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

UNIVERSAL MORTGAGE CORPORATION, d/b/a UFG MORTGAGE,

PLAINTIFF,

v.

JAMES CHISHOLM AND MICHELLE CHISOLM,

DEFENDANTS.
_____/

CASE NO. 08-8335-CI-07

**DEFENDANTS' OBJECTION TO SUMMARY JUDGMENT
THE INSTANT CASE HAS ALREADY BEEN DISMISSED AND THE DOCKET HAS BEEN CLEARED PURSUANT TO FLA.R.C.PRO. 1.070 (J)**

COMES NOW, the Defendants JAMES CHISHOLM and MICHELLE CHISOLM (hereinafter "Defendants"), by and through the undersigned counsel MATTHEW D. WEIDNER, and OBJECTS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT because THE INSTANT CASE HAS ALREADY BEEN DISMISSED in the above entitled civil action, pursuant to Fla. R. Civ. Pro. 1.070(j) and precedent case law, and in support thereof states as follows:

APPLICABLE RULE OF CIVIL PROCEDURE AND RELEVANT CASE LAW

1. Fla. R. Civ. Pro. 1.070(j) provides, in pertinent part, that

> [i]f service of an initial process an d 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. *Bold emphasis added.*

2. The Rule, then, provides the trial court with three options *and only three options* when a plaintiff has not properly served a defendant within 120 days after filing the initial pleading. These 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. Chaffin v. Jacobson, 793 So. 2d 102, 103-04 (Fla. 2d DCA 2001). *See also* Premier v. Davalle, 994 So. 2d 360 (Fla. 3d DCA 2008); Vaught v. Mcneil, 34 Fla. L. Weekly D1503c (Fla. 1st DCA 2009); Miranda v. Young, 34 Fla. L. Weekly D207a (Fla. 2d DCA 2009); Sly v. McKeithen, Case No. 1D09-089 (Fla. 1st DCA). The rule does not provide an option to "Dismiss the case as to unknown Tenants"

1. THE CLEAR INTENT OF THE RULE IS TO SOLVE THE MOST VEXING PROBLEM FACING CIRCUIT COURTS IN DECADES- DOCKETS CLOGGED BY TOO MANY FORECLOSURE CASES

3. The principle behind the rule is to allow circuit courts ability to manage its docket. *See* Chaffin, 793 So. 2d at 104 (**"the purpose of Rule 1.070(j) is to speed the progress of cases on the civil docket...."**) *See also* Skrbic v. QCRC Assocs. Corp., 761 So. 2d 349, 354 (Fla. 3d DCA 2000). This important rule and the language quoted in these cases should be carefully considered by this Court, this Circuit and in fact Courts all across the state who are struggling under the burden of an unprecedented case load. Courts not only have the power to manage their dockets, to move cases along toward conclusion, but because of the mandatory, "SHALL" language of the rule, this court MUST recognize that the case and all others similarly situate have been dismissed by operation of court Order.

4. If Plaintiffs in this case and thousands of others choking courts across this state:

1) Choose not to proceed with their cases;

2) Ignore the notices sent by this court prior to the case's dismissal; and then,

3) Fail to take any action on the case even after an Order of Dismissal is formally memorialized as a Recorded Document with an Official Records Book and Page Number, then a dismissal is absolutely what the Rule requires.

5. The Courts of this circuit and others across the state are under improper pressures to "clear their dockets" and to "solve the foreclosure crisis". Reports are generated and statistics run which some improperly use to infer or suggest that foreclosure cases are not proceeding because of inefficiencies in the courthouse or the inability or unwillingness of judges to efficiently manage their dockets. The overwhelming majority of foreclosure cases are not defended at all, much less by any experienced foreclosure defense attorney that would significantly delay the case's progress. The vast majority of "stalled" pre-judgment cases that currently clog the court's docket in this circuit and across the state are cases where the Plaintiff, presumably for its own reasons, has failed to proceed to judgment. This court should not interpose its judgment in "reviving" those cases, but should respect the notice and dismiss provisions of the Rule and allow the Plaintiff to re-file its case when it has collected the evidence required to foreclose or when the Plaintiff's business model suggests that taking back the title to the property at issue is in its best interests.

II. RECOVERING HUNDREDS OF THOUSANDS OF DOLLARS IN REVENUE THAT IS DUE TO THE COURTS AND TAXPAYERS

6. The courthouse belongs not just to the foreclosure mills and lenders that have choked the docket with cases that they cannot prove up then take title to or that they can prove up but choose not to take title to. The courthouses in this circuit and across the State of Florida belong to all citizens. Moreover, the Courts have an obligation to the taxpayers and citizens of this county and the State of Florida and an unprecedented opportunity to recover potentially hundreds

of thousands of dollars in filing fees by applying the clear intent of the Rule as written. A simple survey of all the cases in which a Master Order of Dismissal has been entered over the last five year period multiplied by the new foreclosure filing fee would allow this court to quickly determine exactly how much revenue correctly applying the rule would generate. Precious judicial and clerk of court judicial resources have been used to incubate or manage stalled cases over the extended period of time. They languish on court dockets and this court quite simply has an affirmative obligation to all taxpayers to recover the resources used in such management. Morevover when local and national media report that the parties responsible for the stalled cases—the Millionaire Foreclosure Mills—are indeed making millions off the court process it is entirely inequitable to continue to use limited taxpayer resources to perpetuate these inequities.

III. THIS COURT CANNOT ADJUDICATE THE RIGHTS OF PARTIES BEFORE THIS COURT WITHOUT COURT PROCESS OR EVIDENCE THAT THEY ARE NOT PROPER PARTIES TO THIS ACTION

7. When this foreclosure case was filed, and when all other foreclosure cases are filed, the Plaintiff is required to formally name, "Unknown Tenants". These words are not perfunctory or superfluous...the Unknown Tenants are real parties in interest in every foreclosure case until their interests are formally discharged by the Plaintiff that filed the action.

8. Any interpretation of this court's Order other than a recognition that the entire case is dismissed, and not dismissed as to the "Unknown Defendants" as is incorrectly asserted to be the meaning of the Order, places the Court in the improper position of making decisions regarding dismissing parties who may very well have an interest in these proceedings, namely any "Unknown Tenants" who may be residing in the property. How does this Court (or any court hearing foreclosure cases) make the determination that "Unknown Tenants" have no interest in the proceedings and may be dropped from the case? If in fact tenants are residing in the property

and judgment of possession is subsequently entered have their fundamental rights not been violated? In the case before this court, "Unknown Tenants" were made parties to this litigation and the Plaintiffs are under an affirmative obligation to discharge those tenant's interest upon affirmation that there are in fact no tenants. For the court to assume that there are no "Unknown Tenants", based exclusively on the tolling of some unknown period of time in which no tenant has been served and with no affidavit or evidence of any kind from the Plaintiff that there are no tenants, places thousands of legitimate tenants at risk of a fundamental violation of their basic due process rights. Moreover, what about the situation where the Plaintiff is in fact aware that there are indeed tenants in the property and the Plaintiff wishes for those Unknown Tenants to remain parties to the action so their interests can be properly foreclosed. If the court has sua sponte dismissed those Defendants, the Plaintiff's rights to control the litigation have been impacted. Finally, a Writ of Possession issued by the court and effectuated by the Sheriffs of this state against "Unknown Tenants" who are in fact residing on the property is ineffectual as to those tenants if they have been dropped as defendants from the proceedings. How many legitimate tenants have had their due process rights violated and been thrown into the streets when the Sheriff of this county executes a Writ of Possession and that was their first notice of foreclosure proceedings? How many more tenants live in Pinellas County that are vulnerable to this nightmarish scenario right now? No Writ of Possession should be issued by this Court or Courts of this Circuit until these questions are answered.

