

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 2004

BARTON REALTY, INC.,	**	
Appellant,	**	
vs.	**	CASE NO. 3D03-2761
FERNANDO LOPEZ, a/k/a	**	LOWER
FERNANDO LOPEZ ESPINOSA,	**	TRIBUNAL NO. 00-8107
Appellee.	**	

Opinion filed April 14, 2004.

An Appeal from the Circuit Court for Miami-Dade County,
Barbara S. Levenson, Judge.

Dearman & Gerson, and Robert J. Harkins, for appellant.

De La Cruz & Cutler; Albert D. Viener; Rodham & Fine, and
Gary Robert Fine, for appellee.

Before FLETCHER, RAMIREZ, and WELLS, JJ.

RAMIREZ, J.

The plaintiff, Barton Realty, Inc., appeals from an order
dismissing the case for lack of prosecution pursuant to rule
1.420(e), Florida Rules of Civil Procedure. Because we conclude
that the plaintiff failed to show good cause as to why the action

should remain pending, we affirm.

It is undisputed that no record activity in the cause took place for a period of one year. Plaintiff argues, however, that there was good cause to maintain the case pending because there was a third-party complaint filed, which was not at issue. We stated in CPI Mfg. Co., Inc. v. Industrias St. Jack's, S.A. De C.V., 28 Fla. L. Weekly D2673 (Fla. 3d DCA Nov. 19, 2003), that the resolution of a motion to dismiss for failure to prosecute involves a two-step process. "First, the defendant is required to show there has been no record activity for one year preceding the motion. Second, if there has been no record activity, the plaintiff has an opportunity to establish good cause why the action should remain pending." Id. We also made clear that the "good cause" criteria was different from the "excusable neglect" standard.

Plaintiff cites to Shaw & Keeter Motor Co., Inc. v. Maris Distrib. Co., Inc., 403 So. 2d 570 (Fla. 1st DCA 1981), for the proposition that, because the third-party complaint was not at issue, plaintiff could not notice the case for trial. He thus argues that this constitutes good cause. The Shaw case simply held that record activity on a third-party complaint during the year preceding the defendant's motion to dismiss for failure to prosecute was sufficient to prevent the dismissal of plaintiff's complaint. Id. at 571. In our case, there was no record activity

at all, either in connection with the plaintiff's complaint or the third-party complaint. The clear import of the Shaw decision is that record activity in connection with the third-party complaint serves as activity in the entire case. Under plaintiff's argument, its complaint could simply be held captive *ad infinitum* because the third-party complaint was not being prosecuted. That is not the law in our state. The plaintiff can always move to sever pursuant to rule 1.270(b), Florida Rules of Civil Procedure.¹

We thus conclude that the trial court did not abuse its discretion in dismissing the case for lack of prosecution.

¹ We note that filing such a motion would alone have constituted record activity sufficient to belay any motion to dismiss.