In the District Court of Appeal
Fourth District of Florida

CASE NO.
(Circuit Court Case No.)

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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ARGUMENT

The trial court erred in not granting an evidentiary hearing and summarily denying [redacted] rule 1.540 motion.

There are two questions that have been raised by the Answer Brief. First, whether the trial court held an evidentiary hearing on [redacted] motion, and second, whether the motion alleged a "colorable entitlement" to relief.

A. The trial court did not hold an evidentiary hearing in this case.

The Plaintiff argues that the trial court actually held an evidentiary hearing on this matter. Any assertion that the hearing as noticed could have been an evidentiary hearing is simply incorrect. A litigant must receive proper notice that a motion is scheduled as an evidentiary hearing. *Herranz v. Siam*, 2 So. 3d 1105, 1107 (Fla. 3d DCA 2009) (reversing and remanding to the trial court to conduct a properly noticed evidentiary hearing where a litigant only had one day notice that the hearing would be evidentiary). To avoid sandbagging of parties, specific notice must be given that a hearing will be evidentiary allowing sufficient time to prepare and an adequate opportunity to present contrary testimony. *Juliano v. Juliano*, 687 So. 2d 910, 911 (Fla. 3d DCA 1997); *see also BMS of Broward, Inc. v. Carter*, 702 So. 2d 252 (Fla. 3d DCA 1997) (holding that litigant did not act unreasonably in not securing the attendance of its witnesses at motion calendar).

The notice in this case contained no indication that the hearing was scheduled as an evidentiary hearing.[1] Nor could it have. The case was closed and [redacted] could not have presented any evidence or propounded discovery without the court reopening the case. Proceduarlly, the trial court could not have scheduled an evidentiary hearing until determining that the motion alleged a colorable entitlement to relief. Accordingly, any *sua sponte* decision by the trial court at the time of the special set hearing to transform that hearing into an evidentiary matter was improper. The notice, at best, was provided after the hearing had already begun which is less notice than the one day provided in *Herranz*.

Further, the notion that a notice of hearing must expressly exclude the presentation of evidence in order for the hearing not to be evidentiary is absurd. In fact, the opposite is true. Specific notice that a matter is evidentiary must be given. *See Juliano*, 687 So. 2d at 911. This is consistent with the trial court's own administrative orders and the local rules of court. The record shows that no evidentiary hearing was ever scheduled or heard.

[1] 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).**

B. Showing of a "Colorable Entitlement" to Relief Triggered the Requirement for an Evidentiary Hearing.

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, motion alleged that Plaintiffs misled the lower court regarding MERS and Wachovia's claims of standing.[2] The misrepresentations are as follows:

1) the Complaint alleged that MERS was owner and holder of the Note and Mortgage;[3]

2) MERS also alleged that the promissory note had been lost, stolen or destroyed) and mortgage were "executed and delivered" to MERS;[4]

3) The first *ex parte* motion to substitute party plaintiff claimed that the "true and correct owner and holder of the mortgage and note" was actually Wachovia, suggesting that the allegations that MERS was the owner and holder of the note and mortgage had been a clerical error;[5]

4) The amended *ex parte* motion to substitute party plaintiff then claimed that MERS was actually the original true holder of the

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

[3] Complaint, ¶ 6 **(A. 4)**.

[4] Complaint, ¶ 4 **(A. 4)**.

[5] Motion to Substitute Party Plaintiff, dated December 15, 2008 **(A. 15)**.

mortgage after all.[6] But the mortgage (though apparently not the note) was transferred to Wachovia by a written assignment;[7]

5) The attorneys representing Plaintiff appeared initially and filed documents as counsel for MERS then 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;

6) the MERS tracking data provided by Wachovia showed that the loan was securitized;[8] yet Shapiro also responded that Wachovia was the owner of the note but objected to any questions concerning whether the note was securitized.[9]

7) In response to interrogatories, an employee of Shapiro, allegedly on behalf of Wachovia, stated that the promissory note "is presently in the possession of [Plaintiff's] Counsel;"[10]

8) The complaint in [redacted] *II* alleges that the promissory note has again been "lost, stolen or destroyed."[11]

Plaintiffs sought to mislead the court as to which entity is the real party in interest and had standing. These representations were signed by attorneys.