9. Finally the actions any actions taken against tenants must be take into account the Federal Protecting Tenants at Foreclosure Act (Title VII of S. 896, Pub. L. No. 111-22, §§701 – 704 (2009) to the extent that such actions violate this federal law, they must cease immediately.

IV. FORECLOSURE JUDGMENTS AFTER DISMISSAL ARE VOID AND EVERY JUDGMENT ISSUED AFTER DISMISSAL EXPOSES TITLE INSURORS, NEW PURCHASERS AND OTHER PARTIES TO SIGNIFICANT LIABILITY

10. Once a case has been dismissed, it thereafter lacks jurisdiction to take any action on that case and any judgment entered thereafter is void, including and especially a Final Judgment of Foreclosure. After a plaintiff suffers a dismissal of his or her cause of action, the court is without further jurisdiction and has no right to render any judgment either in the plaintiff's favor or against him or her. *See* Derma Lift Salon, Inc. v. Swanko, 419 So. 2d 1180 (Fla. 3d DCA 1982); Haft-Gaines Co. v. Reddick, 350 So. 2d 818 (Fla. 4th DCA 1977).

11. A judgment of dismissal without prejudice, that is, one not involving the merits of the case, leaves the parties as if no suit had been instituted. Epstein v. Ferst, 35 Fla. 498, 17 So. 414 (Fla. 1895). Such a judgment is not *res judicata* and hence is no bar to a subsequent action on the same subject matter. Rountree v. Rountree, 72 So. 2d 794 (Fla. 1954).

12. How many judgments have been rendered in cases across this county post-dismissal and what is the total dollar value of policies written on those properties subsequent to Judgment? That's one level of liability. The next level of liability are those legitimate defendants who were served with foreclosure, whether they thereafter appeared in the case or not. Any judgment entered against them is void and they are still the equitable title owners of the property inasmuch as their title ownership has not been properly foreclosed by a valid legal judgment.

13. A dismissal of the case operates to cancel the lis pendens which is formally associated with that case. Federal Tax Liens, certified judgments, municipal liens and other valid liens have attached to property of Defendants who were affected by these dismissals. In the case of municipal liens, those judgments attach not just to the property subject to the instant foreclosure case, but to all real property owned in the defendant's name in the county in which the case is

located. These liens are attached to the subject property by operation of law right now and they cannot be ignored thereafter by any party.

FACTS PARTICULAR TO THIS CASE

14. The named Plaintiff in this case is UNIVERSAL MORTGAGE CORPORATION, D/B/A UFG MORTGAGE (hereinafter "Plaintiff"). The Plaintiff initiated this case when it filed its complaint on or about June 5, 2008.

15. According to the docket, on or about November 5, 2008 the Plaintiff was alerted by the Clerk of the Court of the Court's intention to dismiss under Rule 1.070(j) for failure to obtain service of several certain named Defendants to this lawsuit.

16. Notwithstanding this notice from the Clerk of the Court, the Plaintiff elected to take no further action with regard to the Defendants who had not properly been served after the filing of the complaint. As a result, and pursuant to the Rule, the Court issued its Master Order Dismissal (hereinafter "the Master Order"), attached hereto as Exhibit "A", on February 12, 2009. Here we are now more than one year later and while the Plaintiff has filed post-dismissal pleadings in this action, they have taken no action to have the Order of Dismissal set aside.

17. Although the Master Order cites Rule 1.070(I), it appears that this is a scrivener's error, and that the order was actually referring to Rule 1.070(j) as the Master Order reads "it appearing that service has not been obtained upon the Defendant(s) in the following causes within 120 days after filing the initial pleading..."

18. The Master Order then 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. *Bold emphasis.*

This is clear, unambiguous, operative legal language that cannot be ignored. The impact and effect of this language unfortunately cannot just be explained away because, as explained above, too many parties' rights are affected by the Orders. In short, the clear language of the Order must be given its full weight and legal effect.

19. Turning to the case before the court, the very first case listed on the attached listing is the instant action, Case No. 08-008335-CI-007. Read carefully the specificity with which each case is referenced, Case Number, Name of Plaintiff, Name of Primary Defendant, Unknown Tenant, Tenant 1, Tenant 2, Tenant 3, Tenant 4. Therefore, by express order of Court and with great specificity, the instant action has been dismissed without prejudice and any further action or hearing on this case is improper.

ARGUMENT

20. Here the Plaintiff had ample notice, as evidenced by the Clerk of the Court's letter dated November 5, 2008, that the Court would take action against it pursuant to Rule 1.070(j) for failure to obtain proper service upon certain named Defendants if the Plaintiff did not take action to correct this fatal defect.

21. Notwithstanding this notice, the Plaintiff deliberately chose to ignore the Court's directive and took no further action with regards to proper service upon certain named Defendants to the instant lawsuit.

22. The Court was therefore left with no choice but to issue the Master Order dated February 12, 2009. This Master Order was in direct accordance with the purpose behind Rule 1.070(j), which was to allow the circuit courts the ability to manage its docket by dismissing or moving along stalled or dormant cases. It should be again noted that we are more than one year post-

dismissal and no affirmative action has yet been taken to set aside the Order of Dismissal that was properly entered.

23. When the Court issued its Master Order pursuant to Rule 1.070(j), it was left with three options: (1) direct that service be effected within a specified time; (2) drop the certain named Defendants as a party to the instant lawsuit; or (3) dismiss the case without prejudice.

24. The Rule simply does not provide this court with any authority to, "Dismiss The Case as to Unknown Tenants" as this Order is currently being interpreted. In the matter of foreclosure cases, the courts should never sua sponte, "Drop The Certain Named Defendants As A Party to The Instant Lawsuit". This court action may be an appropriate order for the court to execute in other civil matters when the effect of dropping the Defendant would prevent the Plaintiff from recovering from that Defendant but when, as is the case in a foreclosure action, the effect of dropping the Defendant strips that Defendant of fundamental due process rights and exposes that Defendant to the most severe and extreme court sanctioned power, the power to be forcibly removed from one's place of abode.

