IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

DEUTSCHE BANK TRUST COMPANY
AMERICAS AS TRUSTEE FOR RALI
2007QSS,

Plaintiff,

Case No. 09005256CA

v.

KATHLEEN M. LEWIS AND
PATRICK T. LEWIS, et al.,

Defendants,
_____/

EMERGENCY MOTION FOR REHEARING AND STAY PENDING APPEAL

Defendants, KATHLEEN M. LEWIS AND PATRICK T. LEWIS, move this Court for rehearing of its November 2, 2012 Order denying their Renewed Motion to Dismiss for Lack of Prosecution or for Lack of Subject Matter Jurisdiction or for a stay pending appeal, and would show:

1. On or about March 29, 2011, a Notice of Lack of Prosecution was filed in this case. There was no record activity in the 10 months preceding that notice. Quite simply, nothing at all was filed in this case in the 10 months prior thereto.

2. Likewise, in the 60 days after the Notice of Lack of Prosecution, there was no record activity, either. Again, nothing at all was filed.

3. Given the absence of record activity in the 10 months preceding the Notice and the 60 days thereafter, the only way Plaintiff 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).

4. On May 31, 2011, obviously following this principle of law, this Court executed and served a "Motion, Notice and Judgment of Dismissal," reflecting that this case "shall stand dismissed," without further Order, unless Plaintiff showed "good cause" for it to remain pending.

5. As this Court's Motion, Notice, and Judgment of Dismissal reflected, the requisite "good cause" had to be filed, in writing, at least five days prior to the hearing. See Rule 1.420(e); see also CPI manufacturing Co., Inc. v. Industrias Jack's, 870 So. 2d 89 (Fla. 3d DCA 2004). While Plaintiff contends the Notice of Status that it served on June 30, 2011, constitutes good cause, it did not. That "Notice of Status" was not and is not "good cause" because it was not under oath, see Sebree v. Schantz, 963 So. 2d 842 (Fla. 3d DCA 2007), and, more importantly, did not set forth any "good cause" for Plaintiff's failure to prosecute in the prior, one-year period. See Paedae v. Voltaggio, 472 So. 2d 768 (Fla. 1st DCA 1985). Quite simply, Plaintiff gave no explanation whatsoever for its failure to prosecute the case in the prior, one-year period.

6. Given the absence of record activity and the failure to show good cause, this Court was required to dismiss this case for lack of prosecution. See Chemrock, supra; see also Fla.R.Civ.P. 1.420(e) ("shall dismiss"); Curtin v. Deluca, 886 So. 2d 298 (Fla. 4th DCA 2004) ("Dismissal is mandatory if it is demonstrated that no action towards prosecution has been taken within a year. The trial judge has no discretion in the enforcement of this aspect of the rule."); 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 court's part if it is demonstrated to the trial court that no action toward prosecution has been taken within a year.").

7. At the November 2, 2012 hearing in this cause, Plaintiff's counsel argued there

was record activity by pointing to filings that occurred after the 10 months of inactivity, after the Notice of Lack of Prosecution, after the ensuing, 60-day period of inactivity, and after this Court's May 31, 2011 Motion, Notice, and Judgment of Dismissal. This Court seemed to agree with this argument, explaining (upon the undersigned's request) that there was record activity.

8. Respectfully, the law is clear. Where the alleged "record activity" occurs after the one-year of inactivity, and after the Motion to Dismiss, as here, then those filings are not "record activity" and cannot prevent dismissal for lack of prosecution. As the Florida Supreme Court has explained:

> [I]n 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. To permit a party to show "action" by filing a pleading subsequent to a motion to dismiss for want of prosecution would effectively emasculate the rule by eliminating its penalty aspect. A party could delay the progress of the action for an indefinite period of time in the knowledge that when his adversary moved to dismiss under the rule, he could prevent dismissal merely by filing some pleading, motion, or affidavit. That is, a party could avoid dismissal in every case by acting after the motion was made, whether or not he had prosecuted the action during the previous year, or could show good cause for his failure to do so. The threat of dismissal would cease to have any real deterrent effect in terms of requiring a party to keep a case moving. Accordingly, we conclude that the District Court erred in determining that plaintiff-respondent's October 19 affidavit did or could constitute "action" under Rule 1.420(e).

Chrysler Leasing Corp. v. Passacantilli, 259 So. 2d 1 (Fla. 1972); 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.").

9. In light of the foregoing, this case was required to be dismissed at the July 8, 2011 hearing. In fact, the undersigned submits that is precisely what happened – this case *was*

dismissed. After all, this Court's May 31, 2011 Motion, Notice, and Judgment of Dismissal specifically provided that this case "shall stand dismissed for lack of prosecution without further order of court" absent a showing of good cause. Where this Court entered such an Order, specifying the case would "stand dismissed" absent good cause, and the good cause never happened, then this case "stands dismissed." As a result, and since Plaintiff never moved for rehearing and never filed an appeal, this Court lacks jurisdiction to proceed.

10. Even if this Court's May 31, 2011 Judgment of Dismissal did not operate to dismiss this case, an Order of Dismissal should have been entered at the July 8, 2011 hearing given the absence of record activity and the absence of good cause. See analysis, supra. By failing to rule accordingly at the November 2, 2012 hearing, this Court has reversibly erred. Respectfully, the Court should reconsider.

11. If this Court does not reconsider, Defendants are likely to prevail on appeal. After all, the docket and Court file plainly reflect the absence of record activity and the absence of good cause. Plus, this Court's own Order made it clear that the case "stands dismissed" where there was no good cause filed, and no such good cause was ever filed. Hence, this case "stands dismissed" and the Court lacks jurisdiction to proceed.

12. Defendants should be able to challenge this Court's jurisdiction without proceedings in this Court continuing. As such, Defendants should be granted a stay pending appeal.

WHEREFORE Defendants 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 Electronic Mail to Angela M. Vittiglio, Esq., Law offices of Marshall C. Watson, P.A., at Angela.M.Vittiglio@BankofAmerica.com, on this 2nd day of November, 2012.

_____

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