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 EQUIFIRST CORPORATION,

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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Notes:

1) References to pages in the [redacted] Appendix will be indicated as **(A. __)**.

2) An effort was made to refer to parties by their names (such as, "[redacted] "MERS"[Appellee, Mortgage Electronic Registration Systems, Inc., as Nominee for Equifirst Corporation], or "SUTTON" [Appellee, Sutton Funding, LLC.]), but the generic "Plaintiff" (or the names of counsel, such as "JONES FOSTER") was used where the identity of the party to which a particular act is to be attributed may be disputed.

ARGUMENT

A. Attempted Fraud is Still Sanctionable.

SUTTON's Answer Brief concedes nearly every factual issue raised by [redacted] It confesses that the *ex parte* orders should not have been obtained,[1] that the witness produced on its behalf did not have the degree of knowledge required by the Florida Rules of Civil Procedure;[2] and that plaintiff's counsel have taken different, conflicting positions with regard to whether MERS or SUTTON was the real party in interest.[3]

The theme of SUTTON's response, however, is that, having chosen to voluntarily dismiss the action once defense counsel had exposed its wrongdoing, [redacted] has no right to complain:

- No harm resulted to [redacted][4]
- In light of the voluntary dismissal taken by the Plaintiff, no affect on [redacted] occurred as a result of this discovery issue.[5]
- [redacted] Rule 1.540 motion [does not show] how any alleged fraud or misrepresentation affected [redacted] in any way.[6]

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[1] SUTTON Answer Brief, p. 22.

[2] SUTTON Answer Brief, p. 25.

[3] SUTTON Answer Brief, p. 22, 24, 34.

[4] SUTTON Answer Brief, p. 16.

[5] *Id.*

- ...nor has [redacted] shown how any alleged fraud affected any judgment – or affected the Defendant in any way.[7]
- [A]lthough the ex parte orders should not have been obtained, no effect on [redacted] occurred.[8]
- [redacted] has not pointed out how the confusion [as to the party plaintiff] had any affect whatsoever on the defendant...[9]
- The question is whether [producing a witness without the requisite degree of knowledge] has had any negative affect on the defendant, [redacted][10]

This "no harm, no foul" argument should be soundly condemned. *See Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998)(Court rejected argument "that Cox should not be punished because she failed to deceive.")

That the efforts of defense counsel prevented the success of an apparent fraudulent scheme and subsequent cover-up, is not a defense. 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 and obstruct discovery with impunity, as long as they voluntarily dismiss the minute they are caught. This SUTTON-proposed theory of how litigation should be

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[6] SUTTON Answer Brief, p. 17.

[7] SUTTON Answer Brief, p. 21.

[8] SUTTON Answer Brief, p. 22.

[9] SUTTON Answer Brief, p. 23.

[10] SUTTON Answer Brief, p. 25.

conducted does not comport with the dignity and integrity of the judicial system – fundamental features that must be jealously guarded by the courts.

Worse, SUTTON has the temerity to claim that [redacted] actually benefited from Plaintiff's wrongdoing:

> In fact, not only did the discovery errors committed by plaintiff s counsel not cause any detriment to the defendant, they operated to the defendant's advantage, ultimately resulting in a voluntary dismissal and the need to start the litigation all over again with a separately filed case. Plaintiffs have conceded that defendant is entitled to reasonable attorneys' fees and costs.[11]

Merely reimbursing [redacted] attorney for six months of needlessly wasted effort does not benefit [redacted] Nor does it compensate the court for the waste of its judicial resources that, in these difficult economic times, are particularly scarce in the foreclosure division.

B. The "Relief" Plaintiff Received in This Case is that it Received a Dismissal Without Prejudice Rather than a Dismissal With Prejudice.

The converse of the "no harm to [redacted] argument is SUTTON's "no benefit to Plaintiff" argument. SUTTON repeatedly asserts that [redacted] is not

[11] SUTTON Answer Brief, p. 18.

entitled to Rule 1.540 relief because SUTTON did not benefit from the alleged fraud by obtaining a judgment in its favor.[12]

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, Plaintiff's voluntary dismissal was in furtherance of the alleged fraud, and thus, had a fraudulent purpose of its own. SUTTON's express purpose for the voluntary dismissal is an unabashed attempt to wipe the slate clean and otherwise distance itself from its misconduct:

> MR. STUBBS [Counsel for SUTTON]: ...Sutton Funding has refiled this case to start over, that's what the notice of voluntary dismissal rule is for, in an effort to get rid of all the issues and inconsistencies and problems, they take a voluntary dismissal.[13]

SUTTON's "benefit" therefore, is the chance to "start the litigation all over again," rather than having its case dismissed with prejudice.

