Third District Court of Appeal

State of Florida, January Term, A.D. 2011

Opinion filed June 22, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-2267
Lower Tribunal No. 10-16636

Diaz, Reus & Targ, LLP, a Florida limited liability partnership, and Redfield Investments, A.V.V., etc.,
Appellants,

vs.

Bird Wingate, LLC II, etc.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, John Schlesinger, Judge.

Diaz, Reus & Targ, and Michael Diaz, Jr., Carlos F. Gonzalez, Brant C. Hadaway, and Sumeet H. Chugani, for appellants.

Ronald P. Weil, for appellee.

Before RAMIREZ, C.J., and SHEPHERD and SUAREZ, JJ.

SUAREZ, J.

Redfield Investments, A.V.V., a Netherland Antilles corporation ("Redfield"), appeals a non-final order granting Bird Wingate, LLC II's ("Wingate") motion to vacate voluntary dismissal with prejudice. We have jurisdiction. Fla. R. App. P. 9.130 (a)(5). We affirm.

We give below a summary of the procedural facts of this case, not because most of the facts are relevant to the outcome of the issues on appeal, but because most of the facts are important to point out what can happen in a case where the rules are "expanded." Wingate filed a complaint against Redfield in the circuit court in and for Miami Dade County for breach of contract, specific performance and tortious interference with a contract entered into between the parties for the purchase and sale of real property in Pinecrest, Florida. The day after filing the complaint, Wingate filed an identical complaint in the same circuit receiving a new case number and a new judge. At the same time, Wingate filed a voluntary dismissal with prejudice of the first filed complaint.[1] Redfield was served with the second filed complaint. Redfield removed the case to federal court. Once in federal court, Redfield moved for summary judgment on the ground that the voluntary dismissal with prejudice taken in state court was an adjudication on the merits and, therefore, the complaint was barred by the doctrine of res judicata. Realizing the problem, Wingate filed a motion in state court to vacate the

[1] Although not really violative of the Florida Rules of Civil Procedure, it is definitely a form of "forum shopping."

voluntary dismissal with prejudice and to convert it to a dismissal without prejudice. This motion to vacate was filed ex-parte under Wingate's questionable theory that, as Redfield had not been served with the first filed complaint, Redfield was not required to have notice of this hearing, even though it was a party to the second filed identical complaint. The trial judge who was sitting in for the assigned judge, based on the facts and case law before him, including the fact that Wingate failed to inform him of the issue in federal court, appropriately granted the motion and vacated the voluntary dismissal with prejudice, converting it to a voluntary dismissal without prejudice. Redfield discovered the ex-parte order while reviewing the docket sheet. The substituting judge was then made aware of the ex-parte order, stated that Redfield was a named party and was entitled to notice, and reinstated the voluntary dismissal with prejudice concluding that the assigned trial judge should resolve the issue.

The only issue on appeal arises from the next procedural step taken. An evidentiary hearing on the motion to vacate the voluntary dismissal with prejudice was heard before the judge originally assigned to this case. At the evidentiary hearing, the judge noted two affidavits: one filed by the attorney for Wingate and the other by the paralegal in his office. In sum, the two affidavits stated that there was no intent on the attorney's part to take a voluntary dismissal with prejudice and that the paralegal, inadvertently, made the notice "with prejudice," knowing

that it should have been "without prejudice." The attorney then stated that, due to the amount of paperwork on his desk, he signed the pleading without noticing that it was a notice of voluntary dismissal with prejudice. We find that, based on the only evidence before the trial judge, the two affidavits, the trial judge did not abuse his discretion by granting the motion and vacating the voluntary dismissal with prejudice—converting it to a dismissal without prejudice. Case law is replete in the State of Florida that the power to correct clerical exception of error in a notice of voluntary dismissal lies in Florida Rule of Civil Procedure 1.540(b). The trial judge held the required evidentiary hearing and, based on the only evidence presented, the two affidavits, properly granted the motion. See Miller v. Fortune Ins. Co., 484 So. 2d 1221 (Fla. 1986); see also Watson v. Anderson, 492 So. 2d 1046 (Fla. 1986); Bender v. First Fid. Sav. & Loan Ass'n, 463 So. 2d 445 (Fla. 4th DCA 1985), approved, 491 So. 2d 276 (Fla. 1986). The other procedural issues in this case did not and cannot enter into the decision of this sole issue.

We affirm and insert herein with total agreement the last paragraph from the trial judge's well-written order on rehearing:

> Although this Court is troubled by the procedural machinations undertaken by counsel herein, the court believes and finds wholly credible plaintiff's counsel's affidavit, which he stood by at the hearing, asserting that he never intended to obtain a dismissal with prejudice in this case.

Affirmed.

