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,

Appellant,

v.

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

Appellee.

APPELLANT'S REPLY TO ANSWER BRIEF OF APPELLEE

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPELLANT'S ARGUMENT IN REPLY TO ANSWER BRIEF OF APPELLEE

After *Wilson v. Salamon*, 923 So.2d 363 (Fla. 2005), the Second, Third, Fourth and Fifth District Courts of Florida have consistently applied a "bright-line" test to determine whether there is docket activity under Florida Rule of Civil Procedure 1.420 (e). Unless this Court seeks to abandon the bright-line test it set forth in *Wilson*, it must reverse the decision of the First District Court whereby that court concluded that a filing served during the sixty-day grace period following service of the notice of lack of activity is not sufficient to avoid dismissal under Rule 1.420 (e).

I. THE APPLICABLE STANDARD OF REVIEW IS DE NOVO

Appellee's assertion that the abuse of discretion standard is the applicable standard of review is incorrect. In fact, 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)). See also, *Hunnewell v. Palm Beach County*, 925 So. 2d 468 (Fla. 4th DCA 2006).

The abuse of discretion standard only applies in reviewing a lower court's determination of lack of good cause to avoid dismissal. However, here the issue to be ruled upon is what constitutes "record activity" during the sixty-day grace period following service of the notice of lack of activity. This is purely a question of law.

II. THE SOLE ISSUE IN THIS APPEAL IS WHAT CONSTITUTES RECORD ACTIVITY DURING THE SIXTY-DAY GRACE PERIOD.

Chemrock disagrees with Appellee's recitation of the facts contained in its *Answer Brief*. However, most of those facts are not germane to the issue being decided here. For example, Appellee stated that there was a 16-month period of inaction before it filed the Motion to Dismiss. *Answer Brief* at 11. As previously stated in *Petitioner's Initial Brief on the Merits,* it is Chemrock's position that the delay was on the part of Appellee. However, this fact is not relevant to the issue in this appeal. The sole issue is whether during the sixty-day grace period Chemrock's filings constituted record activity.

Furthermore, Appellee relies almost solely on language from the First District Court's opinion that, in focusing on the 60-day grace period, "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 resolution." *Answer Brief* at 11. This omits the portion of Rule 1.420 (e) that Chemrock is relying upon and that is the issue on appeal: Only "[i]f 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," can the action shall be dismissed…." *Fla. R. Civ. P. 1.420 (e) (emphasis added)*. If there was record activity within the sixty days, then there is no basis for dismissal.

Similarly, Appellee raised issues of whether Chemrock established good cause. This is also not the issue on appeal. The plain language of the rule allows Chemrock to cause "record activity" during the sixty-day grace period, which Chemrock did. Pursuant to *Wilson*, this is enough to preclude dismissal.

III. RULE 1.420 (E) SHOULD BE CONSTRUED IN ACCORDANCE WITH ITS PLAIN LANGUAGE

The Florida Supreme Court has held that the Rules of Civil Procedure are to be construed in accordance with their plain language. *Wilson v. Salamon*, 923 So. 2d 363, 367 (Fla. 2005) (interpreting the language of Florida Rule of Civil Procedure 1.420 (e) by its plain meaning "will further the purpose of decreasing litigation over the purpose of the rule and fostering the smooth administration of the trial court's docket."). *Id*. See also *Brown v. State*, 715 So.2d 241, 243 (Fla. 1998)(recognizing that the Florida Rules of Civil Procedure are construed according to their plain meaning, as are statutes); *Stowe v. Universal Prop. & Cas. Ins. Co.*, 937 So.2d 156, 158 (Fla. 4th DCA 2006)(stating that the trend is to construe rules of civil procedure according to their plain meaning).

