

In the District Court of Appeal Fourth District of Florida

CASE NO. [REDACTED]
(Circuit Court Case No. [REDACTED])

[REDACTED]

Appellant,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS
NOMINEE FOR NOVASTAR MORTGAGE, INC.,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellant
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 793-5658
Facsimile: (866) 507-9888
Email: mail@icelegal.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE AND FACTS	1
A. Introduction – The Initial Complaint Is Filed by MERS.	1
B. Plaintiff’s Counsel Represents that the Use of MERS’ Name was a “Clerical Error” and Substitutes Wachovia Bank, N.A. as Plaintiff <i>Ex</i> <i>Parte</i>	2
C. Plaintiff Voluntarily Dismisses the Case.....	5
D. Wachovia Files a Second Case Against [REDACTED]	5
E. New Counsel Accidentally Appears for MERS, Withdraws.	6
F. [REDACTED] Moves to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b).	7
G. The Court Denies [REDACTED] Motion to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b) Without An Evidentiary Hearing.	8
SUMMARY OF THE ARGUMENT	9
STANDARD OF REVIEW	10
ARGUMENT	11
A. The Lower Court Erred in Summarily Denying [REDACTED] Rule 1.540 Motion Without an Evidentiary Hearing.	11
B. [REDACTED] Showing of a “Colorable Entitlement” to Relief Triggered the Requirement for an Evidentiary Hearing.	12

C. The Fraud Committed by Plaintiffs and their Counsel entitles
██████ to have the voluntary dismissal set aside.19

D. Fraudulent Foreclosures Which Undermine the Integrity of the Court
System Are Matters of Great Public Importance.24

CONCLUSION26

CERTIFICATE OF SERVICE27

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD28

TABLE OF AUTHORITIES

	Page
Cases	
<i>Channel Components, Inc. v. America II Electronics, Inc.</i> , 915 So.2d 1278 (Fla. 2d DCA 2005).....	25
<i>Cox v. Burke</i> , 706 So. 2d 43 (Fla. 5th DCA 1998)	17, 25
<i>Desimone v. Old Dominion Ins. Co.</i> , 740 So. 2d 1233 (Fla. 4th DCA 1999)	18
<i>Dynasty Exp. Corp. v. Weiss</i> , 675 So. 2d 235 (Fla. 4th DCA1996)	12
<i>Hanono v. Murphy</i> , 723 So. 2d 892 (Fla. 3d DCA 1998).....	18
<i>In re Parsley</i> , 384 B.R. 138 (Bankr. S.D. Tex. 2008).....	15
<i>Knight Energy Servs., Inc. v. Amoco Oil Co.</i> , 660 So. 2d 786, 789 (Fla. 4th DCA 1995)	18
<i>Miller v. Fortune Ins. Co.</i> , 484 So. 2d 1221 (Fla. 1986).....	11
<i>Robinson v. Weiland</i> , 936 So. 2d 777 (Fla. 5th DCA 2006)	10, 25
<i>Savino v. Fla. Drive In Theatre Mgmt., Inc.</i> , 697 So. 2d 1011 (Fla. 4th DCA 1997)	17
<i>Schleger v. Stebelsky</i> , 957 So. 2d 71 (Fla. 4th DCA 2007)	10, 12

<i>Select Builders of Florida, Inc. v. Wong</i> , 367 So. 2d 1089 (Fla. 3d DCA 1979).....	11, 19, 20, 24
<i>Singleton v. Greymar Assocs.</i> , 882 So. 2d 1004, 1008 (Fla. 2004).....	18
<i>Southern Bell Tel. & Tel. Co. v. Welden</i> , 483 So. 2d 487 (Fla. 1st DCA 1986).....	10
<i>Stella v. Stella</i> , 418 So. 2d 1029 (Fla. 4th DCA 1982)	10
<i>Taylor v. Martell</i> , 893 So. 2d 645 (Fla. 4th DCA 2005)	17
<i>U.S. Bank Nat’l Ass’n v. Harpster</i> , 51-2007-CA-6684ES (Fla. 6th Cir. March 25, 2010)	24
 Rules	
Fla. R. Civ. P. 1.540(b)(3)	11
<i>In Re: Amendments to the Florida Rules of Civil Procedure</i> , SC09-1460 at 3 (Fla. Feb. 11, 2010).....	14, 25
Rule 2.515(a) Fla. R. Jud. Admin.	15
Rule 4-1.4 R. Regulating Fla. Bar.....	15
Rule 4-1.8 R. Regulating Fla. Bar.....	15
Rule 4-3.1 R. Regulating Fla. Bar.....	16

INTRODUCTION

This is a foreclosure action filed by Appellee and Plaintiff below, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR NOVASTAR MORTGAGE, INC. (“MERS”). The issue on appeal is whether Appellant [REDACTED] (“[REDACTED]” motion to strike plaintiff’s notice of voluntary dismissal alleged a colorable entitlement to relief.

