In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

CHASE BANK USA NA, et al.,

Appellees.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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ARGUMENT

A. These straight forward legal issues are reviewed *de novo*.

There are two questions that have been raised by the Answer Brief. First, whether the order dismissing the case without prejudice is a final order, and second, whether the Defendants are the prevailing party in the case. Both are legal issues. Such issues which do not involve the amount of fees to be awarded are reviewed using the *de novo* standard. *Save on Cleaners of Pembroke II Inc. v. Verde Pines City Ctr. Plaza LLC*, 14 So. 3d 295, 297 (Fla. 4th DCA 2009). Further, when entitlement to fees is based on the interpretation of a contract or a statute, as a pure matter of law, the appellate court undertakes a *de novo* review. *See Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007); *First Union Nat. Bank v. Turney*, 839 So. 2d 774, 776 (Fla. 1st DCA 2003). Since this appeal involves legal issues surrounding entitlement, it is reviewed *de novo*.

B. The order dismissing Plaintiff's case without prejudice was and is a final order.

The trial court in this case specifically stated that the case would have to be re-filed.[1] Despite such clear language, the Plaintiff argues that the trial court's order dismissing the Plaintiff's case without prejudice as a sanction was not a

[1] *Id.*

"final order."[2][3] The Plaintiff also claims that the Defendants acknowledged that the dismissal is a non-final order.[4] A review of the initial brief will show that this statement could not be further from the truth. Not only did the hearing bring to an end the judicial labor but any other issues would need to be brought in a separate proceeding. Florida law is clear that an order that dismisses the entire case is a final order. *See Silvers v. Wal-Mart Stores, Inc.*, 763 So. 2d 1086, 1086 (Fla. 4th DCA 1999); *Carlton v. Wal-Mart Stores, Inc.*, 621 So. 2d 451 (Fla. 1st DCA 1993); *Hinote v. Ford Motor Co.*, 958 So. 2d 1009, 1010 (Fla. 1st DCA 2007). *Carnival Corp. v. Sargeant*, 690 So. 2d 660, 661 (Fla. 3d DCA 1997); *Bd. of County Comm'rs of Madison County v. Grice*, 438 So. 2d 392, 394 (Fla. 1983); *Eagle v. Eagle*, 632 So. 2d 122, 122-23 (Fla. 1st DCA 1994); *Ender v. Mercer*, 7 So. 2d 340, 341 (Fla. 1942).

The Plaintiff cites *Red Bird Laundry v. Parks*, 728 So. 2d 1238 (Fla. 5th DCA 1999), to support its novel theory that the case below never ended. *Parks* was a personal injury action where several *lis pendens* were filed on properties to collect on an eventual judgment. *Id.* After a ruling discharging the *lis pendens*, the defendants moved for attorney's fees on the theory that a *lis pendens* is analogous

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[2] Answer Brief of Appellee Chase Bank USA, p. 10; App. Exh. 8 (01/21/10 Hearing Transcript, p. 11, line 12 – p. 12, line 19).
[3] App. Exh. 3 (07/27/09 Hearing Transcript, at p. 20, lines 18 – 22).
[4] Answer Brief, p. 10.

to a complaint and upon dismissal the defendants should be the prevailing party. *Id.* at 1239. The court denied the motion because no final order had been issued and rule 9.130(a)(4) only allows for "review of . . . non-final orders entered after a final order." (emphasis added). *Id.* Since the personal injury action was presumably still pending, the *lis pendens* could not have been a final order. Unlike the *Parks* case, this case actually ended with the dismissal.

