
IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-697

ROMAN PINO,
Petitioner

v.

BANK OF NEW YORK, ETC., ET AL.
Respondent.

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL FOR THE
FOURTH DISTRICT OF FLORIDA (Case No. 4D10-378)

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF THE AMICI CURIAE

The Amicus Curiae submitting this brief (the “Amici”) is a full service law firm with offices in Central Florida. Among other areas of law, the Amici represents thousands of homeowners in foreclosure actions throughout the State of Florida. The Amici have an interest in this proceeding not only because it will have a significant impact upon its foreclosure clients, but upon all clients involved in civil cases where there has been an allegation of fraud on the court. The Amici urge this Honorable Court to answer the certified question in the affirmative. It is the Amici’s position that in doing so; the court will (1) deter future fraudulent acts during the course of litigation, (2) offer a proper remedy to defendants under such circumstances, and (3) strengthen Florida’s already superb reputation of its judicial system.

SUMMARY OF ARGUMENT

This case presents the very simple question of whether trial courts have jurisdiction, pursuant to Rule 1.540(b) or under their inherent authority, to grant relief from a voluntary dismissal in which there have been allegations of fraud on the court. Although this case involves a foreclosure proceeding, this ruling will have an effect on any case in which a plaintiff is alleged to have committed a fraud on the court and thereafter voluntarily dismisses the case to avoid sanctions.

It is the Amici's position that the Florida Rules of Civil Procedure and case law are clear that trial courts do have the authority and jurisdiction to grant relief from voluntary dismissals, especially where there is an allegation of fraud on the court. In *Miller v. Fortune Ins. Co.*, this Court held that trial courts do have authority to grant relief from all actions taken by the court. *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221 (Fla. 1986). In *Miller* this Court further reasoned that the procedural rules should act as a platform to administer justice rather than to frustrate it. *Id.* at 1224.

The Amici reason that, although a dismissal with prejudice is an extreme sanction, it can and should be used when there is a blatant fraud on the court relevant to a central issue in the case. The power of a court to grant such relief in appropriate circumstances not only deters improper actions by a party, but it offers the defendant an opportunity to bring to light the fraud and to seek appropriate

sanctions. Most importantly, trial courts preserve control of the judicial system by exercising their authority to take appropriate action when a fraud on the court has been perpetrated.

It is the Amici's position that the integrity of the court should be given great weight in considering whether a court has authority to strike a dismissal. Our judicial system depends on truthful disclosure of facts. *Cox v. Burke*, 706 So. 2d 43, 47 (Fla. 5th DCA 1998). The trial court should be vested with the "discretion to fashion the apt remedy" in order to discourage improper conduct in the strongest possible way. *Id.*

ARGUMENT

TRIAL COURTS HAVE JURISDICTION AND AUTHORITY UNDER RULE 1.540(b) TO GRANT RELIEF FROM A VOLUNTARY DISMISSAL

The question certified to the Florida Supreme Court by the Fourth District Court of Appeal is one that will greatly affect mortgage foreclosures across the State of Florida. See *Pino v. The Bank of New York*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011). If answered in the affirmative, however, the ruling will affect more than just foreclosure actions.

The Fourth DCA argues that the Petitioner may have benefitted from the forestalling of the foreclosure in this case. *Pino*, 57 So. 3d at 954. This statement by the Fourth DCA summarizes its position that the Petitioner had not suffered serious prejudice by the dismissal and thus the trial court was correct in not exercising its authority to keep the case open after a voluntary dismissal was filed by The Bank of New York.

The decision, however, does not address the ultimate question certified to this Honorable Court. The certified question is:

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?

In answering this question, it is the Amici's position that this question should be divided into two parts; (1) does a trial court have jurisdiction and authority under Rule 1.540(b), or under its inherent authority to grant relief from a voluntary dismissal; and (2) if so, does it exist when a motion of record alleges fraud on the court in the proceedings but no affirmative relief on behalf of plaintiff has been obtained.

Under the Florida Rules of Civil Procedure, a Plaintiff may dismiss an action at any time by serving a notice of dismissal before a summary judgment hearing, before retirement of the jury in a jury trial, or before submission of a nonjury case to the court for a decision. *Fla. R. Civ. P. Rule 1.420(a)(1)(A)*. This rule has been interpreted to stand for the proposition that a plaintiff has a near absolute right to dismiss the action once, with one narrow exception:

The only recognized common law exception to the broad scope of this rule is in circumstances where the defendant demonstrates serious prejudice, such as where he is entitled to receive affirmative relief or a hearing and disposition of the case on the merits, has acquired some substantial rights in the cause, or where dismissal is inequitable.

