

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR  
PINELLAS COUNTY, FLORIDA

JP MORGAN CHASE BANK,NA  
Plaintiff

CASE NO. 52-2009-CA-00319

v.

DIANE MCRAE, ET. AL.  
Defendant

**MOTION TO DISMISS  
THE INSTANT CASE HIS ALREADY BEEN DISMISSED**

1. On September 17, 2009, this court entered its Order which provides as follows:

“ORDERED AND ADJUDGED THAT THE CASES, AS INDICATED ON THE ATTACHED LISTING, ARE HEREBY DISMISSED WITHOUT PREJUDICE PURSUANT TO RULE 1.070(I) OF THE FLORIDA RULES OF CIVIL PROCEDURE”

(Order Attached as Exhibit A)

2. Accordingly, the instant case was dismissed without prejudice by this court on and any further action or hearing on this case is improper.
3. Although the Order cites Rule 1.070(I), it appears that this is a scrivener’s error and the subsection relied upon is (J) which provides:

**(j) Summons; Time Limit.** If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading directed to that defendant the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or **shall dismiss the action without prejudice or drop that defendant as a party**; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period....

4. The rule provides an important tool for the courts to ensure cases are moving through the docket and that Plaintiffs are actively pursuing the cases or communicating

with the court why the case is not proceeding. Furthermore, the purpose of Rule 1.070(j) is to speed the progress of cases on the civil docket, See Skrbic v. QCRC Assocs. Corp., 761 So.2d 349, 354 (Fla. 3d DCA 2000)

5. The rule establishes a simple procedure which allows the Plaintiff's complaint from being dismissed, but the Plaintiff must act in response to notice from the court.

6. The docket reveals that the Plaintiff was mailed notice of this court's intent to dismiss the action on or about 7/15/09. The Plaintiff took no further action on the case until 10/6/2009, three after notice and one month after the case was dismissed by this court.

7. The universe of reported cases that address Florida Rule of Civil Procedure Rule 1.070 stand for the proposition that dismissal is the appropriate sanction when the Plaintiff fails to comply with the notice and directives of the court, but that care must be taken when such a sanction would act as a dismissal with prejudice, which is not the case here. See Chaffin V. Jacobson, 793 So.2d 102 (Fla.App. 2 Dist. 2001); Premier V. Davalle, 994 So.2d 360 (Fla.App. 3 Dist. 2008); Vaught V. Mcneil, 1D 08-3739 (Fla.App. 1 Dist. 7-24-2009); Premier Capital, LLC, etc., Appellant, vs. Catherine Davalle, Appellee. 3rd District. Case No. 3D08-563. L.T. Case No. 06-6113 33 Fla. L. Weekly D2217b; Miranda v. Young, Appellees. 2nd District. Case No. 2D08-263; Sly v. McKeithen. 1st District. Case No. 1D09-089

WHEREFORE, for the reasons cited above the Defendant would respectfully request that this honorable court would recognize the prior Order entered in this case and find that this case has been dismissed and that the court can take no further action on this

## Florida Case Law

SKRBIC v. QCRC ASSOCIATES CORP., 761 So.2d 349 (Fla.App. 3 Dist. 2000)

LJUBO SKRBIC, Appellant, vs. QCRC ASSOCIATES CORP. et al., Appellee.

No. 3D99-195.

District Court of Appeal of Florida, Third District.

Opinion filed March 15, 2000.

An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge, L.T. No. 97-23658.

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Arthur Joel Berger, for appellant.

Cole White &amp; Billbrough and G. Bart Billbrough, for appellee.

Before JORGENSON, COPE, and LEVY, JJ.

LEVY, Judge.

Appellant appeals from an Order finding that he did not show good cause for failing to perfect service of process within the time period prescribed by Florida Rule of Civil Procedure 1.070(j) and dismissing his Complaint with prejudice. We agree with the trial court's finding that appellant failed to show good cause for his failure to serve defendants within the appropriate time period. However, because of the recent amendment to Rule 1.070(j), we remand to the trial court for the purpose of making a finding as to whether or not there was "excusable neglect" on the part of appellant which would excuse his failure to serve process within the 120-day period required by the Rule. See Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 24 Fla. L. Weekly S109 (Fla. March 4, 1999); Almeida v. FMC Corp., **740 So.2d 557** (Fla. 3d DCA 1999).

On October 16, 1997, appellant filed a Complaint against defendants, Quality Car Rental (the owner of the vehicle), Carlos Fidalgo and Leyda Ferguson (the directors of Quality Car Rental) and Yusuf Yildirim (the driver of the vehicle) (collectively "Appellees"), seeking damages for injuries sustained in an automobile accident that occurred on October 16, 1993.<sup>[fn1]</sup> On or about November 25, 1997, appellee, Quality Car Rental, filed a "Notice of Stay Pursuant to Florida Law" which declared that its insurer was insolvent and noted that, because the jurisdiction of Florida Insurance Guarantee Association (FIGA) was triggered, the action is stayed for up to six months pursuant to section **631.67**, Florida Statute.<sup>[fn2]</sup> Attached with the

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Notice, Quality Car Rental also filed an insolvency order from the Supreme Court of New York dated November 20, 1997.

