IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

HEALTH DIAGNOSTICS OF ORLANDO, LLC d/b/a STAND UP MRI OF SW FLORIDA a/a/o DENIS CATANIA,

Appellant,

v.

MERCURY INSURANCE COMPANY OF FLORIDA,

Appellee.
_____/

CASE NO.: 2012-CV-46
Lower Case No.: 2011-SC-1235

Appeal from the County Court, in and for Orange County, Florida, Judge Antoinette D. Plogstedt.

Thomas Andrew Player, Esquire
for Appellant.

Diane H. Tutt, Esquire
for Appellee.

Before LEBLANC, J. RODRIGUEZ, APTE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellant, Health Diagnostics of Orlando, LLC d/b/a STAND UP MRI OF SW FLORIDA a/a/o Denis Catania ("Health Diagnostics"), brought an action for breach of contract seeking personal injury protection ("PIP") benefits from Appellee, Mercury Insurance Company of Florida ("Mercury"). Health Diagnostics filed a timely appeal of the trial court's "Final Order" entered June 5, 2012 dismissing the action for lack of prosecution. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

On or about February 9, 2011, Health Diagnostics filed an action for breach of contract seeking PIP benefits, alleging that the benefits had been improperly denied or underpaid by Mercury. The lawsuit was docketed by the Clerk of Court on February 14, 2011. On February 15, 2011, the trial court issued a Summons/Notice to Appear for Pretrial Conference, which required the parties to appear at a pre-trial conference on March 21, 2011. Counsel for both parties appeared at the pre-trial conference, at which time counsel for Mercury filed a Notice of Appearance and its Answer and Affirmative Defenses. Litigation proceeded in the trial court, including discovery and various motions. There was a lull in trial court activity between a hearing set on September 8, 2011 and March 25, 2012 upon which date the trial court sua sponte issued a Motion and Notice for Judgment of Dismissal for lack of prosecution. On May 4, 2012, Health Diagnostics filed its Showing of Good Cause to Avoid Dismissal. On June 5, 2012, the trial court, finding that good cause had not been shown, entered a Final Order dismissing the action without prejudice that Health Diagnostics now appeals.

Standard of Review

Although dismissals for lack of prosecution are without prejudice, and not res judicata, they are final for purposes of appellate review. *Swait v. Swait*, 958 So. 2d 552, 553 (Fla. 4th DCA 2007). Generally, the standard of review of a trial court's dismissal of a cause of action for failure to prosecute is abuse of discretion. *Sewell Masonry Co. v. DCC Construction, Inc., et al.*, 862 So. 2d 893, 896 (Fla. 5th DCA 2003), *rev. dismissed*, 870 So. 2d 823 (Fla. 2004). However, the abuse of discretion standard is triggered only if the trial court must make a determination of good cause. *Swait* at 553. The trial court's application of a rule of procedure is reviewed under a de novo standard. *Saia Motor Freight Line, Inc. v. Reid, et al.*, 930 So. 2d 598, 599 (Fla. 2006).

Discussion

Arguments

Health Diagnostics argues on appeal that because its action for PIP benefits was brought in small claims court in which both parties were represented by counsel, this Circuit's Administrative Order No. 2009-12 governing small claims PIP cases applies and automatically invokes the Florida Rules of Civil Procedure in all small claims PIP cases, including Florida Rule 1.420(e) that requires a period of inactivity for 10 months before a motion to dismiss for lack of prosecution can issue.[1] Therefore, Health Diagnostics argues that the trial court erred when it issued its own Motion and Notice for Judgment of Dismissal and then the Final Order because, instead, it incorrectly applied Florida Small Claims Rule 7.110(e) that provides for dismissal after 6 months of inactivity.[2] Health Diagnostics points out that prior to March 25, 2012 when the trial court issued its Motion and Notice for Judgment of Dismissal, the last recorded activity was a hearing held on September 9, 2011, equating to a period of inactivity of 6 months and 18 days.[3] Thus, Health Diagnostics argues that because Rule 1.420(e) requires a

