Supreme Court of Florida

CASE NO.: SC11-697
On Discretionary Review From
The Fourth District Court of Appeal
(4D10-378)
(Circuit Court Case No. 50 2008 CA 031691 XXXX MB)

ROMAN PINO,

Petitioner,

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.,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

Respectfully submitted,

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ISSUE PRESENTED

Rule 1.540(b) allows the striking of a voluntary dismissal when fraud is shown. To be entitled to an evidentiary hearing, a motion to strike must 1) plead fraud with particularity; and 2) plead a basis for relief as to why the proceeding should be set aside. Trial courts have inherent power to protect judicial functions and integrity. This authority includes the right and obligation to deter fraud on the court.

In this case, defendant Roman Pino alleged facts that, if true, would show that the unrecorded mortgage assignment attached to the amended complaint was fraudulent. When Pino sought discovery to prove the allegations, the plaintiff bank responded by voluntarily dismissing the case and refiling. Pino asked the trial court for an opportunity to prove the fraud at an evidentiary hearing so that the court could rescind the bank's dismissal and permanently dismiss the case as a sanction. The trial court refused and the District Court affirmed, ruling that the plaintiff's right to a voluntary dismissal trumped the court's authority to police the integrity of the judicial process. **Based on the allegations, did the trial court have authority, under either Rule 1.540(b) or its inherent powers, to hold an evidentiary hearing to determine whether plaintiff committed fraud that would merit striking its voluntary dismissal and imposing sanctions?**

STATEMENT OF THE CASE AND FACTS

A. The Complaint.

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 ("BNY Mellon") sought to foreclose on the property of Roman Pino.[1] The complaint alleged that "the Plaintiff owns and holds the Note and Mortgage" and that it owns the mortgage "by virtue of an assignment to be recorded."[2] No assignment was attached to the complaint. What was attached was a copy of a mortgage which listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the "Mortgagee" and Silver State Financial Services, Inc. d/b/a Silver State Mortgage as the "Lender."[3] The complaint also alleged that the note had been "lost, destroyed or stolen."[4] Pino moved to dismiss the complaint because, among other deficiencies, BNY Mellon failed to attach an assignment showing a transfer of the mortgage from MERS.[5]

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[1] Complaint filed October 9, 2008 (A. 1).

[2] Complaint, ¶¶ 4, 5 (A. 1).

[3] Mortgage attached to Complaint, (A. 5).

[4] Complaint, ¶ 25 (A. 3).

[5] Pino's Mot. to Dismiss Complaint, p. 4, dated November 10, 2008. (A. 8, 11).

B. BNY Mellon attaches what appears to be a fraudulent assignment to its Amended Complaint.

BNY Mellon sought to correct the defect in its complaint by amending and attaching an unrecorded assignment of mortgage.[6] While not attached to the complaint when it was filed on October 9, 2008, the assignment purports to have been executed twenty days earlier on September 19, 2008.[7] At the same time that BNY Mellon amended its complaint, it responded to the motion to dismiss by arguing that it was legally insufficient.[8]

Pino replied by arguing that the amendment conceded the initial complaint's deficiency.[9] The reply goes on to allege that the assignment of mortgage attached to the amended complaint was fraudulently backdated.[10] Specifically, Pino pointed out that the new assignment was executed by an employee of plaintiff's counsel, David J. Stern, P.A., (Cheryl Samons) and witnessed and notarized by Stern employees who worked in the firm's Litigation Department—employees who would presumably have no contact with the case until after it was filed and

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[6] Am. Complaint, February 12, 2009 (A. 19, 25-26).

[7] *Id.*

[8] Pl.'s Resp. to Mot. to Dismiss, February 12, 2009 (A. 17).

[9] Def.'s Opp. to Pl's Mot. for Award of Attorney's Fees, February 17, 2009. (A. 27, 28).