The language of the rule is clear and unambiguous and should be construed on its face.[1] According to this Court's interpretation of the rule in *Wilson*, if: a) there is no activity on the face of the record for ten months, **and** b) notice of lack of prosecution is given, **and** c) **there is no record activity during the next sixty days**, **and** d) where there is no sufficient

[1] Moreover, the Court already reviewed the history of Rule 1.420 (e) during its analysis of the rule in the *Wilson* opinion. See *Wilson* at 364-366.

affidavit of good cause for the lack of activity a trial court shall take the extraordinary action of involuntarily dismissing the case. See *Fla. R. Civ. P. 1.420 (e)*; *Wilson v. Salamon*, 923 So.2d 363 (Fla. 2005); *Hunnewell v. Palm Beach County*, 925 So. 2d 468 (Fla. 4th DCA 2006)(holding that entry of order denying motion to dismiss precludes dismissal). "This construction of the rule establishes a bright-line test that will ordinarily require only a cursory review of the record by a trial court." *Wilson* at 368.

The rule contemplates that an action cannot be dismissed for failure to prosecute if record activity has been taken by filing of "**pleadings, order of court, or otherwise**…." *Fla. R. Civ. P. 1.420 (e) (emphasis added)*; *Wilson* at 366, citing *In Re Fla. Rules of Civil Procedure*, 211 So. 2d 206, 207 (Fla. 1968). It is noteworthy that the "or otherwise" language appears to be deliberately open-ended so as to give litigants and courts the maximum flexibility of interpretation. Surely, this is not an accident. The Second, Third, Fourth, and Fifth District Courts came to the same conclusion when each interpreted *Wilson* as meaning that "any activity" on the record was sufficient to avoid dismissal for lack of prosecution. *See Norman v. Darville*, 964 So. 2d 864, 865 (Fla. 2nd DCA 2007)(filing of change of

address precludes dismissal); *Reddy v. Farkus*, 933 So. 2d 595, 598 (Fla. 5th DCA 2006)(notice of cancellation of hearing precludes dismissal); *Walker v. McDonough*, 929 So. 2d 1127, 1128 (Fla. 4th DCA 2006)(notice of change of address and notice of absence from jurisdiction preclude dismissal); *Richards v. Sheriff of Palm Beach County*, 925 So. 2d 1166, 1168 (Fla. 4th DVA 2006)(filing of motion to withdraw precludes dismissal); *Nie v. Beaux Gardens Assoc., Ltd.*, 923 So. 2d 1200 (Fla. 3rd DCA 2006)(filing of notices for pretrial conference and notice of case management conference precludes dismissal); *Diamond Drywall Sys., Inc. v. Mashan Contractors, Inc.*, 943 So. 2d 267, 269 (Fla. 3rd DCA 2007)(plaintiff's filing of a nonmeritorious motion for default counts as record activity so as to defeat a motion to dismiss for failure to prosecute).

If the Court interprets the rule according to its plain meaning and looks at the record, the only rational conclusion to be drawn is that, by virtue of filing its *Motion in Opposition to Motion for Dismissal for Lack of Prosecution and Showing Good Cause Why Action Should Remain Pending* on February 20, 2007 (App Rec, Vol. II, 227-252) and its *Affidavit in Support of the Motion in Opposition* (App Rec, Vol. II, 259-263), Chemrock engaged

in record activity during the sixty-day grace period. Therefore, the case should not have been dismissed under this Rule.

A. The Definition Of Record Docket Activity Does Not Change Following A Notice Of Lack Of Prosecution.

There is no language contained in Rule 1.420 (e) that indicates that the definition of record activity changes depending upon whether a filing is before or during the sixty-day grace period following a notice of lack of prosecution. Nor does the rule provide that a specific type of record docket filing must be made. The plain meaning of the rule should be applied. The rule states, in relevant part, "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**,…." *Fla. R. Civ. P. 1.420 (e) (emphasis added).* Therefore, Chemrock's *Motion in Opposition* and the accompanying *Affidavit in Support of the Motion in Opposition* constituted record activity during the sixty-day grace period. (App Rec, Vol. II, 227-252, 259-263).