25. By the express terms of the Master Order, the Court chose option three and dismissed the instant action without prejudice. Any further action or hearing on this case is therefore improper as the Court no longer holds jurisdiction over the matter and cannot render any further judgment for or against the Plaintiff.

26. The Master Order dismissing the case without prejudice leaves the parties as if no lawsuit was ever filed. Should the Plaintiff desire any additional relief from the Court, then, it must pay a new filing few and re-file its complaint under a different case number.

WHEREFORE, because the Master Order has already dismissed the instant action without prejudice, the Defendants respectfully request this Court deny the Plaintiff's Motion for

Summary Judgment, affirm that the instant action has been dismissed without prejudice pursuant to the terms of the Master Order, and any other relief that the Court may deem just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 22nd day of April, 2010 to BRIAN HUMMEL, COURTNEY E. NICHOLSON, and ANN M. CRUZ-ALVAREZ, Florida Default Law Group, P.L., P.O. Box 25018, Tampa, FL 33622-5018.

By: _____
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I#: 2009063913 BK: 16522 PG: 27, 03/13/2009 at 09:58 AM, RECORDING 7 KEN BURKE, CLERK OF COURT PINELLAS COUNTY, FL BY DEPUTY CLERK: CLKPR06

CIRCUIT COURT, PINELLAS COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

MASTER ORDER DISMISSAL CALENDAR NO. 102708-007

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 PLAINITFF, HAVING BEEN NOTICED THAT THE CAUSE OF ACTION WOULD BE DISMISSED ON DECEMBER 08, 2008, 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.

DONE AND ORDERED IN CHAMBERS IN CLEARWATER/ST. PETERSBURG, PINELLAS COUNTY, FLORIDA THIS 12 DAY OF Feb 2009.

Linda R Allan

HON LINDA R ALLAN

EXHIBIT "A"

MASTER ORDER DISMISSAL CALENDAR NO. 102708-007
PAGE 1

CASE NUMBER	PARTY	NOTE
08-008335-CI-007	ANY AND ALL UNKNOWN PARTIES ETC UNIVERSAL MORTGAGE CORPORATION D/B/A UFG MORTGAGE CHISHOLM JAMES ET AL	*
08-008335-CI-007	TENANT 1 ETC UNIVERSAL MORTGAGE CORPORATION D/B/A UFG MORTGAGE CHISHOLM JAMES ET AL	*
08-008335-CI-007	TENANT 2 ETC UNIVERSAL MORTGAGE CORPORATION D/B/A UFG MORTGAGE CHISHOLM JAMES ET AL	*
08-008335-CI-007	TENANT 3 ETC UNIVERSAL MORTGAGE CORPORATION D/B/A UFG MORTGAGE CHISHOLM JAMES ET AL	*
08-008335-CI-007	TENANT 4 ETC UNIVERSAL MORTGAGE CORPORATION D/B/A UFG MORTGAGE CHISHOLM JAMES ET AL	*
08-008366-CI-007	TENANT 1 ETC US BANK N A CARDEN TAMMY D ET AL	
08-008366-CI-007	TENANT 2 ETC US BANK N A CARDEN TAMMY D ET AL	
08-008366-CI-007	TENANT 3 ETC US BANK N A CARDEN TAMMY D 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).

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.)

* * *

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.

Page 350

Arthur Joel Berger, for appellant.

Cole White & 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 Yildrim (the driver of the vehicle) (collectively "Appellees"), seeking damages for injuries sustained in an automobile accident that occurred on October 16, 1993.**[fn1]** 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.**[fn2]** Attached with the

Page 351

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.").

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.
Page 352
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.
Page 353

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
Page 354
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

rule is to say that if good cause or excusable neglect has been shown, then the court **must** extend the time and does not have discretion to do anything else.

However, as already stated, even where there is no showing of good cause or excusable neglect, the court still must make a decision whether to extend the time for service – and where the statute of limitations has run, that discretion should be exercised in favor of extending the time for service.

The substantial problem with the majority opinion is that it is squarely in conflict with the Florida Supreme Court's opinion in Thomas as well as the plain words of amended Rule 1.070(j). The majority opinion says that the plaintiff's entitlement to an extension of time depends on whether excusable neglect is shown. That interpretation is dead wrong.

III.

For the reasons stated, I would reverse the order under review and remand with directions to reinstate plaintiff's complaint and grant an extension of time in which to serve the defendants.

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.[fn1] An alias summons was issued on May 2000, and service was accomplished

on June 16, 2000, by serving IMPAC-CONN's registered agent in Brist 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),[fn2] 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

gave an example to illustrate the need for the amendment. Id. The example given was the identical situation before this court, in which a dismissal without prejudice would preclude refiling because the statute of limitations had run. Id. Thus, the supreme court amended the rule to give a trial court broad discretion to extend the time for service even when good cause has not been shown.

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
Page 104
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. Yet, in a case such as this, where the statute of limitations has run, we agree with Judge Cope that:

> 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.

Skrbic v. QCRC Assocs. Corp., **761 So.2d 349**, **354** (Fla. 3d DCA 2000) (Cope, J., concurring in part and dissenting in part). Thus, we conclude that because the statute of limitations had run and service had been obtained at the time of the hearing on the motion to dismiss, the trial court abused its discretion in not extending the period of time for service.

Reversed and remanded for further proceedings.

BLUE, C.J., and DAVIS, J., Concur.

[fn1] The record does not reflect a ruling on this motion.

[fn2] Florida Rule of Civil Procedure 1.070(j) was amended again on February 17, 2000, in Totura & Co. v. Williams, **754 So.2d 671** (Fla. 2000), and now provides:

> **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. If a motion for leave to amend or proposed amended complaint sufficiently identifies the new party or parties and contains a short statement of facts for which relief will be demanded, the 120-day period for service of amended complaints 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

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.

Page 361

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

issued on October 1, 2007. This summons was successfully served on Davalle's husband on October 16, 2007 at the same address as was listed on the original summons and the alias summons.

Rule 1.070 of the Florida Rules of Civil Procedure provides a trial judge with broad discretion in granting an extension of time to serve process. *See* Fla.R.Civ.P. 1.0700'); *Chaffin v. Jacobson*, **793 So.2d 102**, **103** (Fla. 2d DCA 2001). The pertinent text of rule 1.0700) states the following:

> **(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
>
> **Page 362**
>
> the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period. . . .

In effect, rule 1.070(j) provides the trial court with three options: "(1) direct that service be effected within a specified time; (2) dismiss the action without prejudice; or (3) drop that defendant as a party." *Chaffin*, **793 So.2d at 103-04**. As such, even if no showing of good cause or excusable neglect is presented, the trial court has the option to exercise its discretion to extend the time for service. *Id.; Carter v. WinnDixie Store, Inc.*, **889 So.2d 960** (Fla. 1st DCA 2004).

