In the District Court of Appeal
Fourth District of Florida

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

[redacted]

Appellant,

v.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-0C8, MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2006-0C8, et al.,

Appellees.

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

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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INTRODUCTION

This is a foreclosure action filed by Appellee and Plaintiff below, THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-0C8, MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2006-0C8 ("BNY MELLON"). The issue on appeal is whether Appellant [redacted] Pino's motion to strike plaintiff's notice of voluntary dismissal alleged a colorable entitlement to relief.

STATEMENT OF THE CASE AND FACTS

A. The Complaint.

The Complaint alleged that "the Plaintiff owns and holds the Note and Mortgage" and that it owns the mortgage "by virtue of an assignment to be recorded."[1] However, BNY MELLON did not attach a copy of any such assignment to the Complaint. What was attached to the Complaint was an alleged copy of the mortgage which identifies Mortgage Electronic Registration Systems, Inc. ("MERS") as the "Mortgagee" and Silver State Financial Services, Inc. d/b/a Silver State Mortgage as the "Lender."[2] The Complaint also alleged that the

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[1] Complaint, ¶¶ 4, 5 **(A. 1)**.

[2] Mortgage attached to Complaint, **(A. 5)**.

promissory note had been "lost, destroyed or stolen."[3] PINO moved to dismiss the Complaint on the ground that BNY MELLON had failed to attach an assignment to transfer the mortgage from the mortgagee MERS.[4]

B. BNY MELLON attaches what appears to be a fraudulent assignment to its Amended Complaint.

BNY MELLON sought to correct the defect in its complaint by amending and attaching an unrecorded assignment of mortgage.[5] Even though the assignment was not attached to the complaint when it was filed September 24, 2008, the assignment purports to have been executed five days earlier on September 19, 2008.[6]

In response, PINO filed a motion for sanctions alleging that the assignment of mortgage was fraudulently backdated. PINO specifically averred the following facts:

- The Assignment of Mortgage was executed by Cheryl Samons as "Assistant Secretary" of MERS. Cheryl Samons is actually an employee of David J. Stern, P.A. – BNY MELLON's counsel in

[3] Complaint, ¶ 25 **(A. 5)**.

[4] PINO's Motion to Dismiss Complaint, p. 4, dated November 10, 2008. **(A. 8, 11)**.

[5] Amended Complaint **(A. 19, 25-26)**.

[6] *Id.*

this case. The signature of Cheryl Samons was witnessed by Michele Grant and Esther Otero and notarized by Valerie Nemes. These three individuals work in the Litigation Department of BNY MELLON counsel's firm, rather than the Foreclosure Department. Michele Grant is a Litigation Legal Assistant, specifically, the Legal Assistant to Donna Evertz, Esq., the Litigation Attorney handling the lower court case.

- The Litigation Department of Plaintiff counsel's firm is not assigned to cases until they are contested. Accordingly, Litigation Department employees witnessing and notarizing the Assignment of Mortgage would be involved only if the case was already filed and contested. Of the approximately seventy-five Assignments of Mortgage executed by Ms. Samons which were located for the five-week period surrounding the execution date of the subject Assignment, not one was witnessed and notarized by the Litigation Department employees who were involved with the subject assignment.
- Among the hundreds of assignments executed by Ms. Samons, PINO located only one other assignment witnessed and notarized

by Litigation Department employees, Michele Grant and Valerie Nemes.[7] That assignment was purportedly executed by Ms. Samons on June 19, 2007 – three days before the related foreclosure case was filed.[8] The notary's stamp, however, indicates that Ms. Nemes's commission expires on August 19, 2012. Because notary commissions are issued for periods of four years, the stamp had to have been issued no earlier than August 20, 2008. Indeed, according to the Florida Department of State, Ms. Nemes's commission was, in fact, issued August 20, 2008.[9] Therefore, Ms. Nemes somehow notarized Ms. Samons's signature 14 months before her commission and the associated stamp was issued.[10]

[7] Exhibit A to Defendant PINO's Motion for Award of Attorney's Fees Pursuant to Florida Statute 57.105 ("PINO's Motion for Sanctions"), dated February 17, 2009. **(A. 36).**

[8] *Wells Fargo Bank v. Acosta*, Case No. 502007CA010018XXXXMB. Filing date June 22, 2007.

