Filing # 185098807 E-Filed 10/30/2023 09:41:02 PM

IN THE DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA
FOURTH DISTRICT

LELLY ALFONSO,

Petitioner,

v.

RICHARD LANG,

Respondent.

_____/

Case No.: 4D23-1744

L.T. Case No.: CACE-20-019720

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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INTRODUCTION

The Appellee is correct that "[t]his is not the first time these parties have appeared before this Court." Ans. Br. 1, top. However, what is important to note here is at no point has this Court reached the merits as to the Appellant's allegations of fraud.[1]

Appellee challenges the appeal on two bases. First the Appellee contends that this Court lacks the jurisdiction to hear this appeal. Second, the Appellee contends that even if this Court has the jurisdiction to hear this appeal, there was no abuse of discretion to warrant. Unsurprisingly, perhaps, Appellant's position in this Reply is the opposite – that first, this Court has jurisdiction to hear this appeal because it is well settled that a motion under 1.540(b) is a proper mechanism to correct intrinsic fraud; and that second, the trial court did, in fact, abuse its discretion when it

[1] Appellant previously filed a petition for writ of mandamus to require the lower tribunal to transfer the case (4D22-1189), a writ of prohibition citing acts of the lower court judge (4D22-3157), an appeal of the final judgment which was dismissed for lack of jurisdiction for being untimely filed (4D22-2793), an appeal of an order denying a motion to dismiss which was dismissed for lack of jurisdiction to review an order of that nature (4D23-1622), and this present appeal. This Court did rule on the merits of the Appellant's fraud claims on any of the previous filings.

ignored the clearly demonstrated fraud by the Appellee in granting judgment to Appellee with no trial. As Appellant will show, however, the weight of authority and the weight are the evidence are in favor of the Appellant on both arguments.

ARGUMENT

I. This Court has Jurisdiction to Hear this Case on the Merits because the Jurisdiction of this Court to hear this Matter is Clearly Established in the Plain Language of Rule 9.130 and Authority Relevant to that Rule and Appellant's 1.540(b) Motion was not a Successive Motion for Rehearing because the 1.530 Motion was Untimely Filed and Sought Rehearing on Different Grounds than the 1.540 Motion

A. The Jurisdiction of this Court to hear this Matter is Clearly Established in the Plain Language of Rule 9.130 and Authority Relevant to that Rule

Fla. R. App. P. 9.130(a)(5)[2] provides in part that "[o]rders entered on an authorized and timely motion for relief from judgment are reviewable by the method prescribed by this rule." There is no dispute here that the Appellant's motion for relief from judgment was timely under Rule 1.540. The Appellant's motion for relief from

[2] The Appellant's Initial Brief errantly cited to Rule 9.130(a)(4), which states, "[o]rders disposing of motions for rehearing or motions that suspend rendition are not reviewable separately from a review of the final order; provided that orders granting motions for new trial in jury and nonjury cases are reviewable by the method prescribed in rule 9.110." As there was no motion for new trial (because there was no trial in this case), this section is clearly inapplicable here.

judgment under Rule 1.540 was filed February 28, 2023 – less than one year after the final judgment, which was entered on September 6, 2022.

In this instance, the Appellant alleges intrinsic fraud by the Appellee. While a motion for rehearing on the basis of extrinsic fraud may be heard beyond one year from final judgment, a 1.540 motion pertaining to intrinsic fraud is still proper if filed within one year from final judgment. “[I]ntrinsic fraud [is] 'fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried... Generally, where a party can raise an issue in the initial case, any improper or fraudulent conduct by the opposing party, even if egregious, is deemed to be intrinsic to that proceeding." *Parker v. Parker*, 916 So.2d 926, 929-30 (Fla. 2005). “When an issue is before a court for resolution, and the complaining party could have addressed the issue in the proceeding, such as attacking the false testimony or misrepresentation through cross-examination and other evidence, then the improper conduct, even though it may be perjury, is intrinsic fraud and an attack on a final judgment based on such

fraud must be made within one year of the entry of the judgment…" *Id.* Florida Rule of Civil Procedure 1.540(b) permits relief from judgments on grounds of fraud "whether heretofore denominated intrinsic or extrinsic" within one year of the judgment. See *Anderson v. Anderson*, 845 So.2d 870, 872 (Fla.2003).

