IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, LAKELAND, FLORIDA

KATHLEEN M. LEWIS and
PATRICK T. LEWIS,

Petitioners,

L.T. Case No. 09-5256-CA

v.

Case No.: 2D12-

HONORABLE GEORGE C. RICHARDS and
DEUTSCHE BANK TRUST COMPANY
AMERICAS, AS TRUSTEE FOR RALI 2007QSS,

Respondents.
_____/

PETITION FOR WRIT OF PROHIBITION

Petitioners, Kathleen M. Lewis and Patrick T. Lewis (collectively "Lewis"), by and through their undersigned counsel, petition this Court for a Writ of Prohibition, precluding the Honorable George C. Richards ("Judge Richards") from exercising jurisdiction over Case No. 09-5256-CA in the Circuit Court of the Twentieth Judicial Circuit in and for Charlotte County, Florida ("the Case") pending between Lewis and Respondent, Deutsche Bank Trust Company Americas, as Trustee for RALI 2007QSS ("Deutsche"), or from otherwise proceeding with the Case given the court's lack of jurisdiction, and as grounds would show:

OVERVIEW AND BASIS FOR JURISDICTION

1. On May 31, 2011, there having been no record activity in the 10

months preceding the lower court's March 29, 2011 Notice of Lack of Prosecution, Judge Richards entered a "Motion, Notice and Judgment of Dismissal" ("Judgment of Dismissal"), reflecting that the Case "shall stand dismissed for lack of prosecution without further order of court," that Deutsche "shall take nothing by this action," and that Lewis "shall go hence without day", unless Deutsche showed "good cause" for it to remain pending.

2. The requisite "good cause" was never filed, so the Case "stand[s] dismissed" under the very terms of the lower court's Judgment of Dismissal. As such, the Case is over and the lower court's jurisdiction has terminated.

3. Nonetheless, Judge Richards has scheduled a Case Management Conference, to take place on December 6, 2012, and has allowed the Case to resume, as if the Judgment of Dismissal were never entered.

4. "A petition for writ of prohibition is a proper vehicle to challenge the court's lack of subject matter jurisdiction." Phillips v. State, 69 So. 3d 951, 952 (Fla. 2d DCA 2010). For the reasons set forth herein, the lower court does not have jurisdiction to conduct a Case Management Conference or to otherwise allow the Case to be litigated. As such, this Court should exercise its jurisdiction under Fla.R.App.P. 9.030(b)(3) and enter a Writ of Prohibition.

BACKGROUND

5. Respondent, Deutsche Bank Trust Company Americas as Trustee for

RALI 2007QSS ("Deutsche") initiated the lower court proceeding by suing Lewis for mortgage foreclosure. See Appendix to Petition, 1.

6. On or about March 29, 2011, a Notice of Lack of Prosecution ("the Notice") was filed in the Case, as there was no record activity in the 10 months preceding the Notice. Quite simply, and as the docket reflects, there were no filings whatsoever between October 29, 2009 and March 29, 2011. See Appendix to Petition, 2.

7. There was no record activity in the 60 days following the Notice, either. Again, as the docket reflects, nothing at all was filed in the 60 days after the March 29, 2011 Notice. See Appendix to Petition, 2.

8. On May 31, 2011, Judge Richards appropriately recognized, given the absence of record activity in the 10 months preceding the Notice and the 60 days thereafter, the only way Deutsche could avoid dismissal was to show "good cause" for its failure to prosecute. See Fla.R.Civ.P. 1.420(e); see also Chemrock Corp. v. Tampa Elec. Co., 71 So. 3d 786 (Fla. 2011). Hence, on that day, Judge Richards entered the Judgment of Dismissal, ruling that the Case "shall stand dismissed for lack of prosecution without further order of court" that Deutsche "shall take nothing by this action" and that Lewis "shall go hence without day" unless Deutsche showed "good cause" for the Case to remain pending. See Appendix to Petition, 3.

9. As the Judgment of Dismissal reflects, see Appendix to Petition, 3, and as the law requires, the requisite "good cause" had to be filed, in writing, at least five days prior to the July 8, 2011 hearing. See Rule 1.420(e); see also CPI Manufacturing Co., Inc. v. Industrias Jack's, 870 So. 2d 89 (Fla. 3d DCA 2004).

10. As the docket reflects, the only documents filed before the July 8, 2011 hearing were a Notice of Status and a Notice of Filing discovery responses, which were filed on July 5, 2011. See Appendix to Petition, 4 (Notice of Status) and 5 (Notice of Filing). However, these documents cannot and do not constitute good cause, for a variety of reasons.[1]

11. First, under the plain language of Rule 1.420(e), the requisite good cause had to be "filed" five days prior to the hearing, and these filings on July 5, 2011 were obviously not five days before the July 8, 2011 hearing. Hence, these documents cannot and do not constitute "good cause" to avoid dismissal for lack of prosecution. See CPI Manufacturing, 870 So. 2d at 92 ("Under rule 1.420(e), the written good cause showing needed to be filed no later than September 24, 2002 [at

[1] These documents are not "record activity" which precludes dismissal, either, as they were filed after the one-year period of inactivity. See Chrysler Leasing Corp. v. Passacantilli, 259 So. 2d 1 (Fla. 1972) ("in our view neither the statute nor the contemplates that a party may show "prosecution" by filing a pleading after a motion to dismiss is made by the other side"); 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.")

least five days before the October 1, 2002 hearing]. As such, CPI has failed to make a showing that the trial court abused its discretion in dismissing the case as it was required to do under the rule.").

