

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT**

CASE NO.: 3D2024-0648

L.T. NO.: 2023-016508-CA-01

PENINSULA ASSOCIATION, INC.,

Appellant,

v.

AMPREX PROPERTY MANAGEMENT, INC.,

Appellee.

INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This action was filed on May 10, 2023, by a condominium association, Peninsula Association, Inc., (Association), against its property manager, AMPREX Property Management, Inc. (AMPREX) and the former members of its Board of Directors. R. 14.

Peninsula filed an Amended Complaint on May 10, 2023. R.167.

The Amended Complaint alleged a single count of negligence against AMPREX, which was also its registered agent, for failing to advise the Association that it had been sued in February 2022, and failing to defend the lawsuit. R. 173-76.

The Amended Complaint also alleged two causes of action against the former Board, breach of fiduciary duty and negligence.

The earlier lawsuit, Case No. 2022-2422-CA-01 (the “2022 Action”), resulted in the entry of a Default Final Judgment against Peninsula in the amount of \$65,361 on October 21, 2022. See D.E. 19 (Filing #159688015).¹

¹ The Verified Complaint in the 2022 Action reveals that it was filed as a “direct” action but should have been filed as a derivative action and likely would have been dismissed for failure to plead in compliance with the derivative statute. See *Fritz v. Fritz*, 219 So. 3d 234, 237 (Fla. 3d DCA 2017) (“[A]n action [by a shareholder or a

Moreover, the docket in the 2022 Action reveals that the Plaintiffs successfully garnished the entire amount of the wrongful judgment from Peninsula's bank accounts at Truist Bank. See D.E. 42 (Filing #81250058).

As of the filing of this brief, the docket in the 2022 Action reveals that the Court has not yet ruled on Peninsula's motion to set aside the Final Default Judgment – and thus, as it now stands, Peninsula has not only paid out a \$65,000+ judgment but lost its ability to recover from the negligent parties because the underlying case as dismissed involuntarily with prejudice.

Meanwhile, in the underlying action, on July 6, 2023, the former Board of Directors filed their Motion to Dismiss the Amended Complaint. R. 319.

member of a limited liability company] may be brought directly only if (1) there is a direct harm to the shareholder or member such that the alleged injury does not flow subsequently from an initial harm to the company **and** (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members.”) (citing *Dinuro Investments, LLC v. Camacho*, 141 So.3d 731 (Fla. 3d DCA 2014)). See Point C below.

On September 21, 2023, AMPREX filed a Motion to Transfer the action to Division 05, which is the division where the 2022 Action was pending. R. 359.

The Motion to Transfer was not heard by the administrative judge. Rather, the trial judge below granted the motion to transfer to Division 05 by Order dated October 6, 2023. R. 361.

After the motion was transferred to Division 5, the Board scheduled a hearing on its motion to dismiss for January 26, 2024. R. 372. At the hearing, Peninsula's counsel made an ore tenus Motion to Withdraw, which the Court granted by "Agreed Order" dated February 1, 2024. *Id.* The Order required Peninsula to obtain new legal counsel within 45 days. R. 373.

After more than 45 days (*i.e.*, after March 20, 2024), the Board filed a Motion to Enforce and for Sanctions. R. 376.

AMPREX joined in the motion. R. 375.

At hearing on the Defendants' motion to enforce and for sanction, held on April 2, 2024, Peninsula failed to appear with new counsel and the trial court entered the subject order involuntarily dismissing the action with prejudice for Peninsula's failure to timely procure counsel (the "Involuntary Dismissal Order"). R. 389-90

Undersigned counsel appeared on April 3, 2024.

The notice of appeal from the Involuntary Dismissal Order was timely filed on April 10, 2024. R. 384.

STANDARD OF REVIEW

The standard of review of a trial court's decision on a motion for involuntary dismissal is de novo. *Ramle Int'l Corp. v. Miami-Dade Cnty.*, 48 Fla. L. Weekly D2010 (Fla. 3d DCA Oct. 18, 2023).

Although dismissal of an action as a sanction under *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) is reviewed for abuse of discretion, to the extent *Kozel* applies here, the trial court's failure to apply the standards for the sanction of dismissal set forth in *Kozel* is reviewed de novo. *Crown Asset Mgmt., LLC v. Bribiesca*, 3D23-2094, 2024 WL 3167486, at *3 (Fla. 3d DCA June 26, 2024) ("While dismissal of a complaint for non-compliance with a court order is subject to an abuse of discretion standard of review, failure to apply the standards for the sanction of dismissal set forth in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), is in itself a basis for reversal and remand for application of those standards.") (citations and internal quotations omitted).

SUMMARY OF ARGUMENT

The trial court committed three significant errors in issuing the Involuntary Dismissal Order.

The first, a fundamental error, involves the court granting Peninsula's counsel's ore tenus motion to withdraw. According to the Florida Rules of General Practice and Judicial Administration, motions to withdraw must be in writing to ensure the litigant is properly notified. Rule 2.505(f) mandates that an attorney's motion to withdraw include written notice with specific details such as the client's contact information. This ensures due process, giving the client a chance to respond. The trial court's approval of an oral motion to withdraw violates this rule, constituting fundamental error.