[10] *Id.*

contested. Pino's search of hundreds of Cheryl Samons assignments in the public records revealed only one other witnessed and notarized by these Litigation Department employees. That assignment was fraudulently backdated on its face because Ms. Samons' signature was notarized using a notary stamp that did not exist on the claimed date of execution. The stamp and the associated notary commission were not issued until over a year later.[11] These fraud allegations were also raised by Pino in a motion to dismiss the amended complaint.[12] Pino immediately set the depositions of various notaries and witnesses, all employees of BNY Mellon's counsel.[13]

C. BNY Mellon files a notice of voluntary dismissal and then files a second case against Pino.

On the eve of the depositions, BNY Mellon voluntarily dismissed the case[14] and then filed a separate action against Pino seeking to foreclose the same mortgage.[15] The complaint in the second action is identical to the previous case.

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[11] *Id.* at 6-7 (A. 32-33).

[12] Def.'s Mot. to Dismiss the Am. Complaint, dated February 23, 2009 (A. 52).

[13] Notice of Dep., February 20, 2009 (A. 49).

[14] Notice of Voluntary Dismissal, dated March 9, 2009 (A. 62).

[15] Complaint filed in *The Bank of New York Mellon v. Pino*, Case No. 50 2009 CA 0274000 XXXX MB (Palm Beach County) ("*Pino II*") filed August 13, 2009 (A. 65).

Noticeably absent, however, is the fraudulent assignment of mortgage. In its place is now a new assignment of mortgage that postdates the voluntary dismissal.[16]

D. Pino moves to strike the notice of voluntary dismissal under Rule 1.540(b).

Pino filed the motion under review–a 1.540(b) motion to strike the notice of voluntary dismissal and to dismiss the case with prejudice on the grounds of fraud. The motion requested an evidentiary hearing to demonstrate that BNY Mellon's creation, execution, and filing of the fraudulent assignment constituted fraud on the court.[17] It also adopted all the arguments and supporting fact references in two motions and supporting memoranda that had been filed over the course of the litigation.[18]

At the hearing, Pino argued that he was entitled to an evidentiary hearing based on the showing of colorable entitlement evidenced by the record as set forth in the motion.[19] The court ultimately denied Pino's Rule 1.540(b) motion without

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[16] New Assignment of Mortgage attached to Complaint in *Pino II*, dated July 14, 2009 (A. 69).

[17] Defendant Roman Pino's Mot. to Strike the Notice of Voluntary Dismissal and Dismissal with Prejudice for Fraud Upon the Court, dated August 20, 2009 ("Pino's Rule 1.540(b) Motion") (A. 70).

[18] *Id.* at 2 (A. 71).

[19] Tr. of Proceedings held before the Honorable Meenu Sasser, January 14, 2010, p. 7 (A. 177, 183).

an evidentiary hearing.[20] Pino appealed the trial court's ruling. The Fourth District Court of Appeal affirmed the trial court's ruling *en banc* and certified the following question to this Court as one of great public importance:

> 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?[21]

Judge Polen dissented with an opinion. BNY Mellon moved for clarification to ask the court to specifically state that appellate counsel, Akerman Senterfitt, was not involved in the proceedings giving rise to the allegations of fraud on the court.[22] The clarification was granted and a substituted opinion was entered in its place which was identical to the original, but added a footnote for clarification.[23]

Pino then filed a notice to invoke the discretionary jurisdiction of this Court. This Court accepted jurisdiction of this case on April 15, 2011.

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[20] Order on Defendant, Roman Pino's Mot. to Strike the Notice of Voluntary Dismissal, dated January 14, 2010 (A. 204).

[21] Original Opinion of Fourth District Court of Appeal, February 2, 2011 (A. 207).

[22] BNY Mellon's Mot. for Clarification, served February 4, 2011 (A. 220).

[23] Opinion of Fourth District Court of Appeal, March 30, 2011 (A. 224).