The Committee Notes to Fla. R. App. P. 9.130 add futher support establishing that this appeal is proper under the Rule. The Committee Notes to the 1977 Amendment states, "[s]ubdivision (a)(5) grants a right of review of orders on motions seeking relief from a previous court order on the grounds of mistake, fraud, satisfaction of judgment, or other grounds listed in Florida Rule of Civil Procedure 1.540." The Committee Notes for the 2008 Amendment state, "[s]ubdivision 9.130(a)(5) is intended to authorize appeals from orders entered on motions for relief from judgment that are specifically contemplated by a specific rule of procedure (e.g., the current version of Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, Florida Family Law Rule of Procedure 12.540, and Florida Rule of Juvenile Procedure 8.150 and 8.270)."

Because the Appellant's Rule 1.540 motion was timely and authorized and this Court has jurisdiction to review a denial of a timely and authorized Rule 1.540(b) motion for rehearing, this Court has the jurisdiction to hear this matter.

B. This Court has Jurisdiction to hear "Successive" Motions for Rehearing and Even if this Court did not, Appellant's 1.540(b) Motion was not a "Successive" Motion for Rehearing because the 1.530 Motion was Futile and Sought Rehearing on Different Grounds than the 1.540 Motion

Appellee's argument regarding "successive" motions for rehearing fails on two fronts. First, there is nothing in any case law cited by Appellee that states that this Court lacks jurisdiction to hear a "successive" motion for rehearing. The requirement is that the motion most be "authorized" and "timely." See Fla. R. App. P. 9.130(a)(5). There is no authority cited in Appellee's motion that suggests that if a motion for rehearing is "authorized" and "timely" that if it can be labelled a "successive" motion it must be denied for lack of jurisdiction. Second, even if this Court would lack the

jurisdiction to hear a "successive" motion for rehearing, Appellee's Rule 1.540 motion for rehearing sought rehearing on the basis of fraud, whereas the Rule 1.530 motion for rehearing sought rehearing on other grounds (i.e. lack of competent substantial evidence, improper granting of summary judgment when issues of material fact existed, and improper credibility determination in granting summary judgment) and was futile for being untimely filed.

To suggest that a "successive" motion must be denied for lack of jurisdiction is a stretched understanding of the case relied upon by Appellee - *Colvin v. Longoria,* 358 So. 3d 1273. The appellant in *Colvin* filed two "successive" motions for rehearing. *Colvin v. Longoria,* 2D22-3430 (Fla. 2d DCA, Apr 12, 2023)[3] (page 2). Because the motions for rehearing were filed on September 20, 2022 and September 21, 2022, neither were timely under the fifteen day requirement of Rule 1.530 as to the September 2, 2022 order denying a motion for stay. *Id.*

[3] Appellant is unable to find the case at the citation stated by Appellee (likely due to the recent publication) and relies upon the unpublished version of the opinion.

It is noteworthy that the Colvin court never defines a "successive" motion for rehearing and did not deny the motions because they were "successive"; rather, they were denied because both were untimely and, therefore, unauthorized. *Id.* However, as the word "successive" means "following in order or in uninterrupted sequence; consecutive"[4] it seems reasonable that the term is used to collective describe the timing of the motions (one day apart). Such timing does not exist here, as the Rule 1.540 motion for rehearing was filed over five (5) months after the 1.530 motion for rehearing.