SHEPHERD, J., concurring specially.

The decision of the trial court relieving Wingate from counsel's (perhaps, more accurately stated, his paralegal's) error in the drafting of a voluntary dismissal in this case was correct. In fact, this is one of those rare cases where it was the only possible decision. See Miller v. Fortune Ins. Co., 484 So. 2d 1221 (Fla. 1986) (approving Shampaine Indus., Inc. v. S. Broward Hosp. Dist., 411 So. 2d 364 (Fla. 4th DCA 1982)); see also Watson v. Anderson, 492 So. 2d 1046 (Fla. 1986); Pino v. Bank of N.Y. Mellon; 57 So. 3d 950 (Fla. 4th DCA 2011); Wells Fargo Bank, NA v. Haecherl, 56 So. 3d 892 (Fla. 4th DCA 2011); Lee & Sakahara Assocs., AIA, Inc. v. Boykin Mgmt. Co., 678 So. 2d 394 (Fla. 4th DCA 1996); Bender v. First Fid. Sav. & Loan Ass'n, 463 So. 2d 445 (Fla. 4th DCA 1985), *approved*, 491 So. 2d 276 (Fla. 1986).

Nor were the rules "expanded" to reach this result. Counsel for Wingate employed the correct rule, deployed it, and obtained the relief for his client to which it indubitably was entitled.

The only legerdemain in this case—and the event I suspect is the source of my colleagues' torment—was counsel's error in not giving notice of his motion and hearing to the Diaz Reus law firm, as unequivocally required by Florida Rule

of Civil Procedure 1.080(a), which states: "Unless the court otherwise orders, every pleading subsequent to the initial pleading and every other paper filed in the action, except applications for witness subpoena, shall be served on each party." This lapse, immaterial to the achievement of the correct result in the case, may be a matter for referral of counsel to The Florida Bar. However, the client should not pay the ultimate penalty for its counsel's wrongdoing. See Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993) (finding dismissal with prejudice would in effect punish the litigant instead of his counsel, who was neglectful).

The cases cited by the dissent as a "must" to consider in a proper decision of this case do not call for a different result. Randle-Eastern Ambulance Serv., Inc. v. Vasta, 360 So. 2d 68 (Fla. 1978), the "first" of the cases cited, is inapposite. Unlike our case, the plaintiff in Randle-Eastern did not err in the drafting of her dismissal document. Rather, the plaintiff did not appreciate the consequence of the filing—that her claim would be forever barred by the statute of limitations. Id. at 69. Our case, in contrast, involves a drafting error. Florida Rule of Civil Procedure 1.540(b)(1)'s main purpose—allowing a court to relieve a party or its legal representative from a "mistake" or "inadvertence, surprise, or excusable neglect"—was designed for cases such as this. See Viking Gen. Corp. v. Diversified Mortg. Investors, 387 So. 2d 983, 985 (Fla. 2d DCA 1980) ("The mistake envisioned by the rule is the type of honest and inadvertent mistake made

in the ordinary course of litigation . . . and is generally for the purpose of setting the record straight.").

Miller v. Fortune Insurance Co., 484 So. 2d 1221 (Fla. 1986), the dissent's other cited case, supports affirmance in this matter. The facts in Miller are identical to those in our case:

> Miller's attorney filed a voluntary motion to dismiss a suit in county court against Fortune "with prejudice." Eleven months later, Miller moved the trial court to strike "with prejudice" and substitute "without prejudice." The motion cited to Florida Rule of Civil Procedure 1.540(b) as authority for the change. Ground for the motion was "secretarial error"-supporting affidavits of the attorney and his secretary stated that standard office procedure was to prepare and file voluntary dismissals "without prejudice" unless otherwise specified by the attorney. The secretary swore she mistakenly typed "with prejudice" and the attorney swore he relied on the standard office policy and failed to catch the error.

Id. at 1221-22. Explaining that Randle-Eastern was inapposite to a case of this type, the supreme court held Rule 1.540(b) confers on trial courts the power to correct "substantive clerical errors" such as this in a voluntary notice of dismissal. Id. Significantly, the court stated, "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," regardless of the underlying consequences. Id. at 1224 (citing Shampaine, 411 So. 2d at 364).

The dissent's emphasis on the plaintiff's motive for seeking to expunge the language "with prejudice" from its dismissal filing in this case is misplaced, as

even it concedes the right of a litigant to "switch horses" to obtain a different "mount" midstream "is a strategy [] not prohibited by the rules or the case law."

On this reasoning, I join the opinion of the court.

RAMIREZ, C.J., dissenting.

I dissent with the result reached in this case. The dismissal with prejudice by counsel, although professedly the result of excusable neglect, was in reality the result of counsel's strategic decision to manipulate Florida Rule of Civil Procedure 1.420(a), a rule allowing for the voluntary dismissal of actions.

