

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT  
IN AND FOR BREVARD COUNTY, FLORIDA

COUNTRYWIDE BANK, FSB,

Plaintiff,

Case No. 2008-CA-041916

v.

DAVID P. ELLIS AND SUZANNE M. ELLIS, et al.,

Defendants,

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**MOTION FOR RECONSIDERATION OF  
ORDER DENYING MOTION TO DISMISS FOR LACK OF PROSECUTION**

Defendants, DAVID ELLIS AND SUZANNE ELLIS, by and through their undersigned counsel, move this Court for reconsideration of its October 6, 2010 Order, which kept this case pending in lieu of a dismissal for lack of prosecution, and would show:

1. On October 7, 2010, this Court entered an Order, before the undersigned entered this case, denying a motion to dismiss for lack of prosecution. Respectfully, said Order is contrary to law and should be reconsidered in lieu of a post-judgment appeal that is sure to be meritorious.

**ANALYSIS**

2. On July 29, 2010, this Court served its Notice of Intent to Dismiss for Lack of Prosecution, scheduling a hearing on its Motion to Dismiss for Lack of Prosecution on October 6, 2010.

3. Under the plain language of Rule 1.420(e), Plaintiff was required to file record activity within the 60 days thereafter. In the ensuing 60 days, however (which expired on September 27, 2010), Plaintiff filed nothing. As such, there was no record activity as a matter of law. See Chemrock Corp. v. Tampa Elec. Co., 71 So. 3d 786 (Fla. 2011).

4. Absent such record activity, Plaintiff had to show good cause, at least five days prior to the hearing, for the action to remain pending. See Fla.R.Civ.P. 1.420(e); see also CPI Manufacturing Co., Inc. v. Industrias St. Jackø, S.A., 870 So. 2d 89 (Fla. 3d DCA 2004). Here, the docket plainly reflects that Plaintiff showed no such good cause.

5. This Court may think it somehow had the discretion to keep the case pending in light of Plaintiffø filing of an Amended Complaint and opposition to the dismissal. That is not so. Under the law, anything Plaintiff filed after the 60-day period (which ended on September 27, 2010) did not impact the issue of whether there was record activity. See Chrysler Leasing Corp. v. Passacantilli, 259 So. 2d 1 (Fla. 1972); Caldwell v. Mantej, 544 So. 2d 252 (Fla. 2d DCA 1989). As such, this Court was constrained to determine whether there was “good cause” under the rule. Without record activity, and without good cause, this Court had no discretion to keep this case pending. See Havens v. Chambliss, 906 So. 2d 318 (Fla. 4th DCA 2005) (“The rule is mandatory; “unless a party can satisfy the exceptions provided for in the rule, it specifically states “shall dismiss,” and there is no discretion on the trial courtø 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 is demonstrated that no action toward judgment has been taken within a year.”).

6. This Court may think it is now too late to dismiss this case for lack of prosecution due to the subsequent filings that have transpired. That is not so. See Sebree v. Schantz, Schatzman, Aaronson & Perlman, 963 So. 2d 842 (Fla. 3d DCA 2007) (reversing a final judgment for the plaintiff and remanding with instructions to dismiss for lack of prosecution where, even though the plaintiff prevailed on the merits at summary judgment, the case should have been dismissed previously for lack of prosecution); see also Chrysler and Caldwell, supra.

7. In light of the foregoing, this Court's October 7, 2010 Order was entered in error. Respectfully, there was no lawful basis to keep this action pending. As such, this case should be dismissed for lack of prosecution.

WHEREFORE Defendants respectfully request relief in accordance with the foregoing.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Scott G Layden, Esq., Law Offices of Daniel C. Consuegra, P.L., 9204 King Palm Drive, Tampa, Florida 33619 on this 10th day of April, 2012.

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