STATEMENT OF THE CASE AND FACTS

A. Introduction – The Initial Complaint Is Filed by MERS.

The Complaint alleged that MERS was the “legal and/or equitable owner and holder of the Note and Mortgage and has the right to enforce the loan documents.”¹ MERS also alleged that the promissory note (which had been lost, stolen or destroyed) and mortgage were “executed and delivered” to MERS.² The attached Notice of Lis Pendens was in the name of MERS.³ Attached to the Complaint was a copy of the unendorsed promissory note naming Novastar

¹ Complaint, ¶ 6 (A. 4).

² Complaint, ¶ 4 (A. 4).

³ Notice of Lis Pendens (A. 1).

Mortgage, Inc. (“Novastar”) as the original lender.⁴ The attached mortgage was made out to MERS.⁵

B. Plaintiff’s Counsel Represents that the Use of MERS’ Name was a “Clerical Error” and Substitutes Wachovia Bank, N.A. as Plaintiff *Ex Parte*.

After Defense counsel pointed out in another case filed by Plaintiff’s counsel⁶ that MERS would levy \$10,000 fine against any member who filed a case in MERS’s name, Plaintiff’s counsel filed a Motion to Substitute Party Plaintiff in that case the very next day. Similarly, in this case, the plaintiff also filed a Motion to Substitute Party Plaintiff, which alleged that naming of MERS as Plaintiff was a mere “clerical error” and that the “true and correct owner and holder of the mortgage and note . . . [was] Wachovia Bank, N.A.”⁷ Although the confusion between MERS and Wachovia Bank, N.A. (“Wachovia”) was attributed to a “clerical error,” Plaintiff’s counsel, Shapiro & Fishman, LLC (“Shapiro”), initiated a campaign of filing similar motions in dozens, if not hundreds, of its cases across

⁴ Note (A. 11).

⁵ Mortgage (A. 8).

⁶ *Mortgage Electronic Registration Systems, Inc. v. Persten*, Case No. 50 2008 CA 034713XXXX MB (Palm Beach County).

⁷ Motion to Substitute Party Plaintiff, dated December 15, 2008, ¶ 1 (A. 15).

the state in which MERS was the nominal plaintiff.⁸ In those cases, Shapiro or its client apparently confused MERS with U.S. Bank N.A., Wells Fargo Bank, N.A., Deutsche Bank National Trust Co., Wachovia Bank, N.A., HSBC Bank, USA, and potentially others.⁹

Plaintiff's counsel then filed an Amended Motion to Substitute Party Plaintiff that abandoned its theory that the error was merely clerical, and instead, proceeded on the theory that the change was necessary due to a post-filing transfer of interest and that Wachovia was now the holder of the mortgage by virtue of an assignment.¹⁰ Although the two motions bore no indication of being made *ex parte*, and although the copy served on [REDACTED] was not accompanied by a proposed order, the motion was granted without a hearing having been coordinated, noticed, or held.¹¹ Consequently, [REDACTED] moved to vacate the *ex parte* order substituting Wachovia as the plaintiff.¹²

⁸ *See*, cases tabulated in [REDACTED] Motion to Vacate Ex Parte Order Substituting Party Plaintiff, dated April 27, 2009, pp. 8-10 (**A. 24-26**).

⁹ *Id.*

¹⁰ Amended Motion to Substitute Party Plaintiff dated January 23, 2009 (**A. 29**).

¹¹ Order to Substitute Party Plaintiff, dated February 10, 2009 (**A. 34**).

¹² [REDACTED] Motion to Vacate Ex Parte Order Substituting Party Plaintiff, dated April 27, 2009, (**A. 17**).

█ then propounded discovery on MERS to determine the identity of the real party in interest and the circumstances surrounding the allegation that the note was lost.¹³ In response to Defendant's interrogatories, an employee of Shapiro, allegedly on behalf of Wachovia, stated that the promissory note "is presently in the possession of [Plaintiff's] Counsel."¹⁴ Shapiro also responded that Wachovia was the owner of the note but objected to any questions concerning whether the note was securitized.¹⁵ Additionally, Shapiro produced MERS tracking data which showed that the note had been securitized and was currently held by Wachovia Bank, N.A. as trustee for an unidentified trust.¹⁶

█ moved to dismiss the complaint on the grounds that the attachments to the Complaint contradicted, and thus negated, MERS' allegation that it was the real party in interest.¹⁷ According to the attached mortgage, MERS was the original mortgagee. According to the attached copy of the unendorsed promissory

¹³ See Plaintiff's Response to Defendant's Note Authenticity/Ownership Interrogatories, dated May 8, 2009 (A. 36, 37).

