. *Wilson* at 367-368.[1] In addition, the stated purpose of Rule 1.420(e) is "to encourage prompt and efficient prosecution of cases and to clear trial dockets of litigation that has essentially been abandoned." *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 D.C.A. 2005). This case is not one that was or has been abandoned.

On February 22, 2007, Chemrock filed a *Motion in Opposition to Motion for Dismissal for Lack of Prosecution and Showing Good Cause Why Action Should Remain Pending*, which constitutes record activity within sixty days of TECO's filing of the *Notice of Lack of Prosecution*. (App Rec, Vol. II, 226, 227-252.) On August 20, 2008, Chemrock filed its *Affidavit in Support of this Opposition to Motion To Dismiss For Lack Of Prosecution* and *Supporting Memorandum Of Law* (App Rec, Vol. II, 259-331), which contained a showing of good cause and was filed at least five

[1] Chemrock submits that the First District Court's interpretation of Rule 1.420 (e) violates the guarantees of procedural due process contained in both the United States Constitution, as made applicable to the states by the Fourteenth Amendment, and the Florida Constitution at Article I, Section 9. In addition, the position violates Article I, Section 21 which states: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *Art. I, § 21, Fla. Const.* The surprise dismissal of this case would violate the "denial" portion of this clause of the Florida constitution.

days before the date of the August 26, 2008 hearing. Therefore, this case did not warrant a Rule 1.420 (e) dismissal because Chemrock engaged in record activity during the sixty-day grace period. Indeed to state this more clearly, given the activity on the docket, the lower court lacked authority under Fla.R.C.P. 1.420(e) to dismiss this matter.

Although it is Chemrock's position that a filing during the sixty-day period is sufficient under the rule, Chemrock did more than just oppose the motion; its opposition to the Defendant's Motion to Dismiss was styled as a motion itself and it specifically sought a trial date in the "WHEREFORE" paragraph on Page 3 of its Motion in Opposition, thereby attempting to move the case forward. (App Rec, Vol. II, 229.) This was, essentially, the equivalent of filing a notice for trial or a request for trial date and should have been treated as such by the court.

Moreover, it is significant that TECO could have requested a trial date or the lower court could have set this case for trial upon receipt of Chemrock's Motion in Opposition, or at any time prior to that. Rule 1.440 (c), Setting for Trial, states: "If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less

than 30 days from the service of the notice for trial. By giving the same notice the court may set an action for trial. In actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with rule 1.080(a)." *Fla. R. Civ. P. 1.440 (c)*. This option is the safety mechanism that prevents a case from languishing indefinitely as a result of a plaintiff perpetually averting dismissal by filing a meaningless document whenever a notice of lack of prosecution is filed. (See Appendix B at Page 8 in which the First District court raises this concern.) If either a defendant or a court believes that the plaintiff is not moving the case forward, they have the option of setting the case set for trial or they can request a case management conference. *Fla.R.Civ.P. 1.200(a)* These are the proper mechanisms to deal with a plaintiff who does not push its case, but rather in response to a Notice of Lack of Prosecution makes a filing and then fails to continue to prosecute the action and is unwilling to permit dismissal under Rule 1.420 (e). If such a result is not satisfactory to this Court then the rule itself should be clarified to provide the proper guidance to the bar, and this case should be to the lower court, reinstated, and required to be set for trial. The dismissal of an action should not come as a surprise to either litigant or attorney.

The First District Court certified that its decision conflicted with holdings of the Second and Third District Courts, "To the extent that *Pagan*, *Padron*, and *Edwards* hold differently, we certify conflict." (Appendix B at Page 8.)

In *Pagan v. Facilicorp, Inc.*, 989 So.2d 21, 23 (Fla. 2d DCA 2008), the Second District Court held that, pursuant to Rule 1.420(e), it was error for the circuit court to have dismissed the action for lack of prosecution, even if there was no record activity for a period exceeding ten months, because the nonmovant filed a motion to stay the proceedings during the sixty-day grace period, which met the bright-line test for record activity. Similarly, in *Edwards v. City of St. Petersburg*, 961 So. 2d 1048, 1049-50 (Fla. 2d DCA 2007), the Second District Court held that nonmovant's filing of a motion for hearing and for witness attendance during the sixty-day grace period constituted record activity sufficient to avoid dismissal for lack of prosecution. The Court also noted that the purpose of rule 1.420(e) is to provide a bright-line test to determine if "there is either activity on the face of the record or there is not." *Id*. at 1049 (quoting from *Wilson v. Salamon*, 923 So.2d 363, 368 (Fla. 2005)). *See also*, *Mickens v. Damron*, 1 So. 3d 1160, 1161 (Fla. 2d DCA 2009) (holding

that trial court erred in granting dismissal because motion to amend the complaint was filed within sixty days of receipt the notice of dismissal for failure to prosecute).