Appellant did not attempt (and has to this date never attempted) to serve the Complaint during this period. On October 27, 1998, appellees moved to dismiss the Complaint for failure to serve the appellees within the 120-day period prescribed in Florida Rule of Civil Procedure 1.070(j). A hearing on the motion was held on December 4, 1998. The trial court, finding that appellant did not show good cause for failing to serve process within the 120 days, entered an Order granting the Motion to Dismiss with prejudice. This appeal ensued.

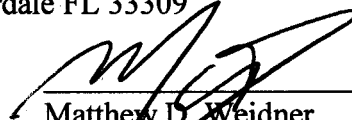
Appellant first argues that, pursuant to Rule 1.070(j), the Complaint must be served within the first 120 days immediately following the filing of the Complaint and that any event that interrupts that specific period, and thereby makes it impossible for the plaintiff to serve defendants within those first 120 days, is automatic good cause sufficient to avoid a dismissal. Accordingly, appellant argues, once the initial 120-day period was interrupted by the filing of the "Notice of Stay," making it impossible for appellant to serve the Complaint within the said initial 120-day period, good cause was automatically shown. We find such an interpretation of the Rule to be illogical, because it would clearly lead to results contrary to the intent of the Rule. See Nationsbank, N.A. v. Ziner, **726 So.2d 364**, 366 (Fla. 4th DCA 1999) ("The purpose of Rule 1.070(j) is to prevent a plaintiff from filing a suit and then taking no action whatsoever to proceed on the claim.").

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case, along with such other relief as the court finds just and proper including an award of attorney's fees.

**CERTIFICATION**

I HEREBY certify that a true and correct copy of the foregoing was mailed on this the 25<sup>th</sup> Day of February 2010 to Brian Kowal Law, Offices of Marshall Watson, 1800 NW 49<sup>th</sup> Street, Ste. 120, Ft. Lauderdale FL 33309



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Matthew D. Weidner  
Matthew D. Weidner, P.A.  
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FBN. 0185957  
Attorney for Defendant

CIRCUIT COURT, PINELLAS COUNTY, FLORIDA  
CIRCUIT CIVIL DIVISION

MASTER ORDER DISMISSAL CALENDAR NO. 070609-013

THIS CAUSE, UPON THE COURTS OWN MOTION, PURSUANT TO FLORIDA RULES OF CIVIL PROCEDURE 1.070(I), IT APPEARING THAT SERVICE HAS NOT BEEN OBTAIN UPON THE DEFENDANT(S) IN THE FOLLOWING CAUSES WITHIN 120 DAYS AFTER FILING THE INITIAL PLEADING AND THE PLAINTIFF, HAVING BEEN NOTICED THAT THE CAUSE OF ACTION WOULD BE DISMISSED ON AUGUST 17, 2009, AND FURTHER HAS MADE NO SHOWING OF CAUSE AS TO WHY SERVICE WAS NOT MADE WITHIN THAT TIME, IT IS THEREFORE;

ORDERED AND ADJUDGED THAT THE CASES, AS INDICATED ON THE ATTACHED LISTING, ARE HEREBY DISMISSED WITHOUT PREJUDICE PURSUANT TO RULE 1.070(I) OF THE FLORIDA RULES OF CIVIL PROCEDURE.

KEN BURKE  
CLERK OF CIRCUIT COURT

2009 SEP 17 PM 4:45

FILED  
CIVIL COURT REC DEPT

DONE AND ORDERED IN CHAMBERS IN CLEARWATER/ST. PETERSBURG, PINELLAS COUNTY, FLORIDA THIS 24 DAY OF Sept, 2009.

HON ANTHONY RONDOLINO


MASTER ORDER DISMISSAL CALENDAR NO. 070609-013

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CASE NUMBER	PARTY	NOTE
09-003014-CI-013	UNKNOWN TENANT IN POSSESSION ETC BANK OF AMERICA N A BARTELL PETER LLOYD ET AL A/K/A BARTELL PETER L	
09-003024-CI-013	JANE DOE ETC CITIMORTGAGE INC NEAL KEVIN C ET AL	
09-003024-CI-013	KEVIN C NEAL CITIMORTGAGE INC NEAL KEVIN C ET AL	
09-003024-CI-013	UNKNOWN SPOUSE OF KEVIN C NEAL ETC CITIMORTGAGE INC NEAL KEVIN C ET AL	
09-003109-CI-013	UNKNOWN TENANTS IN POSSESSION ETC JPMORGAN CHASE BANK NA MCRAE DIANE H ET AL	
09-003136-CI-013	ANY AND ALL UNKNOWN PARTIES ETC BANK OF AMERICA N A PETERSON WILLIAM R ET AL	
09-003136-CI-013	JANE DOE ETC BANK OF AMERICA N A PETERSON WILLIAM R ET AL	
09-003136-CI-013	JOHN DOE ETC BANK OF AMERICA N A PETERSON WILLIAM R ET AL	

## **Florida Rules of Civil Procedure**

### **1.070 Process**

This rule was published on October 23, 2009 | [Case Citations\(2\)](#) | By [Brian Willis, Attorney](#) | [Print](#)  [ShareThis](#)

**(i) Service of Process by Mail.** A defendant may accept service of process by mail.

(1) Acceptance of service of a complaint by mail does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

2) plaintiff may notify any defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request shall:

(A) be in writing and be addressed directly to the defendant, if an individual, or to an officer or managing or general agent of the defendant or other agent authorized by appointment or law to receive service of process;

(B) be dispatched by certified mail, return receipt requested;

(C) be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) inform the defendant of the consequences of compliance and of failure to comply with the request;

(E) state the date on which the request is sent;

(F) allow the defendant 20 days from the date on which the request is received to return the waiver, or, if the address of the defendant is outside of the United States, 30 days from the date on which it is received to return the waiver; and

(G) provide the defendant with an extra copy of the notice and request, including the waiver, as well as a prepaid means of compliance in writing.