¹⁴ *Id.*

¹⁵ Plaintiff's Response to Defendant's Mortgage Loan Ownership Interrogatories, dated May 8, 2009 (A. 43-45).

¹⁶ Plaintiff's Response to Defendant's Request for Production of MERS Tracking (A. 49, 51-52).

¹⁷ Defendant, █ Motion to Dismiss Complaint, dated April 27, 2009 (A. 55).

note, however, Novastar Mortgage, Inc., (“Novastar”) was the original lender and, in the absence of an endorsement, was still the note owner.

C. Plaintiff Voluntarily Dismisses the Case.

Plaintiff voluntarily dismissed the case.¹⁸ The Notice of Dismissal and Discharge of Lis Pendens filed by SHAPIRO states that “Plaintiff” is dismissing the cause. The only Lis Pendens against the subject property which could have been discharged by the Notice was the Lis Pendens filed by MERS.

D. Wachovia Files a Second Case Against [REDACTED]

Less than a month after this case was dismissed, an identical action was filed against [REDACTED] seeking to foreclose the same mortgage.¹⁹ This time the action was filed by Wachovia Bank, National Association. According to the Complaint, the promissory note has again been “lost, stolen or destroyed.”²⁰ A new Lis Pendens was filed in the name of Wachovia Bank.²¹ The attached notice required by the Fair Debt Collections Practices Act (“FDCPA Notice), identified the

¹⁸ Notice of Dismissal and Discharge of Lis Pendens, dated May 29, 2009 (A. 64).

¹⁹ Complaint, filed in *Wachovia Bank, Nat’l Ass’n v. [REDACTED]* Case No. 50 2009 CA 021496XXXX MB (Palm Beach County) (“[REDACTED] II”) filed June 17, 2009 (A. 70).

²⁰ Complaint in [REDACTED] II, dated June 17, 2009, ¶ 26 (A. 74).

²¹ [REDACTED] II notice of Lis Pendens (A. 68).

creditor as “Barclays Capital Real Estate Inc. dba HomEq Servicing as Servicer for Wachovia Bank, National Association.”²²

With regard to ownership of the note and mortgage, Wachovia Bank now alleged that “[p]rior to the filing of this action, Plaintiff acquired the right to enforce the Note and Mortgage from the party entitled to enforce the Note and Mortgage.”²³ Wachovia Bank also alleged that “[t]he Plaintiff is the owner and holder of the Note and Mortgage or is the party entitled to enforce the subject Note consistent with Chapter 673 of the Florida Statutes.”²⁴

E. New Counsel Accidentally Appears for MERS, Withdraws.

In the original case that had been voluntarily dismissed, [REDACTED] moved for an award of attorneys’ fees and costs from MERS.²⁵ New counsel, Jones, Foster, Johnston & Stubbs, P.A. (“Jones Foster”) filed an appearance on behalf of MERS in connection with this motion,²⁶ and filed a motion for extension of time to

²² FDCPA Notice. ¶¶ 3, 4 (A. 66).

²³ Complaint, [REDACTED] II, ¶ 7 (A. 71).

²⁴ Complaint, [REDACTED] II, ¶ 8 (A. 71).

²⁵ Defendant, [REDACTED] Motion for Attorney’s Fees and Costs, dated June 26, 2009 (A.84).

²⁶ Notice of Appearance, dated July 15, 2009 (A. 89).

respond to [REDACTED] discovery regarding fees.²⁷ Nearly three months later, Jones Foster sought to withdraw its appearance on behalf of MERS as inadvertent.²⁸ It now claimed it was counsel for Wachovia.²⁹

F. [REDACTED] Moves to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b).

[REDACTED] filed the motion under review—a 1.540(b) motion where [REDACTED] also moved for dismissal with prejudice on the grounds of fraud on the court.³⁰ The motion requested an evidentiary hearing to demonstrate that Plaintiff’s misrepresentations were all aimed at concealing the identity of the real party in interest—and thus, constituted fraud on the court.³¹ [REDACTED] expected to prove that HOMEQ had urged its counsel to use the names of MERS and Wachovia as

²⁷ Mortgage Electronic Registration Systems, Inc.’s Motion to Extend Time, dated July 28, 2009, ¶ 3 (A. 91).

