

MORGAN & MORGAN

Submitted via Florida E-Portal

September 18, 2024



10031084

Lonn Weissblum
Clerk of the Court
Fourth District Court of Appeal
110 South Tamarind Ave.
West Palm Beach, FL 33401

Re: *James Howell v. Yanier Hernandez and Committed To Trucking, LLC*
4th DCA Case No.: 4D2024-2393
Lower Court Case Nos.: 502022CA000941XXXX

Dear Mr. Weissblum:

Enclosed please find our credit card payment made through the Florida E-Portal in the amount of \$300.00 as payment of the Fourth DCA filing fee for the above referenced Notice of Appeal, which was filed with Palm Beach County Circuit Court on September 13, 2024 (see attached copy).

Thank you and should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

/s/ David L Luck
David L. Luck

DLL/jmp
Enclosures

cc: All counsel of record via Florida E-Portal

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 50-2022-CA-000941-XXXX-MB

JAMES HOWELL,

Plaintiff,

v.

YANIER HERNANDEZ and
COMMITTED TO TRUCKING, LLC,

Defendants.

_____ /

NOTICE OF APPEAL

In an abundance of caution, **NOTICE IS GIVEN** that Plaintiff-Appellant, JAMES HOWELL, appeals to the Fourth District Court of Appeal, the Order of this Court rendered on August 14, 2024, which dismissed Plaintiff's case for failure to appear at trial.

Two days later, on August 16, 2024, Plaintiff and Defendants timely filed a Fla. R. Civ. P. 1.530(b), (g) Joint Motion to Set Aside Order of Dismissal. In addition, while that Joint Motion to Set Aside remained pending, the parties filed a Join Amended Motion to Set Aside Order of Dismissal today, September 13, 2024. Conformed copies of the Dismissal Order and both Motions to Set Aside are attached as **Composite Exhibit A**.

This Court has not yet ruled on the parties' Joint Motions to Set Aside—and they both remain pending. However, given the jurisdictional nature of Rule 9.110(b)'s 30-day appeal deadline, Plaintiff files this protective Notice of Appeal within 30 days of this Court's August 16, 2024, Order of dismissal.

In addition, pursuant to Rules 9.110(l) and 9.020(h)(2)(C), Plaintiff will request that the Fourth District Court of Appeal hold this appeal in abeyance until this Court issues its ruling on the Joint Motions to Set Aside Order of Dismissal.

As noted in the Joint Amended Motion to Set Aside, the Order of Dismissal constitutes reversible error and should be rescinded to avoid the unnecessary expenditure of judicial and litigant resources in the Fourth District Court of Appeal. *See, e.g., Luley v. Danto Builders, LLC, 373 So. 3d 640, 641 (Fla. 4th DCA 2023)* (“The final order of dismissal simply stated the case was dismissed for failure to attend the conference. The order did not set forth any specific findings establishing that Plaintiffs willfully and contumaciously failed to attend.... Accordingly, because Plaintiffs’ due process rights were violated by the county court’s *sua sponte* dismissal of their action, we reverse the final order of dismissal and remand for further proceedings.”). Moreover, there is no basis to find a willful and contumacious failure to attend where, as here, Plaintiff’s lead trial counsel did not attend the pretrial conference because: **(A)** he had already notified the Court and all parties beforehand that he had a symptomatic Covid-19 infection; and **(B)** the parties, because of that circumstance, had a Joint Motion to Continue Trial pending.

CERTIFICATE OF SERVICE

I CERTIFY that on September 13, 2024, a true and correct copy of the foregoing was filed using the Florida Courts ePortal, which will serve e-filing notices on all counsel of record, including those listed below in the service list.

Respectfully submitted,

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/s/ David L. Luck

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COMPOSITE EXHIBIT A

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION AN
CASE NO. 50-2022-CA-000941-XXXX-MB

JAMES HOWELL,
Plaintiff/Petitioner

vs.