SUMMARY OF THE ARGUMENT

Trial courts possess authority under Rule 1.540(b) to hear evidence when allegations of fraud are raised and, upon proof of the fraud, to strike a voluntary dismissal. To be entitled to an evidentiary hearing, a motion to strike must plead fraud with particularity and plead a basis for relief showing why the proceeding should be set aside. Pino's Rule 1.540(b) motion pled that BNY Mellon, through its counsel, created, executed, and filed a fraudulent assignment of mortgage with the court which purports to transfer the subject mortgage lien to itself. The motion requested an evidentiary hearing to prove the fraud and it sought a dismissal with prejudice. The motion pleads fraud with specificity and shows a basis for relief; therefore, the trial court had authority under Rule 1.540(b) to hold an evidentiary hearing to consider striking the dismissal and sanctioning BNY Mellon.

The trial court also had inherent authority to do so. Trial courts have inherent power to protect judicial functions and integrity. This includes the right (even the obligation) to deter fraud on the court—including the imposition of the ultimate sanction: dismissal with prejudice. Here, BNY Mellon filed the voluntary dismissal to avoid the consequences of filing a forged document intended to deceive the court. The trial court possessed inherent authority to stop BNY Mellon from using the voluntary dismissal rule as a shield for its fraud.

STANDARD OF REVIEW

While the standard of review of a ruling on a Rule 1.540(b) motion is generally abuse of discretion, the certified question before this Court is to be reviewed *de novo*. Whether the trial court had jurisdiction and authority under the rules or as a power inherent in its constitutional function is a legal question subject to *de novo* review. *Amerus Life Ins. Co. v. Lait*, 2 So. 3d 203, 205 (Fla. 2009); *Dep't of Revenue ex rel. Simmons v. Wardlaw*, 25 So. 3d 80, 82 (Fla. 4th DCA 2009).

Further, denial of a Rule 1.540(b) motion without an evidentiary hearing is automatically an abuse of discretion as a matter of law unless the motion fails to allege a "colorable entitlement" to relief. *See Schleger v. Stebelsky,* 957 So. 2d 71 (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 asserted as a grounds for relief under Rule 1.540(b)); *Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) (holding that the trial court erred because "where the moving party's allegations raise a colorable entitlement to rule 1.540(b)(3) relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.").

ARGUMENT

A. The Trial Court Had Authority to Hold an Evidentiary Hearing on the Rule 1.540(b) motion.

1. Rule 1.540(b) provides relief from a proceeding (including voluntary dismissal) where fraud is shown.

Florida Rule of Civil Procedure 1.540(b)(3) provides relief from "a final judgment, decree, order or proceeding" for:

> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

A notice of voluntary dismissal is a "proceeding" from which the court may grant relief under Rule 1.540(b). *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1224 (Fla. 1986) ("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."). Where fraud is alleged, even a defendant may ask the court to strike a notice of voluntary dismissal. *See Select Builders of Florida, Inc. v. Wong*, 367 So. 2d 1089, 1091 (Fla. 3d DCA 1979) (affirming an order granting defendant's motion to strike the voluntary dismissal of a plaintiff: "[W]e find the court to be correct in striking the voluntary dismissal and reinstating the matter to prevent a fraud on the court.").

Moreover, summarily denying a Rule 1.540(b) motion without an evidentiary hearing is an abuse of discretion unless the motion fails to allege a "colorable entitlement" to relief. *Schleger v. Stebelsky,* 957 So. 2d 71, 73 (Fla. 4th

DCA 2007); *Dynasty Exp. Corp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA 1996). To warrant an evidentiary hearing, a Rule 1.540(b)(3) motion must specify the essential facts of the fraud and misconduct, and not merely assert legal conclusions. *Dynasty*, 675 So. 2d at 239.

Pino's motion alleges that BNY Mellon, through its counsel, manufactured evidence by creating, executing, and filing a fraudulently backdated assignment of mortgage with the court.[24] An evidentiary lynchpin of the bank's case, this instrument was prepared by the bank's agents to transfer the mortgage and note to itself and falsely purports to do so before the case was filed.[25] Pino's motion explains the circumstances surrounding the fraud and its purpose, which was to backdate an assignment executed after the case was filed so that BNY Mellon could avoid dismissal under *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990) for lack of standing.[26]

Such facts, if proven, cannot be explained or interpreted to be anything but fraud. Indeed, these allegations described conduct so scandalous that the Fourth District recommended that David J. Stern, P.A. be investigated by the Florida Bar

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[24] Pino's Rule 1.540(b) Motion (A. 71-72).