Moreover, in hindsight, it appears that the Rule 1.530 motion may have been a futile motion. In 4D2022-2793 (filed as to the same lower tribunal action), this Court determined that it lacked jurisdiction to hear Appellant's appeal because the Appellant's 1.530 Motion for Rehearing was untimely filed. Applicable authority states that not only did the Fourth District Court of Appeals lack the jurisdiction to consider the Rule 1.530 motion, but the trial court likewise, lacked jurisdiction to hear Appellant's Rule 1.530

[4] https://www.dictionary.com/browse/successive, accessed October 26, 2023.

motion. A "trial court [is] without jurisdiction to grant or even consider an untimely motion under rule 1.530." *Foche Mortg., LLC v. CitiMortgage, Inc.*, 163 So.3d 525, 526 (Fla. 3d DCA 2015). Given the non-justiciability of the Rule 1.530 motion for rehearing, it is impossible to conclude that the Appellant's motion under Rule 1.540(b) could be considered a "successive" motion or else the result is that Appellant is punished for misunderstanding the rules. Such an interpretation of Colvin would make the plain language of Rule 1.540 of no avail.

Moreover, the Appellant's motion for rehearing under 1.530 did not seek relief from judgment on the basis of intrinsic fraud by the Appellee, but on the basis of judicial error, citing lack of evidence and error under Rule 1.510 and applicable case law – NOT fraud. See Introduction to Appellant's Rule 1.530 motion, Appendix to Appellee's Answer Brief ("Lang App."), p. 57 ("In general, this Court has generally committed reversible error on three counts. First, the Court has failed to recognize that, as a matter of law, Plaintiff lacks admissible competent substantial evidence to prove his case. Second, to the extent that Plaintiff has presented evidence,

Defendant has presented opposing evidence to create issues of material fact. Third, this Court has improperly made credibility determinations in favor of Plaintiff. Plaintiff's failure to present competent substantial evidence requires dismissal under applicable law, and were this not so, Defendant's evidence opposing Plaintiff's would require trial"). See also Conclusion to Appellant's Rule 1.530 motion for rehearing (Lang App. P. 66) (stating, "Defendant has hereby presented fifteen (16) instances of error, which Defendant would contend would justify reversal of this Court's rulings – either in whole or in part. Plaintiff lacks admissible competent substantial evidence to prove his case. To the extent that Plaintiff has presented evidence, Defendant has presented opposing evidence to create issues of material fact. Plaintiff's failure to present competent substantial evidence requires dismissal under applicable law, and were this not so, Defendant's evidence opposing Plaintiff's would require trial. The credibility determinations in Plaintiff's favor were impermissible under authoritative precedent…").

Given that there is no authority saying this Court lacks jurisdiction over a "successive" motion for rehearing, that the trial

court lacked jurisdiction to consider Appellant's Rule 1.530 motion for rehearing, and that grounds under which that Rule 1.530 motion sought rehearing differed, the Appellant's Rule 1.540(b) motion for rehearing is clearly not a "successive" motion as described in the case law described in Appellee's answer brief.

It is not a stretch to say that even Appellant's cited authority is completely against Appellant's position. For instance, Appellee relies upon *Arleo v. Garcia*, 695 So. 2d 862 (Fla. 4th DCA 1997). However, this case resulted in the manner it did because Arleo, the petitioner, did not have any grounds enumerated under Rule 1.540. *Arleo*, *supra*, 695 So. 2d at 862 (stating, "Rule 1.540 does not provide the trial court with jurisdiction since the pension matter at issue does not rest on a clerical error…"). That is not the case here, where fraud is alleged and fraud is specifically listed ground for rehearing under Rule 1.540(b) and, as such, the trial court had jurisdiction to hear Appellant's Rule 1.540 motion.

