

April 2003

THE LACK OF PROSECUTION "GOT YA" RULE MARCHES ON

by Ted Babbitt

RCP 1.420(e) has been the subject of an extraordinary amount of judicial labor and intellectual consternation. That Rule provides that if the record on its face shows lack of activity for one year, the Court on its own motion or on the motion of any party, shall dismiss the action for failure to prosecute unless the nonmoving party shows to the Court's satisfaction within five days prior to a hearing on that subject why good cause exists not to dismiss the action. Initially, the Court must review the court file to determine whether anything has been filed within the past year. If there is nothing of record, the burden shifts to the nonmoving party to demonstrate in writing within five days before the hearing that there is a basis for precluding dismissal. Metropolitan Dade County v Hall, 784 So.2d 1087 (Fla. 2001).

Any trial lawyer knows that a lot can be going on in a case despite the lack of evidence of such activity in the court file itself. Depositions and interrogatories are not routinely filed in the court file yet they can take up an enormous amount of the time taken in moving the case forward to a conclusion. Prior to the decision of the Supreme Court in Metropolitan Dade County, supra, District Courts had held that the taking of a deposition without filing it did not constitute record activity. See eg. Smith v DeLoach, 556 So.2d 786 (Fla. 2nd DCA 1990), Levine v Kaplan, 687 So.2d 863 (Fla. 5th DCA 1997). While the Supreme Court's

opinion in Metropolitan Dade County, supra, clarified that the taking of a deposition or the making of an offer of judgment are, as a matter of law, activity designed to move the case forward and thus prevent the granting of a dismissal, the Courts have held that numerous other actions which one would think constitute activity do not constitute sufficient effort to prevent a dismissal. See eg. National Enters., Inc. v Foodtech Hialeah, Inc., 777 So.2d 1191, 1193 (Fla. 3rd DCA 2001) (filing of two notices of hearing is not sufficient activity); Nesbitt v Community Health of S. Dade, Inc., 566 So.2d 1 (Fla. 3rd DCA 1989) (notices, pleadings or orders related to the withdrawal and substitution of counsel are insufficient to prevent dismissal); Brennan v Ryter, 339 So.2d 661 (Fla. 1st DCA 1976), cert. den. 348 So.2d 944 (notices of trial insufficient); Norflor Const. Corp. v City of Gainesville, 512 So.2d 266 (Fla. 1st DCA 1987), rev. den. 520 So.2d 585 (certain Court orders and plaintiff's responses to such orders are not sufficient); Moossun v Orlando Regional Health Care, 760 So.2d 193 (Fla. 5th DCA 2000) (order setting case management conference are insufficient to prevent dismissal); Buss Aluminum Products, Inc. v Crown Window Co., 651 So.2d 694 (Fla. 2nd DCA 1995) (plaintiff's reply to defendant's answer does not stay dismissal).

Recently the Supreme Court has added to the list of things that do not satisfy the requirements of RCP 1.420(e) to preclude dismissal. Fishbones-Sand Lake Road, Inc. v Allen, 28 F.L.W. S89 (Fla. Jan. 23, 2003) was a case in which a case management conference was not only scheduled by the Court but was

attended by counsel during the one year period. The Supreme Court declined to accept jurisdiction to overrule the trial judge's order dismissing this action. In his dissent, Justice Lewis echoes the feelings of many authors who have criticized the very existence of RCP 1.420(e) and questioned the judicial interpretations validating the harshness of that Rule:

The result of the Court's decision in this case is an ever-widening circle of Floridians being artificially precluded from pursuing their legal rights due to an unjustifiably high bar for access to the judiciary created by misguided rule interpretations. . . . I cannot agree that the scheduling of a case management conference and counsel's actual participation in a case management conference would not constitute sufficient record activity under rule 1.420(e) to preclude dismissal of the case for failure to prosecute.

The very fact that there are reams of appellate decisions on the subject of this Rule and its application speaks volumes as to the need to revise or eliminate this Rule. It is only cases where the dismissed party (invariably the plaintiff) wants to stay in Court that this Rule becomes an anathema. No party would go to the trouble and expense of appealing a Circuit Court's order unless the statute of limitations had run and the Rule was being used to prevent a party from receiving its day in Court. The Rule is presumably designed to rid trial courts of cases which clog dockets without hope that those cases will ever be concluded. Yet, the fact that these appellate opinions exist shows that the Rule is being used

to dismiss cases which parties wish to pursue. Why else would they be appealed in the first place?

It is hard to understand the justification for keeping this rule in existence. A case in which the parties genuinely have no intention of pursuing can be easily disposed of by motion for summary judgment, motion to dismiss or dozens of other means which would not be vigorously opposed by a party who had no intention of pursuing an action. On the other hand, the dismissal of even one case which the plaintiff genuinely wishes to pursue is an injustice resulting from the misuse of this rule. One would hope that the Civil Procedure Rules Committee would recommend this rule's abolition but, in the meantime, all parties should be aware of this "got ya" rule and be certain that sufficient record activity exists to preclude its misuse.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.