The Third District Court has also held that if the record revealed at least one filing within sixty days of the Notice of Lack of Prosecution, the action should not have been dismissed. See *Padron v. Alonso*, 970 So. 2d 399 at 401 (Fla. 3d DCA 2007). Furthermore, the Third District has specifically addressed the issue that is paramount in the instant case, i.e., whether a litigant's filing within the sixty-day grace period of a response to a motion to dismiss for failure to prosecute precludes such dismissal. See *Guerrero v. Miami-Dade County, et al.*, 994 So. 2d 472 at 473 (Fla. 3d DCA 2008) (holding that filing of a timely response to a motion to dismiss for failure to prosecute constitutes record activity sufficient to preclude dismissal under Rule 1.420(e)).

2. A Filing Served During The 60-Day Grace Period Is Sufficient To Avoid Dismissal Under Rule 1.420 (e).

The 3rd, 4th and 5th District Courts have held, in conflict with the First District Court, that a filing by the nonmoving party during the

sixty-day grace period averts dismissal. See *Lingo Const. v. Pritts Inc.*, 990 So. 2d 705 at 706 (Fla. 4th DCA 2008) (holding that motion to set arbitration filed within sixty day period provided by Rule 1.420(e) was sufficient basis to deny motion to dismiss for lack of prosecution); *Fuzzell v. E.I. DuPont De Nemours & Co.*, 987 So. 2d 1271 at 1274 (Fla. 5th DCA 2008) (holding that motion to lift stay of discovery filed by nonmovant during sixty-day grace period constituted record activity sufficient to avoid dismissal). *See also Guerrero v. Miami-Dade County, et al.*, 994 So. 2d 472 at 473 (Fla. 3d DCA 2008) and *Huertas v. Palm Beach County*, 602 So.2d 553 (Fla. 4th DCA 1992) (holding that filing of a timely response to a motion to dismiss for failure to prosecute constitutes record activity sufficient to preclude dismissal under Rule 1.420(e)). In fact, to hold otherwise would essentially render meaningless the sixty-day fail-safe language in the rule.

IV. CONCLUSION

For the reasons set forth above, the First District Court of Appeal's Opinion filed November 17, 2009 affirming the Circuit Court for Duval County's granting of TECO's *Motion to Dismiss for Lack of Prosecution* dated August 26, 2008 should be reversed, and the action should be remanded to the lower court, reinstated and required to be set for trial.

Respectfully Submitted,

__/s/_____
Jamie P. Yadgaroff, Esquire (Pro Hac Vice)
PA Attorney ID #70217
Attorney for Petitioner
One Bala Avenue, Suite 310
Bala Cynwyd, PA 19004
Telephone: (610) 660-8814
Facsimile: (610) 660-8817

Date: March ___, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of *Petitioner Chemrock Corporation's Initial Brief on the Merits* has been provided to counsel for the Defendant, Tampa Electric Company, d/b/a Teco People's Gas Company, Sarah Maroon, Esquire, Akerman Senterfitt, 50 N. Laura Street, Suite 2500, Jacksonville, FL 32202 via Overnight Mail, this 19th day of March, 2010.

__/s/_____

Jamie P. Yadgaroff, Esquire (Pro Hac Vice)
PA Attorney ID #70217
Attorney for Petitioner
One Bala Avenue, Suite 310
Bala Cynwyd, PA 19004
Telephone: (610) 660-8814
Facsimile: (610) 660-8817

CERTIFICATE OF COMPLIANCE

I certify that Petitioner Chemrock Corporation's *Initial Brief on the Merits* complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

__/s/_____

Jamie P. Yadgaroff, Esquire (Pro Hac Vice)
PA Attorney ID #70217
Attorney for Appellant
One Bala Avenue, Suite 310
Bala Cynwyd, PA 19004
Telephone: (610) 660-8814
Facsimile: (610) 660-8817

Date: March 19, 2010