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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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I. BNY MELLON's Statement of Case confuses allegations and facts.

The answer brief contains an entire fact section based on allegations.[1] It is important to note that this case never made it to the pleading stage. A motion to dismiss was pending at the time BNY MELLON sought to voluntarily dismiss. Therefore, any allegations in the complaint were just that – allegations. Much of the so-called facts are merely citations to the Complaint.[2] This is indicative of what occurred in the lower court. BNY MELLON again seeks to create its own facts. Further, half of the allegations cited as facts are beyond the scope of review and have nothing to do with the issue on appeal.[3]

Coupled with the allegations, the answer brief later argues that [redacted] did not dispute he was in default or dispute any of the terms of the note and mortgage.[4] The point the argument misses is that [redacted] could not have disputed such

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[1] *See* Answer Brief of the Bank of New York Mellon ("Answer Brief") p. 1.

[2] *Id.*

[3] Ironically, the answer brief in a footnote accuses [redacted] of impermissibly using a news article to support claims of backdating and it cites a case where a party tried to supplement the record. Notably, the footnote leaves out the fact that [redacted] never sought to supplement the record or include the article in the appendix nor did he ever suggest that the article was part of the record. It only appears in the public policy discussion following a case addressing similar issues.

[4] Answer Brief, p. 1, 4, 10, 12-14.

allegations because he never filed a responsive pleading in this case. Further, [redacted] initial brief would not dispute irrelevant allegations or facts that are beyond the scope of review of this Court on appeal. Accordingly, BNY MELLON's statement of the case should be stricken.

II. BNY MELLON Incorrectly States the Standard of Review.

BNY MELLON cites two family law opinions from the Third and Fifth Districts to support its assertion that the trial court was faced with a jurisdictional issue.[5] First, is *Cruz v. Domenech*, 905 So. 2d 938, 940 (Fla. 3d DCA 2005), which was a paternity action where the Third District determined when a lower court can modify a custody order. The other case cited by BNY MELLON is *Barko v. Barko*, 557 So. 2d 932, 933 (Fla. 5th DCA 1990). In that case, a wife appealed a final order which modified a final judgment of dissolution and terminated alimony payments to her. *Id.* Both cases are inapplicable on their face.

[redacted] motion was filed under Fla. R. Civ. P. 1.540(b) and it alleged fraud. None of BNY MELLON's cases involve fraud in the context of a rule 1.540(b) motion. The general standard of review on a rule 1.540(b) motion is abuse of discretion, however, the denial of a rule 1.540(b) motion without an evidentiary

[5] Answer Brief, p. 5.

hearing is, as a matter of law, an abuse of discretion unless the motion fails to allege a "colorable entitlement" to relief. *See Schleger v. Stebelsky*, 957 So. 2d 71, 73 (Fla. 4th DCA 2007); *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 a ground under Rule 1.540); *Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) (requiring permissible discovery and a formal evidentiary hearing "where the moving party's allegations raise a colorable entitlement to rule 1.540(b)(3) relief . . . .").

Accordingly, there is no need to look to cases with different procedural postures to decide the issues here. *Schleger*, *Stella*, *Robinson*, and *Welden* as cited by [redacted] all involve allegations of fraud raised by 1.540(b) motions. Further, this Court itself stated and applied the standards as laid out in *Schleger* and *Stella*.

III. [redacted] showing of a "colorable entitlement" based on the fraudulently backdated assignment triggered the requirement for an evidentiary hearing.

[redacted] 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.[6] The motion specifically referred to the forged

[6] [redacted] Rule 1.540 Motion (A. 68-70).

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.[7] Florida courts have held that a dismissal with prejudice is appropriate where a party submits fraudulently executed documents to the court. *See Taylor v. Martell*, 893 So. 2d 645, 646 (Fla. 4th DCA 2005) (affirming dismissal with prejudice where party fraudulently executed and filed documents). Therefore, the rule 1.540 motion alleged a colorable entitlement to relief.