YANIER HERNANDEZ,
COMMITTED TO TRUCKING LLC,
Defendant/Respondents.

ORDER REGARDING DISMISSAL

THIS MATTER having come before the Court in the above referenced matter on August 14, 2024 and the Court being fully advised in the premis finds as follows:

[X] The Plaintiff failed to appear at Trial/Pre-Trial Conference/Status Hearing/Hearing on Damages/Hearing. This case is dismissed for failure to prosecute without prejudice. The Clerk shall close this case.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida.

FINAL DISPOSITION FORM
(Fla.R.Civ.P. Form 1.998)
THE CLERK IS DIRECTED TO CLOSE THIS
FILE MEANS OF FINAL DISPOSITION
Disposed by Judge

50-2022-CA-000941-XXXX-MB 08/14/2024
Scott Kerner
Scott Kerner Circuit Judge
ADMINISTRATIVE OFFICE OF THE COURT

50-2022-CA-000941-XXXX-MB 08/14/2024
Scott Kerner
Circuit Judge

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 50-2022-CA-000941-XXXX-MB

JAMES HOWELL,

Plaintiff,

v.

YANIER HERNANDEZ and
COMMITTED TO TRUCKING, LLC,

Defendants.

_____ /

JOINT MOTION TO SET-ASIDE ORDER OF DISMISSAL

COMES NOW the parties, by and through their counsel, and files this Joint Motion to Set-Aside the Court's Order of Dismissal dated August 14, 2024, and state as follows:

1. On the evening of August 12, 2024, Plaintiff's counsel tested positive for Covid-19, after having increased symptoms throughout the day.
2. On the morning of Tuesday, August 13, 2024, the Court notified the parties the case was called to trial to commence on Wednesday, August 14, 2024.
3. At 10:49 am on August 13, 2024, Plaintiff's counsel, by email, notified the Court of testing positive for Covid and that a motion for continuance would be filed.
4. The Moton for Continuance dated August 13, 2024, was accepted at 12:22:21 PM.
5. Throughout the day, Plaintiff's counsel called the Court's chambers in follow up on this matter.
6. At the close of the day, having not heard from the Court on this matter, Plaintiff's counsel conferred with Defense counsel and it was agreed that a member of Plaintiff's firm in the Palm Beach office, William Lewis, and Defense counsel would appear

- early morning to advise in-person the Court that Plaintiffs' counsel was symptomatic with Covid and was the only attorney of record for the Plaintiff, and thus, it would be prejudicial to the client to proceed with trial.
7. At 8:59 PM, the parties received an email from the Court confirming receipt of the information about Plaintiff's counsel condition and the motion for continuance. The email response further indicated, that if the parties were in agreement on a continuance, to submit an agreed order.
 8. The next morning at 6:23 AM, Defense counsel notified the Court there was no objection to submitting an agreed order for continuance.
 9. Thereafter, Plaintiff's counsel instructed his staff to prepare an agree order on the continuance, but before it was submitted the parties received that day the subject Order of Dismissal.
 10. On behalf of the parties, Plaintiff's counsel apologizes to the Court for causing any disruption on the trial docket and for not appearing in Court on Wednesday, August 14, 2024; I mistakenly assumed from the Court's email response the night before that submitting an agreed order on continuance properly addressed this matter. No disrespect was intended; I had made arrangements for a member of my firm to appear in Court on by behalf given medically I could not attend.
 11. The parties assert each side was prepared for trial on this docket and this was in no way an attempt to delay the trial.
 12. The dismissal of the case results in irreparable harm to the Plaintiff; the statute of limitation will have run on the cause of action.
 13. Attached is a copy of the Proposed Order.

WHEREFORE, the Plaintiff JAMES HOWELL and Defendants YANIER HERNANDEZ and COMMITTED TO TRUCKING, LLC, by and through their counsel respectfully request the Court enter an order setting aside the dismissal and placing this case on the next applicable trial docket.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail this __16th__ day of August 2024 to: John Richards, Esq. at servicefl@boyclawgroup.com.