As Chemrock explained in its *Initial Brief on the* Merits, the Second, Third, Fourth, and Fifth District Courts have already held that a filing served during the 60-day grace period is sufficient to avoid dismissal under Rule 1.420 (e). 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); *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); *Mickens v. Damron*, 1 So. 3d 1160, 1161 (Fla. 2d DCA 2009); *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).

IV. CHEMROCK DID NOT ABANDON THE LITIGATION AND DID REQUEST A TRIAL DATE

Chemrock was and is ready to go to trial. TECO, not Chemrock, was the party who wanted a continuance in 2003. 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, which it refused to pursue. (App Rec, Vol. II, 260, paragraph 8.)

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). Chemrock's opposition to the Defendant's Motion to Dismiss was styled as a motion, and in the "WHEREFORE" paragraph on Page 3, Chemrock specifically requested that the Court set a date for trial. (App Rec, Vol. II, 229.) This is record activity.

In addition, Chemrock asked for a trial date in its March 8, 2005 letter to Judge Fryfield.[2] (App Rec, Vol. II, 261, paragraph 10, and Vol. II, 280.) This letter is akin to a notice to set the case for trial. A notice to set a case for

[2] Furthermore, although the letter does not constitute formal docket activity because it was not filed with the court and was apparently omitted from the docket, it still shows Chemrock's desire to prosecute its case. There is a record of the letter, and its existence is not disputed; Therefore, it could be construed as record activity. Moreover, it is sufficient to show good cause as to why the action should remain pending (although good cause is not needed since the bright-line test has been met). *Lucaya Beach Hotel Corp. v. MLT Management Corp.*, 898 So.2d 1118, 1120 (Fla. 4th DCA 2005)(ruling that letter to judge requesting hearing does not constitute record activity because it was not filed with the court but is sufficient to show good cause as to why the action should remain pending), citing to *Smith v. Broward County*, 654 So. 2d 1297 (Fla. 4th DCA 1995).

trial precludes dismissal of a case for failure to prosecute. Appellee relies upon *Govayra v. Straubel*, 266 So.2d 1065 (Fla. 1985) in its answer brief as authority for its argument that this exception does not apply. However, the facts of that case differ from these facts. In that case, the plaintiff failed to file any response to the trial court's Notice Preceeding Order of Dismissal, thus justifying the trial court's subsequent order of dismissal. *Id.* at 1066. In addition, the plaintiff had requested a continuance after seeking a trial date. In this case, Chemrock sought a trial date after the continuance had occurred.

V. CHEMROCK SHOULD NOT BE DEPRIVED OF ITS DAY IN COURT

Chemrock has a legitimate dispute with Appellee and should not be deprived of its day in court. "A primary concern of the courts is to see that cases are resolved on their merits." Wilson at 368.

The June 2003 Order Granting Continuance left the case open ended. The Court did not order a case management conference or a status conference at any point thereafter. Chemrock did ask for a trial date by letter and in its Motion in Opposition, as well as in its appeal to the First District Court, but its requests were disregarded for some unknown reason. Chemrock respectfully

submits that trial judges have a responsibility to review their docket from time to time. By way of illustration, Florida Rule of Judicial Administration 2.545 (b) requires trial judges to "take charge of all cases at an early state in the litigation" and to "control the progress of the case thereafter until the case is determined." *Florida Rule of Judicial Administration* 2.545 (b).

VI. 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 and reinstated.

Respectfully Submitted,

__/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: May 28, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant's Reply to Answer Brief of Appellee has been provided to counsel for the Appellee, Tampa Electric Company, d/b/a Teco People's Gas Company, Pedro F. Bajo, Jr., Esquire, Bajo Cuva, P.A., 100 North Tampa Street, Suite 1900, Tampa, Florida 33602 via Overnight Mail, this 28th day of May, 2010.

__/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

CERTIFICATE OF COMPLIANCE

I certify that Appellant Chemrock Corporation's Reply to Answer Brief of Appellee 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: May 28, 2010