**(j) Summons; Time Limit.** If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading directed to that defendant the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period. When a motion for leave to amend with the attached proposed amended complaint is filed, the 120-day period for service of amended complaints on the new party or parties shall begin upon the entry of an order granting leave to amend. A dismissal under this subdivision shall not be considered a voluntary dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).

**Florida Case Law**

SKRBIC v. QCRC ASSOCIATES CORP., 761 So.2d 349 (Fla.App. 3 Dist. 2000)

LJUBO SKRBIC, Appellant, vs. QCRC ASSOCIATES CORP. et al., Appellee.

No. 3D99-195.

District Court of Appeal of Florida, Third District.

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An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge, L.T. No. 97-23658.

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Arthur Joel Berger, for appellant.

Cole White & Billbrough and G. Bart Billbrough, for appellee.

Before JORGENSEN, COPE, and LEVY, JJ.

LEVY, Judge.

Appellant appeals from an Order finding that he did not show good cause for failing to perfect service of process within the time period prescribed by Florida Rule of Civil Procedure 1.070(j) and dismissing his Complaint with prejudice. We agree with the trial court's finding that appellant failed to show good cause for his failure to serve defendants within the appropriate time period. However, because of the recent amendment to Rule 1.070(j), we remand to the trial court for the purpose of making a finding as to whether or not there was "excusable neglect" on the part of appellant which would excuse his failure to serve process within the 120-day period required by the Rule. See Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 24 Fla. L. Weekly S109 (Fla. March 4, 1999); Almeida v. FMC Corp., **740 So.2d 557** (Fla. 3d DCA 1999).

On October 16, 1997, appellant filed a Complaint against defendants, Quality Car Rental (the owner of the vehicle), Carlos Fidalgo and Leyda Ferguson (the directors of Quality Car Rental) and Yusuf Yildirim (the driver of the vehicle) (collectively "Appellees"), seeking damages for injuries sustained in an automobile accident that occurred on October 16, 1993.<sup>[fn1]</sup> On or about November 25, 1997, appellee, Quality Car Rental, filed a "Notice of Stay Pursuant to Florida Law" which declared that its insurer was insolvent and noted that, because the jurisdiction of Florida Insurance Guarantee Association (FIGA) was triggered, the action is stayed for up to six months pursuant to section **631.67**, Florida Statute.<sup>[fn2]</sup> Attached with the

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Notice, Quality Car Rental also filed an insolvency order from the Supreme Court of New York dated November 20, 1997.

Appellant did not attempt (and has to this date never attempted) to serve the Complaint during this period. On October 27, 1998, appellees moved to dismiss the Complaint for failure to serve the appellees within the 120-day period prescribed in Florida Rule of Civil Procedure 1.070(j). A hearing on the motion was held on December 4, 1998. The trial court, finding that appellant did not show good cause for failing to serve process within the 120 days, entered an Order granting the Motion to Dismiss with prejudice. This appeal ensued.

Appellant first argues that, pursuant to Rule 1.070(j), the Complaint must be served within the first 120 days immediately following the filing of the Complaint and that any event that interrupts that specific period, and thereby makes it impossible for the plaintiff to serve defendants within those first 120 days, is automatic good cause sufficient to avoid a dismissal. Accordingly, appellant argues, once the initial 120-day period was interrupted by the filing of the "Notice of Stay," making it impossible for appellant to serve the Complaint within the said initial 120-day period, good cause was automatically shown. We find such an interpretation of the Rule to be illogical, because it would clearly lead to results contrary to the intent of the Rule. See Nationsbank, N.A. v. Ziner, **726 So.2d 364**, 366 (Fla. 4th DCA 1999) ("The purpose of Rule 1.070(j) is to prevent a plaintiff from filing a suit and then taking no action whatsoever to proceed on the claim.").

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Other Documents - 0

Where, as in the instant case, the plaintiff cannot serve the defendants within the first 120 days following the filing of the Complaint, we find that the 120-day period is tolled until such time as the case may proceed, whether by operation of law or trial court Order. Accordingly, we hold that at the conclusion of the six-month stay, the 120-day period again began to run. Since, in the instant case, 40 days passed between the filing of the Complaint and the filing of the "Notice of Stay", the appellant had 80 days remaining within which to serve the appellees after the stay was lifted by operation of law. Although we recognize that the language of the Rule does not provide for any tolling periods, treating a FIGA "Notice of Stay" as a tolling period is, for the reasons explained above, the most logical and sensible approach to the question. Since appellant did not serve a copy of the Complaint on any of the appellees at any time between the filing of the Complaint on October 16, 1997, and the date of the hearing on appellees' Motion to Dismiss on December 4, 1998, a period of almost 14 months (of which only six months was excused because of the FIGA "Notice of Stay"), we find that the trial court was eminently justified in making the finding that the appellant did not show good cause for failing to serve process within the 120 days as required by Rule 1.070(j) as it was in effect at that time.