In *Chaffin*, the trial court granted a motion to dismiss without prejudice because of the plaintiffs failure to perfect service within the 120-day time limit set forth in rule 1.070(j). *Chaffin*, **793 So.2d at 103**. The statute of limitations had run on the claim, which effectively turned the motion to dismiss into a dismissal with prejudice. *Id.* At the hearing on the motion to dismiss, the trial court failed to address that it could extend the period for service even without a showing of good cause or excusable neglect, thereby avoiding what turned into a dismissal with prejudice. *Id.* As such, the Second District reversed on the basis that "because the statute of limitations had run and service had been obtained at the time of the hearing on the motion to dismiss, the trial court abused its discretion in not extending the period of time for service." *Id.* at 104 (agreeing with Judge Cope's concurring opinion in *Skrbic v. QCRC Assocs. Corp.*, **761 So.2d 349**, **354** (Fla. 3d DCA 2000) that in a situation where the statute of limitations has run, discretion must be exercised in accordance with Florida's policy in favor of resolving civil disputes on the merits).

Here, Premier's Motion for Reconsideration was denied on the merits because the trial court determined that Premier made "no showing of anything done to perfect service within the first 120 days." The circumstances of this case, including that the process server was incorrectly told that Davalle was unknown at the address specified on the summons, and the fact that

Davalle was ultimately served at this same address, suggest that the process server was purposely led astray by Davalle's daughter. However, we do not address whether the trial court abused its discretion in determining that no showing of good cause was made during the 120-day service period. We do find error in the trial court's failure to consider that it was permitted to grant an extension of time for service, even without a showing of good cause. *Winn-Dixie*, **889 So.2d 960** (reversing the trial court's order on the basis that it was unclear whether the trial court was aware that, if the circumstances of the case warranted such extension, it could extend the time for service even without a showing of good cause.) We note that neither side afforded the trial court with the applicable case law. Accordingly, we reverse and remand.

Reversed and remanded.

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.[1] 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 or 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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[1]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).

* * *

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

GLENDA SLY, 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,[1] 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,

application of Rule 1.070(j) often resulted in harsh consequences: "such as where noncompliance triggered dismissal without prejudice, but expiration of the statute of limitations would preclude refiling of the action. Thus, in such a situation, dismissal for procedural noncompliance could have the practical effect of dismissal with prejudice." *Totura & Co. v. Williams*, 754 So. 2d 671, 677 (Fla. 2000) (citing *Amendment to Florida Rule of Civil Procedure 1.070(j)-Time Limit for Service*, 720 So. 2d 505, 505 (Fla. 1998)) (internal citation omitted).

In the order granting Appellees' motion to dismiss, the trial court found that Appellant had failed to demonstrate good cause or excusable neglect for the delay and service. The trial court then explicitly noted that the statute of limitations had run and acknowledged that the ruling would terminate all further proceedings. In situations where the statute of limitations has run, the trial court should normally exercise discretion in favor of giving the plaintiff additional time to perfect service. *Chaffin v. Jacobson*, 793 So. 2d 102, 104 (Fla. 2d DCA 2001) ("[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.") (quoting *Skrbic v. QCRC Assocs. Corp.*, 761 So. 2d 349, 354 (Fla. 3d DCA 2000) (Cope, J., concurring in part and dissenting in part)). Where the statute of limitations has run, "[d]iscretion in these circumstances must be exercised with the understanding that Florida has a longstanding policy in favor of resolving civil disputes on the merits." *Id. Brown v. Ameri Star, Inc.*, 884 So. 2d 1065, 1067 (Fla. 2d DCA 2004) (recognizing that the intent that of Rule 1.070(j) is to "serve as 'a case management tool' and not as 'a severe sanction.' ") (citing *Chaffin v. Jacobson*, 793 So. 2d 102, 103-04 (Fla. 2d DCA 2001)).

Because the statute of limitations had run and service had been obtained prior to the hearing on the motion to dismiss, we conclude that the trial court abused its discretion in granting the motion to dismiss. *See Chaffin*, 793 So. 2d at 104; *see also, Kohler v. Vega-Maltes*, 838 So. 2d 1249, 1250-51 (Fla. 2d DCA 2003).

Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion. (BARFIELD, CLARK and ROWE, JJ., CONCUR.)

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[1]If the plaintiff can demonstrate good cause or excusable neglect, then the trial court *must* grant an extension for time of service. *See* Fla. R. Civ. P. 1.070(j).

* * *

District Court of Appeal of Florida,
Third District.
DERMA LIFT SALON, INC., a Florida corporation, B. G. Gross, M.D., and Francis Maschek,
Petitioners,
v.
Honorable Edward SWANKO, Acting Circuit Court Judge, of the Eleventh Judicial Circuit,
Respondent.

No. 82-1767.
Oct. 5, 1982.

Defendants in medical malpractice action sought writ of prohibition. The District Court of Appeal, Daniel S. Pearson, J., held that, when trial court dismissed action without prejudice and later denied motion for rehearing, its jurisdiction over the cause terminated and it could not thereafter vacate the order of dismissal.

Petition granted.

West Headnotes

[1] KeyCite Citing References for this Headnote

314 Prohibition
314I Nature and Grounds
314k8 Grounds for Relief
314k10 Want or Excess of Jurisdiction
314k10(2) k. Particular Acts or Proceedings. Most Cited Cases

Writ of prohibition was appropriate remedy for defendants who challenged jurisdiction of court in final order in action after dismissing the action and denying rehearing.

[2] KeyCite Citing References for this Headnote

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k78 Nature and Scope of Decision
30k78(4) k. Judgment of Dismissal or Nonsuit. Most Cited Cases

30 Appeal and Error KeyCite Citing References for this Headnote
30VII Transfer of Cause
30VII(A) Time of Taking Proceedings
30k343 Commencement of Period of Limitation
30k345.2 k. Petition for Rehearing or Bill of Review. Most Cited Cases
(Formerly 30k345(2))

Trial court's order of dismissal, albeit without prejudice, was a final appealable order subject to the further jurisdiction of the trial court only upon a timely-filed motion for rehearing or on the court's own initiative within the time for a rehearing motion and, when motion for rehearing was denied, trial court lost jurisdiction over the cause and could not later vacate its order of dismissal. West's F.S.A. Rules Civ.Proc., Rules 1.530, 1.540.

***1180** Harvey Richman, Miami Beach, for petitioners.

No appearance for respondent.

Before DANIEL S. PEARSON, FERGUSON and JORGENSON, JJ.

DANIEL S. PEARSON, Judge.

[1] The petitioners, who are defendants below in a medical malpractice action, contend that the trial court, having entered a final order dismissing the action and denied rehearing thereon, lost jurisdiction over the action and should be prohibited from the further exercise of jurisdiction. The remedy they seek is appropriate. *City of St. Petersburg, Florida v. The Circuit Court of the Sixth Judicial Circuit,* --- So.2d ---- (Fla. 2d DCA 1982) (Case No. 82-1372, opinion filed July 14, 1982); State v. Gooding, 149 So.2d 55 (Fla. 1st DCA 1963).

