Third District Court of Appeal

State of Florida

Opinion filed November 6, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1424 & 3D18-1194
Lower Tribunal No. 11-42771

Publicidad Vepaco, C.A., and Latele Television C.A.,
Appellants,

vs.

Nelson Mezerhane and Rogelio Trujillo,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Bronwyn C. Miller, Judge.

Law Office of Mesa & Associates, P.A., and Manuel Arthur Mesa and Matthew Carcano, for appellants.

Kula & Associates, P.A., and Elliot B. Kula and William D. Mueller, for appellees.

Before LOGUE, SCALES, and GORDO, JJ.

LOGUE, J.

Appellants, the plaintiffs below, appeal the trial court's order dismissing this case for lack of prosecution. We affirm.

Facts

In the case below, Publicidad Vepaco, C.A., and Latele Television C.A., two Venezuelan corporations, sued Nelson Mezerhane and Rogelio Trujillo, two Venezuelan nationals living in Florida for fraud, conspiracy to defraud, conversion, conspiracy to commit conversion, civil theft, and unjust enrichment. The allegations stemmed from loans made available to the plaintiffs by a bank principally owned by one of the defendants. As the litigation proceeded, a dispute arose over the control of the plaintiff corporations which led to different attorneys claiming to represent the plaintiffs. Mr. Andrew M. Kassier of Andrew M. Kassier, P.A., and Mr. Albert J. Piantini of Piantini and Associates, P.A., maintained they represented the plaintiffs. At the same time, Mr. Manuel Arthur Mesa of the firm of Mesa & Asssociates, P.A. maintained he represented the plaintiffs. In fact, at one point, the defendants filed a motion to stay the proceedings until the issue of control of the plaintiff corporations was resolved. The plaintiffs opposed the motion, which was ultimately denied by the trial court.

On October 18, 2017, pursuant to Florida Rule of Civil Procedure 1.420 (e), the defendants filed a notice that no record activity had occurred since December 21, 2016. Plaintiffs filed no record activity in response. On December 27, 2017, the

defendants filed their motions to dismiss for failure to prosecute. After being continued at the request of the plaintiffs, the hearing took place on January 31, 2018. The trial court deferred ruling on the motions to dismiss and concluded that an evidentiary hearing was necessary on the issue of representation and that the court would "also convene an evidentiary hearing on the issue of good cause in conjunction with the representation hearing." The trial further ruled that the pleadings were "frozen" as to the good cause issue.

The evidentiary hearing was held on April 12, 2018. At the hearing, the court determined that both sets of plaintiffs' counsels – Mr. Kassier and Mr. Piantini, and Mr. Mesa – were aligned in interest in avoiding the dismissal and therefore, the court could properly hear argument on the merits of the dismissal motions. On May 8, 2018, the trial court entered a detailed eleven-page order dismissing the case, without prejudice, for lack of prosecution. The court denied the plaintiffs' motion for rehearing and both groups of the plaintiffs' purported counsel filed notices of appeal.[1]

Standard of Review

[1] The dispute over who represented the plaintiffs continued into this appeal. Attorneys Piantini and Kassier moved to strike the notice of appeal filed by attorney Mesa. This Court relinquished jurisdiction so that the trial court could hold an evidentiary hearing to determine who was authorized to act as counsel for the plaintiffs. Mr. Mesa and his firm were determined to be proper counsel. Mr. Piantini and Mr. Kassier sought certiorari review which this Court denied in Publicidad Vepaco C.A. v. Mezerhane, 273 So. 3d 1060 (Fla. 3d DCA 2019).

We review a trial court's determination of whether good cause exists in the context of a motion to dismiss for lack of prosecution for an abuse of discretion. Metro. Dade Cnty. v. Hass, 784 So. 2d 1087, 1090 n.4 (Fla. 2001) (noting that dismissal is mandatory under the rule if there has been no action taken toward prosecution within one year and "[t]he abuse of discretion standard is triggered only if the trial court must make a determination of good cause."); Johnson v. Maroone Ford LLC, 944 So. 2d 1059, 1060 (Fla. 4th DCA 2006) ("The standard of review of a trial court's dismissal of a cause of action for failure to prosecute is abuse of discretion.").

Analysis

Motions to dismiss for failure to prosecute are governed by rule 1.420(e).[2] Under rule 1.420(e), if there has been no record activity for a period of 10 months

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[2] The rule provides:

> In all actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred. 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, and if no stay was issued or approved prior to the expiration of such 60-day period, the action shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party

and there has been no stay of the proceedings, any interested party may serve notice to all parties that no record activity has occurred. Id. If no record activity occurs in the 60 days immediately following service of the notice of record inactivity and there is no stay, then the action "shall be dismissed by the court" either by its own motion or the motion of any interested party. Id. However, dismissal may be avoided if, not later than 5 days prior to the hearing on the motion to dismiss, a party shows good cause in writing as to why the action should remain pending. Id.

Rule 1.420(e) has been interpreted as "a mandatory rule. 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." CPI Mf'g Co., Inc. v. Industrias St. Jack's, S.A. de C.V., 870 So. 2d 89, 91 (Fla. 3d DCA 2003) (citation omitted); see Wilson v. Salamon, 923 So. 2d 363, 368 (Fla. 3d DCA 2005) ([t]he language of the rule is clear—if a review of the face of the record does not reflect any activity in the preceding year, the action shall be dismissed, unless a party shows good cause why the action should remain pending . . . .").

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shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

Here, it is undisputed that no record activity occurred in the underlying case during the 10-month period preceding the defendants' October 18, 2017 notice of record inactivity. Likewise, it is undisputed that there was no record activity following that notice until December 27, 2017, when the defendants filed their motion to dismiss for lack of prosecution. At that point, the plaintiffs had five days prior to the date of the hearing to file a showing of good cause. On the face of the record, it is evident that the plaintiffs failed to demonstrate the record activity required by the rule.

It therefore became incumbent upon the plaintiffs to show "good cause." Wilson, 923 So. 2d at 368. Under Florida law, "'[g]ood cause' has repeatedly been defined as requiring two prongs: [1] some contact with the opposing party and [2] some form of excusable conduct or occurrence which arose other than through negligence or inattention to the pleading deadline." Havens v. Chambliss, 906 So. 2d 318, 319 (Fla. 4th DCA 2005). Good cause is not demonstrated by the plaintiffs' argument that the disarray involving the control and representation of the plaintiff corporations excused the lack of record activity. It was incumbent on the plaintiffs to resolve those matters within a reasonable time. Any prejudice relating to the failure to do so must fall on the plaintiffs, because that matter was in their control, not on the defendants. This is particularly true here because the plaintiffs opposed the defendants' motion to stay the case until the dispute over representation was

resolved. Having decided to prosecute the case in these circumstances over defendants' objection, the plaintiffs cannot be heard to argue these circumstances excused their failure to prosecute.

Affirmed.