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[12] SUTTON Answer Brief, p. 19 ("Here, the record reflects no misrepresentations and no relief to Plaintiff.") p. 21 (has [not shown] how any alleged fraud affected any judgment") p. 24 (" did not meet requirement of "demonstrating ... that the fraud affected the judgment.").

[13] Transcript of Proceedings held before the Honorable Meenu Sasser, August 10, 2009, pp. 38-39 **(A. 432-33).**

C. The Fraud Must Be Viewed in the Light of All Plaintiff's Misdeeds Taken as a Whole.

SUTTON next tries to parse out distinct elements of its wrongdoing in order to argue that individually, they do not rise to the level of fraud. For example, in the context of its "failure to produce a knowledgeable witness," SUTTON argues that the court would simply have compelled the attendance of a different witness:

> It is highly unlikely that the court would have considered this failure a "fraud on the court" or the basis for a dismissal of the case with prejudice.[14]

But, to prove fraud, [redacted] is entitled to show "a series of distinct acts" which "when taken together as a whole constitute fraud." *Department of Revenue v. Rudd*, 545 So. 2d. 369, 372 (Fla. 1st DCA 1989). Fraudulent intent usually must be proved by circumstances which "by their number and joint consideration [is] sufficient to constitute proof." *Id.* It requires a "full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute a fraud" *Id.* (emphasis added).

Accordingly, while a court may find that Plaintiff's misdeeds in this case, when taken individually, do not rise to the level of fraud, taken together they paint the picture of a non-party (HOMEQ), manipulating its counsel to falsely represent

[14] SUTTON Answer Brief, p. 27.

that MERS, then SUTTON, is the real party in interest, and then blocking any discovery aimed at uncovering the truth.

D. [redacted] Pled Fraud with Particularity and Identified Specific Misrepresentations.

SUTTON argues that [redacted] has not "pled fraud with particularity,"[15] and that the "record reflects no misrepresentations" of fact to the court.[16] In reality, [redacted] specifically pled misrepresentations to the court – the evidence of which is abundant in the record even before an evidentiary hearing has been held. The misrepresentations, fraud and misconduct were identified in five motions and memoranda, and specified again in [redacted] Rule 1.540 motion.[17] Foremost among the misrepresentations are the contradictory representations as to which entity is the real party in interest and how it obtained standing – issues that go to the heart of the case. SUTTON does not deny that factual misstatements were made, but trivializes them as innocent mistakes with the rhetorical question:

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[15] SUTTON Answer Brief, p. 21.

[16] SUTTON Answer Brief, p. 19.

[17] Defendant, [redacted] [redacted] Conditional Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, dated August 7, 2009, p. 4 **(A. 388)**; *see*, citations to the record in [redacted] Initial Brief, pp. 29-30.

"How could plaintiff have hoped to gain by misrepresenting the appropriate party?"[18] This sentiment is repeated throughout its brief.[19]

However, Plaintiff's fraudulent motive in keeping the real party in interest a secret is exactly that which necessitates an evidentiary hearing. In the context of summary judgment motions, the courts have long recognized that "fraudulent intent" and "knowledge" is proven through circumstantial evidence, such that deciding a fraud claim without a trial is rarely appropriate. *Cohen v. Kravit Estate Buyers, Inc.*, 843 So. 2d 989 (Fla. 4th DCA 2003); *Department of Revenue v. Rudd*, 545 So. 2d. 369, 372 (Fla. 1st DCA 1989). By analogy, Plaintiff's fraudulent intent in this case must be determined by an evidentiary hearing.

Another misrepresentation that was specifically identified was the claim that MERS (and later SUTTON) was obligated to pay the fees of Plaintiff's counsel, when in reality it was HOMEQ who paid the fees.[20] (Despite SUTTON's claim on

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[18] SUTTON Answer Brief, p. 23.

[19] SUTTON Answer Brief, p. 18 ("Appellant never suggests any foundation or reason to believe that anyone would think it served any purpose by proceeding to the trial with the wrong plaintiff."); p. 22 ("Nowhere in the numerous lengthy motions or in the appellant's brief has plaintiff's counsel ever suggested what plaintiff's counsel could have hoped to gain or accomplish by making misrepresentations to the court with regard to who held the Note and who was entitled to enforce the Mortgage.")

[20] *See*, citations to the record in [redacted] Initial Brief, pp. 20-21.

appeal that "[t]he record reflects nothing with regard to the adequacy of Plaintiff's counsel's communications with their clients one way or the other,"[21] in reality, the record indisputably reflects that all client communications regarding the prosecution of this foreclosure occurred with HOMEQ, not with MERS or SUTTON.[22])

Yet another misrepresentation was the implicit representation that the HOMEQ employee, Jill Orrison, was a corporate representative of both MERS and SUTTON with the most knowledge of dozens of issues of fact.[23] SUTTON concedes Plaintiff's wrongdoing in presenting Ms Orrison for deposition, but questions "whether this rises to the level of 'fraud.'"[24] Again, that question must be answered through an evidentiary hearing and consideration of all the relevant facts, collectively.