On May 11, 1982, the trial court entered an order dismissing without prejudice an action brought by the plaintiff, Maria Oshiro, as personal representative of the estate of Jose Oshiro. The basis of the dismissal was that the plaintiff had persistently and continuously failed to comply with rules of discovery and orders of the court to enforce discovery. Plaintiff's timely motion for rehearing of this order of dismissal was denied on July 19, 1982. On July 20, 1982, the plaintiff filed a motion to set aside the order denying rehearing. On August 18, 1982, the trial court vacated the order denying rehearing and, *sub silentio,* vacated the order of dismissal by ordering that the "litigation is reinstated and reopened and Plaintiff may go forward with this cause of action."

[2] The trial court's order of dismissal entered May 11, 1982, albeit "without prejudice," was a final appealable order, Gries Investment Company v. Chelton, 388 So.2d 1281 (Fla. 3d DCA 1980), subject to the ***1181** further jurisdiction of the trial court only upon a timely filed motion for rehearing under Florida Rule of Civil Procedure 1.530, *see* Snyder v. Gulf American Corporation, 224 So.2d 405 (Fla. 2d DCA 1969), or on its own initiative within the time allowed for a rehearing motion. When the plaintiff's motion for rehearing was denied by the trial court on July 19, 1982, the trial court's jurisdiction over the cause terminated.[FN1] *City of St. Petersburg, Florida v. The Circuit Court of the Sixth Judicial Circuit, supra. See* Nahoom v. Nahoom, 341 So.2d 257 (Fla. 3d DCA 1977); *State v. Gooding, supra.*

FN1. The plaintiff's motion to set aside the order denying rehearing contained no allegations which could arguably bring it within Florida Rule of Civil Procedure 1.540.

Accordingly, the petition for writ of prohibition is granted. The trial court is directed to quash its order of August 18, 1982, and to reinstate the order of dismissal. We assume it will not be necessary to issue the writ.

Fla.App. 3 Dist.,1982.
Derma Lift Salon, Inc. v. Swanko
419 So.2d 1180

District Court of Appeal of Florida, Fourth District.
HAFT-GAINES COMPANY, a Delaware Corporation, Relator,
v.
The Honorable Thomas J. REDDICK, Judge of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Respondent.

No. 77-844.
Oct. 12, 1977.

After the parties to a civil action filed a stipulation for dismissal of that action and the Circuit Court, Broward County, Thomas J. Reddick, J., dismissed the action with prejudice, the court held that it retained equity jurisdiction to entertain a motion to enforce a settlement agreement between the parties. On an application for a writ of prohibition, the District Court of Appeal, Letts, J., held that the trial court's jurisdiction terminated after the final order of dismissal.

Writ of prohibition granted.

West Headnotes

KeyCite Citing References for this Headnote

307A Pretrial Procedure
307AIII Dismissal
307AIII(A) Voluntary Dismissal
307Ak517 Effect
307Ak517.1 k. In General. Most Cited Cases
(Formerly 307Ak517)

Trial court's jurisdiction over civil action terminated when it dismissed such action with prejudice on parties' motion, and court could not thereafter entertain motion to enforce settlement agreement under which dismissal had been obtained. 30 West's F.S.A. Rules of Civil Procedure, rule 1.420.

***818** Frank E. Maloney, Jr. of Fleming, O'Bryan & Fleming, Fort Lauderdale, for relator.

Robert L. Shevin, Atty. Gen., Tallahassee, and Harry M. Hipler, Asst. Atty. Gen., West Palm Beach, for respondent.

Howard I. Weiss of Levine & Fieldstone, P. A., Miami, for Steve Weil.

LETTS, Judge.

The Writ of Prohibition is Granted.

The facts are that the plaintiff and the defendant entered into an out of court settlement of this cause confirmed by letter.[FN1] In accordance with this settlement, attorneys for both sides executed and entered into a "Stipulation for Dismissal" filed with the court which read in toto:

FN1. The terms and contents of this letter are disputed.

COME NOW the parties Steve Weil and Haft-Gaines Company by and through their undersigned attorneys and stipulate that this action may be dismissed in accordance with Florida Rule of Civil Procedure 1.420 with prejudice to both parties.

The disputed letter of settlement is not, and never was, a part of the record below, nor will we permit it to become so on appeal. Pursuant to the stipulation set forth above, the court then entered a final order on the basis thereof which simply said, "This action is dismissed . . . with prejudice to both parties."

No further pleadings were attempted until twenty-four days later when the plaintiff below filed a motion in the same cause to "compel return of property." As grounds, this motion set forth that the defendant below had failed to give over certain property pursuant to the out of court letter of settlement already referred to. Surprisingly, the prayer, at the conclusion of this motion, sought compensatory and punitive damages, costs and attorneys fees.

Predictably, a motion to dismiss was filed in opposition and the trial court correctly granted the motion to dismiss noting that it was without jurisdiction but that its ruling was without prejudice to the plaintiff below "to file a new law suit."

Four months after the original order of dismissal pursuant to the written stipulations therefor, the plaintiff below next filed in the same cause a "motion to enforce settlement agreement" which once again sought, in the prayer, compensatory and ***819** punitive damages, fees and costs. There then ensued a hearing relative to a further motion to dismiss whereat the court concluded that it had all along retained equity jurisdiction. An order was then entered setting the cause for jury trial.

We hold that the trial court's jurisdiction terminated after the final order of dismissal, pursuant to the joint stipulation, both as to subject matter and person. Shelby Mutual Insurance Company v. Pearson, 236 So.2d 1 (Fla.1970). See also Cannon Sand and Rock Company v. Maule Industries, 203 So.2d 636 (Fla. 3rd DCA 1967).

The Writ of Prohibition is hereby granted. The trial court has no jurisdiction and the scheduled jury trial may not take place.

ALDERMAN, C. J., and DOWNEY, J., concur.

Fla.App. 1977.
Haft-Gaines Co. v. Reddick,
350 So.2d 818

END OF DOCUMENT

EPSTEIN et al.
v.
FERST et al.

April 30, 1895.

Appeal from circuit court, Madison county, John F. White, Judge.

Bill by Epstein & Bro. and Eckstein & Co. against M. Ferst & Co., F. R. Sweat, and T. T. Ellison. From the decree rendered, plaintiffs appeal. Affirmed.

West Headnotes

KeyCite Citing References for this Headnote

228 Judgment
228II By Confession
228k53 k. Confession After Action Brought in General. Most Cited Cases

A clerk of a circuit court has no authority to enter judgment on confession, made without service of process, when no suit was pending, without appearance by defendant, and without proof of the execution of the confession of judgment.