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

[26] Pino's Rule 1.540(b) Motion (A. 73).

and appellate counsel, Akerman Senterfitt, rightly sought to distance itself from the charges.

Pino's allegation of forgery squarely fits into the language of the rule as fraud, misrepresentation, or other misconduct of an adverse party. *See* Fla. R. Civ. P. 1.540(b)(3). The language of the rule should be given its plain meaning. *See Metcalfe v. Lee*, 952 So. 2d 624, 627-28 (Fla. 4th DCA 2007). Further, Florida case law already holds that a notice of voluntary dismissal can be struck for fraud.

In *Select Builders*, the plaintiff filed suit to expunge an injunction that was allegedly improperly filed in the public records. 367 So. 2d at 1090. The court entered an order expunging the injunction. It later developed that the appellant may have perpetrated a fraud upon the trial court in obtaining the order expunging the document. *Id.* Accordingly, the trial court vacated its previous order. The defendants then moved for sanctions against the plaintiff, contending that it misled the court and committed certain procedural irregularities. The trial court ordered the plaintiff to take immediate steps to place the parties and the real estate in a status quo. The trial court also required the appellant to deposit certain monies that it received from the sale of the property to a third party. At this juncture, the appellant filed its notice of voluntary dismissal, dismissing the action under Rule 1.420. Upon the defendants' motion to strike the voluntary dismissal, 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 defendants' 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.* at 1091.

2. The circumstances in this case are analogous to those in the *Select Builders* case.

The circumstances here are remarkably similar to those of the *Select Builders* case in that it has developed during the course of the litigaton that the plaintiff may have committed a fraud on the court. After Pino brought the allegations of fraud to the attention of the court by way of a motion and sought discovery to prove the fraud, BNY Mellon, exactly like the plaintiff in *Select Builders*, filed a notice of voluntary dismissal seeking to avoid the consequences of its actions. Even more compelling here, the allegation of forgery in this case is more egregious than any wrongdoing described in *Select Builders.* Based on these allegations, the trial court had authority to hold an evidentiary hearing and, upon proof of those allegations, strike the notice of voluntary dismissal under rule 1.540(b).

B. The Trial Court Also Has the Inherent Authority to Protect Its Own Integrity.

Trial courts possess the inherent power to protect the function, dignity, and integrity of the judicial system. *Tramel v. Bass*, 672 So. 2d 78, 83 (Fla. 1st DCA 1996). Courts have "the right and obligation to deter fraudulent claims from proceeding in court." *Savino v. Fla. Drive In Theatre Mgmt., Inc.*, 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997). In using such authority, trial courts have considerable discretion to impose severe sanctions when a fraud has been perpetrated. *See e.g., Tramel*, 672 So. 2d at 83-85 (striking pleadings of defendant for intentional fraud on the court in submitting deliberately altered evidence); *Sotolongo v. Celebrity Cruises, Ltd.*, 49 So. 3d 862 (Fla. 3d DCA 2010) (affirming contempt order disqualifying attorney from cases).

The United States Supreme Court has recognized the inherent authority and obligation of the courts to protect litigants, and the judicial system itself, from dishonesty:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society… The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119 (1st Cir. 1989). This sentiment is echoed throughout the Florida cases. *See Fitzgerald v. Fitzgerald*, 790 So. 2d 1216, 1217 (Fla. 2d DCA 2001) (recognizing the trial court's authority to override a notice of voluntary dismissal when fraud is committed); *Tobkin v. State*, 777 So. 2d 1160, 1164 (Fla. 4th DCA 2001) (recognizing fraud exception to right to voluntary dismissal); *U.S. Porcelain, Inc. v. Breton*, 502 So. 2d 1379, 1380 (Fla. 4th DCA 1987) (distinguishing *Select Builders* because there were no findings of fraud, deception, irregularities, nor any misleading of the court); *Durie v. Hanson*, 691 So. 2d 485, n. 2 (Fla. 5th DCA 1997) (denying a motion to strike a voluntary dismissal used to thwart a lack of prosecution and recognizing fraud exception); 1 Fla. Jur. 2d, Actions § 231; Henry P. Trawick Jr., Trawick's Florida Practice & Procedure § 21:2.