²⁸ Motion to Withdraw as Counsel for Mortgage Electronic Registration Systems, Inc., dated October 8, 2009 (A. 95).

²⁹ Notice of Appearance for Wachovia, dated November 25, 2009 (A. 98).

³⁰ [REDACTED] A . [REDACTED] Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court (“[REDACTED] Motion to Strike”), dated August 12, 2009 (A. 100).

³¹ *Id.* at 2-4 (A. 101-03).

Plaintiff, and that both Shapiro and Jones Foster had complied without ever communicating with the “clients” they purported to represent.³²

G. The Court Denies [REDACTED] Motion to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b) Without An Evidentiary Hearing.

Judge Cook heard argument on [REDACTED] Rule 1.540(b) motion and [REDACTED] motion to dismiss for fraud. [REDACTED] argued that she was entitled to an evidentiary hearing on based on the showing of colorable entitlement evidenced by the record as set forth in the motion.³³ The court denied [REDACTED] Rule 1.540(b) motion without an evidentiary hearing.³⁴ This appeal timely ensued.

³² *Id.* at 3-4 (A. 102-03).

³³ Transcript of Proceedings held before the Honorable Jack Cook, November 30, 2009, p. 8 (A. 127, 128).

³⁴ Order Denying Defendant, [REDACTED] A . [REDACTED] Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, dated December 8, 2009 (A. 133).

SUMMARY OF THE ARGUMENT

The homeowner, [REDACTED] asked a seemingly simple (but case-dispositive) question of the captioned “Plaintiff” in this case: Do you own my loan? The response was months of litigation in which attorneys, at the bidding of an entirely different financial institution, HOMEQ, obstructed [REDACTED] efforts to learn the truth.

[REDACTED] asked for an evidentiary hearing so the court could reopen the case so her fraud claims could be heard. And even though the record is replete with evidence of Plaintiff’s misrepresentations and concealment as to which entity actually has standing to sue in this case, the court denied [REDACTED] motion without an evidentiary hearing. With far more than a “colorable entitlement” to Rule 1.540 relief in the record, this Court should remand for an evidentiary hearing.

STANDARD OF REVIEW

This Court has jurisdiction to review the order denying the Rule 1.540(b) motion under Florida Rule of Appellate Procedure 9.130(a)(5). Generally, the standard of review of a ruling on a Rule 1.540(b) motion is abuse of discretion. *Schleger v. Stebelsky*, 957 So. 2d 71 (Fla. 4th DCA 2007). However, the issue on this appeal is whether the trial court erred in failing to grant an evidentiary hearing on the Rule 1.540(b) motion. Such a motion should not be summarily denied without an evidentiary hearing. *Id.* at 73. Denial of a Rule 1.540(b) motion without an evidentiary hearing is, as a matter of law, an abuse of discretion unless the motion fails to allege a “colorable entitlement” to relief. *See id.*; *Stella v. Stella*, 418 So. 2d 1029 (Fla. 4th DCA 1982); *Robinson v. Weiland*, 936 So. 2d 777 (Fla. 5th DCA 2006) (evidentiary hearing requirement applies when fraud is asserted as a grounds for relief under Rule 1.540); *Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) (holding that the trial court erred because “where the moving party's allegations raise a colorable entitlement to rule 1.540(b)(3) relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.”)

ARGUMENT

A. The Lower Court Erred in Summarily Denying [REDACTED] Rule 1.540 Motion Without an Evidentiary Hearing.

[REDACTED] showing of a “colorable entitlement” to relief triggered the requirement for an evidentiary hearing. Florida Rule of Civil Procedure 1.540(b)(3) provides relief from “a final judgment, decree, order or proceeding” for:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

A notice of voluntary dismissal is a “proceeding” from which the court may grant relief under Rule 1.540(b). *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1224 (Fla. 1986) (“Rule 1.540(b) may be used to afford relief to all litigants who can demonstrate the existence of the grounds set out under the rule.”). Where fraud is alleged, even a defendant may ask the court to strike a notice of voluntary dismissal. *See Select Builders of Florida, Inc. v. Wong*, 367 So. 2d 1089, 1091 (Fla. 3d DCA 1979) (affirming an order granting defendant’s motion to strike the voluntary dismissal of a plaintiff: “[W]e find the court to be correct in striking the voluntary dismissal and reinstating the matter to prevent a fraud on the court.”).