BNY MELLON's answer brief does not dispute the allegations of the motion or even address the issue of colorable entitlement. Rather, the answer brief focuses on one issue, whether BNY MELLON's failure to successfully commit fraud on the trial court precludes [redacted] from having the trial court hear the fraud issue at an evidentiary hearing. It does not.

A. Attempted fraud is still sanctionable.

The answer brief is consistent with BNY MELLON's position at the hearing below in that it seemingly does not dispute the factual issues that BNY

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

MELLON's counsel manufactured the date on the assignment.[8] The theme of BNY MELLON's answer, however, is that, having chosen to voluntarily dismiss the action once defense counsel had exposed the forged assignment, [redacted] has no right to complain because the fraud was unsuccessful and no harm resulted to [redacted].[9] 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 BNY MELLON-proposed theory of how litigation should be conducted does not comport with the dignity and integrity of the judicial system – fundamental features that must be jealously guarded by the courts.

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[8] See Answer Brief, p. 11; Tr. of Proceeding before the Honorable Meenu Sasser, p. 18, dated January 14, 2010. (A. 178).

[9] *See* Answer Brief.

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

> Only [redacted] benefited from the voluntary dismissal—he continues to possess the property even though he has not made loan payments in over two years.[10]

Merely reimbursing [redacted] attorney for over a year 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" BNY MELLON 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 BNY MELLON's "no benefit to Plaintiff" argument. BNY MELLON repeatedly asserts that [redacted] is not entitled to rule 1.540 relief because BNY MELLON did not benefit from the alleged fraud by obtaining a judgment in its favor.[11]

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

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[10] Answer Brief, p. 12.

[11] Answer Brief, p. 9, ("In fact, the circuit court had taken no action in [BNY MELLON's] favor, let alone action granting the affirmative relief sought by [BNY MELLON], *i.e.* the foreclosure of [redacted] mortgage.") p. 12 ("[O]nly [redacted] has benefited from the voluntary dismissal . . . .").

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

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

C. Fraud trumps a voluntary dismissal.

BNY MELLON relies heavily on *Bevan v. D'Alessandro*, 395 So. 2d 1285 (Fla. 2d DCA 1981), to support its argument that the voluntary dismissal should not be stricken for fraud. Such reliance is misplaced.

The question in *Bevan* was whether a plaintiff can avoid a lack of prosecution by voluntarily dismissing the case prior to the lack of prosecution hearing. 395 So. 2d at 1286. In other words, does a voluntary dismissal trump a pending lack of prosecution motion? The Fourth District expressed skepticism because the plaintiff thwarted the intent of the lack of prosecution rule but nevertheless held that the voluntary dismissal controlled and there was no jurisdiction to subsequently rule on the lack of prosecution motion. Here, by contrast, we are dealing with allegations of fraud in the face of a voluntary dismissal.

The question in this case is whether fraud trumps a voluntary dismissal. The Third District has already answered the question affirmatively in *Select Builders of Florida, Inc. v. Wong*, 367 So. 2d 1089, 1091 (Fla. 3d DCA 1979). In that case, it developed that the plaintiff may have perpetrated a fraud upon the trial court in obtaining an order expunging a document. *Id.* Accordingly, the trial court vacated its previous order. The defendants then moved for sanctions against the plaintiff, contending that the Plaintiff misled the court and committed certain procedural irregularities. After being ordered to take immediate steps to place the parties and the real estate in a status quo and being required to deposit money it received from the sale of the property to a third party, the plaintiff filed its notice of voluntary dismissal under Fla. R. Civ. P. 1.420. On the defendants' motion, 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.*

The question here is the same as in *Select Builders*. Fraud trumps a voluntary dismissal. 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, BNY MELLON then filed its notice of voluntary dismissal seeking to avoid the consequences of its actions. To compare the allegations, the *Select Builders* plaintiffs may have committed fraud on the court, while here, BNY MELLON has all but admitted that it forged the assignment in this case.