Courts even have the power to dismiss a case with prejudice upon a showing that a party has committed fraud. *Taylor v. Martell*, 893 So. 2d 645, 646 (Fla. 4th DCA 2005) (affirming dismissal with prejudice where party fabricated documents). Dismissal for fraud is appropriate where "a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the

trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998), *citing Aoude*, 892 F.2d at 1118. This is because "[o]ur courts have often recognized and enforced the principle that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [its] ends." *Hanono v. Murphy*, 723 So. 2d 892, 895 (Fla. 3d DCA 1998). Where a party perpetrates a fraud on the court which permeates the entire proceedings, dismissal of the entire case is proper. *Desimone v. Old Dominion Ins. Co*., 740 So. 2d 1233, 1234 (Fla. 4th DCA 1999). *See also Papadopoulos v. Cruise Ventures Three Corp.*, 974 So. 2d 418, 419 (Fla. 3d DCA 2007) *citing Metro. Dade v. Martinsen,* 736 So. 2d 794, 796 (Fla. 3d DCA 1999) (Sorondo, J., concurring) (stating that "few crimes ... strike more viciously against the integrity of our system of justice than the crime of perjury").

Indeed, this Court's concern for protecting the integrity of the judicial process should be all the more heightened where, as here, BNY Mellon has invoked the court's equitable jurisdiction. *Singleton v. Greymar Assocs.,* 882 So. 2d 1004, 1008 (Fla. 2004) ("[w]e must also remember that foreclosure is an equitable remedy…"); *see Knight Energy Servs., Inc. v. Amoco Oil Co*., 660 So. 2d 786, 789 (Fla. 4th DCA 1995) ("[a] foreclosure action is an equitable proceeding

which may be denied if the holder of the note comes to the court with unclean hands or the foreclosure would be unconscionable.”). A decision upholding the rulings below will essentially repeal the equitable doctrine of unclean hands.

1. **The inherent authority of a trial court is not dependent on the success of a party’s fraud.**

BNY Mellon seemingly does not dispute the factual allegations of Pino’s motion. Rather, it focuses on one issue: whether its failure to succeed in committing fraud on the court precludes Pino from having the trial court hear the fraud issue at an evidentiary hearing. It does not.

BNY Mellon’s position, and that of the court below, is that Pino would have to show that the bank obtained “affirmative relief” through its fraud before the court would have authority to punish the wrongdoing—that attempted fraud does not support an exercise of the court’s inherent powers. For support, BNY Mellon cites a case that did not involve fraud, *Bevan v. D'Alessandro*, 395 So. 2d 1285 (Fla. 2d DCA 1981). In *Bevan*, the plaintiff voluntarily dismissed the case to avoid a dismissal for lack of prosecution. 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. *Id*. at 1286.

From this, BNY Mellon ignores the fraud language and argues that striking its voluntary dismissal would be contrary to Florida law because it had not previously obtained affirmative relief.[27] According to BNY Mellon, securing "affirmative relief" in this case would have meant successfully foreclosing on Pino's home[28] (presumably with the use of its fraudulent assignment). Under this twisted logic, the very fact that the attempted fraud was exposed by defense counsel is now a shield that protects BNY Mellon from any punishment.

Aside from the fact that *Bevan* did not deal with fraud, there is no legitimate reason to apply a requirement that a wrongdoer succeed in deceiving the court or an opposing party before it may be punished. The reason the *Bevan* court was correct in denying the motion was because it could not have provided the relief requested by the movant. There is no discernable difference in the effect of a voluntary dismissal and a dismissal for lack of prosecution—both are without prejudice. *See* Fla. R. Civ. P. 1.420(a)(1), (e). Therefore, the *Bevan* court had the option of allowing the case to be dismissed without prejudice or to vacate the

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[27] Tr. of Proceedings held before the Honorable Meenu Sasser, p. 17, dated January 14, 2010 (A. 193).