Ormond Beach Accocs. Ltd. V. Citation Mortg., Ltd., 835 So. 2d 292, 295 (Fla. 5th DCA 2001). This case offers examples of when it is appropriate for a court to strike a voluntary dismissal pursuant to Rule 1.420(a)(1)(A). *Ormond*,

however, fails to offer concrete exceptions to the general rule. Furthermore, *Ormond* does not address the ultimate issue presented in this case which is tied to fraud on the court. *Id.*

Another case relevant to the case at issue held that trial courts may strike a notice of voluntary dismissal filed to avoid sanctions on account of fraudulent conduct. *Select Builders of Florida v. Wong*, 376 So. 2d 1089, 1091 (Fla. 3d DCA 1979). In *Select Builders*, the court struck a notice of voluntary dismissal and retained jurisdiction when the plaintiff committed a fraud on the court. *Id.* at 1090. The trial court in *Select Builders* held that the Motion for Sanctions filed by the defendant in the case was sufficient grounds pursuant to Rule 1.420(a)(2) to prevent a voluntary dismissal. *Id.* at 1091.

Although the court in *Select Builders* did not address Rule 1.540(b), it clearly holds that a court may strike a voluntary dismissal when there has been a fraud on the court. Furthermore, the Third DCA reasoned that a court may retain jurisdiction after a notice of voluntary dismissal to protect its judicial integrity as a court of equity. *Id.*

In the Fourth DCA's *Pino* opinion, that Court discusses *Select Builders* in both the majority and dissenting opinions. Although these offer two different interpretations, the *Select Builders* court failed to establish any solid examples as to when courts may retain jurisdiction after the filing of a voluntary dismissal. For

the reasons set forth below, the Amici requests that this Court establish precedent that a trial court may retain jurisdiction when a fraud on the court has been alleged.

Finally, this Court held that “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.” *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1224 (Fla. 1986). There is no mention in *Miller* that the plaintiff be awarded affirmative relief in order to invoke Rule 1.540(b). In fact, the court in *Miller* stands for the proposition that trial courts have authority to grant relief from all actions taken by the court. *Id.* at 1224. In *Miller*, this Honorable Court stressed the importance of the procedural rules acting as a platform to administer justice rather than a platform to frustrate it. *Id.* (citing *Singletary v. State*, 322 So.2d 551, 555 (Fla.1975)).

It is clear that trial courts do in fact have authority, under narrow exceptions and pursuant to the rules of procedure, to grant relief from voluntary dismissals. As such, the first part of the certified question should be answered in the affirmative; trial courts do have authority to grant relief from a voluntary dismissal.

**A FRAUD ON THE COURT ALLEGATION BY ITSELF SHOULD BE
SUFFICIENT FOR A DEFENDANT TO SEEK RELIEF PURSUANT TO
RULE 1.540(b)**

In its decision in *Pino*, the Fourth DCA argued that, because the defendant in the case had not been adversely affected by the dismissal, the defendant was not entitled to relief under Rule 1.540(b). *Pino*, 57 So. 3d at 954. That decision, however, falls short of defining the term “adversely affected.”

In the *Pino* decision, both the majority and dissenting opinions attempt to navigate through the case law addressing this very subject. As evidenced by the analysis above regarding the relevant case law, it is clear that the case law currently available is left to interpretation as to whether seeking affirmative relief is a precursor to a court having authority to grant relief from a voluntary dismissal.

Although the Fourth DCA acknowledged the affect that an answer to the certified question in the affirmative would have on foreclosure cases across the state of Florida, such an answer will affect *all* cases in which there is an allegation of fraud on the court. In all cases where fraud on the court is alleged, denying a court the authority to strike a voluntary dismissal seriously compromises judicial integrity and does not hold the party committing the fraud accountable for its actions. Because there is no case law that directly parallels the issue to be decided, it is important to look at current case law addressing a plaintiff’s fraud on the court.