Strangely, the plaintiff goes on to cite a string of cases that address neither attorney's fees nor dismissals without prejudice starting with *Shaw v. Schlusemeyer*, 683 So. 2d 1187 (Fla. 5th DCA 1996).[5] Unlike the situation here, that case involved an order allowing the plaintiff leave to amend the complaint. *Id.* at 1187-88. Plaintiff also cites *JB Int'l, Inc. v. Mega Flight, Inc.*, 840 So. 2d 1147 (Fla. 5th DCA 2003), representing to this Court that *JB Int'l* held that "fees [were] not authorized" when, in fact, the case mentioned nothing about fees. It was a replevin action where the court temporarily awarded the disputed property to the plaintiff pending a final adjudication. *Id.* at 1150. Before any adjudication the case was dismissed for lack of prosecution and the property was ordered to be returned

[5] The Plaintiff is foisting the same untruthful statements about the facts of their cases on this honorable Court as it did on the trial court below—despite the fact that the Defendants pointed out the error, not once, but twice.

to the defendant. *Id.* The only issue was whether the property should have been returned.

The Plaintiff cites another case that does not mention fees, *CPI Mfg. Co. v. Industrias St. Jack's S.A. DE C.V.*, 870 So. 2d 89 (Fla. 3d DCA 2003). The issue in *CPI Mfg.* was whether the failure to prosecute rule trumped an enlargement of time rule. Plaintiff also relies heavily on *Junkas* v. *Union Sun Homes, Inc.*, 412 So. 2d 52 (Fla. 5th DCA 1982) where the court held that the fee of an expert who never testified is not a taxable cost. *Id*.

Rule 9.130(a)(4) permits an appeal of a non-final order entered after a final order. The order dismissing the case as a sanction was a final order because it dismissed the entire proceeding and the Plaintiff was instructed that it would have to re-file the case if it wanted to proceed. Given that there was a final order, the non-final order denying the Defendant's entitlement to attorney's fees is properly before this court. *See Reliable Reprographics Blueprint & Supply, Inc. v. Florida Mango Office Park*, 645 So. 2d 1040 (Fla. 4th DCA 1994) (holding that an order denying entitlement to attorney's fees entered subsequent to a final order is appealable).

C. The record reflects that the case was dismissed as a sanction.

The trial court sanctioned the Plaintiff by dismissing the case without prejudice.[6] This fact should be undisputed. Nevertheless, the Plaintiff now denies the case was dismissed as a sanction.[7] It now claims the trial court's express and unequivocal explanation that the dismissal was a "sanction" was just "an unfortunate use of that word."[8] Further, Plaintiff's characterization of this case as essentially settled is disingenuous. If the case were in such a posture, the Plaintiff would have been required to voluntarily dismiss and certainly would have negotiated a resolution such that each party pay its own attorneys' fees. There was absolutely no agreement signed by the Plaintiff for a modification or even a trial modification.

Ironically, the facts laid out in its own Answer Brief confirm that the case was dismissed "as a sanction."[9] Moreover, the only motion before the court at the hearing was the Defendant's motion for sanction of dismissal. Accordingly, the trial court's use of the word sanction was no mistake.[10]

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[6] App. Exh. 3 (07/27/09 Hearing Transcript, at p. 20, line 16 –p. 21, line 8).
[7] Answer Brief, p. 12-13.
[8] *Id.*
[9] Answer Brief, p. 7.
[10] App. Exh. 2 (Defendants' Motion for Sanction of Dismissal).

The Plaintiff also argues that any wrongdoing by the law firm of Marshall Watson was not that of its client—the Plaintiff Chase Bank. Such an argument is misplaced because generally, an attorney serves as an agent for his client. Therefore, the attorney's acts are the acts of the client. *Kates v. Millheiser,* 569 So. 2d 1357 (Fla. Dist. Ct. App. 1990) citing *Andrew H. Boros, P.A., v. Arnold P. Carter, M.D., P.A.,* 537 So.2d 1134, 1135 (Fla. 3d DCA 1989); *see also* Fla. R. Admin. P. 2.505(h) (providing "Attorney as Agent of Client. In all matters concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client, and any notice by or to the attorney or act by the attorney in the proceeding shall be accepted as the act of or notice to the client"); *see also Brooks Tropicals, Inc. v. Acosta*, 959 So. 2d 288, 295 (Fla. 3d DCA 2007); *Lipsig v. Ramlawi*, 760 So. 2d 170, 186 (Fla. 3d DCA 2000); *State ex rel. Personal Finance Co. v. Lewis,* 191 So. 295, 296 (1939); *Johnson v. Estate of Fraedrich,* 472 So. 2d 1266, 1268 (Fla. 1st DCA 1985). The same is true under agency law. An act done by an agent on behalf of the principal within the scope of the agency is not the act of the agent but of the person by whose direction it is done. *Id.*; *Mendelsund v. Southern-Aire Coats of Fla., Inc.,* 210 So. 2d 229, 231 (Fla. 3d DCA 1968); *Epperson v. Rupp,* 157 So. 2d 537, 538 (Fla. 3d DCA 1963). Since a party to this case did commit a wrong which was addressed by the trial