[28] BNY Mellon's Resp. to Roman Pino's Mot. to Strike the Notice of Voluntary Dismissal, p. 2, dated January 7, 2010 (A. 163).

dismissal and hold a hearing for the purposes of dismissing the case, again without prejudice. The latter course would have been futile.

To the extent that the Third District may have implied in *Select Builders* that a new limitation—an affirmative relief requirement—should be grafted upon the inherent powers of the courts, this Court should reject the suggestion. None of the cases cited in *Select Builders* mention any affirmative relief requirement. *See Columbus Hotel Corp. v. Hotel Mgmt. Co.*, 156 So. 893, 897-98 (Fla. 1934); *Masilotti v. Masilotti*, 29 So. 2d 872, 873 (Fla. 1947); *Ryan v. Ryan*, 277 So. 2d 266, 272-73 (Fla. 1973). In fact, in *Ryan v. Ryan*, this Court recognized the inherent authority of a court to deal with fraud as a fundamental concept of equity which is necessary to protect the integrity of the judiciary:

> [A] fraud upon the courts could no more be tolerated in this than in any other litigation. The courts will not knowingly become a party to contrivance or fraud… This is inherent in the judicial process. It is not limited to a future discovery of the fraud but may become apparent in the proceedings… , in which event the court should deal directly with it in such proceedings. In this there may be a direct fraud perpetrated . . . by misrepresentations, concealments or untruths, manifesting itself either in the course of the proceeding or at a later time. The courts will not indulge or reward falsehood and when such a purposeful inducement or fraud upon…the court is made to appear by the evidence… This recognition of such a fundamental concept of equity is necessary in order to preserve the integrity of the judiciary, lest it become a party to a fraud or allow a misuse of the judicial machinery. Not even under statutory imposition can an independent judiciary

> which is the ultimate protector of right and justice, be subjugated and undermined.

277 So. 2d at 272-73 (emphasis added). This Court has not limited the authority of the judicial branch to punish fraud on the court and it should not start now.

The notion that the court cannot strike the voluntary dismissal unless BNY Mellon successfully defrauded the court is a "no harm, no foul" argument that should be soundly condemned. *See Cox*, 706 So. 2d at 46 (rejecting argument "that Cox should not be punished because she failed to deceive."). That the efforts of defense counsel prevented the success of a fraudulent scheme is not a defense to a motion for dismissal for fraud and unclean hands. Just as an attempted crime is still a crime, an unsuccessful attempt to defraud the court is still sanctionable. "The failure of a party's corrupt plan does not immunize the defrauder from the consequences of his misconduct." *Aoude*, 892 F.2d at 1120.

Even assuming there is a requirement that BNY Mellon receive a benefit, such a requirement would be satisfied in this case. First, BNY Mellon's procedural maneuver indefinitely blocked depositions that would have most likely exposed fraud—not only in this case, but in hundreds, if not thousands, of cases handled by its attorney, David J. Stern, P.A. Obstructing discovery in this way benefits BNY Mellon because, with the passage of time, memories become more attenuated and

witnesses untraceable, making it more and more difficult to prove the fraud. Second, BNY Mellon escaped any punishment for attempting to defraud the court. It is continuing to use the voluntary dismissal as a shield from its own bad acts.

If this Court were to adopt such a rule, it would be a clear signal to litigants, particularly plaintiffs, that presenting perjury and false evidence will have no consequences. If one is caught in such a transgression, he or she need merely forego the intended fruits of the falsehoods, dismiss the case and file another—the only penalty being the refiling fee. Obviously, this would encourage deceit and fraud by the unscrupulous who are only dissuaded from illegal behavior by the threat of retribution. Surely the banks would object to an analogous holding that bank robbery is not punishable so long as the robber returns the stolen money before the court hands down a conviction.