[9] Exhibit B to PINO's Motion for Sanctions. **(A. 37).**

[10] PINO's Motion for for Sanctions. **(A. 27).**

After serving the motion for sanctions, PINO set the depositions of various notaries and witnesses, all employees of BNY MELLON counsel's firm. PINO also moved to dismiss the amended Complaint.[11]

C. BNY MELLON Files a Notice of Voluntary Dismissal and then Files a Second Case Against PINO.

On the eve of the depositions, BNY MELLON voluntarily dismissed the case.[12] An identical action has now been filed against PINO by the same Plaintiff seeking to foreclose the same mortgage.[13] The Complaint is virtually identical to the previous case except it does not plead that the note is lost. Noticeably absent from the new case is the fraudulent assignment of mortgage. In its place is now a new assignment of mortgage that post dates the voluntary dismissal.[14]

D. PINO Moves to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b).

PINO filed the motion under review – a 1.540(b) motion where PINO also moved for dismissal with prejudice on the grounds of fraud. The motion requested

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[11] Defendant [redacted] PINO's Motion to Dismiss the Amended Complaint, dated February 23, 2009 **(A. 49).**

[12] Notice of Voluntary Dismissal, dated March 9, 2009 **(A. 59).**

[13] Complaint filed in *The Bank of New York Mellon v. Pino*, Case No. 50 2009 CA 0274000 XXXX MB (Palm Beach County) ("*Pino II*") filed August 13, 2009 **(A. 62).**

[14] New Assignment of Mortgage attached to Complaint in *Pino II*, dated July 14, 2009 **(A. 66).**

an evidentiary hearing to demonstrate that BNY MELLON's creation, execution, and filing of the fraudulent assignment constituted fraud on the court.[15]

At the hearing, PINO argued that he was entitled to an evidentiary hearing based on the showing of colorable entitlement evidenced by the record as set forth in the motion.[16] The court ultimately denied PINO's Rule 1.540(b) motion without an evidentiary hearing.[17] This timely appeal ensued.

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[15] Defendant [redacted] PINO's Motion to Strike the Notice of Voluntary Dismissal and Dismissal with Prejudice for Fraud Upon the Court, dated August 20, 2009 ("PINO's Rule 1.540 Motion") **(A. 67).**

[16] Tr. of Proceedings held before the Honorable Meenu Sasser, January 14, 2010, p. 7 **(A. 174, 175).**

[17] Order on Defendant, [redacted] PINO's Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, dated January 14, 2010 **(A. 180).**

SUMMARY OF THE ARGUMENT

PINO's showing of a "colorable entitlement" to relief triggered the requirement for an evidentiary hearing. PINO's motion alleges that employees of BNY MELLON's counsel forged documents by creating, executing, and filing a fraudulently backdated assignment of mortgage with the court. The motion specifically referred to the forged document that was filed with the court. The forged document is an instrument which not only purports to transfer a property interest to counsel's own client, but which constitutes the evidentiary lynchpin of that client's case.

Florida courts have held that a dismissal with prejudice is appropriate where a party submits fraudulently executed documents to the court. Further, PINO's motion alleges facts which, if proven, cannot be explained or interpreted to be anything but fraud. The rules of procedure were never intended to be used as a sanctuary from which plaintiffs can hide from the consequences of their actions. Here, BNY MELLON filed the voluntary dismissal to avoid the consequences of filing a forged document intended to deceive the court.

Accordingly, it was error to summarily deny PINO's Rule 1.540(b) motion without 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 PINO's Rule 1.540 Motion Without an Evidentiary Hearing.

PINO's 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.").

1. PINO's Showing of a "Colorable Entitlement" to Relief Triggered the Requirement for an Evidentiary Hearing.

PINO's motion alleges that BNY MELLON's counsel created, executed, and filed a fraudulent document with the court.[18] Such an allegation of forgery squarely fits into the language of the rule as "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Fla. R. Civ. P. 1.540(b)(3). Accordingly, the language of the rule should be given its plain meaning. *See Metcalfe v. Lee*, 952 So. 2d 624, 627-28 (Fla. 4th DCA 2007).

Furthermore, 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). 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. *Id.* Again, PINO's motion alleges that an employee of BNY MELLON's counsel forged documents by creating, executing, and filing a

[18] PINO's Rule 1.540 Motion **(A. 68-70).**

fraudulently backdated assignment of mortgage with the court.[19] PINO's motion also adopted all the arguments and supporting fact references in two motions and supporting memoranda that had been filed over the course of the litigation.[20]

PINO's motion could not get any more specific as to the fraud which entitled him to dismissal, or at the very least, an evidentiary hearing on the issue.[21] The motion referred to the forged document that was filed with the lower court.[22] The forged document is an instrument which not only purports to transfer a property interest to counsel's own client, but which constitutes the evidentiary lynchpin of that client's case.[23] The motion also explains the circumstances surrounding the fraud and its purpose which was to backdate an assignment executed after the case was filed in order for BNY Mellon to misrepresent to the court that it had standing to avoid dismissal under *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990).[24]

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[19] *Id.*

[20] *Id.* at 2 **(A. 68)**.