Second, the trial court should not have handled the Motion to Transfer. Under Revised Administrative Order No. 79-2, only the Administrative Judge is authorized to hear such motions in Miami-Dade County. The prescribed procedure for transferring a case involves filing a written motion and having it heard by the Administrative Judge, not the Division Judge. The trial court's deviation from this procedure was erroneous.

Finally, fundamental fairness necessitates reversing the Order to allow the Association a remedy. Condominium associations serve the public interest. Allowing individual unit owners to file derivative suits as direct actions and obtain default judgments due to a property manager's negligence undermines the association's collective financial interests. In this case, the \$65,000 judgment benefits two individual owners rather than the association as a whole, necessitating a reassessment from their neighbors if the order stands. Reversing the order would enable the Association to pursue its rightful claims against AMPREX, ensuring justice and financial fairness.

ARGUMENT

The trial court committed three errors by issuing the Involuntary Dismissal Order, the first of which is “fundamental” error under existing precedent and alone requires reversal.

A. The Trial Court Fundamentally Erred by Granting Peninsula’s Counsel’s Ore Tenus Motion to Withdraw

The trial court erred by granting Peninsula’s counsel’s *ore tenus* motion to withdraw, because under the Florida Rules of General Practice and Judicial Administration, a motion to withdraw must be in writing to assure notice to the soon-to-be unrepresented litigant. Fla. R. Gen. Prac. & Jud. Admin. 2.505(f) (“An appearance of an attorney for a party in an action or proceeding shall terminate upon withdrawal only by .. [a] written order of the court after hearing upon a motion setting forth reasons for withdrawal and the client’s last known address, telephone number, and e-mail address.”).

Here, the trial court violated this rule because it granted an “ore tenus” motion to withdraw. Florida precedent is clear that *ore tenus* motions to withdraw are disallowed and that failure to follow Rule 2.505(f) is reversible error. *Agape Charter Sch., Inc. v. Summit Charter Sch., Inc.*, 254 So. 3d 1129, 1130 (Fla. 5th DCA 2018) (“[Rule]

2.505(f)(1) contains a **mandatory** requirement that an attorney filing a motion to withdraw timely serve both the motion and the notice of hearing on his or her client at the client's last known address. That was not done here. 'The notice requirement implicates due process concerns of notice and opportunity to be heard; obviously, then, the notice and motion must be timely and must afford the client an opportunity to respond.' These due process implications mean that a violation of rule 2.505(f)(1) is **fundamental error.**" (citations omitted) (emphasis added).

The reason this error is fundamental is because it carries due process concerns for Peninsula. *See Mota v. Miami-Dade Cnty.*, 337 So. 3d 411 (Fla. 3d DCA 2021) ("Florida Rule of Judicial Administration 2.505(f)(1) contains a mandatory requirement that an attorney filing a motion to withdraw timely serve both the motion and the notice of hearing on his or her client 'at the client's known address' and that this 'notice requirement implicates due process concerns of notice and opportunity to be heard'; obviously, then, the notice and motion must be timely and must afford the client an opportunity to respond.").

Here, the trial court fundamentally erred in granting an ore tenus motion for Peninsula's counsel to withdraw, and therefore the Order on review should be reversed on that basis alone.

B. The Motion To Transfer Should Have Been Heard By the Administrative Judge Rather Than The Division Judge

Pursuant to Revised Administrative Order No. 79-2, entitled, "In Re: Assignment, Reassignment, and Transfer of Cases in the General Jurisdiction Division of the Circuit Court," the only approved mechanism to transfer a circuit court case in Miami-Dade County from one division to another division is by filing a motion to transfer and having it heard by the Administrative Judge. Rev. A.O. No. 79-2(4)(b) ("Any party desiring to transfer a case from the assigned section to another section **shall** file a written motion for transfer stating the reasons of said motion, serve notice on all parties, **and set the matter for hearing before the Administrative Judge of the Division.**") (emphasis added).

The failure to follow this procedure was error. Had the case been heard by the administrative judge, perhaps it would not have been transferred because there was no point transferring it or taking any other action that delayed the Association's right to sue AMPREX.

C. Fundamental Fairness Requires that The Order Be Reversed So That The Association Has A Remedy

The final reason that the Court should vacate the Order is fundamental fairness. Condominium associations have come under fire, politically and legally, since Champlain Towers. But condominium associations are still not-for-profit entities designed to serve the public interest in running condominium properties.

Allowing renegade unit owners to file derivative suits as **direct actions**, and then obtain a default money judgment when a property manager negligently performs its registered agent duties, would allow individual unit owners to obtain a **windfall – herein**, a windfall in the amount of \$65,000 and keep it for themselves – instead of having the money go to the Association as a derivative action would require given that the main allegation here was failure to maintain the common areas. This is \$65,000 of their neighbor’s money and will need to be reassessed again unless this Court vacates the Order so that the Association can pursue its claims against AMPREX.

CONCLUSION

The Court should reverse the order on review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Initial Brief complies with the font and word-count requirements in Rules 9.045 and 9.210(a)(2)(B), Fla. R. App. P., as it is typed in Bookman Old Style 14-point font and contains 2,218 words, which is less than the 13,000-word limit.

By: /s/Robert P. Kelly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2024, I electronically filed the foregoing and sent a copy by email to:

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