Florida Appeals Court Allows Mortgage Servicer to Dismiss Action in Face of Sanctions, But Certifies Issue to Florida Supreme Court

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You discharge your law firm because it may have acted improperly, and dismiss the lawsuit without prejudice rather than attempt to fix all the errors you find in the file. May you dismiss the suit if your adversary has not suffered any harm other than the cost and fees associated with defending the claim? That's the question posed by a recent decision in Florida, and the court, sitting en banc, decides that question in the affirmative, but has asked the Florida Supreme Court to weigh in on the issue.

In *Pino v. Bank of New York Mellon* (Fla. App. 4th District, Feb. 2, 2011), Florida's Fourth District Court of Appeal, sitting *en banc*, upheld the bank's voluntary dismissal of a foreclosure action filed after the defendant had moved for sanctions against the bank for filing an allegedly fraudulent assignment of mortgage. Affirming the trial court's refusal to strike the voluntary dismissal, the appellate court held that neither Florida Rule 1.540(b) – Florida's equivalent to Rule 60 of the Federal Rules of Civil Procedure, which allows a court to relieve a party from a final judgment based upon grounds that include fraud or other misconduct – nor the common law exceptions to that rule allow a defendant to set aside the plaintiff's notice of voluntary dismissal where the plaintiff has not obtained any affirmative relief before dismissal. Maintaining that Florida's courts have consistently construed Florida Rule 1.420(a) to mean that "at any time before a hearing on a motion for summary judgment, a party seeking affirmative relief has nearly an absolute right to dismiss his entire action," the court noted that the only limited exception to this rule exists where the defendant demonstrates serious prejudice.

BNY Mellon originally filed an action to foreclose a mortgage against the defendant, alleging that it owned and held the note and mortgage by assignment, but neglected to attach a copy of any assignment. When the defendant sought dismissal for failure to state a claim in light of the lost note and absence of an assignment of the mortgage, BNY Mellon amended its complaint and attached a new unrecorded assignment dated just before the original pleading was filed. The defendant moved for sanctions, alleging that the assignment document was false and had been fraudulently made, based on the fact that the assignment had been executed by an employee of the mortgagee's attorney and that the commission date on the notary stamp showed that the document could not have been notarized on the date in the document. BNY Mellon then filed a notice of voluntary dismissal of the action. Five months later, BNY Mellon refiled an identical foreclosure action, no longer alleging that the note was lost and attaching a new assignment of mortgage dated after the voluntary dismissal. The defendant then filed a motion in the prior dismissed action under Florida Rule 1.540(b), seeking to strike the voluntary dismissal on the grounds of fraud on the court, to dismiss the newly-filed action as a sanction, and to request an evidentiary hearing. This motion was denied by the trial court on the grounds that once the previous action had been voluntarily dismissed the court lacked jurisdiction and had no authority to consider any relief under Rule 1.540(b).

Holding that a defendant may only obtain relief under Rule 1.540(b) when a plaintiff has obtained a ruling that has adversely impacted the defendant, the appellate court found that the defendant was not adversely impacted by the dismissal nor seriously prejudiced and denied relief to the defendant. The court indicated that the proper relief was found under Rule 1.420, and that rule guaranteed the plaintiff's right of voluntary dismissal:

> The right to dismiss one's own lawsuit during the course of trial is guaranteed by Rule 1.420(a), endowing a plaintiff with unilateral authority to block action favorable to a defendant which the trial judge might be disposed to approve. The effect is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of "jurisdiction." If the trial judge loses the ability to exercise judicial discretion or to adjudicate the cause in any way, it follows that he has no jurisdiction to reinstate a dismissed proceeding.

Pino, slip op. at 6, quoting *Randle-Eastern Amb. Service v. Vasta*, 360 So. 2d 68, 69 (Fla. 1978). That said, the court agreed that the defendant may nonetheless be entitled to costs and possibly attorneys' fees upon the voluntary dismissal.

In a dissenting opinion, Judge Polen disagreed that Rule 1.420 completely relieved the court of jurisdiction from a voluntary dismissal and maintained that Rule 1.540(b) provided recourse since that rule allows the court to relieve a party from a final proceeding for fraud, misrepresentation, or other misconduct of an adverse party. Judge Polen further stated:

> Defendant's colorable showing of possible fraud in the making and filing of the assignment led to the scheduling of the depositions of those involved in making the document, and the notice of depositions led directly to the voluntary dismissal to avoid such scrutiny for an attempted fraud...a party should not escape responsibility and appropriate sanctions for unsuccessfully attempting to defraud a court by purposefully evading the issue through a voluntary dismissal.

Slip op. at 11 (dissent). Judge Polen maintained he would have held that the trial judge had the jurisdiction and authority to consider the motion under Rule 1.540(b) on its merits and, he also believed that if the court found that a party filed a false and fraudulent document in support of its claim, it would have the authority to take appropriate action, including the striking of a voluntary dismissal filed to assist in such conduct. Commenting on the dissent, the majority noted as follows:

[W]e do not view it as an appropriate exercise of the inherent authority of the court to reopen a case voluntarily dismissed by the plaintiff simply to exercise that authority to dismiss it, albeit with prejudice. Only in those circumstances where the defendant has been seriously prejudiced . . . should the court exercise its inherent authority to strike a notice of voluntary dismissal. The defendant in this case does not allege any prejudice to him as a result of the plaintiff's voluntary dismissal of its first lawsuit. Indeed, he may have benefitted by forestalling the foreclosure.

Slip op. at 5. It will now be up to the Florida Supreme Court to answer the following certified question:

> Does a trial court have jurisdiction and authority under rule 1.540(b), Fla. R. Civ. P., or under its inherent authority, to grant relief from a voluntary dismissal where the motion alleges a fraud on the court in the proceedings, but no affirmative relief on behalf of the plaintiff has been obtained from the court?

As both states and the U.S. Supreme Court often do, expect the question to be recast before its resolution. The result will be watched closely.

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Practice Areas

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