[21] *See id* at 1, 1-3 **(A. 68-70).**

[22] *Id.* at 2-3 **(A. 68-69).**

[23] Assignment of Mortgage attached to Amended Complaint, dated September 19, 2008 **(A. 25-26).**

[24] PINO's Rule 1.540 Motion **(A. 70).**

Interestingly, BNY MELLON did not deny the underlying facts at the hearing but claimed the facts do not rise to the level of fraud:

> MR. TEW: . . . we in no way agree that what happened was fraud or was done with the intention to mislead or take advantage of the court or the defendant.
>
> I think -- and I won't argue this but I think the facts will show these were mistakes made by clerical people at the Stern law firm, empty head but not evil heart.[25]

Accordingly, PINO's motion raises more than mere legal conclusions; the allegations arise from the record and are pled with particularity.

2. PINO also demonstrated more than a "colorable entitlement" to the sanction of dismissal based on fraud.

Even more than the misconduct itself, the deceitful intent that motivated the misconduct—to mislead the court on an issue central to the case by filing a forged document—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

[25] Tr. of Proceeding before the Honorable Meenu Sasser, p. 18, dated January 14, 2010. **(A. 178).**

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, BNY MELLON 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.").

PINO's motion alleges that there can be no doubt that all those who participated in the execution, the witnessing, and the notarizing of this Assignment of Mortgage did so fraudulently and with the intent of committing fraud on the court.[26] Such facts, if proven, cannot be explained or interpreted to be anything but fraud. Florida courts have already held that a dismissal with prejudice is appropriate where a party submits fraudulently executed documents to the court. *See Taylor*, 893 So. 2d at 646. Therefore, the motion alleged and demonstrated much more than a mere "colorable entitlement" to having the voluntary dismissal

[26] This fraudulent backdating of assignments appears to be a pattern with Plaintiff's counsel. Michelle Camacho purportedly notarized a Samons' assignment of mortgage on November 1, 2007, and another on December 14, 2007, even though her commission did not issue until months later on March 25, 2008, Exhibits C_1, C_2 and D to PINO's Motion for Sanctions. **(A. 38-40).** Sabrina Romero purportedly notarized a Samons' assignment of mortgage on September 20, 2007, even though she did not become a notary until November of that year, Exhibits E and F to PINO's Motion for Sanctions. **(A. 41-42).** Shannon Smith notarized a Samons' assignment of mortgage on September 26, 2008, but swore that Ms. Samons had executed the document before her nearly a year earlier (October 5, 2007) at a time before she even became a notary, Exhibits G and H to PINO's Motion for Sanctions. **(A. 43-44).** Ericka Iglesias witnessed and notarized an assignment on February 17, 2007 – over 14 months before her commission was issued, Exhibits I_1 and J to PINO's Motion for Sanctions. **(A. 45, 48).** Ms. Iglesias also notarized assignments on November 26, 2007 and December 21, 2007 – both before her commission was issued, Exhibits I_2 and I_3 to PINO's Motion for Sanctions, **(A. 46-47).**

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

B. The Fraud Committed by BNY MELLON and its Counsel entitles PINO 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, BNY MELLON filed the voluntary dismissal to avoid the consequences of filing a forged document intended to deceive the court. 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. The circumstances in this case are analogous to those in the *Select Builders'* case.

The circumstances here are remarkably similar to those of the *Select Builders* case in that it has developed in this case that the plaintiff may have

committed a fraud on the court. After PINO 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, BNY MELLON, exactly like the *Select Builders'* plaintiff, filed a notice of voluntary dismissal seeking to avoid the consequences of its actions. Even more compelling here, the allegation of forgery in this case is worse than any expressed in the *Select Builders'* opinion.

At the hearing, BNY MELLON argued that striking its voluntary dismissal would be contrary to Florida law because the Plaintiff had not previously obtained affirmative relief.[27] According to BNY MELLON, securing "affirmative relief" in this case would have meant successfully foreclosing on PINO's home[28] (presumably with the use of its fraudulent assignments). Under this rationale, the fact that BNY MELLON was unable to achieve its fraudulent objective and instead having chosen to voluntarily dismiss the action once defense counsel had exposed its wrongdoing would be a complete shield to its fraud.

