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 BRIEF IN SUPPORT OF INVOCATION OF DISCRETIONARY JURISDICTION OF THE SUPREME COURT

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I. Statement of the Case and Facts

On or about August 6, 2002, Petitioner, Chemrock Corporation (hereinafter "Chemrock"), filed an Amended Complaint against Defendant, Tampa Electric Company, d/b/a/ Teco People's Gas Company (hereinafter "Defendant") in the Circuit Court of Florida, 4th Judicial District. (App Rec ("App Rec"), Vol. I, 015-022.) Chemrock completed its discovery and was 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.)

Subsequently, the Defendant propounded additional discovery and sought to postpone the trial date. (App Rec, Vol. II, 260, paragraph 7.) The Defendant had indicated that it 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 the Defendant's expert, which Defendant 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. (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. Chemrock filed a Motion to Exclude Expert Witness, which the Defendant opposed on the basis that it needed to take additional discovery before producing the expert's report. The Motion to Exclude was denied on September 14, 2005. (App Rec, Vol. I, 177-181.)

On or about December 27, 2006, the Defendant filed a Notice of Lack of Prosecution. (App Rec, Vol. II, 226.) On or about February 21, 2007, 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). *Fla. R. App. P. Rule 1.420(e) (2008).*

On or about June 24, 2008, Defendant filed its motion to dismiss the action for failure to prosecute. (App Rec, Vol. II, 253-258.) On or about August 25, 2008, Chemrock filed an Affidavit in support of its Opposition to Motion to Dismiss. (App Rec, Vol. II, 259-331.) On or about August 27, 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 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 A), 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 A at Page 8.)

On December 9, 2009, Chemrock filed a *Notice to Invoke Discretionary Jurisdiction* and is 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 for the reasons set forth below.

II. Summary of Argument

This Court possesses and should exercise its discretionary jurisdiction, 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), to review the decision of the First District Court rendered on November 17, 2008, which that court expressly certified to be in direct conflict with holdings of the Second and Third District Courts on the same legal issue.

III. Argument

In its opinion 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 (Appendix A), the First District Court expressly certified that its holding that

Chemrock's filing during the sixty-day grace period did not constitute "record activity" under Rule 1.420 (e) was in direct conflict with the decisions of the Second and Third District Courts of Appeal in *Pagan v. Facilicorp, Inc.*, 989 So.2d 21, 23 (Fla. 2d DCA 2008), *Padron v. Alonso*, 970 So. 2d 399, 401 (Fla. 3d DCA 2007), and *Edwards v. City of St. Petersburg*, 961 So. 2d 1048, 1049-50 (Fla. 2d DCA 2007). (See Appendix A at Page 8).

This Court has jurisdiction, 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), to review the decision of the First District Court rendered on November 17, 2008. Rule 9.030 (a) (2) (A) (vi) of the Florida Rules of Appellate Procedure provides in relevant part:

> (a) Jurisdiction of Supreme Court.
> (2) *Discretionary Jurisdiction*. The discretionary jurisdiction of the supreme court may be sought to review
> (A) decisions of district courts of appeal that
> (vi) are certified to be in direct conflict with decisions of other district courts of appeal;

Fla. R. App. P. 9.030 (a) (2) (A) (vi). Furthermore, Article V, § 3 (b)(4), Florida Constitution (1980), provides in relevant part:

> **(b) Jurisdiction.--**The supreme court:
>
> (4) May review any decision of a district court of appeal …that is certified by it to be in direct conflict with a decision of another district court of appeal.

FLA. CONST. art. V, § 3(b)(4). The express and direct conflict was certified by the First District on the face of its decision.

The legal issue that was the subject of the First District Court's holding below and in the *Pagan*, *Padron*, and *Edwards* cases was what constitutes a "record filing" or "record activity" sufficient to avoid dismissal for failure to prosecute under Rule 1.420(e)(2008).

In this case, the First District Court framed the issue as, "whether any filing served during the 60-day grace period is sufficient to avoid dismissal under the amended version of Rule 1.420(e)." (Appendix A at Page 2). 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* was filed within the sixty-day grace period created by amended Rule 1.420(e). (App Rec, Vol. II, 227-252.) That Rule 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). The court held that the definition of "record activity" was applicable to the ten months before the notice of lack of prosecution may be filed, but inapplicable to the sixty-day grace period following service of notice. The court found that the grace period requires more than just a filing and affirmed the decision of the trial court.

Although it is Chemrock's position that a filing during the sixty-day period is sufficient under the rule, Chemrock did more; Its opposition to the Defendant's Motion to Dismiss was styled as a motion and 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.) Nevertheless, the First District Court held, "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 A 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 intent to dismiss for 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)).[1]

This legal issue relating to Rule 1.420(e) is significant enough for the Court to opt to exercise its discretionary jurisdiction. Since there is a conflict between the District Courts' interpretations of the rule, clarification is necessary. A plaintiff's cause of action may be at stake.

[1] It is noteworthy that the 4th and 5th District Courts have also held, in conflict with the First District Court, that any 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).

IV. Conclusion

As set forth above, this Court has discretionary jurisdiction 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 Chemrock petitions the Court to exercise its discretionary jurisdiction.

Respectfully Submitted,

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Date: January 20, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of *Petitioner Chemrock Corporation's Brief in Support of Invocation of Discretionary Jurisdiction of the Supreme Court* 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 20th day of January, 2010.

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CERTIFICATE OF COMPLIANCE

I certify that Petitioner Chemrock Corporation's *Brief in Support of Invocation of Discretionary Jurisdiction of the Supreme Court* complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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