Appellee's counsel filed two identical complaints for the sole and admitted purpose of picking the more desirable judge to whom the case was assigned. He would then dismiss the case assigned to the less desirable judge and proceed on the other. The wisdom of this strategy is questionable. Counsel must pay two filing fees and forego the ability to take a subsequent voluntary dismissal should the occasion arise for such action, assuming counsel for the defendant discovers the existence of the prior-filed case. It is a strategy, however, not prohibited by the rules or the case law. In Patterson v. Allstate Insurance Company, 884 So. 2d 178, 180 (Fla. 2d DCA 2004), the court summarized a party's right to voluntarily dismiss an action:

> Florida Rule of Civil Procedure 1.420(a) . . . gives plaintiffs the right to voluntarily dismiss their action at any time "before a hearing on motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court." Until the line drawn by this rule is crossed, the plaintiff's

> right to a voluntary dismissal is "absolute." Fears v. Lunsford, 314 So. 2d 578 (Fla. 1975).

In Service Experts, LLC v. Northside Air Conditioning & Electrical Service, Inc., 2010 WL 4628567 (Fla. 2d DCA Nov. 17, 2010), the court further explains that "[t]here are limited exceptions to a plaintiff's 'absolute' right to take a voluntary dismissal as a matter of right: (1) if there is fraud on the court, (2) if the defendant can establish the common law exception to the right of voluntary dismissal, or (3) if the plaintiff dismisses the case at a stage which is deemed the equivalent of a summary judgment."

Our decision must be made in light of two Florida Supreme Court cases. The first is Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So. 2d 68 (Fla. 1978), which considered "what would happen if a plaintiff who had taken a voluntary dismissal later realized that the opportunity to relitigate with the defendant was foreclosed, and attempted to correct the earlier tactical error by asking the trial judge for permission to be relieved of the dismissal." Id. The Randle-Eastern case would clearly deny relief to the appellee, as the court stated in no uncertain terms that "a voluntary dismissal under Rule 1.420(a)(1)(i) divests the trial court of jurisdiction to relieve the plaintiff of the dismissal." Id. at 69.

The second case we must consider is Miller v. Fortune Insurance Company, 484 So. 2d 1221 (Fla. 1986). There, the Florida Supreme Court retreated from the

expansive language in Randle-Eastern, and "h[e]ld that the limited jurisdiction conferred on the courts by rule 1.540(b) to correct errors includes the power to correct clerical substantive errors in a voluntary notice of dismissal." 484 So. 2d at 1224. In Miller, as in our case, the dismissal was with prejudice, as opposed to without prejudice, as a result of secretarial error. Thus, superficially, Miller is on all fours with our case. Miller, however, stated that:

> We adhere to the principle that "[i]t has never been the role of the trial courts of this state to relieve attorneys of their tactical mistakes. The rules of civil procedure were never designed for that purpose, and nothing in Rule 1.540(b) suggests otherwise." Randle, 360 So. 2d at 69.

Id. at 1223. Our decision then hinges on whether what happened here was a tactical mistake or a secretarial error. I believe it was a tactical mistake. The whole scheme of filing two suits and dismissing the one falling before the less desirable judge was a quintessential tactical scheme. Admittedly, the scheme was botched, as the trial court found, through excusable neglect. But it was the direct result of the attorney's stratagem of filing two suits to engage in what was nothing other than judge-shopping.

Counsel here filed two suits and before attempting service, dismissed one of those suits. Defense counsel only learned of the existence of this prior suit by chance. When he discovered the existence of the prior suit, he also learned that the

dismissal had been with prejudice. Thus, defense counsel moved to dismiss the second action as res judicata.

Confronted with this motion, counsel for the appellee filed an *ex parte* motion to correct the dismissal from "with prejudice" to "without prejudice." It was done *ex parte* ostensibly because no appearance or other filing had been made in the dismissed action. Yet counsel knew full well that the appellants were represented by counsel, that the matter was hotly contested, and that the erroneous dismissal was being used as grounds for a dismissal of the second action as res judicata. At oral argument, attorney Ronald Weil, an experienced lawyer, unapologetically tried to justify his actions by arguing that technically nothing had been filed in the previously dismissed action. In my view, his action was indefensible because he knew that the defendant was being represented in the same, identical matter, only under a different case number.

The judge that granted the *ex parte* motion was never informed that the defendants were represented by counsel in the same, identical litigation. Counsel for the appellant had to file a motion for reconsideration, to which counsel for appellee had the effrontery of arguing that appellants had no standing.

I would reverse the trial court because I believe the dismissal with prejudice was nothing more than a botched tactical ploy.