BNY MELLON argues that voluntary dismissal should not be stricken because BNY MELLON had not previously obtained affirmative relief.[12] As stated above, it is nonsensical to apply a standard requiring "affirmative relief" as defined by BNY MELLON in cases alleging fraud. In this case that would have meant successfully foreclosing on [redacted] home with the use of its fraudulently dated assignments. The argument carved from the *Bevan* misses two relevant points. First, 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. *Bevan*, 395 So. 2d at 1286. Meaning, the *Bevan* court itself recognized its facts were distinguishable from *Select Builders* because fraud was not alleged in *Bevan*.

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

Second, the *Select Builders'* court had previously vacated the order expunging the injunction, therefore, under BNY MELLON's definition that would have been the affirmative relief. *See id.* Accordingly, the purpose of striking the notice of voluntary dismissal of the plaintiff was to allow the *Select Builders* court the opportunity to address the allegations of fraud on the court. The trial court here should have done the same.

D. None of BNY MELLON's cases address the "colorable entitlement" standard.

BNY MELLON does not cite a single case deciding whether a party had shown a colorable entitlement to relief such that an evidentiary hearing was required. Instead, BNY MELLON argues that such fraudulent backdating is not severe enough to merit dismissal with prejudice. For this proposition BNY MELLON cites a single case which was a personal injury action in which a plaintiff made statements about the severity of the injury or the existence of prior injuries that conflicted with the evidence. *See Amato v. Intindola*, 854 So. 2d 812 (Fla. 4th DCA 2003) (surveillance video contradicted plaintiff's testimony).

That case quotes from *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998). In *Cox*, a dismissal with prejudice was affirmed where 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. This case, even more so than *Cox*, presents significant evidence suggesting that the court cannot be confident who the real plaintiff is given BNY MELLON's apparent need to manufacture documents to attempt to prove its standing as the mortgagee.

Also, the allegations here are already far more egregious than the exaggerations of injury discussed in *Amato*. Accordingly, *Amato* is distinguishable and cites to *Cox* which actually supports [redacted] position. Nevertheless, to apply any measure before all the facts have been developed through an evidentiary hearing puts the cart before the horse.

E. BNY MELLON now misrepresents its position below.

BNY MELLON also argues that the fraudulent backdating would likely not warrant the sanction of dismissal with prejudice because the assignment of mortgage which was filed so the case would not be dismissed was unnecessary for its theory of ownership.[13] Despite this new theory, BNY MELLON's own statement of facts admits that the complaint pled that the mortgage was owned and held by virtue of an assignment.[14] To now, after the fact, change theories and

[13] Answer Brief, p. 11.

[14] Answer Brief, p. 1-2; *see also* Complaint, Appendix to Answer Brief, p. 14.

suggest that it filed a superfluous assignment of mortgage is disingenuous. This is the same lack of candor that has resulted in this appeal.

As support for this new theory, BNY MELLON relies on *Vance v. Fields*, 172 So. 2d 613, 614 (Fla. 1st DCA 1965), to argue that a mortgage without a note creates no rights. never disputed the fact that a party must be the owner of a note and mortgage to foreclose. BNY MELLON also cites to *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725 (Fla. 5th DCA 2004), to assert that a mortgage is the security for the payment of a note and is mere incident of and ancillary to such note. This out of context assertion confuses the issue decided in *Perry*. The *Perry* court held that the lower court could consider a copy of the mortgage based on the defendant's failure to respond to a request for admission admitting that the mortgage attached to the complaint was the true and correct copy, and because the defendant's did not question the authenticity of the copy of the mortgage. *Id.* at 726-27. No such issues are present in this case and the *Perry* holding in no way dispenses with the requirement that to foreclose a mortgage the plaintiff must be the mortgagee.

CONCLUSION

The law is clear that fraud trumps a voluntary dismissal. A plaintiff cannot avoid the consequences of fraud on the court by voluntarily dismissing the case. Accordingly, this Court should reverse and remand with directions to schedule an evidentiary hearing on the fraud issues while permitting discovery prior to the hearing.

Dated July 30, 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 July 30, 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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