B. [REDACTED] Showing of a “Colorable Entitlement” to Relief Triggered the Requirement for an Evidentiary Hearing.

Summarily denying a Rule 1.540(b) motion without an evidentiary hearing is an abuse of discretion unless the motion fails to allege a “colorable entitlement” to relief. *Schleger v. Stebelsky*, 957 So. 2d 71 (Fla. 4th DCA 2007); *Dynasty Exp. Corp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA1996).

1. [REDACTED] demonstrated more than a “colorable entitlement” to the sanction of dismissal based on the misconduct of Plaintiff and its counsel.

In order to warrant an evidentiary hearing, a Rule 1.540(b)(3) motion must specify the essential facts of the fraud and misconduct, and not merely assert legal conclusions. Here, [REDACTED] motion alleged that Plaintiffs misled the lower court regarding MERS and Wachovia’s claims of standing.³⁵ Such misrepresentations were all aimed at concealing the identity of the real party in interest and thus constituted fraud on the court.³⁶ [REDACTED] motion also adopted all the arguments and supporting fact references in three motions and in two of Plaintiff’s responses to discovery that had been filed over the course of six months of litigation.³⁷

³⁵ [REDACTED] Motion to Strike, p. 2-4 (A. 101-03).

³⁶ *Id.*

³⁷ *Id.*

a) Plaintiffs misled the court as to which entity is the real party in interest and had standing;

Plaintiff's counsel made contradictory claims as to whether MERS or Wachovia was the real party in interest, and how that party became the owner and holder of the promissory note. First, the Complaint alleged that MERS was the "legal and/or equitable owner and holder of the Note and Mortgage and has the right to enforce the loan documents."³⁸ The first Motion to Substitute Party Plaintiff alleged, however, that the "true and correct owner and holder of the mortgage and note" was actually Wachovia, suggesting that, from the very beginning, the allegations that MERS was the "legal and/or equitable" owner and holder of the Note and Mortgage" had been nothing but a clerical error.³⁹

The Amended Motion to Substitute Party Plaintiff then claimed that MERS was actually the original "equitable and true holder of the . . . mortgage" after all.⁴⁰ But the mortgage (though apparently not the note) was transferred to Wachovia by a written assignment.⁴¹ That assignment was executed December 19, 2008 – after

³⁸ Complaint, ¶6 (A. 4).

³⁹ Motion to Substitute Party Plaintiff, dated December 15, 2008 (A. 15).

⁴⁰ Amended Motion to Substitute Party Plaintiff, dated January 23, 2009, ¶ 4 (A. 30).

⁴¹ *Id.* at ¶¶ 3-5.

the case was filed and after [REDACTED] questioned whether MERS was the real party in interest.⁴² It was notarized in Sacramento, where HOMEQ has an office.⁴³

This cavalier attitude with respect to the most basic of facts – who owns the note being sued upon – epitomizes that which prompted the Florida Supreme Court to change Florida Rule of Civil Procedure 1.110 to require that foreclosure complaints be verified.⁴⁴ The Florida Supreme Court stated the following four primary purposes for amending the rule:

(1) to provide incentive for the Plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded “lost note” counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by Plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations.

Id. at 3-4. While the courts already have the authority to sanction those who do not confirm the facts before filing a complaint (§ 57.105 Florida Statutes), such a rule might have saved months of financially burdensome litigation in this case.

⁴² Assignment attached to Amended Motion to Substitute Party Plaintiff dated January 23, 2009 (A. 32).

⁴³ *Id.* (A. 33).

⁴⁴ *In Re: Amendments to the Florida Rules of Civil Procedure*, SC09-1460 at 3 (Fla. Feb. 11, 2010).

b) Plaintiffs' counsel was unaware of whom they represented.

Throughout the case, the attorneys representing Plaintiff, whether that be Shapiro or Jones Foster, were seemingly baffled as to who they represented. Both appeared initially and filed documents as counsel for MERS. Both later claimed that through "error" they had appeared for MERS but actually intended to appear on behalf of Wachovia – a completely different, entity unrelated to MERS.

It is difficult to square this statement with Shapiro's obligations under the Rules Regulating the Florida Bar. *See*, Rule 4-1.4 R. Regulating Fla. Bar (requiring communication between the attorney and the client); Rule 4-1.8 R. Regulating Fla. Bar and Comment (representation of a client when another client is paying for the representation creates ethical risks which may be avoided only by communication with both clients). *See also In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (condemning the banking industry practice of thwarting communications between attorneys and their clients which led to the filing of inaccurate motions and the recanting of counsel's sworn testimony).