2. BNY Mellon's use of a voluntary dismissal to avoid punishment for wrongdoing is an abuse of the dismissal privilege.

Plaintiff's right of voluntary dismissal was never intended as an escape hatch to avoid the consequences of its fraud. A plaintiff cannot be permitted to knowingly deceive the court and, when its transgressions are discovered, simply press the "reset button" and begin the litigation again as if it had done nothing wrong. *See e.g., Select Builders*, 367 So. 2d at 1091. Nor can voluntary dismissal

be used as a sanctuary from which plaintiffs can hide from the consequences of their wrongdoing. In short, the court's ability to protect its integrity does not end when a wrongdoer unilaterally decides to dismiss a case.

In balancing the inherent powers of the court against a plaintiff's right of dismissal, this Court should not draw a line that protects wrongdoers and blesses fraud on the court. Especially when this very Court has retained jurisdiction of voluntarily dismissed cases for reasons far short of fraud. *See State v. Schopp*, 653 So. 2d 1016, 1018 (Fla. 1995).

C. Fraudulent Foreclosures Which Undermine the Integrity of the Court System Are Matters of Great Public Importance.

The problem of fraudulently executed documents in foreclosure cases is a statewide (even nationwide) issue that is not unique to BNY Mellon or this case. Indeed, the Fourth District in this case recognized that very fact in certifying the question:

> We conclude that this is a question of great public importance, as many, many mortgage foreclosures appear tainted with suspect documents.[29]

The veracity of banks and their chosen counsel is so often in question that this Court changed Florida Rule of Civil Procedure 1.110 to require that foreclosure

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[29] Opinion of the Fourth District Court of Appeal, p. 6 (A. 229).

complaints be verified. *In re Amendments to the Florida Rules of Civil Procedure*, 44 So. 3d 555, 556 (Fla. 2010). The Court stated the following four primary purposes for amending the rule:

> (1) to provide incentive for the Plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded "lost note" counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by Plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations.

Id. This point is even more powerful in this case where it is alleged that plaintiff's agents created, executed, and filed fraudulently dated documents with the court. However, even the new rule will have no force or effect if it can be nullified by simply filing a notice of voluntary dismissal.

While this case arises in the context of a foreclosure—one of the hundreds of thousands of cases constituting what this Court has called a "significant crisis"[30]—the issue of fraud on the court clearly extends well beyond foreclosure. The protection of the integrity of the court system by discouraging fraudulent conduct

[30] *In Re: Task Force on Residential Mortgage Foreclosure Cases*, AOSC09-8 (March 27, 2009).

during judicial proceedings is of paramount importance regardless of the nature of the matter being litigated.

> The integrity of the civil litigation process depends on the 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 [fraudulent concealment of facts] must be discouraged in the strongest possible way.

Robinson v. Weiland, 988 So. 2d at 1113, *quoting* *Cox*, 706 So. 2d at 47; *see also* *Channel Components, Inc. v. America II Electronics, Inc*., 915 So. 2d 1278 (Fla. 2d DCA 2005).

CONCLUSION

The trial court had authority to conduct an evidentiary hearing on the issue of striking the voluntary dismissal. Pino's Rule 1.540(b) motion pled that BNY Mellon, through its agents, created, executed, and filed a fraudulent assignment of mortgage with the court. The allegations were pled with specificity and showed a basis for relief.

The trial court also had authority to protect judicial functions and integrity. This includes the right and obligation to deter fraud on the court—including to dismiss cases with prejudice. BNY Mellon filed the voluntary dismissal to avoid the consequences of filing a forged document intended to deceive the court. The trial court should not be stripped of its inherent authority to stop BNY Mellon from using the dismissal rule as a shield for its fraud.

Accordingly, the trial court's denial of Pino's motion to strike the notice of voluntary dismissal should be reversed and remanded for an evidentiary hearing.

Respectfully submitted,

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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 June 13, 2011 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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