It is well settled that trial courts have inherent authority to dismiss actions based on fraud. *Howard v. Risch*, 959 So. 2d 308, 310 (Fla. 2d DCA 2007). Because dismissal is the most severe of all sanctions for a plaintiff, it should be applied only in the most extreme circumstances. *Id.* The Second DCA uses the following test for evaluating trial courts' discretionary dismissals for fraud on the court:

A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

Ramey v. Haverty Furniture, 993 So. 2d 1014, 1018(Fla. 2d DCA 2008).

Ramey also held that such dismissals are proper if the fraud perpetrated related to a central issue in the case. *Id.* at 1020.

It is important to note that dismissals by the trial courts should be used cautiously and only upon circumstances evidencing the most blatant showing of fraud, collusion, pretense, or other similar wrongdoing. *Distefano v. State Farm*, 846 So. 2d 572, 574 (Fla. 1st DCA 2003).

By application of these principles, it is evident that a dismissal with prejudice by a court, while surely an extreme sanction, is nonetheless appropriate when a plaintiff commits a fraud on the court regarding the central issue in a case.

This same principle should be used by courts in considering 1.540(b) motions to strike a voluntary dismissal when a plaintiff has perpetrated a fraud on the court. The Amici urges the court to hold that in cases in which a fraud on the court as to a relevant issue is alleged, and the fraud is relevant to a central issue in the case, trial courts have jurisdiction and authority under Rule 1.540(b) to strike a voluntary dismissal when the dismissal is simply filed as a tactic to avoid sanctions.

In *Pino*, the majority reasoned that it is not an appropriate exercise of authority “to reopen a case voluntarily dismissed by the plaintiff simply to exercise that authority to dismiss it, albeit with prejudice.” *Pino*, 57 So. 3d at 954. It further stated that “only in those circumstances where the defendant has been seriously prejudiced . . . should the court exercise its inherent authority to strike a voluntary dismissal.” *Id.* The Amici finds two problems with the majority opinion of the lower court.

First, there is a big difference between a dismissal with prejudice and a dismissal without prejudice. The DCA majority does not seem to acknowledge the implications of a dismissal with prejudice. In *Pino*, because the court failed to strike the voluntary dismissal, BNY was allowed to refile its complaint five months later. *Id.* at 952. In the original action, once fraud was alleged by the defendant, and once defendant noticed its intent to depose those who allegedly signed and notarized the fraudulent documents, BNY voluntarily dismissed the action. *Id.* at

951. The documents entered in the first action that were alleged to be fraudulent were, not surprisingly, different from those entered in the second action. *Id.* at 952. Because the case has since settled, there have been no evidentiary hearings to the Amici's knowledge that were dispositive of the fraud allegations. However, when there is a fraud on a court, it is repugnant to the integrity of that court to allow the plaintiff to avoid the consequences of its fraud by a dismissal tactic and then be allowed to refile the action with properly executed documentation that differs from the (fraudulent) documentation submitted in the prior action.

Second, the majority opinion does not find that the defendant was prejudiced by having to defend itself in a fraudulent action. In such circumstances, however, it is the Amici's position that more than the prejudice suffered by the defendant should be considered. The issue of the integrity of the court should be given great weight when deciding if a court inherently has authority to strike a dismissal in appropriate circumstances.

The integrity of the civil litigation process depends on 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 must be discouraged in the strongest possible way . . . This is an area where the trial court is and should be vested with discretion to fashion the apt remedy.

Cox. v. Burke, 706 So. 2d 43, 47 (Fla. 5th DCA 1998). It is for this reason that this Honorable Court should answer the certified question in the affirmative.

CONCLUSION

The Amici's position is that the Court should answer the certified question in the affirmative. First, trial courts do have authority, both inherently and pursuant to the rules of procedure, to grant relief from a voluntary dismissal. Second, trial courts should have authority to grant such relief by considering all factors. As demonstrated by the argument presented, factors such as judicial integrity, determent of future fraudulent acts, and whether the fraud perpetrated relates to a central issue in the case should be heavily considered by a trial court in exercising its discretion to strike a notice of voluntary dismissal.

Simple allegations of fraud on the court should not entitle a defendant to Rule 1.540(b) relief in every situation. However, in extreme cases, when the fraud perpetrated is blatant and repugnant to the judicial process, a trial court should retain jurisdiction and authority to strike a voluntary dismissal at its discretion regardless of whether affirmative relief was obtained by the plaintiff.