Similarly, Jones Foster filed a Notice of Appearance and a motion on behalf of MERS, both of which were signed by an attorney. Those signatures should have complied with Rule 2.515(a) Fla. R. Jud. Admin., which provides that "[t]he signature of an attorney shall constitute a certificate by the attorney that the

attorney has read the pleading or other paper [and] that to the best of the attorney's knowledge, information and belief there is good ground to support it..." *See also*, Rule 4-3.1 R. Regulating Fla. Bar and Comment ("What is required of lawyers...is that they inform themselves about the facts of their clients' cases..."). Despite these obligations, Jones Foster later claimed that it had mistakenly prepared and signed all the documents on behalf of the wrong entity.

2. [REDACTED] also demonstrated more than a "colorable entitlement" to the sanction of dismissal with prejudice based on fraud and misrepresentation.

When MERS filed the Complaint, [REDACTED] expected to prove that MERS was not the owner and holder of the promissory note, and thus, not the real party in interest. When Wachovia emerged and claimed that it was the owner and holder of the note and mortgage, [REDACTED] expected to prove that it too was not the real party in interest, in part, because, as MERS' assignee, Wachovia's standing depended entirely upon MERS having had standing to begin with. That Wachovia had no standing (in its individual capacity) was corroborated by the MERS tracking data provided by Wachovia which showed that the loan was securitized.⁴⁵ According to those records, if Wachovia had any relationship to this mortgage loan, it was in the capacity as a trustee for a trust.

⁴⁵ MERS Tracking Data (A. 51-52).

But Plaintiffs' misconduct prevented [REDACTED] from gathering her evidence. Its procedural misconduct (*ex parte* contact) and repeated misrepresentations as to who was the proper plaintiff, deprived [REDACTED] an evidentiary hearing on the issue of Wachovia's standing. The misconduct, therefore, was calculated to conceal the fact that MERS' and Wachovia's claims that it owned the note were untrue. Even more than the falsehoods themselves, the deceitful intent that motivated the misconduct—to mislead the court on an issue central to the case—provided the court with ample cause to dismiss the case.

Courts have the power to dismiss a case with prejudice upon a showing of a commission of a fraud on the court by a party. *Taylor v. Martell*, 893 So. 2d 645, 646 (Fla. 4th DCA 2005) (affirming dismissal with prejudice where party fraudulently executed and filed documents). Dismissal for fraud is appropriate where “a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.” *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998). Trial courts have “the right and obligation to deter fraudulent claims from proceeding in court.” *Savino v. Fla. Drive In Theatre Mgmt., Inc.*, 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997). This is because “[o]ur

courts have often recognized and enforced the principle that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [its] ends." *Hanono v. Murphy*, 723 So. 2d 892, 895 (Fla. 3d DCA 1998). Where a party perpetrates a fraud on the court which permeates the entire proceedings, dismissal of the entire case is proper. *Desimone v. Old Dominion Ins. Co.*, 740 So. 2d 1233, 1234 (Fla. 4th DCA 1999).

The court's concern for protecting the integrity of the judicial process should be all the more heightened where, as here, the Plaintiff has invoked the court's equitable jurisdiction. *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1008 (Fla. 2004) ("We must also remember that foreclosure is an equitable remedy..."); see *Knight Energy Servs., Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 789 (Fla. 4th DCA 1995) ("A foreclosure action is an equitable proceeding which may be denied if the holder of the note comes to the court with unclean hands or the foreclosure would be unconscionable.").

██████████ motion alleges that the Plaintiffs and their counsel misled the court with the intent of committing fraud on the court. Such facts, if proven, can only be explained as fraud. Therefore, the motion alleged and demonstrated much more than a mere "colorable entitlement" to having the voluntary dismissal

stricken such that Plaintiff's fraud could be scrutinized by the court. The lower court erred in refusing to grant [REDACTED] an evidentiary hearing.

C. The Fraud Committed by Plaintiffs and their Counsel entitles [REDACTED] to have the voluntary dismissal set aside.

1. Voluntary dismissals are not meant to absolve a plaintiff from wrongdoing.

Plaintiff's right of voluntary dismissal was never intended as an escape hatch to avoid the consequences of its fraud. A plaintiff cannot be permitted to knowingly deceive the court and, when its transgressions are discovered, simply press the "reset button" and begin the litigation again as if it had done nothing wrong. *See e.g., Select Builders*, 367 So. 2d at 1091.

Nor can voluntary dismissal be used as a sanctuary from which plaintiffs can hide from the consequences of their actions. Here, Plaintiffs filed the voluntary dismissal to avoid the consequences of misrepresentations intended to deceive the court on a central issue of the case. The Third District Court of Appeals has already rejected the argument that the consequences of fraud can be avoided by voluntarily dismissing the case.