In support of its position BNY MELLON cites *Bevan v. D'Alessandro*, 395 So. 2d 1285 (Fla. 2d DCA 1981). In *Bevan*, however, the plaintiff voluntarily

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[27] Tr. of Proceedings held before the Honorable Meenu Sasser, p. 17, dated January 14, 2010 **(A. 178).**

[28] BNY MELLON's Response to [redacted] Pino's Motion to Strike the Notice of Voluntary Dismissal, p. 2, dated January 7, 2010 **(A. 160).**

dismissed the case to avoid a dismissal for lack of prosecution – not a dismissal for fraud. The *Bevan* court distinguished *Select Builders* in part because the plaintiff's voluntary dismissal in *Bevan* did not "rise to the level of a fraud on the court under the circumstances" nor did the plaintiff receive affirmative relief. *Id.* at 1286. Here, PINO has alleged fraud on the part of BNY MELLON that will, if proven through discovery and an evidentiary hearing, rise to the level of fraud on the court.

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. The court in *Select Builders* never stated any requirement that affirmative relief be had. The court however did distinguish other cases where neither fraud was present nor affirmative relief received. *Id.* at 1091. More important is the fact that prior to the notice of voluntary dismissal and its striking, the *Select Builders'* court had already vacated the order expunging the injunction. *See id.* Therefore, the purpose in striking the notice of voluntary dismissal of the plaintiff was to allow the court to address the allegations of fraud on the court. Here, PINO, like the defendants in *Select Builders*, filed a motion for sanctions to bring the fraud to the attention of the court prior to the plaintiff's filing of the voluntary dismissal in an attempt to

immunize itself from its fraudulent acts. Wrongdoers should not be rewarded under the rules of procedure.

The notion that the court cannot strike the voluntary dismissal unless BNY MELLON successfully defrauded the court is a "no harm, no foul" argument that should be soundly condemned. *See Cox*, 706 So. 2d at 46 (rejecting argument "that Cox should not be punished because she failed to deceive.") That the efforts of defense counsel prevented the success of a fraudulent scheme is not a defense to a motion for dismissal for fraud and unclean hands. Just as an attempted crime is still a crime, an unsuccessful attempt to defraud the court is still sanctionable. Parties should not be permitted to intentionally mislead the court with impunity, as long as they voluntarily dismiss the minute they are caught.

Such a policy rewards wrongdoing because the wrongdoer receives a dismissal without prejudice rather than the dismissal with prejudice that would result if the fraud is brought to the attention of the court. In fact, had the dismissal not thwarted PINO's discovery efforts to prove the fraud, BNY MELLON's complaint would have been dismissed with prejudice.

3. Prohibiting BNY MELLON from restarting the case in an attempt to expunge its own fraud conserves judicial resources.

Lastly, striking BNY MELLON's notice of voluntary dismissal does not offend the policy of favoring the finality of judgments. In fact, reopening the case actually supports the policy by cutting down on litigation time when these cases will ultimately be re-filed immediately. To restart from the beginning will waste needless time and resources of both the court and the parties. The only person benefitting from such a rule is the wrongdoer who is shielded from the consequences of their fraudulent conduct. A wrongdoer should not benefit from a carte blanche shield against fraud.

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

The problem of fraudulently executed documents is a statewide problem and is not unique to BNY MELLON counsel's firm. *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 executed by Cheryl Samons) **(A. 183)**; *see also supra* text accompanying note 26. This problem is widespread amongst foreclosure mills that each have thousands of cases

throughout the state.[29] The veracity of banks and their firms is so often in question that the Florida Supreme Court has changed Florida Rule of Civil Procedure 1.110 to require that foreclosure complaints be verified.[30] 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. This point is even more powerful in this case where it is alleged that employees of plaintiff's counsel created, executed, and filed fraudulently dated documents with the court. However, even the new rule will have no force or effect if it can be nullified by simply filing a notice of voluntary dismissal.

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[29] *See* Amir Efrati, *Judge Bashes Bank in Foreclosure Case*, Wall St. J., April 17, 2010, available at http://online.wsj.com/article/SB10001424052702303491304575188943977777722.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/

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

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).

CONCLUSION

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

Respectfully submitted,

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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 April 21, 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 14 Point.

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