At the time of the December, 1998, hearing, Rule 1.070(j) provided:

If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading and the party on whose behalf service is required does not show good cause why service was not made within that time, the action shall be dismissed without prejudice or that defendant dropped as a party on the court's own initiative after notice or on motion.

Fla. R. Civ. Pro. 1.070(j) (1998) (emphasis supplied). In March, 1999, while this case was on appeal, the Supreme Court amended Rule 1.070(j). Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 746 So.2d 1084, (Fla.

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March 4, 1999). The new version of the Rule provides:

If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period.

Amendment to Florida Rule of Civil Procedure 1.070(j), 24 Fla. L. Weekly at S109(emphasis supplied). At the time of the December 1998 hearing, the amended version of the Rule was not available to the trial judge. In Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 24 Fla. L. Weekly S109 (Fla. March 4, 1999), the Supreme Court held that "the amendment shall apply to all civil cases commenced after the date of this opinion and, insofar as just and practicable, to all civil cases pending as of the date of this opinion." Therefore, the instant case was "in the pipeline" at the time of the amendment and the parties are entitled to findings under the amended Rule. Accordingly, we remand this case to the trial court for the purpose of making a finding as to whether or not there was "excusable neglect" on the part of the appellant that would excuse his failure to serve process within the above-described 120-day period.

JORGENSON, J., concurs.

[fn1] We note that the Amended Complaint, upon which we are now traveling, was filed on the very last day permissible under the four-year statute of limitations.

[fn2] Section 631.67, Florida Statutes provides that:

[a]ll proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court or before any quasi-judicial body or administrative board in this state shall be stayed for 6 months, or such additional period from the date the insolvency is adjudicated, by a court of

competent jurisdiction to permit proper defense by the association of all pending causes of action as to any covered claims; provided that such stay may be extended for a period of time greater than 6 months upon proper application to a court of competent jurisdiction.

§ **631.67**, Fla. Stat. (1999).

COPE, J. (concurring in part and dissenting in part).

While I agree that the order must be reversed, I would remand with directions to reinstate the plaintiff's complaint.

I.

On the last day of the statute of limitations, plaintiff filed this suit. Thirty days later, a notice of stay was filed on account of the insolvency proceedings for the liability insurer who would be responsible for the defense of the defendants. This created an automatic stay of the case for six months. Of course, the stay could be extended if the insolvency proceedings lasted beyond six months.

Florida Rule of Civil Procedure 1.070(j) requires that the defendants be served within 120 days after the filing of the complaint unless there is good cause not to do so. Obviously in this case there was a stay in effect through, and beyond, the 120th day. That being so, the plaintiff showed good cause why the defendants had not been served within 120 days. The motion to dismiss should have been denied and the trial court should have set a deadline for the plaintiff to accomplish service. See Almeida v. FMC Corp., 24 Fla. L. Weekly D765 (Fla. 3d DCA March 24, 1999); Vidal v. Perez, **720 So.2d 605** (Fla. 3d DCA 1998).

We should be especially reluctant to approve a Rule 1.070(j) dismissal under the circumstances present here. The entire delay in this case was created because someone on the **defendants'** side of the case - the liability insurer - filed a notice of stay. The defendants received the benefit of the fact that the case could not proceed against them. No one ever filed a notice indicating that the automatic stay had expired. It is unseemly to allow the defendants to argue that the plaintiff did not proceed quickly enough, when it was someone on the **defendants'** side of the case who caused the proceedings to come to a halt.

The majority opinion takes the unprecedented step of **expanding** old Rule 1.070(j) by saying that the 120-day deadline is tolled during the period of a stay, and then begins to run anew when the stay expires. The rule does not say that. All the rule calls on the plaintiff to do is show good cause why he did not serve the defendants by the 120th day. The plaintiff has made the necessary showing.

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By expanding the scope of old Rule 1.070(j), the majority opinion has overlooked what the Florida Supreme Court itself has said about the old rule:

As noted by Judge Griffin: "The rule in its present form has been widely and properly criticized." Maher v. Best Western Inn, **667 So.2d 1024**, 1026 (Fla. 5th DCA 1996) (Griffin, J., dissenting). It has been referred to as a "procedural pit" and acts as a catalyst for further litigation. See, e.g., Greco v. Pedersen, **583 So.2d 783**, 785 (Fla. 2d DCA 1991) ("We are dismissing this case, while perhaps upholding the predicate for a new lawsuit against yet another attorney, in the supposed interest of efficient judicial administration.").

Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, **720 So.2d 505**, 505-06 (Fla. 1998). In light of the just-stated criticisms, this court should **not** expand old Rule 1.070(j) beyond its plain terms.

Since a stay prevented service on the defendants within 120 days, we should hold that good cause was shown under old Rule 1.070(j). We should remand with directions to reinstate the plaintiff's complaint and set a deadline for service of process on defendants.

II.

