

SUPREME COURT OF FLORIDA

CASE NO: 66,716

DISTRICT COURT OF APPEAL,
4TH DISTRICT - NO. 84-2646

ANDREW BENDER,

Petitioner,

vs.

FIRST FIDELITY SAVINGS &
LOAN ASSOCIATION OF WINTER PARK,
ETC.,

Defendants. _____ /

FILED

SID J. WHITE

JUL 27 1983

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

INITIAL BRIEF

Petitioner, ANDREW BENDER, appeals to the Supreme Court of the State of Florida from a decision rendered by the Fourth District Court of Appeals in Case No. 84-2646, which directly conflicts with holdings of other Appellate Courts and of the Supreme Court.

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WHETHER A VOLUNTARY DISMISSAL FILED BY A PARTY TO AN ACTION DIVESTS THE TRIAL COURT OF JURISDICTION TO ALLOW THAT PARTY TO READ "WITHOUT PREJUDICE" WHEN IT IS ALLEGED, PURSUANT TO FLORIDA RULES OF CIVIL PROCEDURE RULE 1.540(b)(1) THAT THERE WAS MISTAKE, INADVERTANCE OR EXCUSABLE NEGLIGENCE IN THE FILING OF THE INITIAL VOLUNTARY DISMISSAL WITH PREJUDICE.	
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STATEMENT OF THE CASE AND FACTS

At the trial Court level both Petitioner and Respondent herein were Defendants in a mortgage foreclosure case. Respondent herein, FIRST FIDELITY SAVINGS AND LOAN ASSOCIATION OF WINTER PARK, f/k/a FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF MARTIN COUNTY then filed a Cross-Claim for foreclosure of the second mortgage against ANDREW BENDER, Petitioner herein. Realizing that their second position would be wiped out in the main action, Respondent herein then made a tactical decision to voluntarily dismiss their Cross-Claim and institute an action against Petitioner herein based upon the Promissory Note alone. Therefore, on April 27, 1984 Respondent filed a Promissory Note Complaint against Petitioner and on July 9, 1984 filed a Voluntary Dismissal With Prejudice. (See Page 2 of Appendix filed herein.)

Thereafter, on July 24, 1984, Respondent filed its Motion to Amend Voluntary Dismissal so that it would read "Without Prejudice". (See Page 3 of Appendix filed herein.) Said Motion relied upon Rule 1.540(b) Fla.R.Civ.P. in seeking relief from mistake or inadvertance.

On November 15, 1984 Broward County Circuit Court Judge Lawrence L. Korda granted Respondent's Motion to Amend the Voluntary Dismissal. (See Page 5 of Appendix filed herein.)

Said decision was appealed to the Fourth District Court of Appeals. Petitioner relied upon the Supreme Court holding in RANDLE-EASTERN AMBULANCE SERVICE, INC. v. VASTA, 360 So.2d 68,

and the Second District holding in MILLER v. FORTUNE INSURANCE COMPANY, 453 So.2d 489 to support his position that the trial Court lost its jurisdiction for all purposes when Respondent filed its Voluntary Dismissal With Prejudice. In reply, Respondent cited the Fourth District Case of SHAMPAINE INDUSTRIES, INC. v. SOUTH BROWARD HOSPITAL DISTRICT, 411, So.2d 364.

The Fourth District Court of Appeals affirmed the lower Court, based upon their previous holding in SHAMPAINE INDUSTRIES, INC., v. SOUTH BROWARD HOSPITAL DISTRICT, 411, So.2d 364.

SUMMARY OF ARGUMENT

THE FILING OF A VOLUNTARY DISMISSAL WITH PREJUDICE operates to deprive the trial Court of jurisdiction over all matters subsequent to that filing, including relief under Rule 1.540(b) Fla.R.Civ.P. reliance for this argument is made upon the following:

1. RANDLE-EASTERN AMBULANCE SERVICE, INC. v. VASTA, 360 So.2d 68, which states in part, that a Voluntary Dismissal deprives the Court of further jurisdiction.