KeyCite Citing References for this Headnote

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k565 k. Judgment Without Prejudice. Most Cited Cases

A decree stating that the same is without prejudice to a party will not support a plea of res judicata as to such party.

KeyCite Citing References for this Headnote

186 Fraudulent Conveyances
186III Remedies of Creditors and Purchasers
186III(C) Right of Action to Set Aside Transfer, and Defenses
186k241 Conditions Precedent
186k241(2) k. Necessity of Judgment. Most Cited Cases

Holders of void judgments are not judgment creditors and cannot attack conveyances made by their debtors as fraudulent.

Syllabus by the Court

1. A decree of a court of chancery stating that the same is without prejudice to a party is, as to such party, the same as no decree, and will not support a plea of res adjudicata, and the same matters in issue in the original suit can be again heard and determined.

2. A plaintiff on November 2, 1885, filed a declaration with common counts, but no bill of particulars. No praecipe had been filed or process issued in the case, the declaration being the first paper filed. Together with such declaration was a paper which, after stating venue and title of the cause, was in the following form: 'And now comes Farley R. Sweat, defendant in this cause, and waiving process of summons, or other notice, and says that he acknowledges that he is indebted to the plaintiff [naming him] in the sum of five hundred and twenty-three 09-100 dollars, with interest at seven per centum per annum from the first day of October, A. D. 1885, as alleged in his declaration; that he consents that the plaintiff have judgment for said sum, to be entered on the first Monday in November, A. D. 1885. Oct. 31st, 1885. F. R. Sweat.' The clerk, upon this paper, without proof of the execution of the same, or appearance of defendant, entered a judgment for the amount named in the paper. *Held*, that such judgment was without authority of law, and was void.

3. Clerks of the circuit court in this state have no authority to enter judgments upon such a confession as is set forth in the preceding headnote, made without service of process, when no suit is pending, no appearance of defendant, and there is no proof of the execution of the confession of judgment.

4. Parties having void judgments are not judgment creditors, so that they can attack fraudulent conveyances made by their debtors.

***499** ****414** J. N. Stripling, for appellants.

***505** S. Pasco and C. W. Stevens, for appellees.

***508** LIDDON, J.

Appellants filed their bill of complaint in the circuit court against the appellees. The respective firms of complainants alleged that they were judgment and execution creditors of the defendant F. R. Sweat, and the purpose of the bill was to set aside, as fraudulent against creditors, a mortgage upon a stock of merchandise made by said Sweat to his codefendants Ferst & Co. The defendant T. T. Ellison was made a party because he had been appointed a receiver in proceedings by Ferst & Co. to foreclose the said mortgage, and had, by virtue of an order of the court, taken possession of the mortgaged property. The complainants in the present case, upon their own application, had been made parties defendant in the foreclosure proceedings of Ferst & Co. against Sweat, and had sought, as prior lienors and judgment creditors, to defeat the mortgage upon substantially the same allegations of fraud as are contained in their bill of complaint in the present case. In such proceedings they had filed an answer and a cross bill. Their answer, being considered as a demurrer, was overruled, and on demurrer thereto the cross bill was dismissed. This order of dismissal was general, but the said defendants (complainants in the present case), upon notice, afterwards, obtained a modification of the decree, wherein it was decree 'that the ***509** decree of this court * * * whereby the demurrer of the defendants I. Epstein & Bro. and G. Eckstein & Co. to the bill of complaint was overruled, and the demurrer of the complainants to the cross bill of the defendants I. Epstein & Bro. and G. Eckstein & Co. was sustained, and cross bill dismissed, be, and the same is hereby, modified so that the same shall be without prejudice to the rights of the defendants I. Epstein & Bro. and G. Eckstein & Co. to take such other proceedings as they ****415** may be advised is necessary to assert their rights.'

The defendant answered the bill of complaint, and the first matter of defense urged in the answer is that the matters thereof had already, in the proceedings of Ferst & Co. v. Sweat et al., been adjudicated in defendant's favor. Various other matters were alleged in the pleadings, and testimony was taken by the respective parties.

Such portions of the pleadings and proof as are necessary to the proper understanding of the points decided in this opinion will be hereinafter referred to. The bill of complaint on final hearing was dismissed, and from this decree and appeal is taken.

First, as to the defense of res adjudicata: The present complainants were parties, upon their own motion, to the proceedings in which the mortgage now sought to be attacked was foreclosed. It is useless to discuss whether, in such proceedings, their rights in the matter were, or could have been, properly adjudicated. By the paractically unanimous agreement of the authorities, a decree of a court of chancery-especially one dismissing a bill of complaint, and stated to be without prejudice to a party-is, as to such party, the same as no decree, and will not support a plea of res adjudicata. The very same matters in issue in the original suit can ***510*** be again heard and determined. 2 Daniell, Ch. Pl. & Prac. (6th Ed.) 994; 2 Beach, Mod. Eq. Prac. § 644. In a late decision in Rhode Island (Reynolds v. Hennessy, 17 R. I. 169, text 175, 20 Atl. 307, and 23 Atl. 639), we find the following: 'The court dismissed the bill without prejudice to the right of the complainant to prosecute the present action at law, which had then been brought. The intention and effect of such a reservation in a decree are, by express terms, to prevent it from operating as a bar to another suit. A dismissal 'without prejudice' leaves the parties as if no action had been instituted. Magill v. Trust Co., 81 Ky. 129; Lang v. Waring, 25 Ala. 625; Durant v. Essex Co., 7 Wall. 107, 109; Ballentine v. Ballentine (Pa.) 15 Atl. 859. It has been held that such a reservation prevents the bar, even though it has been erroneously incorporated in the decree. Wanzer v. Self, 30 Ohio St. 378; Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466.' See, also, Northern Pac. R. Co. v. St. Paul, M. & M. Ry. Co., 47 Fed. 536; County of Mobile v. Kimball, 102 U. S. 691, text 695; Railroad Co. v. Davis, 62 Miss. 271; Ragsdale v. Railroad Co., Id. 480; 2 Black, Judgm. § 721.

The complainants in the suit of Ferst & Co. v. Sweat et al. prosecuted their bill for foreclosure to final decree. This final decree is not in the record. We cannot tell whether complainants in the present case were or were not named as parties defendant in said decree, or whether the case was treated as dismissed, as against said defendants. The burden of proving this defense rested upon the defendants, and, in the absence of the ***511*** final decree from the record, we cannot say the present complainants were parties defendant to it. From such of the record as is before the court, they seem to have been eliminated from the case. From what has been said, it follows that there was no efficacy in the defense of a former adjudication.