The defendants have candidly, and quite properly, conceded

that the newly amended Rule 1.070(j) applies to cases that are pending "in the pipeline" on appeal. See Thomas v. Silvers, 24 Fla. L. Weekly S492, S493 (Fla. Oct. 21, 1999); Almeida v. FMC Corp., 24 Fla. L. Weekly at D766.

If good cause was shown under the old rule, it necessarily has been shown under the new rule. Therefore plaintiff is entitled to reinstatement under the new rule as well.

The majority opinion remands for the trial court to determine whether there was excusable neglect within the meaning of the new rule. With all due respect, the majority opinion misinterprets the new rule.

Newly amended Rule 1.070(j) provides in part:

If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading, the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period.

Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 746 So.2d 1084, 1084 (Fla. 1999).

The majority opinion has overlooked the language which precedes the semicolon. The Florida Supreme Court has explained:

The newly amended rule broadens a trial court's discretion to permit an extension of time for service of process **absent a showing of good cause**. This amendment brings rule 1.070(j) in line with its federal counterpart, Federal Rule of Civil Procedure 4(m). The amended rule provides that when a plaintiff fails to effect timely service of process **without showing good cause or excusable neglect**, the trial court retains the discretion to (1) extend the period for service, (2) dismiss the action without prejudice, or (3) drop that defendant as a party.

Thomas v. Silvers, 24 Fla. L. Weekly at S493 (emphasis added); see Totura & Co., Inc. v. Williams, 25 Fla. L. Weekly S141, S143 (Fla. Feb. 17, 2000).

Under the new rule, even if there is no showing of good cause or excusable neglect, the trial court has the discretion to extend the time period for service, dismiss without prejudice, or drop the unserved defendant as a party. These options are addressed to the discretion of the trial

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court, and a trial court ruling will be reviewable for abuse of that discretion.

In this case the complaint was filed on the last day of the statute of limitations. While the plaintiff has, in fact, shown good cause for not serving the defendants by the 120th day, for purposes of discussion I will assume that the plaintiff's showing does not rise to the level constituting good cause or excusable neglect.

Assuming that is the state of affairs, the trial court would in my judgment be obligated to pick the first option - extend the period of time for service. That is so because a dismissal in this case would amount to a dismissal with prejudice. Discretion in these circumstances must be exercised with the understanding that Florida has a long-standing policy in favor of resolving civil disputes on the merits. Furthermore, the purpose of Rule 1.070(j) is to speed the progress of cases on the civil docket, but not to give defendants a "free" dismissal with prejudice. Thus, where there has been no showing of good cause or excusable neglect, but the statute of limitations has run, discretion should normally be exercised in favor of giving the plaintiff an extension of time to accomplish service.

The majority opinion focuses on the part of the amended rule which comes after the semicolon. That part of the new rule indicates that "if the plaintiff shows good cause or excusable neglect for the failure, the court **shall** extend the time for service for an appropriate period." Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 24 Fla. L. Weekly at S109 (emphasis added). The purpose of this part of the



## Florida Case Law

CHAFFIN v. JACOBSON, 793 So.2d 102 (Fla.App. 2 Dist. 2001)

W. RONALD CHAFFIN, Appellant, v. ROBERT A. JACOBSON, individually,  
INTEGRATED CONTROL SYSTEMS, INC., a Florida corporation, INTEGRATED  
CONTROL SYSTEMS, INC., a Connecticut corporation; JAMES B. IRWIN,  
individually, and the ESTATE OF DONALD CERBONE, Appellees.

No. 2D00-4984.

District Court of Appeal of Florida, Second District.

Opinion filed August 17, 2001.

Appeal from the Circuit Court for Charlotte County; Sherra Winesett,  
Judge.

Kelley B. Gelb of Krupnick, Campbell, Malone, Roselli, Buser, Slama,  
Hancock, McNelis, Liberman & McKee, P.A., Fort Lauderdale, for  
Appellant.

Vance R. Dawson and Stephanie A. Segalini of Rissman, Weisberg,  
Barrett, Hurt, Donahue & McLain, P.A., Orlando, for Appellee, Integrated  
Control Systems, Inc.

FULMER, Judge.

W. Ronald Chaffin appeals from an order dismissing his complaint  
without prejudice as to Integrated Control Systems, Inc., a Connecticut  
corporation (hereinafter IMPAC-CONN), for failure to perfect timely  
service of process. We reverse and remand with directions to reinstate  
the complaint.

On November 1, 1999, Chaffin filed a pro se complaint naming six  
defendants including IMPAC-CONN. Chaffin never successfully served  
IMPAC-CONN with that complaint, despite his attempt on November 15,  
1999, to issue a summons for service on IMPAC-CONN through the Florida  
Secretary of State. Thereafter, Chaffin retained a law firm to represent  
him in the litigation, and an amended complaint was filed on February 1,  
2000. On May 26, 2000, Chaffin moved for an extension of time within  
which to serve IMPAC-CONN.<sup>[fn1]</sup> An alias summons was issued on May  
2000, and service was accomplished

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on June 16, 2000, by serving IMPAC-CONN's registered agent in Bristol  
Connecticut.