[redacted] identified still other instances of fraudulent misconduct which are described in detail throughout [redacted] Initial Brief and will not be repeated here. All of these instances were pled and properly before the lower court for its

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[21] SUTTON Answer Brief, p. 25.

[22] *See*, citations to the record in PESTEN Initial Brief, pp. 38-29.

[23] *See*, citations to the record in [redacted] Initial Brief, pp. 7-12.

[24] SUTTON's Answer Brief, p. 25.

consideration when the Rule 1.540 motion was summarily denied without a hearing.

E. Whether Defense Counsel Was "Confused" As to the Party Plaintiff's Identity Is Irrelevant to Determining Fraud.

SUTTON argues that the contradictory claims as to the identity of the appropriate plaintiff should be ascribed to mere "confusion on the part of plaintiff's counsel."[25] It bolsters that argument with the claim that defense counsel "also demonstrated confusion" as to the named Plaintiff[26] – a claim that has already been refuted.[27] But if a defendant had shown confusion, it could only have been caused by Plaintiff's counsel's own inconsistent allegations. Thus, any resulting befuddlement of Plaintiff's adversaries could hardly excuse Plaintiff's counsel from knowing what entity is actually their client. Nor could it excuse that client from knowing whether it is the real party in interest. In short, an adverse party's bewilderment, itself caused by Plaintiff's counsel, is irrelevant to

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[25] SUTTON's Answer Brief, p. 25.

[26] SUTTON's Answer Brief, p. 24.

[27] *See*, table in Motion to Change Style, dated April 23, 2009 **(A. 199)** (charting the periods that SUTTON was briefly the Plaintiff due to *ex parte* orders that were later vacated); transcript of Proceedings held before the Honorable Meenu Sasser, August 10, 2009, p. 15 **(A. 409)** (explaining that [redacted] Notice of Production was directed to MERS as a non-party because SUTTON was the Plaintiff at the time); and [redacted] Initial Brief, p. 8 (explaining that, by agreement of counsel, SUTTON was not subpoenaed for deposition).

determining if Plaintiff's counsel was merely "confused" or was knowingly involved in a fraudulent party-plaintiff shell game at the behest of their true client, HOMEQ.

F. Jones Foster's citation to *Kumar* Belies Its Assertion That It Never Suggested That Plaintiff Is Merely an Agent of the Real Party in Interest.

In his Initial Brief, [redacted] pointed out that "JONES FOSTER suggested SUTTON could prosecute the action under its own name even if it was not the real party in interest, as long as it was acting for the (unidentified) entity that was."[28] SUTTON spends nearly two pages of its brief arguing that this is "simply incorrect."[29] According to SUTTON, its memorandum argued only that SUTTON's standing was properly alleged in the First Amended Complaint, which made no mention of an agency relationship.[30]

What SUTTON never explains is why the paragraph it contends makes no allusion to an agency relationship ends with a citation to *Kumar Corporation v. Nopal Lines, Ltd.*, 462 So. 2d 1178 (Fla. 3d DCA 1985). *Kumar*, which has not been cited in any other context in this action, is a principal case in Florida

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[28] [redacted] Initial Brief, pp. 34-35.

[29] SUTTON's Answer Brief, pp. 13-14, 23-24.

[30] SUTTON's Answer Brief, pp. 14, 23.

jurisprudence for the axiom that an action may be prosecuted in the name of someone other than, but acting for the real party in interest. *See Juega v. Davidson*, 8 So. 3d 488, 490 (Fla. 3d DCA 2009) (quoting *Kumar*: " [A] nominal party, such as an agent, may bring suit in its own name for the benefit of the real party in interest."); *Mortgage Electronic Registration v. Azize*, 965 So. 2d 151, 153 (Fla. 2d DCA 2007) (quoting Kumar: "[A]n action to be prosecuted in the name of someone other than, but acting for, the real party in interest."); *Weiss v. Johansen*, 898 So. 2d 1009 (Fla. 4th DCA 2005). SUTTON's citation to *Kumar*, therefore, supports the opening sentence of the paragraph in dispute, and has no place unless SUTTON is now claiming standing as an agent of the real party in interest.

Oddly, SUTTON caps its argument by suggesting once again that its standing stems from an undisclosed agency relationship: "had [the agency argument] been made, the point would be valid, i.e. that an authorized agent may pursue foreclosure."[31] Yet, the point could only have been "valid" if it applied to the underlying facts. It is mystifying why SUTTON would find it necessary to remind this Court that "authorized agents may pursue foreclosure" if it were convinced that it has standing to pursue the action on its own.