Appellee additionally relies upon *Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149 (Fla. 3d DCA 2013) . *Balmoral Condo*, however, directly opposes the position taken by the Appellee. In

Balmoral Condo, the Third District Court of Appeals spelled out significant differences between Rules 1.530 and 1.540. The explanation by the court is very pertinent to this case, and so follows here:

> The grounds for rehearing under rule 1.530 are broad. Under rule 1.530, a party may move for rehearing of final orders in order "to give the trial court an opportunity to consider matters which it overlooked or failed to consider." As this Court has explained, under rule 1.530, [a] rehearing is a second consideration of a cause for the sole purpose of calling to the attention of the court any error, omission, or oversight that may have been committed in the first consideration. Upon the timely filing of a petition for rehearing, the court may reopen the case and reconsider any or all of the provisions of its final decree. These broad grounds include the contention that the final order conflicts with the governing law and is otherwise simply wrong on the merits. But the time limit for serving a motion for rehearing under rule 1.530 is short. Rule 1.530(b) provides that "[a] motion for new trial or for rehearing

shall be served not later than 10 days after the return of the verdict in a jury action or the date of filing the judgment in a non-jury action." Thus, while a timely motion for rehearing can be amended by leave of court before the motion is determined, *id.*, "the trial court has no authority either to permit the filing of any further motion for rehearing beyond the one authorized by Florida Rule of Civil Procedure 1.530, or to extend the time for filing that motion." As a result, "once a judgment becomes final—as where (a) a final judgment has been entered, and (b) a motion for rehearing under 1.530 has been denied or no such motion is filed and the ten days for filing same has expired—the trial court loses jurisdiction to rehear the judgment on the merits."

In contrast to rule 1.530, the grounds to seek relief from a final judgment or order under rule 1.540 are narrow. In fact, the grounds for relief are strictly limited to an enumerated list. ("[T]he trial court is restricted in providing relief from judgments, decrees, or orders to the limited number of grounds set forth in Florida Rule of Civil Procedure 1.540."). In

addition to clerical error, this list is limited to "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application." Fla. R. Civ. P. 1.540(b)… Significantly, the contention that the order was simply wrong as a matter of law on the merits is not one of the enumerated grounds for relief under rule 1.540 (citations omitted). That ground must be raised in a motion under rule 1.530 or on plenary appeal.

While the grounds for a motion to vacate under rule 1.540 are narrow, the time limit for serving a motion for relief

> from judgment under rule 1.540 extends far beyond the ten days allowed under rule 1.530. Rule 1.540(b) provides that the "motion shall be filled within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order or proceeding was entered."...

Balmoral Condo. Ass'n v. Grimaldi, 107 So. 3d 1149, 1151-52 (emphasis added) (citations omitted).

Given the plain language of Fla. R. App. P. 9.130 and its commentary, it is clear that this Court has jurisdiction to hear this matter. Moreover, in this case, the Appellant filed her Rule 1.530 motion on the proper grounds of lack of evidence and judicial error; and filed her Rule 1.540 motion on one of the enumerated grounds (fraud). As such, the Rule 1.540 motion is not a "successive" motion for rehearing of the sort that could bar this Court hearing this case on its merits.

II. The Trial Court's Refusal to Satisfy its Obligation to Deter Fraud in the Face of Clearly Proven Fraud was an Abuse of Discretion

In this case, the Appellee made false statements in sworn affidavits. The Appellee never retracted those statements, nor did the Appellee offer any justification or counter-evidence as to the false statements – despite ample opportunity to do so. To reiterate:

1. In his August 17, 2021 Affidavit of Indebtedness, Appellee stated, "I am the only person who maintained and continues to maintain the records concerning payments, and calculations regarding amounts due and owing pursuant to the terms of the subject loan." Appendix to Appellant's Initial Brief ("App.") 136, ¶ 8.

   This was a lie. There were no "records concerning payments, and calculations regarding amounts due and owing pursuant to the terms of the subject loan." Appellee never presented any counter-evidence despite ample opportunity.
2. In his August 17, 2021 Affidavit of Indebtedness, Appellee stated, "[t]he records concerning the current amount due

under the subject loan are reflected in the calculations listed below." App. 136. ¶ 9.

