

RECORD ACTIVITY AND GOOD CAUSE ON A MOTION
TO DISMISS FOR FAILURE TO PROSECUTE
by Ted Babbitt

R.C.P. 1.420(e) provides that if it appears on the face of the record that no activity has taken place within one year, the Court shall, on its own motion or on a party's motion, dismiss for failure to prosecute unless the action has been stayed or the nomoving party can show in writing within five days prior to the hearing why good cause exists not to dismiss the action. Courts have held that a dismissal under this rule is mandatory and that the trial court has no discretion with respect to that issue when the record is devoid of action within a year. Little v Sullivan, 173 So.2d 135 (Fla. 1965). The only time the trial judge has discretion is on the issue of good cause. Little, supra at 136.

This rule has been criticized as both harsh and unnecessary. The effect of a dismissal for lack of prosecution is only important when the statute of limitations has run so that the case can't be refiled. When that occurs, it is often said that the action, which was originally brought, is replaced by a legal malpractice action.

The Supreme Court has given guidance as to what constitutes record activity and the procedure to establish that activity or alternatively show good cause in the case of Metropolitan Dade County v Hall, 784 So.2d 1087 (Fla. 2001). In that case, plaintiff's deposition was taken within the year prior to the

time a motion to dismiss for lack of prosecution was made. In addition, an offer of judgment was made during that period as well. The Circuit Court held that since neither of these activities were of record, the good cause requirement was triggered and that the plaintiffs failed to show good cause why the matter should not be dismissed and thus granted the motion. Both the Second and Fifth Districts would have affirmed the trial court's action in this case.

In Smith v DeLoach, 556 So.2d 786 (Fla. 2nd DCA 1990), the Second District held that the filing of a deposition was not record activity and unless the plaintiffs could show that they were prevented from further prosecuting their action, the mere filing of those depositions would not constitute good cause under the second step of the rule.

In Levine v Kaplan, 687 So.2d 863 (Fla. 5th DCA 1997), the Fifth District agreed with the Second holding that the mere taking of a deposition did not constitute record activity and further held that where the plaintiff could not show a compelling reason why the case was not prosecuted, the mere filing of the deposition would not constitute good cause.

In the underlying District Court case of Hall v Metropolitan Dade County, 760 So.2d 1051 (Fla. 3rd DCA 2000) the Third District disagreed with the Second and Fifth and held that as a matter of law the taking of a deposition is a step calculated to hasten the suit to judgment and the taking of that deposition within

the preceding year automatically defeats a motion to dismiss for lack of prosecution. See Hall at 1052.

The Supreme Court opinion in this case affirmed the Third District using more complex reasoning to reach the same result. The Supreme Court effectively amended Rule 1.420(e) by providing a structure as to how a party can show that activity such as the taking of a deposition or an offer of judgment precludes a dismissal under the rule. The Supreme Court held that the first step of Rule 1.420(e) requires only that the trial court review the record to see whether anything is filed within the requisite time period or not. Assuming that there is nothing in the record, the burden then shifts to the nonmoving party to demonstrate in writing no later than five days prior to the hearing that there is a basis upon which dismissal should not proceed. The Court held that the making of an offer of judgment or the taking of a deposition are, as a matter of law, good cause to avoid dismissal if taken in good faith to move the case forward but that the nonmoving party is obliged to notify the trial court within the five day period of the existence of those depositions or offer of judgment in order to preclude dismissal.

In this case, there was no activity on the face of the record as required by rule 1.420(e). The issue in the case therefore becomes whether the offer of judgment and depositions taken but not filed were activities in the case that were done in good faith and moved the case forward to a conclusion so as to meet the good cause basis for not dismissing

the action. Hall's deposition was taken, and Hall served the County with an offer of judgment. We hold that, within the meaning of rule 1.420(e), depositions taken and offers of judgment made in accordance with the Florida Rules of Civil Procedure are good cause to avoid dismissal if the depositions and offers are taken and made in good faith to move the case forward to a conclusion. For the purpose of the application of rule 1.420(e), depositions and offers of judgment are to be treated as if they had been filed in the record, except that when there is no record activity for a year, the depositions and offers of judgment taken during that year must be brought to the Court's attention in writing at least five days before a hearing on a motion for dismissal based on rule 1.420(e).

By holding that Rule 1.420(e) is to be interpreted to provide that offers of judgment and depositions form a part of the record even if not filed so long as a party notifies the Court of their existence within the five day rule, the rule itself precludes the dismissal regardless of who took the deposition or made the offer since there is, as a matter of law, record activity within the one year period.

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