12. Second, these filings were not "good cause" because they were not provided under oath. See Sebree v. Schantz, 963 So. 2d 842 (Fla. 3d DCA 2007) ("Because of the high burden placed on the plaintiff [to show good cause], it necessarily follows that unsworn allegations or argument of counsel, standing alone, will not satisfy the plaintiff' burden [to show good cause]. 'Evidence of record is required, not simply argument or unsworn allegations.'") (quoting Smith v. Buffalo's Original Wings & Rings II of Tallahassee, Inc., 765 So. 2d 983 (Fla. 1st DCA 2000)).

13. Third, these filings were not "good cause" because they did not set forth any legitimate explanation for Deutsche's failure to prosecute the case in the prior, one-year period.[2] See Paedae v. Voltaggio, 472 So. 2d 768 (Fla. 1st DCA 1985) (explaining what constitutes "good cause" under Rule 1.420(e) and what does not).

14. Fourth, and perhaps most significantly, the lower court never entered any type of order indicating that Deutsche established the requisite "good cause" to

[2] The Notice of Status merely recites what had transpired in the Case without making any effort whatsoever to explain the failure to prosecute. Appendix to Petition, 4.

avoid dismissal. See Appendix to Petition, 2 (docket). As a result, under the very language of Judge Richards' Judgment of Dismissal, the Case "stand[s] dismissed for lack of prosecution without further order of the court," Deutsche "shall take nothing by this action," and Lewis "shall go hence without day." Appendix to Petition, 3. Quite simply, the Case is over, and the court lacks jurisdiction to proceed.

15. Admittedly, a lower court's decision to allow a case to proceed despite a plaintiff's lack of prosecution under Rule 1.420(e) usually constitutes a non-final order that is adjudicated after entry of a final judgment, not via writ of prohibition. See e.g. Sebree v. Schantz, Schatzman, Aaronson & Perlman, 963 So. 2d 842 (Fla. 3d DCA 2007) (reversing the final judgments on appeal and remanding with instructions to dismiss without prejudice for lack of prosecution). However, that is because this fact-pattern usually arises because the lower court denied a motion to dismiss, and that order being a nonfinal order, appellate jurisdiction does not lie until after the case is over. See Sebree.

16. Here, by contrast, the Judgment of Dismissal is a final Order. Judge Richards completely disposed of the Case, ruling the Case "shall stand as dismissed for lack of prosecution without further order," that Plaintiff "shall take nothing by this action" and that Lewis "shall go hence without day." This language of finality plainly divested the lower court of jurisdiction. As the First

District has explained:

> When the trial court dismisses an action without prejudice to amend the complaint, the order is nonfinal and nonappealable. See e.g. Benton v. Dept. of Corrections, 782 So. 2d 981 (Fla. 1st DCA 2001). When, however, it appears that the trial court intended the plaintiff to pursue his or her claim in a different proceeding, the order is final.

Hollingsworth v. Brown, 788 So. 2d 1078, 1079 n.1 (Fla. 1st DCA 2001); see also Carlton v. Wal-Mart Stores, Inc., 621 So. 2d 451, 452 (Fla. 1st DCA 1993) ("While the dismissal is "without prejudice," it is clear that it is "without prejudice to file another, separate, action, rather than "without prejudice" to file an amended complaint in the first action.") (citing cases).

17. The lower court's inclusion of the "take nothing by this action" and "go hence without day" in the Judgment of Dismissal only cements the conclusion that the Judgment of Dismissal is a final order.

18. Admittedly, all of that language in the Judgment of Dismissal is predicated on the absence of good cause. After all, all of the language in paragraph 4 of the Judgment of Dismissal, as quoted above, only applied "if no showing of good cause is filed within the time specified." Appendix to Petition, 3. However, as explained above, there was no good cause filed within the time specified, nor did the lower court conclude there was "good cause" shown. As such, the dismissal language in paragraph 4 plainly applies, the May 31, 2011 Judgment of Dismissal is a final order, and the lower court lacks jurisdiction to proceed.

19. Lewis spelled out these arguments in the Renewed Motion to Dismiss for Lack of Prosecution or Lack of Subject Matter Jurisdiction. See Appendix to Petition, 6. Unfortunately, Judge Richards denied that motion, Appendix to Petition, 7, then denied an Emergency Motion for Rehearing and Stay Pending Appeal. See Appendix to Petition, 8, 9. This is troubling, as a December 6, 2012 Case Management Conference remains scheduled, see Appendix to Petition, 10, and, for the foregoing reasons, it is clear the lower court lacks jurisdiction.

20. "Questions of subject matter jurisdiction are reviewed *de novo*." Stanek-Cousins v. State, 912 So. 2d 43 (Fla. 4th DCA 2005). Applying a *de novo* standard of review, this Court should grant the instant Petition, precluding the Judge from proceeding with the Case given the court's absence of jurisdiction.

CONCLUSION

This Court should issue a Writ of Prohibition, precluding the lower court from proceeding with the December 6, 2012 Case Management Conference or otherwise adjudicating the Case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Honorable George C. Richards, 350 E. Marion Avenue Punta Gorda, FL 33950, and via email to Angela M Vittiglio, Esq., Law Office of Marshall C. Watson, 1800 NW 49th St., Suite 120, Ft. Lauderdale, FL 33309 on

this 16th day of November, 2012.

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