On July 10, 2000, IMPAC-CONN filed a motion to dismiss based upon  
Chaffin's failure to perfect service within the 120-day deadline under  
Florida Rule of Civil Procedure 1.070(j). After a hearing, the trial  
court entered an order granting the motion to dismiss without prejudice.  
Because the statute of limitations had run on Chaffin's claim against  
this defendant, the order granting the motion to dismiss acted as a  
dismissal with prejudice.

The hearing on the motion to dismiss was held on October 5, 2000. The  
parties presented argument to the trial court pertaining to whether good  
cause existed for the delay in service, but they did not discuss the 1999  
amendment to rule 1.070(j),<sup>[fn2]</sup> which broadened the trial court's  
discretion to extend the period for service without a showing of good  
cause or excusable neglect. See Amendment to Florida Rule of Civil  
Procedure 1.070(j)-Time Limit for Service, 746 So.2d 1084 (Fla. 1999);  
Thomas v. Silvers, 748 So.2d 263 (Fla. 1999). On appeal, Chaffin does not  
assert, as he did below, that he showed good cause for the delay in  
service; rather, he argues that the trial court abused its discretion in  
not applying the new version of rule 1.070(j) and not allowing the  
additional time for service. We recognize that the parties failed to  
discuss the amended rule at the hearing on the motion to dismiss;  
nevertheless, we are compelled to reverse because Chaffin was entitled to  
the benefit of the rule in effect at the time of the hearing and the  
trial court's dismissal was an abuse of discretion under the  
circumstances.

In proposing the 1999 amendment to rule 1.070(j), the supreme court  
explained that prior to amendment the rule sometimes acted as a severe  
sanction instead of a case management tool. See Amendment to Florida  
Rule of Civil Procedure 1.070(j) Time Limit For Service, 720 So.2d 505  
(Fla. 1998). In making the proposal to amend the rule, the supreme court

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Cases Only - 10
Statutes Only - 0
Treatises Only - 0
Other Documents - 0



## Florida Case Law

PREMIER v. DAVALLE, 994 So.2d 360 (Fla.App. 3 Dist. 2008)

PREMIER CAPITAL, LLC, etc., Appellant, v. Catherine DAVALLE, Appellee.

No. 3D08-563.

District Court of Appeal of Florida, Third District.

September 17, 2008.

Rehearing Denied November 12, 2008.

Appeal from the Circuit Court, Miami-Dade County, David C. Miller, J.

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Rothstein Rosenfeldt Adler and Riley W. Cirulnick and Richard Storfer, Fort Lauderdale, for appellant.

Rodham & Fine and Gary R. Fine, Fort Lauderdale, for appellee.

Before WELLS, SUAREZ, and CORTIÑAS, JJ.

CORTIÑAS, J.

Appellant, Premier Capital, LLC ("Premier") seeks review of the trial court's denial on the merits of its motion for reconsideration. The motion for reconsideration ("Motion for Reconsideration") addressed the trial court's granting of Catherine Davalle's ("Davalle") motion to quash service and its denial of Premier's ore tenus motion seeking an extension of time for service. The transcript of the Motion for Reconsideration demonstrates that the trial court failed to consider that it was permitted to grant an extension of time for service even without a showing of good cause. As such, we reverse and remand.

Davalle personally guaranteed a promissory note entered into by Intelligence Systems, Inc. ("ISI"). The promissory note and the personal guaranty were assigned to Premier. ISI defaulted on the promissory note and Davalle failed to make payments pursuant to the personal guaranty. Premier sued Davalle to recover the monies owed.

The original summons was issued on March 29, 2006. Davalle was not served within the 120-day time limit set forth in Florida Rule of Civil Procedure 1.070(j). An attempt was made to serve Davalle on August 4, 2006, at which time the process server was informed that Davalle was "unknown at the given address." An alias summons was issued on August 23, 2006. An attempt to serve Davalle at the same address as that specified on the original summons was made on December 29, 2006. The process server was informed by Davalle's daughter that Davalle did not live at the address and she refused to give any further information relating to her mother. A pluries summons was





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**34 Fla. L. Weekly D1503c**

CHARLES M. VAUGHT, JR., Appellant, v. WALTER A. MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Appellee. 1st District. Case No. 1D08-3739. Opinion filed July 24, 2009. An appeal from the Circuit Court for Leon County. John C. Cooper, Judge. Counsel: Charles M. Vaught, Jr., pro se, Appellant. Bill McCollum, Attorney General, and Joe Belitzky, Senior Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Appellant raises three issues on appeal. We affirm as to two issues but remand to the trial court to amend its order to indicate it is without prejudice to appellant's right to file an amended complaint on the declaratory judgment and to effectuate appropriate process pursuant to Florida Rule of Civil Procedure 1.070(j). (WOLF, WEBSTER, and CLARK, JJ., CONCUR.)