In *Select Builders*, the plaintiff filed suit to expunge an injunction that was allegedly improperly filed in the public records. *Select Builders*, 367 So. 2d at 1090. The court entered an order expunging the injunction. It later developed that

the appellant may have perpetrated a fraud upon the trial court in obtaining the order expunging the document. *Id.* Accordingly, the trial court vacated its previous order. The defendants then moved for sanctions against the plaintiff, contending that it misled the court and committed certain procedural irregularities. The trial court ordered the plaintiff to take immediate steps to place the parties and the real estate in a status quo. The trial court also required the appellant to deposit certain monies that it received from the sale of the property to a third party. At this juncture, the appellant filed its notice of voluntary dismissal, dismissing the action pursuant to Fla. R. Civ. P. 1.420. Upon the defendants' motion to strike the voluntary dismissal, the trial court entered an order striking the plaintiff's notice of voluntary dismissal and retaining jurisdiction over the cause. *Id.*

The Third District affirmed the order granting defendant's motion to strike the voluntary dismissal of the plaintiff stating, "we find the court to be correct in striking the voluntary dismissal and reinstating the matter to prevent a fraud on the court." *Id.*

2. This case is guided by the *Select Builders*' decision.

This Court should be guided by the *Select Builders* case in that [REDACTED] has shown through a proffer of specific evidence that plaintiff may have committed a fraud on the court. After [REDACTED] brought the allegations of misrepresentation to

the attention of the court by way of a motion to vacate default, motion to dismiss, and motion to vacate *ex parte* order while also seeking discovery to prove the fraud, Plaintiffs, exactly like the *Select Builders'* plaintiff, filed a notice of voluntary dismissal seeking to avoid the consequences of its actions.

At the hearing, Wachovia argued that the allegations even if taken as true did not rise to the level of fraud on the court. The lower court agreed and ultimately denied [REDACTED] motion on three bases. First, that Plaintiff's attempt to obtain two *ex parte* orders was not improper or unusual; second, that the contradictory statements do not rise to colorable entitlement; and lastly, that there was nothing limiting [REDACTED] from presenting evidence at the hearing.⁴⁶ The lower court erred on all three points.

The unauthorized *ex parte* procedure used to obtain the orders substituting party plaintiff—while constituting a deplorable departure from due process—was not the fraud at issue. The fraud that [REDACTED] motion points to is Plaintiff's conduct in misleading the court on the central issue in the case. The *ex parte* motions and orders were only the means to deceive [REDACTED] and the court on that

⁴⁶ Transcript of Proceedings held before the Honorable Jack Cook, p. 19-20, dated November 30, 2009, p. 8 (A. 127, 131).

issue. It is not the *ex parte* motions in isolation that create a colorable entitlement, but their use to deceive the court and [REDACTED]

And while the deprivation of due process merely underscored [REDACTED] main argument, the lower court's revelation that it grants hundreds of unauthorized *ex parte* motions every week should not be trivialized. That the court would be a willing participant in the banking industry's ongoing shell game as to the real party in interest in foreclosure cases is troubling enough. It is also disconcerting that the trial court would justify this procedural malady with the hardly surprising observation that foreclosure defendants (most of whom are without legal representation) rarely object. In light of the Supreme Court's new verification requirement—intended to provide incentive for the banks to ensure the accuracy of their complaints—substituting the very party making the claim, with the facile stroke of an *ex parte* pen, circumvents the very purpose of the rule.

The casual manner in which the lower court allows the plaintiff to be substituted without hearings seemed to inform the court's decision on how serious to take Wachovia's misrepresentations that were asserted in documents that were signed and filed with the court. Also, it seems the lower court misunderstood the nature of the allegations concerning misrepresentations. The court stated that the

contradictory responses and assertions occurred in two different cases.⁴⁷ In fact, as outlined in the motion, the contradictory representations occurred in this case. While the allegations of misrepresentation were corroborated by the [REDACTED] *II* case, the motion specifically points to Plaintiffs' claims made through filings and by responses to discovery in this case. The allegations in the motion are pled with specificity. Accordingly, [REDACTED] allegations of fraud on the part of Plaintiffs will, if proven through discovery and an evidentiary hearing, rise to the level of fraud on the court.

Additionally, the lower court's assertion that the hearing as noticed could have been an evidentiary hearing is simply incorrect. The notice did not contain anything stating that it was an evidentiary hearing.⁴⁸ Moreover, [REDACTED] could not have presented any evidence or propounded discovery without the court reopening the case; which it should have done based on [REDACTED] showing of a colorable entitlement. Only at that point would [REDACTED] be in position to show that Plaintiffs perpetrated a fraud on the court.