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[31] SUTTON Answer Brief, p. 31.

G. None of SUTTON's Cases Address the "Colorable Entitlement" Standard.

None of SUTTON's cases decide whether a party had shown a colorable entitlement to relief such that an evidentiary hearing is required. Only one addressed whether it was necessary to hold an evidentiary hearing to determine whether fraud had been committed – and that case reversed and remanded with the explanation that an evidentiary hearing is required. *Bologna v. Schlanger*, 995 So. 2d 526, 528 (Fla. 5th DCA 2008) ("...there should be clear and convincing evidence of a scheme calculated to evade or stymie discovery of facts central to the case [which] will almost always require and evidentiary hearing.").

In *Romar Intern., Inc. v. Jim Rathman Chevrolet/Cadillac, Inc.*, 420 So. 2d 346 (Fla. 5th DCA 1982), the court merely held that attorneys' fees based on a party's failure to attend its deposition could not be awarded after a voluntary dismissal. In its discussion, the court mentioned a narrow exception to a plaintiff's right to voluntarily dismiss – "where a fraud on the court is attempted by the filing of the voluntary dismissal." *Id.* at 347. Since no such fraud was alleged, it is not surprising that the court "found no reason to vacate the voluntary dismissal."[32]

[32] SUTTON's Answer Brief, p. 28.

In *Furst v. Blackman*, 819 So. 2d 222 (Fla. 4th DCA 2002), this Court reversed an order granting a motion to strike a sham pleading. The Court had already reversed an order dismissing the same case once before, because (among other things) the trial court had not held an evidentiary hearing pursuant to Rule 1.150(a) Fla.R.Civ.P. *Furst v. Blackman*, 744 So. 2d 1222 (Fla. 4th DCA 1999). On the second appeal, after an evidentiary hearing, this Court found that the identified inconsistencies between affidavits and the pleadings either did not exist or did not make the pleadings "'undoubtedly false' and known to be so." *Furst v. Blackman*, 819 So. 2d at 224.

The four remaining cases cited by SUTTON are personal injury actions in which a plaintiff made statements about the severity of the injury or the existence of prior injuries that conflicted with the evidence. *Amato v. Intindola*, 854 So. 2d 812 (Fla. 4th DCA 2003) (surveillance video contradicted plaintiff's testimony); *Jacob v. Henderson*, 840 So. 2d 1167 (Fla. 2d DCA 2003) (same); *Rios v. Moore*, 902 So. 2d 181 (Fla. 3d DCA 2005) (medical records apparently contradicted plaintiff's testimony); and *Ruiz v. City of Orlando*, 859 So. 2d 574 (Fla. 5th DCA 2003) (medical records contradicted plaintiff's testimony).

In *Ruiz*, the court found that the plaintiff's conflicting statements regarding prior injuries did not rise to the fraud standard established in *Cox v. Burke*, 706 So. 2d 43 (Fla. 5th DCA 1998). The court noted:

> *Cox* presented an extremely unusual fact pattern, wholly unlike the more conventional impeachment issues that have shown up in some more recent decisions, including this case. In *Cox*, there was a significant amount of evidence suggesting that the court could not even be confident of who the plaintiff was, much less what had happened to her.

Id. at 576 (emphasis added). Perhaps even more so than in *Cox*, this case presents significant evidence suggesting that the court cannot be confident of who the real plaintiff is – i.e. what entity is driving this litigation – much less which, if any, of those entities is the real party in interest. Even Plaintiff's counsel has never been confident of who the Plaintiff is.

In summary, the facts here are already far more egregious than the exaggerations of injury discussed in SUTTON's cases. Even if they were analogous, those cases simply set forth the standard or measure to be applied to those facts after the case is remanded for a formal evidentiary hearing "as well as permissible discovery prior to the hearing." *Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986). To apply that measure before

all the facts have been developed through an evidentiary hearing puts the cart before the horse.

Nowhere could this transposition of procedural steps be more evident than in SUTTON's argument that: "No determination has been made that Appellees misrepresented anything at trial or in discovery."[33] No determination has been made precisely because no evidentiary hearing has ever been held.

Here, the record is already bursting with the smoke from admitted "conflicting statements," improper *ex parte* orders, and discovery misconduct – not to mention Plaintiff's counsel's repeated inability to even identify their own client. [redacted] is entitled to an evidentiary hearing (and related discovery) to reveal the fire that lurks beneath that smoke. Given SUTTON's admissions in its Answer Brief, [redacted] has clearly shown a colorable entitlement to Rule 1.540 relief, and thus, full entitlement to an evidentiary hearing.

CONCLUSION

The lower court's denial of [redacted] 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, and Amended Second Motion For Sanctions.

[33] SUTTON's Answer Brief, p. 31.

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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 October 5, 2009 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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