IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

BAC HOME LOANS SERVICING, LP FKA
COUNTRYWIDE HOME LOANS SERVICING
LP,

Plaintiff,

Case No. 10 1198 CA B

v.

ERIK GARCIA, *et. al.*

Defendants,
_____/

MOTION TO VACATE OR FOR REHEARING ON *SUA SPONTE* ORDER GRANTING LEAVE TO AMEND

Defendants, ERIK GARCIA and IRELA GARCIA, by and through their undersigned counsel, move this Court for entry of an Order vacating its February 9, 2012 Order, entered *sua sponte*, without notice, and without hearing, or for (re)consideration of their Motion to Dismiss for Lack of Prosecution, and would show:

1. On January 4, 2012, Defendants served their Motion to Dismiss for Lack of Prosecution. In support, Defendants showed there was no record activity in the 10 months preceding the service of their November 4, 2011 Notice of Intent to Dismiss for Lack of Prosecution and no record activity in the 60 days thereafter.

2. On January 17, 2012, Plaintiff served a Motion for Leave to Amend Complaint.

3. On February 9, 2012, this Court, acting *sua sponte*, without notice, and without hearing, entered an Order on Defendants' Motion to Dismiss. In the Order, this Court granted the motion but also gave Plaintiff leave to amend.

4. Respectfully, this Court's ruling is wrong as a matter of law. Candidly, it is disappointing that this Court made such a clear error of law without even giving the undersigned

a chance to be heard.

5. Under well-established law, whatever record activity may have transpired after the filing of the Motion to Dismiss for Lack of Prosecution is irrelevant. Here, for instance, the Motion for Leave to Amend, filed long after the Motion to Dismiss for Lack of Prosecution, does not cure the lack of record activity. See Chrysler Leasing Corp. v. Passacantilli, 259 So. 2d 1 (Fla. 1972) ("In our view neither the statute nor the rule contemplates that a party may show "prosecution" by filing a pleading after a motion to dismiss is made by the other side. The underlying purpose of the rule … is to expedite the course of litigation and keep dockets as nearly current as possible by penalizing those who would allow litigation to become stagnant."); Caldwell v. Mantei, 544 So. 2d 252 (Fla. 2d DCA 1989) ("These responses which were filed after the motion to dismiss are deemed to be nonrecord activity which require dismissal absent a showing of good cause for the delay in prosecution."); Ace Delivery Service, Inc. v. Pickett, 274 So. 2d 15 (Fla. 2d DCA 1973) ("When a motion to dismiss is made, a party is required to show either active prosecution within the preceding year or good cause for his failure to prosecute to avoid dismissal of his complaint. … Rule 1.420(e) clearly requires that the pleading be filed with the court in order to toll the running of the year.").

6. To put it differently, this Court does not have the discretion to keep this case pending based on any filings by the Plaintiff after the Motion to Dismiss and after the one year of inactivity. See Havens v. Chambliss, 906 So. 2d 318 (Fla. 4th DCA 2005) ("The rule is mandatory … there is no discretion on the trial court's part if it is demonstrated to the trial court that no action toward prosecution has been taken within a year."); Curtin v. DeLuca, 886 So. 2d 298 (Fla. 4th DCA 2004) ("Dismissal is mandatory if it has been demonstrated that no action toward prosecution has been taken within a year. The trial judge has no discretion in the

enforcement aspect of the rule.").[1]

7. This Court's failure to conduct a hearing on the Motion, and failure to dismiss this case outright, without prejudice but without leave to amend, will create reversible error at the conclusion of the case. See cases, supra. Respectfully, this is not a close call. As such, this Court should vacate its February 9, 2012 Order.

8. To be clear, and in the interests of candor to the tribunal, Defendants are not asserting that an outright dismissal is appropriate. Rather, a hearing must be set on the motion, where Plaintiff is given a chance to show "good cause" for the inactivity per Rule 1.420(e). At that hearing, if there is no good cause shown, then dismissal is required. See cases, supra.

9. Also, even if this Court somehow refuses to vacate the portion of the Order allowing the case to remain pending, this Court should not be requiring Defendants to file an Answer. Their Motion to Dismiss the initial Complaint was granted. There is no basis to deprive Defendants of their opportunity to challenge whether the Amended Complaint states a cause of action.

10. The undersigned understands that this Court is inundated with foreclosure cases. However, with all due respect, proceeding *sua sponte* in this manner, on legal issues where the Court is clearly incorrect, is not the solution to the problem. The Order should be vacated and Defendants afforded a chance to be heard.

WHEREFORE Defendants respectfully request relief in accordance with the foregoing.

[1] Although the substance of Rule 1.420(e) has changed over the years, including as recently as the Summer of 2011, the case law requiring record activity in the year preceding the filing of the motion has never changed. As the Florida Supreme Court explained in Chrysler, the record activity must occur before the motion to dismiss, not after, or the rule would be completely emasculated. That is, unfortunately, exactly what this Court is doing via the subject Order – recognizing the dismissal was proper but granting leave to amend to allow the case to proceed anyway. Respectfully, that is plainly contrary to law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Patricia Tedescko, Smith, Hiatt & Diaz, P.A., P.O. Box 11438, Fort Lauderdale, FL 33339-1438 on this 20th day of February, 2012.

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