/s/ Jason Gelinas

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/s/ John Richards

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**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

CASE NO: 50-2022-CA-000941-XXXX-MB

JAMES HOWELL,

Plaintiff,

v.

**YANIER HERNANDEZ AND
COMMITTED TO TRUCKING LLC,**

Defendant.

_____ /

COURT ORDERS SETTING ASIDE DISMISSAL

THIS CAUSE having come before this Court on the Party's Joint Motion to Set-Aside Order of Dismissal, dated August 14, 2024 it is ORDERED and ADJUDGED that:

1. Party's Joint Motion to Set-Aside Order of Dismissal dated August 14, 2024 is hereby **GRANTED**. This matter will be placed on the next applicable Trial Period.

DONE AND ORDERED in Chambers in Palm Beach County, Florida on the _____ day of _____, 20__.

Honorable Judge Scott Kerner
Circuit Court Judge

Cc: Jason Gelin, Esquire
John Richards, Esquire

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 50-2022-CA-000941-XXXX-MB

JAMES HOWELL,

Plaintiff,

v.

YANIER HERNANDEZ and
COMMITTED TO TRUCKING, LLC,

Defendants.

_____ /

AMENDED JOINT MOTION TO SET-ASIDE ORDER OF DISMISSAL

Pursuant to Fla. R. Civ. P. 1.530(a), (g), COMES NOW the parties, by and through their counsel, and file this Amended Joint Motion to Set-Aside the Court's Order of Dismissal dated August 14, 2024. In terms of the relief sought and the position taken, this motion is the same as that which the parties filed previously on August 16, 2024. The difference is that this motion expressly cites Rule 1.530 as the applicable procedural mechanism—however, Rule 1.530 was always the basis for both the initial and amended Motions. In addition, this Amended Motion also cites binding case law—including from the Fourth District—holding that the Court's dismissal Order constitutes reversible error, which must be remedied here or on appeal.

In further support, the parties state:

1. On the evening of August 12, 2024, Plaintiff's counsel tested positive for Covid-19, after having increased symptoms throughout the day.
2. On the morning of Tuesday, August 13, 2024, the Court notified the parties the case was called to trial to commence on Wednesday, August 14, 2024.

3. At 10:49 am on August 13, 2024, Plaintiff's counsel, by email, notified the Court of testing positive for Covid and that a motion for continuance would be filed.
4. The Moton for Continuance dated August 13, 2024, was accepted at 12:22:21 PM.
5. Throughout the day, Plaintiff's counsel called the Court's chambers in follow up on this matter.
6. At the close of the day, having not heard from the Court on this matter, Plaintiff's counsel conferred with Defense counsel and it was agreed that a member of Plaintiff's firm in the Palm Beach office, William Lewis, and Defense counsel would appear early morning to advise in-person the Court that Plaintiffs' counsel was symptomatic with Covid and was the only attorney of record for the Plaintiff, and thus, it would be prejudicial to the client to proceed with trial.
7. At 8:59 PM, the parties received an email from the Court confirming receipt of the information about Plaintiff's counsel condition and the motion for continuance. The email response further indicated, that if the parties were in agreement on a continuance, to submit an agreed order.
8. The next morning at 6:23 AM, Defense counsel notified the Court there was no objection to submitting an agreed order for continuance.
9. Thereafter, Plaintiff's counsel instructed his staff to prepare an agree order on the continuance, but before it was submitted the parties received, that day, the subject Order of Dismissal, which was expressly stated to be "without prejudice."
10. However, a dismissal "without prejudice" has the disastrous impact of a dismissal with prejudice where, as here, the applicable statute of limitations has run and would thereby bar the plaintiff's attempt to refile her, his, or its lawsuit. *See, e.g., Walden v. Adekola,*