[1] Florida Rule of Civil Procedure 1.420(e) (2012) in addressing the failure to prosecute states: In all actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred. If no such record activity has occurred within the 10 months immediately preceding the service of such notice, and no record activity occurs within the 60 days immediately following the service of such notice, and if no stay was issued or approved prior to the expiration of such 60-day period, the action shall be dismissed by the court on its own motion or on motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing, at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

[2] Florida Small Claims Rule 7.110(e) (2012) in addressing the failure to prosecute states: All actions in which it affirmatively appears that no action has been taken by filing of pleadings, order of court, or otherwise for a period of 6 months shall be dismissed by the court on its own motion or on motion of any interested person, whether a party to the action or not, after 30 days' notice to the parties, unless a stipulation staying the action has been filed with the court, or a stay order has been filed, or a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending.

[3] The court record includes court minutes for a hearing set for September 8, 2011 noting that the parties resolved the issues prior to the hearing.

lack of record activity for 10 months before notice is issued, the notice was premature and the subsequent Final Order dismissing the action was issued in error and must be reversed.

In addition, Health Diagnostics argues that even if the trial court's Motion and Notice for Judgment of Dismissal could somehow be construed as having been brought under Rule 1.420(e) and be construed as not being premature, the trial court engaged in a determination of "good cause" which was unnecessary under the Rule because on May 11, 2012, one week prior to the hearing thereon, Health Diagnostics filed its Motion to Compel Deposition. Thus, Health Diagnostics argues that it clearly established record activity under the 60 day "safe harbor" grace period of the Rule and cites *Chemrock Corp. v. Tampa Electric Co.*, 71 So. 3d 786 (Fla. 2011) in support of this argument. Lastly, on December 26, 2012, Mercury in response to this appeal, filed its Confession of Error stating that it does oppose reversal of the Final Order.

Findings

Administrative Order No. 2009-12 became effective on November 1, 2009 and to date it has remained in effect. Paragraph 2 of the Administrative Order states "All of the Florida Rules of Civil Procedure are hereby invoked." [4] Accordingly, this Court concurs with Health Diagnostics that per the Administrative Order, Rule 1.420(e) applies to the instant action. Further, from review of the record, this Court also finds that there was not a lack of trial court activity for the required 10 months. In addition, even if there had been inactivity for 10 months, Health Diagnostics established record activity under the 60 day "safe harbor" grace period of the Rule. Accordingly, the trial court's Motion and Notice for Judgment of Dismissal and the Final Order dismissing the action for lack of prosecution were premature and thus, the Final Order must be reversed.

[4] The title of Administrative Order No. 2009-12 is "Administrative Order Governing Small Claims Pre-Trial Conferences in PIP Cases". While the title of the Order only references pre-trial conferences, the provisions also address mediation, discovery, and make all Florida Rules of Civil Procedure applicable.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The trial court's Final Order entered June 5, 2012 dismissing the action without prejudice is **REVERSED** and this cause is **REMANDED** for further proceedings consistent with this opinion.

2. Appellant, Health Diagnostics' Motion to Tax Appellate Attorney Fees and Costs filed October 12, 2012 per sections 627.428 and 627.736, Florida Statutes, is **GRANTED** as to the attorney fees, conditioned on Health Diagnostics ultimately prevailing in the trial court action and the assessment of those fees is **REMANDED** to the trial court. Health Diagnostics is entitled to have costs taxed in its favor by filing a proper motion with the trial court pursuant to 9.400(a), Fla. R. App. P.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 6th day of February, 2013.

/S/_____
BOB LEBLANC
Circuit Judge

/S/_____
JOSE R. RODRIGUEZ
Circuit Judge

/S/_____
ALAN S. APTE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Thomas Andrew Player, Esquire,** Weiss Legal Group, P.A., 698 North Maitland Avenue, Maitland, Florida 32751, Appeals@weisslegalgroup.com, Player@weisslegalgroup.com; **Diane H. Tutt, Esquire,** Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow, & Schefer, P.A., 3440 Hollywood Blvd., Second Floor, Hollywood, Florida 33021, dtutt@conroysimberg.com, eservicehwdappl@conroysimberg.com on the 6th day of February, 2013.

/S/_____
Judicial Assistant