The complainants claim to be judgment creditors of the defendant Sweat. It is conceded that it is necessary that they should be such judgment creditors, before they can maintain their present suit. The defendants Ferst & Co., in effect, deny that the complainants are such judgment creditors; alleging in their answer that, so to the judgments and executions upon which the complainants base their claims, defendants are informed and believe that the same are illegal and void, and deny that the same were properly obtained. The judgments in favor of the two complainants severally were practically in the same form (a slight difference between them being hereinafter noted). The declaration in either case contained only common counts, but contained all the usual common counts known to the law. No bill of particulars was attached to either declaration, and both were filed November 2, 1885. On the same day, in the case of Eckstein against the defendant Sweat, was filed a paper in the following words and figures:

'In the Circuit Court, Madison County, Fla. Gustave Eckstein, Doing Business under the Name and Style of Gustave Eckstein & Co., vs. Farley R. Sweat. And now comes Farley R. Sweat, defendant in this cause, and waiving process of summons, or other notice, and says that he acknowledges that he is indebted to the plaintiff, Gustave Eckstein, doing business under the name and style of Gustave Eckstein & Co., in the sum of five hundred and twenty-three 09-100 ***512*** dollars, with interest at seven per centum per annum from the first day of October, A. D. 1885, as alleged in his declaration; that he consents that the plaintiff have judgment for said sum, to be entered on the first Monday in November, A. D. 1885. Oct. 31st, 1885. F. R. Sweat. Attest: J. N. Stripling.'

A similar paper, except that the signature of Sweat was not attested, and the amount of indebtedness mentioned was $769.48, was filed in the case of Epstein & Bro. v. Sweat. Judgment in the same form was entered in each case. The Eckstein judgment was as follows:

'In the Circuit Court, Third Judicial Circuit of Florida. Madison County. Gustave Eckstein, Merchant, Doing Business under the Firm Name of Gustave Eckstein & Co., vs. Farley R. Sweat. And now, this, the 2nd day of November, A. D. 1885, comes the plaintiff, by his attorney, W. R. Boyd, and moves for a final judgment; and the defendant, Farley R. Sweat, having waived ***416** process of summons and further notice, and consenting to a judgment for the amount specified in the plaintiff's declaration, with interest at 7 per cent. from the first day of October, 1885, and the damages having been assessed by the clerk at five hundred and twenty-six dollars and fourteen cents ($526.14), principal and interest, therefore it is considered by the court that the plaintiff, Gustave Eckstein, do recover of and from the defendant, Farley R. Sweat, the sum of five hundred and twenty-six 14-100 ($526.14) dollars, together with their costs, now taxed at one 43-100 ($1.43) dollars, and that the said plaintiff have execution therefor. * * *'

***513** It does not appear that there was any process, or praecipe for same, in the case. The question arises, what is the force and effect of such a judgment? Can a clerk of the circuit court, who is purely a ministerial officer, with only statutory powers, enter a valid judgment in a proceeding of this kind? Admitting such a paper to be a confession of judgment, had the clerk the authority to enter a judgment upon such a confession, made without service of process, when no suit was pending, and without any appearance by the defendant, or any proof that he executed such a confession. Clearly, there is no statutory authority for such action in this state. The only statutes at that time upon our statute books providing for judgments by confession were expressly limited to the courts of justices of the peace. McClel. Dig. p. 642, § 63; Id. p. 643, § 71; Id. p. 630, § 6, subd. 7. The only circumstances in which the clerk could enter a judgment in an ordinanry action at law are set forth in the statute (Id. p. 822, § 36). Judgment upon confession before suit brought is not included in the act. We think the judgment void for want of any power or jurisdiction to enter it. The paper purporting to be a confession of judgment did not specially authorize the clerk to enter it. Admitting, for the sake of the argument, that the clerk might, under any circumstances, enter a judgment upon a confession of judgment before suit brought, he could not do so under the circumstances of the present case. We think the judgment void, not only for want of jurisdiction over the subject-matter, but for want of jurisdiction over the person of the defendant. It is not shown that the defendant appeared in the case. There was no proof before the clerk that the defendant signed the paper upon ***514** which judgment was entered. All that can be said of it is that it purported to be signed by the defendant. It would be a most dangerous doctrine to permit clerks to enter judgments upon papers of this character without any proof that they are genuine. Even in those states which permit a judgment to be taken upon a power of attorney given for that purpose, it is held that judgments entered upon such powers of attorney, without proof of their execution, are void for want of jurisdiction obtained of the defendant. Gardner v. Bunn, 132 Ill. 403, 23 N. E. 1072.

From what has been said, it follows that the complainants (appellants here) are not judgment creditors, and are not in a situation to attack the fraudulent conveyance by their debtor. This being the situation, all that part of the record alleging and tending to prove a fraudulent conveyance is excluded from the consideration of the case.

There is no error in the record, and the decree of the circuit court is affirmed.

Fla. 1895
EPSTEIN v. FERST
35 Fla. 498, 17 So. 414

Supreme Court of Florida, Special Division B.
ROUNTREE et al.
v.
ROUNTREE et al.

April 20, 1954.
Rehearing Denied June 8, 1954.

Suit to partition land. The Circuit Court for Columbia County, R. H. Rowe, J., rendered a decree of dismissal, and plaintiffs appealed. The Supreme Court, Drew, J., held that where two necessary parties defendant had not filed answers or had decrees pro confesso entered against them, cause was not at issue, though other defendants had filed answer, and that it was reversible error to dismiss suit on ground that testimony had not been taken within the time allowed.

Decree reversed with directions.

West Headnotes

[1] KeyCite Citing References for this Headnote

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)14 Dismissal
30k1061.2 k. In General. Most Cited Cases
(Formerly 30k1061(2))

150 Equity KeyCite Citing References for this Headnote
150VI Taking and Filing Proofs
150k350 k. Time for Taking. Most Cited Cases

Where two necessary parties defendant had not filed answers or had decrees pro confesso entered against them in suit to partition land, though other defendants had filed answer, the cause was not at issue within meaning of equity rule limiting the time for taking testimony, and it was reversible error to dismiss suit on ground that testimony had not been taken within the time allowed. 31 F.S.A. Rules of Equity, rules 39, 46.

[2] KeyCite Citing References for this Headnote

150 Equity
150VI Taking and Filing Proofs
150k350 k. Time for Taking. Most Cited Cases

Until all defendants have filed answers or had decrees pro confesso entered against them in equity suit, cause is not at issue and plaintiffs are not entitled to an order of reference for the taking of testimony. 31 F.S.A. Rules of Equity, rules 39, 46.

[3] KeyCite Citing References for this Headnote

150 Equity

150VI Taking and Filing Proofs
150k350 k. Time for Taking. Most Cited Cases

Equity rule providing that cause shall be deemed at issue at expiration of 10 days from the filing of answer relates to question of whether cause is at issue between plaintiff and defendant or defendants filing answer. 31 F.S.A. Rules of Equity, rule 39.

[4] KeyCite Citing References for this Headnote

150 Equity
150VI Taking and Filing Proofs
150k350 k. Time for Taking. Most Cited Cases

For cause to be at issue within meaning of equity rule limiting the time for taking testimony, the issue must appear to have been made up between all of the parties, except those against whom decrees pro confesso have been entered, and one of numerous defendants cannot by merely filing an answer, start the time running within which plaintiff must prove his case. 31 F.S.A. Rules of Equity, rules 39, 46.