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## 34 Fla. L. Weekly D2070a

**Civil procedure -- Dismissal -- Failure to perfect service within 120 days -- Circuit court abused discretion in dismissing complaint with prejudice under rule 1.070(j) for failure to establish good cause or excusable neglect for not serving process within 120 days of filing complaint where dismissal with prejudice was not one of options available to court under rule 1.070(j), four-year statute of limitations had run on timely filed claims when court entered its order dismissing complaint, and plaintiff had obtained service on each defendant by time of hearing on motion to dismiss -- Circuit court should have extended time for service -- Additional time pro se inmate took to perfect service was not extraordinary**

GUSTAVO MIRANDA, Appellant, v. STEVEN YOUNG, JACK BROCK, HILLSBOROUGH COUNTY SHERIFF'S OFFICE, Appellees. 2nd District. Case No. 2D08-2633. Opinion filed October 9, 2009. Appeal from the Circuit Court for Hillsborough County; Frank Gomez, Judge. Counsel: Gustavo Miranda, pro se. Thea G. Clark of Hillsborough County Sheriff's Office, Tampa, for Appellees.

(FULMER, Judge.) Gustavo Miranda, pro se, appeals the circuit court's order dismissing his complaint with prejudice. In its order, the court found that Miranda failed to establish good cause or excusable neglect for not serving process upon Appellees within 120 days of filing the complaint as required by Florida Rule of Civil Procedure 1.070(j). Because we conclude that the circuit court erred in dismissing the complaint, we reverse and remand for further proceedings.

Prior to 1999, rule 1.070(j) provided that when a party failed to perfect service of an initial pleading within 120 days after filing "and the party on whose behalf service is required does not show good cause why service was not made within that time, the action shall be dismissed without prejudice or that defendant dropped as a party." *Amendment to Fla. Rule of Civil Procedure 1.070(j)-Time Limit for Serv.*, 720 So. 2d 505, 505 (Fla. 1998). However, the Florida Supreme Court amended the rule in 1999 to comport with the amendment of its federal counterpart, Federal Rule of Civil Procedure 4(m). *Amendment to Fla. Rule of Civil Procedure 1.070(J)-Time Limit for Serv.*, 746 So. 2d 1084 (Fla. 1999); *see also Totura & Co., Inc. v. Williams*, 754 So. 2d 671, 676-77 (Fla. 2000) (noting same). The intent of the amendment was to provide courts with broad discretion to extend the time for service even when good cause for untimely service had not been shown. *Totura*, 754 So. 2d at 677; *see also Amendment*, 720 So. 2d at 505 (proposing amendment to conform to the federal rule and to provide courts with discretion to extend the time for service "even when good cause has not been shown"). The amendment allowed courts to avoid the "harsh results" often exacted under the prior version of the rule "such as where noncompliance triggered dismissal without prejudice, but expiration of the statute of limitations would preclude refiling of the action." *Totura*, 754 So. 2d at 677.

The current version of rule 1.070(j) provides in pertinent part as follows:

(j) Summons; Time Limit. If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading directed to that defendant the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period.

With respect to the application of rule 1.070(j), this court observed in *Chaffin v. Jacobson*, 793 So. 2d

102, 103-04 (Fla. 2d DCA 2001), as follows:

As now written, the rule presents a trial court with three options when a plaintiff has not properly served a defendant within 120 days after filing the initial pleading. Those options are: (1) direct that service be effected within a specified time; (2) dismiss the action without prejudice; or (3) drop that defendant as a party. If a plaintiff shows good cause or excusable neglect for failure to make timely service, the court must extend the time for service and has no discretion to do otherwise. However, if neither good cause nor excusable neglect is shown, the trial court is no longer required to dismiss without prejudice or drop the defendant as a party, but is left to exercise its discretion.

We further noted that when the statute of limitations has run and service has been perfected as of the date of the hearing on the motion to dismiss, a trial court abuses its discretion by not extending the time for service and dismissing the complaint. *Id.* at 104; *see also Brown v. Ameri Star, Inc.*, 884 So. 2d 1065, 1067 (Fla. 2d DCA 2004) (noting that "it ordinarily is an abuse of discretion not to allow additional time for service of the summonses even in the absence of a showing of good cause or excusable neglect" if the order of dismissal is entered after the statute of limitations has run); *Kohler v. Vega-Maltes*, 838 So. 2d 1249, 1250 (Fla. 2d DCA 2003) ("[W]here the statute of limitations has run and there has been no showing of good cause or excusable neglect, discretion should be exercised in favor of giving the plaintiff an extension of time to accomplish service.").

We conclude in the case before us that the circuit court erred in dismissing Miranda's complaint with prejudice. First, dismissal *with* prejudice was not one of the options available to the court under rule 1.070(j). The court could have directed that service be perfected within a certain amount of time, it could have dismissed the action *without* prejudice, or it could have dismissed the defendants who had not been served. *Chaffin*, 793 So. 2d at 103-04.

Further, the circuit court's findings in its order reflect that the four-year statute of limitations had run on Miranda's timely-filed claims when the court entered its order dismissing the complaint.<sup>1</sup> In addition, Miranda had obtained service on each of the defendants by the time of the hearing on the motion to dismiss. Under those circumstances, it was an abuse of discretion to dismiss the complaint, and the circuit court should have extended the time for service. *Brown*, 884 So. 2d at 1067; *Kohler*, 838 So. 2d at 1250; *Chaffin*, 793 So. 2d at 104.

