

ON APPEAL TO THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

BRYAN A. GRAYDON,  
Appellant,

v.

JAMES TRIZIS,  
Appellee.

SMALL CLAIMS #05-000680SC-423  
CIRCUIT APPEAL #07-000033AP-88B

FILED  
2007 DEC -3 AM 10:36  
JAMES TRIZIS  
BRYAN A. GRAYDON  
CIRCUIT COURT IN PINELLAS COUNTY

ORDER AND OPINION  
AND REMAND

**THIS CASE** is before this Court pursuant to a Notice of Appeal filed by the Plaintiff/Appellant on July 3, 2007. The Court having reviewed Appellant's Amended Initial Brief, having reviewed the file, and being otherwise advised in the premises,

**FINDS AND ORDERS** the following:

1. This case began on January 31, 2005, when the Plaintiff/Appellant filed his *pro se* Statement of Claim in the Small Claims Division of the Pinellas County Court. He claimed that the Defendant owed him monies for work done and materials furnished by Plaintiff to Defendant.
2. The Statement of Claim was finally served on the Defendant on or about October 24, 2005, and the case was scheduled for a pretrial conference on November 1, 2005. The pretrial conference order and notice of trial signed by the hearing officer on November 1, 2005, reflects that both the Plaintiff and Defendant appeared, *pro se*, at the pretrial conference, and that the trial was scheduled for 1 p.m., February 8, 2006. The pretrial conference order required the parties to provide copies of documents and witness lists to each other no later than twenty (20) days prior to the trial.
3. On January 18, 2006, the Plaintiff filed his compendium of documents and witness lists consisting of over 50 pages. The Defendant filed nothing.
4. Then, the day before the trial, on February 7, 2006, an attorney on behalf of the Defendant filed a notice of appearance and also a motion to dismiss based on statute of limitations and a motion for judgment on the pleadings. At the time of trial, on February 8, 2006, the Court granted the Plaintiff's motion to continue so that the Plaintiff could

PINELLAS COUNTY FLORIDA  
INST# 2008324226 12/05/2008 at 08:19 AM  
OFF REC BK: 16443 PG: 1321-1324  
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look into hiring an attorney. The Court gave the Plaintiff twenty (20) days to obtain counsel, after which the Defendant could then schedule any pending motions for hearing. This Order was entered on February 15, 2006.

5. On February 28, 2006, the Plaintiff filed his motion to extend time to obtain legal counsel. The Plaintiff indicated in his motion that he had some health issues and he was requesting until March 20, 2006, to obtain counsel. Previously, on March 2, 2006, the Defendant's attorney had filed a notice of hearing for his motion to dismiss setting a hearing for March 23, 2006. Yet, the day before the hearing, the Defendant's attorney filed a notice cancelling the hearing.
- ~~6. The next document that appears in the Court file is the Notice of Intent to Dismiss for Failure to Prosecute issued by the Clerk of the Court on October 25, 2006. This Notice of Intent to Dismiss for Failure to Prosecute indicates that the Court will dismiss the case pursuant to Rule 7.110(e) on November 27, 2006, unless a statement in writing showing good cause why the case should remain pending is filed at least five (5) days prior to November 27, 2006. It also indicates that no hearing will be held by the Court unless specifically requested and scheduled on the Court's calendar.~~
7. On November 22, 2006, the Plaintiff timely filed his two-page typed statement to the Court indicating his intention to proceed with the case and wanting to set the case for trial as soon as possible. The Plaintiff also explained that in the process of making arrangements to proceed in this case he had an emergency hospitalization on September 9, 2006, and since that date remained under the care of a physician and that his condition had limited his ability at that time to coordinate the case.
8. It then appears that there was little record activity in the case from the time that the Plaintiff filed his timely notice of intent to prosecute the case on November 22, 2006, until March of 2007 when it is indicated that the Plaintiff was contacting the judge's office to coordinate trial dates. The record indicates that the Plaintiff obtained several trial dates from the Court, and that he then wrote a letter to the Defendant's attorney dated March 20, 2007, indicating five different trial dates in May and June.
9. The Court file then contains a "Memorandum" issued by the trial judge indicating that the Court had received the Plaintiff's request to set the matter for trial but that it would be necessary to have motion hearings prior to the trial. This Memorandum also states that

the Plaintiff's motion to allow case to remain pending, Plaintiff's motion to amend Complaint, and Plaintiff's motion to set cause for half-day trial are scheduled for hearing on April 26, 2007.

10. The next activity in the Court file is the "Order on Court's Motion to Dismiss for Lack of Prosecution" entered by the Court on May 2, 2007, wherein the Court simply finds in Paragraph 6 that the Plaintiff failed to show good cause why the Court should not dismiss the action. Plaintiff filed a motion for rehearing, but this motion for rehearing was denied by the Trial Court when it entered its Order Denying Plaintiff's Amended Emergency Motion for Rehearing on June 12, 2007. Plaintiff then timely filed his Notice of Appeal herein.
11. The Florida Constitution provides that our trial courts will be open and accessible to our citizens to address all legitimate grievances with the primary concern of the courts to ensure that cases are resolved on their merits. A collateral concern, however, is to ensure that resolution of cases is not impaired by processing meritless cases or cases that are filed then abandoned. Thus, as indicated by the Florida Supreme Court, we have devised a mechanism pursuant to our rules to identify the "dead wood" in the system, but we must be careful not to "throw out the baby with bath water." Wilson v. Salamon, 923 So.2d (Fla. 2005).
12. In view of the foregoing, and considering the present case, it appears that the Plaintiff/Appellant engaged in significant activity to initiate and begin prosecuting his Statement of Claim. Pursuant to the Pretrial Order, on January 18, 2006, he complied with the Pretrial Conference Order and filed extensive documentation relative to his documents and witnesses. The Defendant never filed anything but showed up on the date of trial with a lawyer. Thereafter, there was little record activity for several months and, pursuant to the rule, 7.110(e), the Clerk generated a Notice of Intent to Dismiss for Failure to Prosecute giving the Plaintiff time within which to show good cause why the case should remain pending. In response, the Plaintiff timely submitted in writing his various reasons why the case should remain pending including his emergency hospitalization.
13. Although the Plaintiff filed his written statement on November 22, 2006, as to why the case should remain pending, this was not disposed of by the Court until the hearing on

April 26, 2007, almost five (5) months later. Thus, where the intent of the rule is to weed out the "dead wood" in the system, here, the length of time that it took the Court to act upon the Notice of Intent to Dismiss was almost as long as the lack of record activity in the case. The Trial Court failed to timely act on the Notice of Intent to Dismiss and the Plaintiff's written response. Moreover, it is clear that the Trial Court itself was actively involved in offering to the Plaintiff future trial dates. Yet, notwithstanding that the Plaintiff was trying to set the case for trial, the Trial Court instead issued a "Memorandum" setting various motions for a hearing on April 26, 2007, and then dismissed the case for lack of prosecution.

14. It is clear to this panel that the Trial Court abused its discretion in dismissing this case.

See: Noughton v. Hooker, 941 So.2d 1176 (Fla. 2d DCA 2006); Lang v. Mason, 911 So.2d 167 (Fla. 2d DCA 2005).

15. Reversed and remanded.

**DONE AND ORDERED** in Chambers at St. Petersburg, Pinellas County, Florida, this

2<sup>nd</sup> day of December, 2008.

Original opinion entered by Circuit Judges J. Thomas McGrady, Peter Ramsberger, and Amy M. Williams

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