[5] KeyCite Citing References for this Headnote

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k565 k. Judgment Without Prejudice. Most Cited Cases

Decree of dismissal, expressly providing that it was without prejudice to rights of plaintiffs or any of them to institute a new suit, was not res adjudicata of any rights of the parties and did not bar subsequent suit for partition of land.

***794** J. B. Hodges, Lake City, for appellants.

Brannon & Brown, Lake City, for appellees Alex Rountree, Jr., and his wife, Essie Rountree, Eddie Rountree and his wife, Gladys Rountree, L. A. Dicks and L. N. Bailey.

A. K. Black, Lake City, for appellees Nina Parnell Cole and Mamie Rountree.

DREW, Justice.

On October 2, 1952, plaintiffs in the lower court, appellants here, some 28 in number, filed a complaint for partition of forty acres of land alleging in substance that they and each of eleven named defendants, except defendants L. A. Dicks and L. N. Bailey, had an interest in the land by reason of being heirs of Anderson Rountree, Sr., and his wife Rachel, but that certain of the defendants were claiming the whole of the land and had purported to lease a portion thereof to Dicks, who had assigned the lease to Bailey. Plaintiffs prayed for determination of the ***795** respective interests of the parties for partition thereof with an accounting for rents from said lease, and for other relief.

On February 10, 1953, Alex Rountree, Jr., and his wife, Essie Rountree, Eddie Rountree and his wife Gladys Rountree, L. A. Dicks, and L. N. Bailey, six of the defendants below, appellees here, jointly filed an answer in the cause and also filed separately a motion to dismiss the complaint. Without a ruling having been obtained on the motion to dismiss, the same defendants, on May 12, 1953, filed another motion to dismiss the complaint on the grounds that, 'Defendants' answer was filed February 10, 1953, at which time issue was joined. * * * Time for

taking testimony expired on April 10, 1953, and no effort was made in behalf of the plaintiffs to extend the time.'

On May 25, 1953, pursuant to this latter motion, the court entered the following final decree:

'This cause came on to be heard upon certain of the defendants' motion to dismiss filed May 11, 1953, for failure of plaintiffs to take testimony within the time provided by law. The answer in said cause was filed February 10, 1953, and the Court deems it at issue ten days thereafter. Within the ten day period plaintiffs filed motion to strike certain portions of the answer.

'The Court considered the motion to dismiss filed May 11, 1953, as being in the nature of a motion for decree on bill and answer, and the time for taking testimony having long since expired, and neither party having asked for additional time in which to take testimony, or having shown good cause for the extension of time, the Court is of the opinion that the motion should be granted and the cause dismissed.

'It is, thereupon, Ordered, Adjudged and Decreed that this cause be and the same is hereby dismissed, with prejudice, at the cost of the plaintiffs.'

In addition to the motion to dismiss filed on February 10, 1953, there was pending at the time of the entry of the final decree various motions by plaintiffs and other defendants. We further observe that at the time of the decree, neither the defendant Mamie Rountree, who was insane but represented by guardian ad litem appointed by the Court October 29, 1952, nor the defendant Nina Parnell Cole, who was represented by counsel of record, had filed answers in the cause.

[1] [2] Aside from the matter of entry of the above decree for failure to take testimony, while yet was pending and undisposed of a motion to dismiss (see Storm v. Houghton, 156 Fla. 793, 24 So.2d 519), we think it was clearly error to determine the cause was at issue before either an answer had been filed or a decree pro confesso had been entered as to each of the defendants. The defendants Mamie Rountree and Nina Parnell Cole were necessary parties to the partition action. Lovett v. Lovett, 93 Fla. 611, 112 So. 768. Until all of the defendants had filed answers or had decrees proconfesso entered against them, the cause was not at issue, and the plaintiffs could not be entitled to an order of reference for the taking of testimony. See Grimsley v. Rosenberg, 94 Fla. 673, 114 So. 553; Slaughter v. Abrams, 101 Fla. 1141, 133 So. 111.

The Rosenberg case was a mortgage foreclosure wherein all defendants had answered or defaulted, except certain minor defendants, at the time an order of reference was entered. In declaring that phase of the procedure to be error, this Court stated [94 Fla. 673, 114 So. 554], 'There is clearly no occasion for the appointment of an examiner to take testimony upon the pleadings until an issue is presented, and in the instant case no issue was presented on behalf of the minor defendants until the answer of the guardian was filed.'

The Abrams case was a mortgage foreclosure action wherein constructive service of process upon one of the defendants was defective. After observing that the purported service could not support the decree pro confesso entered, this Court stated [101 Fla. 1141, 133 So. 112], 'it is irregular***796*** and improper practice to refer a suit in chancery to a master for the purpose of taking testimony therein before all the issues are properly made up.'

[3] Whether the cause here was at issue under Equity Rule 39, 31 F.S.A., as between the appellants and the appellees, ten days from the filing of the answer, is really not the point here at all. This rule obviously relates to the question of when the cause is at issue between the plaintiff and the defendant or defendants filing the answer.

[4] ☑ The real question arises under Equity Rule 46, which provides that 'two months from the time *a cause is at issue* and no longer shall be allowed for the making [taking] of testimony in any cause, * * *.' (Emphasis supplied.) This rule obviously refers to the time the *cause* is at issue, and for the *cause* to be at issue, the issue must appear to have been made up between all of the parties, except those against whom decrees pro confesso have been entered. Where there are many defendants, some may immediately file answers, whereas others, for numerous reasons, may be difficult to serve with process, or, if immediately brought into the litigation, may consume much time in preliminary proceedings before filing an answer. It was never intended that one of numerous defendants could, by merely filing an answer, start, the time running within which the plaintiff must prove his case.

In the instant case the cause was not at issue even at the time of entry of the final decree. For this reason the decree of the court appealed from deprived the plaintiffs of a fair opportunity to present their case on its merits, and constituted reversible error.

[5] ☑ Appellees cross-assigned error in the court's failure to conclude the plaintiffs' action on grounds of res adjudicata. The decree upon which this contention rests was one of dismissal entered July 8, 1952, and which expressly provided that it was 'without prejudice to the rights of the plaintiffs or any of them to institute a new suit as may be deemed advisable, * * *.' Without question that decree of dismissal 'without prejudice' settled no rights of the parties and was no bar to the subsequent action. Compare Field v. Field, Fla., 1953, 68 So.2d 376.

The decree appealed from is reversed with directions to permit the parties to proceed in accordance with the views herein expressed.

ROBERTS, C. J., THOMAS, J., and WISEHEART, Associate Justice, concur.

Fla. 1954
ROUNTREE v. ROUNTREE
72 So.2d 794

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