

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

APPELLATE DIVISION (CIVIL): AY  
CASE NO.: 502016AP900219CAXXMB  
L.T. NO.: 2015CC011321XXXXMB

BURTON H. WOLFE  
Appellant,

v.

NEXTERA ENERGY, INC.,  
FLORIDA POWER & LIGHT CO.,  
FPL ENERGY SERVICES, INC.,  
JEANETTE HALLAK, and  
PALM BEACH COUNTY SHERIFF'S OFFICE,  
Appellees.

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Opinion filed: **APR 21 2017**

Appeal from the County Court in and for Palm Beach County,  
Judge Frank S. Castor

For Appellant: Burton H. Wolfe, *pro se*  
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PER CURIAM.

Appellant, Burton Wolfe (“Wolfe”), appeals the trial court’s dismissal of his Amended Complaint. We find that the trial court erred by dismissing Wolfe’s action against NextEra Energy, Inc., Florida Power & Light Co., FPL Energy Services, Inc. (collectively “NextEra and FPL”) and Jeanette Hallak (“Hallak”), because the filing of a first amended complaint before service of the original complaint precluded dismissal. We affirm the dismissal of Wolfe’s action

against the Palm Beach County Sheriff's Office ("PBSO") because Wolfe failed to comply with presuit notice requirements and failed to state a cause of action for declaratory relief.

On October 28, 2015, Wolfe filed a lawsuit against NextEra and FPL for unjust enrichment as well as violations of the Florida Administrative Code and the Florida Deceptive and Unfair Trade Practices Act. Wolfe moved for a default against both defendants on December 9, 2015, and February 1, 2016, but the trial court denied both these motions because FPL and NextEra had not been served with process.

On March 28, 2016, the trial court entered an "Order Directing Plaintiff to Effect Service Upon Defendant(s)," finding that 120 days had elapsed since the filing of the complaint, Defendants still had not been served with process, and no court order had been entered extending the time for service. Citing to Florida Rule of Civil Procedure 1.070(j), the order provided that Wolfe had thirty (30) days from the date of the order to either serve process on Defendants or file a motion showing good cause or excusable neglect why the Defendants had not been served.

On April 15, 2016, Wolfe filed an Amended Complaint, keeping the original defendants and adding Jeanette Hallak and PBSO. Wolfe's Amended Complaint was served on PBSO on April 29, 2016, on Jeanette Hallak on May 3, 2016, and on NextEra and FPL on May 4, 2016.

The defendants all moved to dismiss the Amended Complaint. (1) Hallak, NextEra and FPL on the grounds that Wolfe failed to comply with the court order directing him to serve process on appellees within the 30 day time period set forth in the trial court's March 28, 2016, order; (2) Hallak on the alternative grounds that Wolfe failed to state a claim as to three claims against her; and (3) PBSO on the grounds that Wolfe failed to comply with conditions precedent for filing a negligence claim and that Wolfe failed to state a claim for a declaratory judgment. The trial court granted both motions and dismissed the case as to all defendants.

### **Dismissal as to Hallak, NextEra and FPL**

Pursuant to Florida Rules of Civil Procedure 1.070(j) and 1.190(a), this Court agrees with Wolfe that the Amended Complaint that he filed on April 15, 2016 (1) superseded the original Complaint, (2) rendered the March 28, 2016 order moot, and (3) set up a new time period for serving the Amended Complaint. Under Florida Rule of Civil Procedure 1.070(j), a plaintiff has 120 days to serve process upon a defendant. Although a plaintiff must generally serve the initial complaint within 120 days, a plaintiff has an absolute right to amend the complaint once as a matter of course before the responsive pleading is served. In *Boca Burger, Inc. v. Forum*, the Supreme Court of Florida held that “a judge’s discretion to deny amendment of a complaint arises only after the defendant files an answer or if the plaintiff already has exercised the right to amend once.” 912 So. 2d 561, 567 (Fla. 2005). The lower court had no discretion to dismiss the Amended Complaint because none of the defendants had filed an answer, nor had Wolfe ever previously amended the original Complaint. Although the court’s March 28 order required service of the original complaint on NextEra and FPL by April 28, 2016, Wolfe filed his Amended Complaint prior to the April 28 deadline and served the parties well within the new 120-day service period. Thus, the dismissal as to FPL and NextEra was in error and must be reversed.

The trial court also dismissed the claims against Hallak based upon the March 28, 2016 order. In addition to the foregoing, this ruling was in error because Hallak was not a party to the original complaint. However, Hallak had alternatively moved to dismiss on the grounds that Wolfe failed to state a claim as to counts IV, V, and VII. Wolfe stated in his answer brief that he was not pursuing count IV against Hallak and it is therefore moot.

### **Dismissal as to PBSO**

In reviewing the record, we find that Wolfe did not comply with presuit notice requirements for filing a negligence claim against PBSO. Pursuant to section 768.28(6)(a), Florida Statutes, “an action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality or the Florida Space Authority, presents such claim in writing to the Department of Financial Services or the appropriate agency denies the claim in writing.” Moreover, subsection (b) reads, “[f]or purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action.”

Wolfe has not alleged any facts showing he provided the necessary presuit notice to the Department of Financial Services. Wolfe’s mailing of a letter and the original complaint—to which PBSO was not a defendant—to PBSO on November 19, 2015, is not sufficient to satisfy section 768.28(6)(a)’s notice requirements. Additionally, Wolfe did not copy the Department of Financial Services as required by the statute. Therefore, we affirm the trial court’s order dismissing the complaint for failure to satisfy the notice requirement of section 768.28(6)(a), Florida Statutes. We also affirm based upon Wolfe’s failure to state a cause of action for declaratory relief.

Accordingly, we **REVERSE** the lower court’s dismissal of Wolfe’s Complaint against NextEra Energy, Inc., Florida Power & Light Co., FPL Energy Services, and Hallak. We **AFFIRM** the lower court’s dismissal of Wolfe’s Complaint against PBSO because Wolfe failed to comply with presuit notice requirements and failed to state a cause of action for a declaratory judgment.

GILLEN, ROWE, AND HAFELE, JJ., concur.

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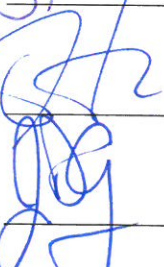

Appealed: August 10, 2016

DATE OF PANEL: FEBRUARY 21, 2017

PANEL JUDGES: GILLEN, ROWE, HAFELE

AFFIRMED/REVERSED/OTHER: REVERSE AND REMAND

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:	)
	)	With Opinion	)	With/Without Opinion	)
 4/20/17	)		)		)
_____ J.	)	_____ J.	)	_____ J.	)
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