court via a sanction of dismissal without prejudice, this law-firm-as-a-shield argument should be rejected.

Furthermore, if the Plaintiff disagreed with such a ruling it could have appealed. The reasons for the dismissal are not particularly relevant and only further prove that this was a final order. That being said, the record reflects that the case was clearly dismissed as a sanction.

D. Defendants prevailed in the case that was dismissed.

"[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." *Moritz v. Hoyt Enter., Inc.*, 604 So. 2d 807, 809-10 (Fla. 1992); *Kapila v. AT&T Wireless Servs., Inc.*, 973 So. 2d 600, 602 (Fla. 3d DCA 2008); *Shaw v. Schlusemeyer*, 683 So. 2d 1187, 1188 (Fla. 5th DCA 1996). The trial court dismissed the Plaintiff's entire case as a sanction. Nonetheless, the Plaintiff argues that somehow it is the prevailing party and cites the Third District's decision in *Cheetham v. Brickman*, 861 So. 2d 82 (Fla. 3d DCA 2003) to argue that the Defendants are not the prevailing party."[11] *Id*. at 83. Under *any* test it is clear the Defendant's were the prevailing party.

[11] App. Exh. 7 (Plaintiff's Response in Opposition),p. 3.

Florida courts hold that even a defendant that has a claim dismissed for failure to prosecute becomes the prevailing party entitled to fees. *See Baratta v. Valley Oak Homeowners Ass'n at the Vineyards, Inc.*, 891 So. 2d 1063, 1065 (Fla. 2d DCA 2004). The same is true if a plaintiff takes a voluntary dismissal. *Alhambra Homeowners Ass'n v. Asad*, 943 So. 2d 316 (Fla. 4th DCA 2006); *see also Stuart Plaza Ltd. v. Atlantic Coast Dev. Corp. of Martin County*, 493 So. 2d 1136, 1137 (Fla. 4th DCA 1986); *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990) (same); *Casarella, Inc. v. Zaremba Coconut Creek Pkwy. Corp.*, 595 So. 2d 162, 163 (Fla. 4th DCA 1992). There is no reason not to apply the same rules for situations involving an involuntary dismissal of a plaintiff's case. *See* Author's Comment, Rule 1.420 ("Paragraph (d) of this rule applies to any dismissal.").

Similarly, a defendant that successfully procures a dismissal as a sanction is the prevailing party. *Frazier v. Dreyfuss*, 14 So. 3d 1183, 1184-85 (Fla. 4th DCA 2009) (awarding fees to the defendants after dismissing the case for failure to arbitrate). Moreover, the argument that the Plaintiff can be the prevailing party after its case was dismissed as a sanction is nonsensical. The Defendants have recovered a judgment in this case—a judgment of dismissal. The Defendants agree with the holding in *Cheetham* that an award of costs must be made to the winning party, not the losing party. Since the Defendants were the winning party they are

also necessarily the prevailing party. This Court should hold, consistent with the holding in *Frazier*, that the Defendants are the prevailing party.

CONCLUSION

The order dismissing the case as a sanction is a final order and the Defendants were and are the prevailing party. Accordingly, the lower court's ruling which denied the Defendants an award of attorney's fees and costs must be reversed and vacated and this case remanded to the trial court with directions to enter an order granting entitlement to attorney's fees and costs in favor of the Defendants and against the Plaintiff.

Dated: August 16, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this August 16, 2010 to all parties on the attached service list.

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

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