

SUPREME COURT OF FLORIDA

TALLAHASSEE MEMORIAL REGIONAL MEDICAL
CENTER, INC.; A.D. BRICKLER, M.D.;
AND FLORIDA PATIENT'S COMPENSATION FUND,

Defendants/Petitioners,

vs.

BARBARA JEAN GANT and
LEON GANT, JR.,
her Husband,

Plaintiffs/Respondents.

DCA CASE NO. BI-182

SUPREME COURT

CASE NO. 69,063

ANSWER BRIEF OF RESPONDENTS
BARBARA JEAN GANT and LEON GANT, her Husband
ON APPEAL FROM THE
CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, LEON COUNTY,
AND THE FIRST DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Respondents will hereinafter be referred to as GANT. Petitioners will hereinafter be referred to as TMRMC, THE FUND and BRICKLER.

STATEMENT OF THE CASE AND FACTS

GANT adopts the statements of the case and of the facts set forth by TMRMC, THE FUND, and BRICKLER.

SUMMARY OF ARGUMENT

GANT urges the Court to affirm the ruling of the lower Court.

GANT asserts that the untimely filing of a Motion to Dismiss for Failure to Prosecute under Rule 1.420(e), Florida Rules of Civil Procedure, constitutes record activity (if not a "pleading" then "otherwise") within the meaning of the rule. As the Appellant Court correctly found, the filing of the motion hastens the conclusion, resolution or disposition of the case and this is record activity sufficient to toll the one year rule.

ARGUMENT

DOES THE UNTIMELY FILING OF A MOTION
TO DISMISS FOR FAILURE TO PROSECUTE
CONSTITUTE RECORD ACTIVITY, AND
RE-START THE ONE YEAR PERIOD FOUND
IN RULE 1.420(e), FLORIDA RULES OF
CIVIL PROCEDURE?

When a defendant files an untimely Motion to Dismiss for Failure to Prosecute, the filing of the Motion itself undeniably constitutes record activity. Inman, Inc. v. Miami Dade Water and Sewer Authority, 489 So.2d 218 (Fla. 3rd DCA 1986.) The one year starts to run again from the date of the untimely filing. There is no question that the Motion to Dismiss for Lack of Prosecution filed by THE FUND, was untimely and the Court correctly so held. (See, Paragraph 2, Order on Appeal, Appendix "A"). Florida East Coast Railway Company v. Russell, 398 So.2d 949 (4th DCA 1981), pet. rev. den. 411 So.2d 381, accord Parker v. Gordon, 442 So.2d 273 (4th DCA) citing Johnson v. Mortgage Investors of Washington, 410 So.2d 541, and Russell, supra., and Zentmeyer v. Ford Motor Company, Inc., 464 So.2d 673 (Fla. App. 5th Dist. 1985) citing Johnson and Russell, supra.

THE FUND urges this Court to find that a defendant should be allowed to file its motion at anytime before the expiration of the year of no record activity, then call the motion up for hearing after the year expires and be entitled to dismissal if there is no intervening record activity. If this were the law, a defendant could entrap an unwary plaintiff by filing the motion late in the year, since the plaintiff would probably not have

time, nor think it necessary, to react between the time he received the motion and the expiration of the year. The rule should not be construed in such a manner. The purpose of the rule is to advance or further a cause to conclusion, resolution or disposition. An untimely motion to dismiss for failure to prosecute certainly accomplishes the purpose of the rule as the Appellant Court found citing most of the cases relied upon by THE FUND, BRICKLER and TMRMC (see Page 4 of the Opinion in Appendix "B").

It appears to GANT that the Court in Inman, Inc., supra., concludes that although a premature motion is undeniably record activity, it does not "advance" the cause to resolution, citing Overseas Development, Inc. v. AmeriFirst Federal Savings and Loan Association, 433 So.2d 587 (Fla. 3rd DCA). Advance means "to move something forward in position, time or place," Black's Law Dictionary with Pronunciations, 5th Edition.

The rule does not list those activities of record that will prevent dismissal. Presumably, the committee could have listed such activities had it chosen to do so. (Compare rule 9.300(d), Florida Rules of Appellate Procedure). Therefore, undeniable record activity having been established by the premature filing of the motion according to Inman, supra., the cause is certainly moved forward in "position, time or place."

TMRMC and BRICKLER argue that the premature motion filed by THE FUND does not constitute a pleading. Without addressing that

argument, suffice it to say, that the rule embraces other record activity in that said activity can be "pleadings, order of court or otherwise" (emphasis supplied).

CONCLUSION

Logic dictates that the one year period terminates upon the untimely filing of a Motion to Dismiss for Failure to Prosecute, since the motion is either record activity in the form of "pleading, order of court or otherwise" (emphasis supplied). If not, an unsuspecting Plaintiff might let the remainder of the year run during the pendency of the dismissal proceedings and a Defendant could file a second motion on a timely basis before the first motion was heard and properly denied. Likewise, the filing of any pleading, order of court or otherwise that advances the cause should restart the one year period. Clearly, such an untimely filing undeniably constitutes record activity within the meaning expressed in the Rule and advances the cause to resolution.

The untimely filing of the Motion to Dismiss for Failure to Prosecute in this cause is record activity within the one year period of Rule 1.420(e), Florida Rules of Civil Procedure, and the Court below should be affirmed.

RESPECTIVELY SUBMITTED on this 8th day of September, 1986.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing Answer Brief of Respondents Barbara Jean Gant and Leon Gant, her Husband on Appeal from the Circuit Court, Second Judicial Circuit, Leon County, and the First District Court of Appeal has been furnished by U.S. Mail to: John D. Buchanan, Jr., P. O. Drawer 1049, Tallahassee, Florida, 32302 and Craig A. Dennis, Collins, Dennis & Williams, P. O. Box 550, Tallahassee, Florida, 32302, on this 8th day of September, 1986.



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