Although we understand the circuit court's need to manage its docket, rule 1.070(j) was not intended to operate as a sanction or to result in the dismissal of a claim with prejudice on technical grounds. "[T]he purpose of Rule 1.070(j) is to speed the progress of cases on the civil docket, but not to give defendants a 'free' dismissal with prejudice." *Chaffin*, 793 So. 2d at 104 (quoting *Skrbic v. QCRC Assocs. Corp.*, 761 So. 2d 349, 354 (Fla. 3d DCA 2000) (Cope, J., concurring in part and dissenting in part)). The dismissal of the complaint under rule 1.070(j) after the expiration of the statute of limitations is inconsistent with Florida's long-standing policy in favor of resolving disputes on their merits. *Brown*, 884 So. 2d at 1067. In addition, Miranda is proceeding pro se and is incarcerated. The additional time he took to perfect service on the Appellees is, thus, not extraordinary.

Accordingly, we reverse the order of dismissal with prejudice and remand for further proceedings consistent with this opinion. Our decision does not impact the other grounds for dismissal raised by Appellees in their motion to dismiss, which were not addressed by the circuit court in its order.

Reversed and remanded. (NORTHCUTT and SILBERMAN, JJ., Concur.)

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<sup>1</sup>Although the complaint is not the model of clarity, the allegations sound in negligence, battery, malicious prosecution, and excessive and unjustified use of force, with each of those claims falling under the four-year statute of limitations. See §§ 95.11(3)(a), (o), (p), 768.28(13), Fla. Stat. (2002). Miranda cited 42 U.S.C. § 1983 in his brief as the basis for his complaint for a civil rights violation, but he did not cite that statute in his complaint. State limitations periods for personal injury torts apply to a section 1983 action for personal injuries, and thus the four-year statute of limitations would still apply under a section 1983 claim. *Wallace v. Kato*, 549 U.S. 384, 387 (2007).

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34 Fla. L. Weekly D2622a

**Civil procedure -- Trial court abused its discretion by dismissing complaint with prejudice for failure to effect service of process within 120 days from filing of complaint where statute of limitations had expired and service had been obtained prior to hearing on motion to dismiss -- In situations where statute of limitations has run, trial court should normally exercise discretion in favor of giving plaintiff additional time to perfect service**

GLENDASLY, as Personal Representative of the Estate of JAMES T. SLY, JR., Deceased, Appellant, v. FRANK McKEITHEN, Bay County Sheriff, BOARD OF COUNTY COMMISSIONS, BAY COUNTY, FLORIDA; CORRECTIONS CORPORATION OF AMERICA; and MIKO DAVETTE HARRIS, Appellees. 1st District. Case No. 1D09-0895. Opinion filed December 22, 2009. An appeal from the Circuit Court for Bay County. James B. Fensom, Judge. Counsel: Roy D. Wasson and Annabel Majewski, of Wasson & Associates, Chartered, Miami; and Sam K. Zawahry, of the Zawahry Firm, P.A., Panama City, for Appellant. Clifford C. Higby and Halley A. Stark of Bryant & Higby, Chartered, Panama City, for Appellees, Corrections Corporation of America and Miko Davette Harris.

(PER CURIAM.) Glenda Sly, as personal representative of the estate of James Sly, Jr., appeals from an order granting the motion of Corrections Corporation of America and Harris to dismiss for failure to comply with Florida Rule of Civil Procedure 1.070(j), which requires service of process to be effected within 120 days from the filing of the complaint. Because we conclude that it was an abuse of discretion for the trial court to dismiss the complaint with prejudice for failure to timely serve process when the statute of limitations had expired, we reverse the order dismissing Appellant's complaint with prejudice and remand the case for further proceedings.

Appellant filed the initial complaint on April 5, 2007, just prior to the expiration of the applicable statute of limitations. On July 25, 2007, before the expiration of the 120 days within which to serve process, Appellant filed a motion for extension of time to serve process. Appellant filed two additional motions for extensions of time to serve process on November 20, 2007, and January 22, 2008. Appellant never set a hearing for any of these motions; no order for an extension of time was entered by the trial court for any of the three motions, nor was a summons issued. Appellant filed an amended complaint on March 24, 2008, and Appellees were finally served on March 28, 2008, nearly a year after the filing of the initial complaint.

After Appellees filed a motion to dismiss for failure to comply with the 120-day requirement, the trial court dismissed the case with prejudice, declining to exercise discretion to permit Appellant additional time to perfect service, and finding that Appellant failed to demonstrate good cause or excusable neglect for the delay. The dismissal with prejudice precluded Appellant from refiling due to the expiration of the statute of limitations.

Under Rule of Civil Procedure 1.070(j), if the initial process and initial pleading is not served upon the defendant within 120 days after the filing of the initial pleading, and a showing of good cause or excusable neglect is not made,<sup>1</sup> the trial court has the discretion to (1) direct that service be effected within a specified time; (2) drop that defendant as a party; or (3) dismiss the action without prejudice. See *Thomas v. Silvers*, 748 So. 2d 263, 264-65 (Fla. 1999).

Rule 1.070(j) was amended in 1999 in order to broaden the trial court's discretion to allow an extension of time for service of process "even when good cause has not been shown." *Carter v. Winn-Dixie Store, Inc.*, 889 So. 2d 960, 961 (Fla. 1st DCA 2004) (quoting *Britt v. City of Jacksonville*, 874 So. 2d 1196, 1197 (Fla. 1st DCA 2004) (emphasis added)). Prior to the amendments,