This was a lie. There were no "records concerning the current amount due under the subject loan" that were reflected in the calculations. Appellee never presented any counter-evidence despite ample opportunity.

3. In his August 17, 2021 Affidavit of Indebtedness, Appellee stated, "[t]he amounts due and owing through the scheduled hearing date, and which Plaintiff seeks to collect, are itemized as follows:

    a) Outstanding Principal (8/11/21) $31,758.00

    b) b) Interest Due under Note (04/7/1998 - 8/11/21 at 8.5% Note

    c) rate = 8,527 days X $7.40 per diem) $63,107.20

    d) c) 5% Late Fee per payment ($12.30 X 280 months) $3,440.00

    e) d) Title Search $590.00.

This was a fabrication. At no point in the trial court proceedings did Appellee put forth any records upon which

these numbers were based. Appellee never presented any counter-evidence despite ample opportunity.

4. In his August 17, 2021 Lost Note Affidavit, Appellee stated, "Affiant has made a diligent search of the records and files in his possession, which records are kept by him as the 'Lender' in the ordinary course [of] business under Affiant's custody and control…" App. 134, ¶ 6.

   This was a lie. There were no records or files in Appellee's possession which he could search, and the Appellee kept no records as the lender in the ordinary course of business. Appellee never presented any counter-evidence despite ample opportunity.

5. In his March 16, 2022 Updated Affidavit of Indebtedness, Appellee stated, "[t]he records concerning the current amount due under the subject loan are reflected in the calculations listed below." App. 141, ¶ 9.

   This was a lie. There were no records reflected in the calculations. Appellee never presented any counter-evidence despite ample opportunity.

6. In his March 16, 2022 Updated Affidavit of Indebtedness, Appellee stated, "[t]he amounts due and owing through the scheduled hearing date, and which Plaintiff seeks to collect, are itemized as follows:

    a) Outstanding Principal $ 31,208.24

    b) Interest Due under Note (01/1/2000 to 6/1/2022 at 8.5% Note rate = 7,456 days X $7.40 per diem) $ 55,174.40

    c) 5% Late Fee per payment ($12.30X 280 months) $ 3,444.00." App. 141, ¶ 13.

    This was a fabrication. At no point in the trial court proceedings did Appellee put forth any records upon which these numbers were based. Appellee never presented any counter-evidence despite ample opportunity.

The evidence of numerous false sworn statements by the Appellee is abundant. In Interrogatory #6 of her First Set of Interrogatories, the Appellant asked the Appellee, "What records were kept by the Plaintiff regarding payments by the Defendant?" App. 30. The Appellee answered under oath in part that "written

records regarding payments made to Plaintiff by the Defendant were lost in the same way that the original Note and Mortgage were lost." *Id*. In an email by Plaintiff's counsel to Defendant's counsel on November 23, 2021 at 3:47 PM, Appellant's counsel – responding to an email about Appellee's lack of business records – stated:

> I fail to see how we can be in violation of a Court Order for us to produce records when we do not have any records… since the Order states in paragraph 6, "Plaintiff shall produce any and all business records regarding its accounting of the total amount due within 15 days of the date of this Order"… please take this email as confirmation: **Plaintiff has no <u>records</u>**."

App. 38 (emphasis and punctuation in original). The Appellee admitted in deposition that he had no records and lost any records that he had in 2007. Pl. Dep. 60: 2-13 ("…the records that I was maintaining were lost in – during one of the many moves") (App. 480); Id. 38: 9-16 ("… a lot of my papers were lost in probably our move to New Mexico") (App. 458); *Id*. 11: 8-10 (Appellee testified he moved to New Mexico in 2007) (App. 431). Appellee stated any

business records or other documents he may have had were "probably in a landfill or something somewhere." *Id*. 62: 17-19 (App. 482). At hearing on June 1, 2023, the Appellant presented in evidence the false statements of the Appellee, as well as evidence showing the falsity of those statements. App. 404. When questioned at the hearing, Plaintiff could not point to a single business record where the figure for indebtedness of $31,208.24 had come from except to point to the mortgage note.