2. MILLER v. FORTUNE INSURANCE COMPANY, 453 So.2d 489 which states in part that if the Court loses jurisdiction, it is lost for all purposes, including a Motion for Relief under Rule 1.540(b) Fla.R.Civ.P.

ARGUMENT

The opinion in RANDLE-EASTERN AMBULANCE SERVICE, INC. v. VASTA, 360 So.2d, 68, @ Pg.69 states in part that the effect of a

Voluntary Dismissal is to terminate the litigation instantaneously and deprive the trial Court of jurisdiction in all respects:

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".

The Second District Court of Appeals case of MILLER v. FORTUNE INSURANCE COMPANY, 453 So.2d. 489 contains the same basic set of facts as the instant case. Plaintiff therein filed a Notice of Voluntary Dismissal "With Prejudice" and subsequently sought a Motion for Relief from Voluntary Dismissal pursuant to Rule 1.540(b), Fla.R.Civ.P. on the grounds that the filing "With Prejudice" was a result of secretarial error. The Plaintiff therein attempted to use the rationale which was successful in the Fourth District case of SHAMPAINE INDUSTRIES, INC. v. SOUTH BROWARD HOSPITAL DISTRICT, 411 So.2d 364. That is, if a Dismissal is not a "volitional dismissal" then 1.540(b) relief is available. The Court in SHAMPAINE INDUSTRIES, INC. v. SOUTH BROWARD HOSPITAL DISTRICT, 411 So.2d 364 cuts a fine line in stating that although there was an intent to dismiss, the intent was not to be with prejudice. Therefore, it was not a volitional dismissal and the relief was available. The Court in MILLER v. FORTUNE INSURANCE COMPANY took the SHAINPAINE decision to task in a very eloquent manner. See MILLER v. FORTUNE INSURANCE COMPANY, 453 So.2d. 489 @ Pg.491, and concluded:

"Since we have no record here, we cannot determine the underlying reasons for the dismissal. However, we conclude that makes no difference, for if the Court loses jurisdiction, it is lost for all purposes. There is also no representation here that Petitioner did not intend to dismiss at all, and that the dismissal whatever its nature, was a mistake."

Applying the foregoing rationale to the instant case, it is clear that when Respondent intentionally filed its Voluntary Dismissal With Prejudice, the trial Court was deprived of any further jurisdiction over that matter. Therefore, the trial Court was without jurisdiction to entertain the Motion to Amend the Voluntary Dismissal.

CONCLUSION

The trial Court in the instant case erred in allowing the Respondent herein, FIRST FIDELITY SAVINGS AND LOAN ASSOCIATION OF WINTER PARK to amend its Voluntary Dismissal after it had deliberately filed a Dismissal With Prejudice of that action. If, as stated in RANDLE-EASTERN AMBULANCE SERVICE, INC. v. VASTA, 360 So.2d, 68, the Court loses jurisdiction on a Voluntary Dismissal, it matters not whether the dismissal was "With Prejudice" or "Without Prejudice". Furthermore, as stated in MILLER v. FORTUNE INSURANCE COMPANY, 453 So.2d 489, if the Court loses jurisdiction, it is lost for all purposes. This action, at the trial Court level, was dismissed with prejudice. Therefore, no jurisdiction remains, even for the filing of a Rule 1.540(b) Fla.R.Civ.P. Motion. Therefore, the Voluntary Dismissal With Prejudice, deliberately filed by the Respondent herein must stand as the final possible action to which that party is entitled in the lower Court.

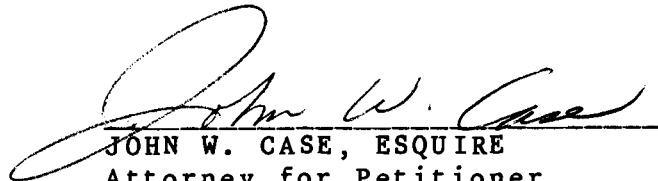
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to ROBERT L. LORD, JR., ESQUIRE, PAPY, POOLE, WEISSENBORN & PAPY, 201 Alhambra Circle, Suite 502, Coral Gables, FL 33134 this 25th day of June, 1985.



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