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[6] Amended Motion to Substitute Party Plaintiff, dated January 23, 2009, ¶ 4 **(A. 30)**.

[7] *Id.* at ¶¶ 3-5.

[8] MERS Tracking Data **(A. 51-52).**

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

[10] Plaintiff's Response to Defendant's Note Authenticity/Ownership Interrogatories, dated May 8, 2009 **(A. 36, 37).**

[11] Complaint in [redacted] *II*, dated June 17, 2009, ¶ 26 **(A. 74)**.

Nevertheless, the Plaintiff claims that such misrepresentations as outlined in the motion and record were not clear and did not provide a basis for relief.[12] As support, the Plaintiff cites three cases that actually reversed the trial court and required an evidentiary hearing on rule 1.540 motions. *See Schleger v. Stebelsky*, 957 So. 2d 71 (Fla. 4th DCA 2007) ; *Dynasty Exp. Corp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA1996); *Robinson v. Weiland*, 936 So. 2d 777 (Fla. 5th DCA 2006)

agrees with such holdings which dictate that this Court should reverse and remand for an evidentiary hearing. The motion in this case 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 allegations in the motion are pled with specificity. Accordingly, 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.

The Plaintiff further argues that the misrepresentations were not the basis for relief. However, in the context of a voluntary dismissal, there is no judgment from which any plaintiff could have benefited. Rather than being a result of the alleged fraud, the Plaintiff's voluntary dismissal was in furtherance of the alleged fraud,

[12] Answer Brief, p. 11-12.

and thus, had a fraudulent purpose of its own. The Plaintiff's express purpose for the voluntary dismissal is an unabashed attempt to wipe the slate clean and otherwise distance itself from its misconduct. The Plaintiff sought to "start the litigation all over again," rather than having its case dismissed with prejudice.

Notably, the Answer brief fails to cite the main case that deals with striking a voluntary dismissal for fraud on the court. In *Select Builders of Florida, Inc. v. Wong*, 367 So. 2d 1089, 1091 (Fla. 3d DCA 1979), 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. Just as in *Select Builders*, [redacted] brought the allegations of fraud to the attention of the court by way of a motion for sanctions and sought discovery to prove the fraud, [redacted] then filed its notice of voluntary dismissal seeking to avoid the consequences of its actions.

C. The Plaintiff's argument about the facts necessarily requires an evidentiary hearing.

The Plaintiff argues that the facts do not support the conclusion that there was an attempt to commit fraud on the court. According to Plaintiff, the complaint

was filed and two weeks later they moved to substitute the plaintiff. After moved to vacate the ex parte order, the Plaintiff voluntarily dismissed the case. A seemingly, simple case.

According to the Plaintiff first alleged that the owner and holder of the mortgage and note was MERS. Then it claimed the owner and holder was actually Wachovia by mistake. Still later, it claimed that the true owner and holder was MERS but that after the suit, the mortgage was assigned to Wachovia. The Plaintiff argues that its allegation that Wachovia is the proper party is supported by its decision to re-file the case in Wachovia's name. Ironically, the Plaintiff in *II* (whoever that may be) has now amended its complaint to now allege that Arch Bay Holding, LLC Series 2009B is now the proper party. Now the list of the Plaintiffs goes—MERS, Wachovia, Wachovia through MERS, and now lastly Arch Bay Holdings.

The same misrepresentations exist regarding the note. The note was said to be lost, and then found by the Plaintiff's counsel, and then lost again in *II*, but now apparently found again. Although much of the misrepresentations are clear from the record, there remain contradictory facts that need to be resolved by way of an evidentiary hearing. Like *Schleger*, *Weiss*, and *Robinson*, this Court must reverse and remand for an evidentiary hearing on the rule 1.540 motion.

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 Baptiste's motion for dismissal with prejudice for fraud upon the court.

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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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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.

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