10 Q. Paragraph 8 states that you are the only person who

11 has knowledge of records concerning payments and calculations

12 regarding amounts due and owing pursuant to the terms of the

13 note. What records is this paragraph referring to?

14 A. I can only judge by that -- that we're referring to

15 the mortgage note.

16 Q. And you're saying in Paragraph 9 that, "The records

17 concerning the amounts due are reflected below."

18 And now scroll down to Paragraph 13, where there's

19 an amount of $31,208.24. Again, I want to ask you, where

20 does this amount come from?

21 A. Again, I can only refer back to the mortgage note…

App. 409, 10-21. The note, however, contained no records of payment or indebtedness. The amount of $31,208.24 was pure fabrication. The Appellee had opportunity to present counter-evidence and testimony and declined to do so. App. 409.

"[T]he trial court has the right and obligation to deter fraudulent claims from proceeding in court." *Savino v. Florida Drive In Theatre Management, Inc.*, 697 So.2d 1011, 1012 (Fla. 4th DCA 1997) (emphasis added). The key here word is obligation. An "obligation" is "an act or course of action to which a person is morally or legally bound; a duty or commitment."[5] The trial court had an *obligation* to do something about Appellee's fraud – namely, to prevent the fraudulent claims from proceeding. To turn a blind eye to clearly proven fraud and do nothing to deter fraud – in light of a clearly stated "*obligation*" to deter fraud – is a clear abuse of discretion. Even more egregious – not only did the trial court ignore

5 https://www.oed.com/search/dictionary/?scope=Entries&q=obligation, accessed October 26, 2023.

the evidence of falsity, but it relied on the Appellee's demonstrably false statements to grant summary judgment and final judgment against the Appellant. "The law is clear that a trial court has the inherent authority to dismiss actions based on fraud… Such a power is indispensible to the proper administration of justice because no litigant has a right to trifle with the courts." *Young v. Curgil*, 358 So.2d 58, 59 (Fla. 3d DCA 1978). "In cases where fraud can be proven by clear and convincing evidence, it is clearly within the trial court's discretion to punish the offending party by dismissal." *Ibarra v. Izaguirre*, 985 So.2d 1117, 1119 (Fla. 3d DCA 2008).

CONCLUSION

It is clear that this Court has jurisdiction to hear this case on the merits because that jurisdiction is clearly established in the plain language of Fla. R. App. P. 9.130 and Fla. R. Civ. P. 1.540, and other authority relevant to those rules. Moreover, there is no authority cited by Appellee that divests this court of jurisdiction to hear a "successive" motion for rehearing and, even if such authority exists, Appellant's 1.540(b) Motion was not a "successive" motion for rehearing because the 1.530 motion was futile and sought rehearing on different grounds than the 1.540 motion.

Regarding fraud, the evidence presented in this case clearly and convincingly establishes fraud on the part of the Appellee. The trial court had the obligation to prevent the Appellee's fraudulent claims from proceeding and refused to uphold its obligation. Such a departure by the trial court from its obligation to deter fraud is an abuse of discretion warranting reversal.

CERTIFICATE OF FONT AND WORD COUNT LIMIT COMPLIANCE

I hereby certify that this brief has been generated in Bookman Old Style 14-point font and has a word count (all parts) of 4,735 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed to the Florida Courts E-Filing portal to be served by email upon Carlos Reyes, Esq., whose address of record is 301 E Pine St Ste 1400, Orlando, FL 32801-2741, at carlos.reyes@gray-robinson.com, and Kristie Hatcher-Bolin, whose address of record is One Lake Morton Drive, Post Office Box 3, Lakeland, Florida 33802-0003, at Kristie.hatcher-bolin@gray-robinson.com on this 30th day of October, 2023.

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