773 So. 2d 1218, 1219 (Fla. 3d DCA 2000) (holding that where the statute of limitations has run, a dismissal without prejudice operates as a dismissal with prejudice). Florida jurisprudence does not countenance such final dismissals for the failure to attend a pretrial conference—particularly where, as here, there was an understandable reason for counsel’s lack of attendance (*i.e.*, a symptomatic COVID diagnosis and the agreement of all parties to continue the case):

[The trial court’s] dismissal without prejudice was **too severe a sanction** to impose upon [plaintiff], even if “good cause” did not exist [for counsel’s failure to personally attend the pretrial conference]. *See Catogas v. Sapp*, 397 So. 2d 1182, 1183 (Fla. 3d DCA 1981) (holding that where record lacks evidence of willful or flagrant disregard for court’s authority, dismissing complaint without prejudice for failure of counsel to appear is too severe a sanction to impose upon a litigant); *see also Garland v. Dixie Ins. Co.*, 495 So. 2d 785 (Fla. 4th DCA 1986) (holding dismissal of complaint without prejudice for failure of counsel to appear at pretrial conference was too severe a sanction where record did not show willful or intentional disregard of trial court’s order); *Anthony v. Schmitt*, 557 So. 2d 656, 662 (Fla. 2d DCA 1990) (holding that where order did not contain findings of willful disobedience by trial counsel, dismissal of complaint without prejudice for failure of plaintiff’s attorney to attend status conference, was too severe a sanction to impose upon plaintiff); *Dave’s Aluminum Siding, Inc. v. C & M Ventures*, 582 So. 2d 147 (Fla. 3d DCA 1991) (holding dismissal of complaint without prejudice for counsel’s failure to appear at case management conference was too severe a sanction where record lacked evidence that failure to appear was willful or flagrant disregard for court’s authority). The [trial court] abused his discretion by dismissing [plaintiff’s] complaint without prejudice and is hereby **REVERSED**.

Martinez v. Collier Cnty. Pub. Sch., 804 So. 2d 559, 561 (Fla. 1st DCA 2002); *see also, e.g., Petersen & Hawthorne, P.A. v. EMI Enters., Inc.*, 115 So. 3d 1064, 1064 (Fla. 4th DCA 2013) (applying the same rule and reversing the trial court’s dismissal for failure of counsel to attend the pretrial conference); *Luley v. Danto Builders, LLC*, 373 So. 3d 640, 641 (Fla. 4th DCA 2023) (“The final order of dismissal simply stated the case was dismissed for failure to attend the conference. The order did not set forth any specific

findings establishing that Plaintiffs willfully and contumaciously failed to attend.... Accordingly, because Plaintiffs' due process rights were violated by the county court's *sua sponte* dismissal of their action, we reverse the final order of dismissal and remand for further proceedings.”).

11. On behalf of the parties, Plaintiff's counsel apologizes to the Court for causing any disruption on the trial docket and for not appearing in Court on Wednesday, August 14, 2024; I mistakenly assumed from the Court's email response (received the night before the pretrial conference) that submitting an agreed order on continuance properly addressed this matter. No disrespect was intended; I had made arrangements for a member of my firm to appear in Court on my behalf given that medically I could not attend.

12. The parties assert each side was prepared for trial on this docket and this was in no way an attempt to delay the trial.

13. As noted above, the dismissal of the case results in irreparable harm to the Plaintiff; as the statute of limitation will have run on the cause of action regardless of the Court's use of the language “without prejudice.”

14. Attached is a copy of the Proposed Order granting the relief sought in this agreed Motion—to wit, rescinding the Order of Dismissal and reinstating this action so that it may be tried on its merits.

WHEREFORE, the Plaintiff JAMES HOWELL and Defendants YANIER HERNANDEZ and COMMITTED TO TRUCKING, LLC, by and through their counsel respectfully request the

Court enter an order setting aside the dismissal and placing this case on the next applicable trial docket.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed via the Florida Courts ePortal on September 13, 2024, which system will serve copies on all counsel of record, including John Richards, Esq. at servicefl@boydlawgroup.com.

/s/ Jason Gelinas

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