⁴⁷ *Id.* at 19 (A. 131).

⁴⁸ Order Specially Setting Hearing on Rule 1.540 Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, dated September 21, 2009, (A. 125).

Case law supports a striking of a notice of voluntary dismissal when fraud is shown. In *Select Builders of Florida, Inc. v. Wong*, the court struck the notice of voluntary dismissal to prevent fraud on the court. 367 So. 2d at 1090. Here, [REDACTED] like the defendants in *Select Builders*, filed a motion seeking sanctions that brought the fraud to the attention of the court prior to the Wachovia's filing of the voluntary dismissal which attempted to immunize itself from its fraudulent acts. Wrongdoers should not be rewarded under the rules of procedure.

D. Fraudulent Foreclosures Which Undermine the Integrity of the Court System Are Matters of Great Public Importance.

The problem of fraud and misrepresentation in these cases is a statewide problem and is not unique to Plaintiff counsel's firms. *See e.g., U.S. Bank Nat'l Ass'n v. Harpster*, 51-2007-CA-6684ES (Fla. 6th Cir. March 25, 2010) (dismissing complaint with prejudice for fraudulent backdating of an assignment) (A. 136). This problem is widespread amongst foreclosure mills that each have thousands of cases throughout the state.⁴⁹ The veracity of banks and their firms is so often in

⁴⁹ *See Amir Efrati, Judge Bashes Bank in Foreclosure Case*, Wall St. J., April 17, 2010, available at <http://online.wsj.com/article/SB1000142405270230349130457518894397777722.html?KEYWORDS=David+J+Stern#articleTabs%3Darticle>; *see also* Michael Sasso, *Foreclosure firm's revenues jump to \$260 million*, The Tampa Tribune, April 20, 2010 available at <http://www2.tbo.com/content/2010/apr/20/foreclosure-firms-revenues-jump-260-million/>

question that the Florida Supreme Court has changed the pleading requirements in these cases. Florida Rule of Civil Procedure 1.110 to require that foreclosure complaints be verified.⁵⁰ The new rule will have no force or effect if it can be nullified by simply filing a notice of voluntary dismissal.

The protection of the integrity of the court system by discouraging fraudulent conduct during judicial proceedings is of paramount importance:

The integrity of the civil litigation process depends on the truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct [fraudulent concealment of facts] must be discouraged in the strongest possible way.

Robinson v. Weiland, 988 So. 2d at 1113, quoting *Cox v. Burke*, 706 So. 2d 43, 47 (Fla. 5th DCA 1998); See also *Channel Components, Inc. v. America II Electronics, Inc.*, 915 So.2d 1278 (Fla. 2d DCA 2005).

⁵⁰ *In Re: Amendments to the Florida Rules of Civil Procedure*, SC09-1460 at 3 (Fla. Feb. 11, 2010).

CONCLUSION

The lower court's denial of Baptiste's motion to strike the notice of voluntary dismissal should be reversed and remanded for an evidentiary hearing on that motion as well as [REDACTED] motion for dismissal with prejudice for fraud upon the court.

Respectfully submitted,

ICE LEGAL, P.A.

Counsel for Appellant

1975 Sansburys Way, Suite 104

West Palm Beach, FL 33411

Telephone: (561) 729-0530

Facsimile: (866) 507-9888

Email: mail@icelegal.com

By: _____



ENRIQUE NIEVES III

Florida Bar No. 41736

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this May 10, 2010 to all parties on the attached service list.

ICE LEGAL, P.A.

Counsel for Appellant

1975 Sansburys Way, Suite 104

West Palm Beach, FL 33411

Telephone: (561) 729-0530

Facsimile: (866) 507-9888

Email: mail@icelegal.com

By: _____



ENRIQUE NIEVES III

Florida Bar No. 41736

SERVICE LIST

Sidney A. Stubbs, Esq.
JONES, FOSTER, JOHNSTON
& STUBBS, P.A.
505 South Flagler Drive
Suite 1200
West Palm Beach, FL 33401
Plaintiff/Appellee's counsel

Barry Fishman, Esq.
SHAPIRO & FISHMAN, LLP
2424 North Federal Highway
Suite 360
Boca Raton, Florida 33431
Plaintiff/Appellee's counsel

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Answer Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

ICE LEGAL, P.A.

Counsel for Appellant
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: _____



ENRIQUE NIEVES III

Florida Bar No. 41736