DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2011

ROMAN PINO,

Appellant,

v.

THE BANK OF NEW YORK MELLON,

Appellee.

No. 4D10-378

[February 2, 2011]

EN BANC

WARNER, J.

The defendant in a mortgage foreclosure action filed by BNY Mellon appeals a trial court's denial of his motion under Florida Rule of Civil Procedure 1.540(b) to vacate a voluntary dismissal. The notice was filed after the defendant moved for sanctions against the plaintiff for filing what he alleged was a fraudulent assignment of mortgage. Because the notice of voluntary dismissal was filed prior to the plaintiff obtaining any affirmative relief from the court, we affirm the trial court's order.

BNY Mellon commenced an action to foreclose a mortgage against the defendant. The mortgage attached to the complaint specified another entity, Silver State Financial Systems, as lender and still another, Mortgage Electronic Registration Systems, as mortgagee. The complaint alleged that BNY Mellon owned and held the note and mortgage by assignment, but failed to attach a copy of any document of assignment. At the same time, it alleged the original promissory note itself had been "lost, destroyed or stolen." The complaint was silent as to whether the note had ever been negotiated and transferred to BNY Mellon in the manner provided by law.[1]

The defendant initially sought dismissal for failure to state a cause of action, arguing that in light of the claim of a lost instrument, the absence of an

[1] *See* § 673.2011(2), Fla. Stat. (2010) (if instrument is payable to an identified person "negotiation requires transfer of possession of the instrument" and endorsement by holder).

assignment of mortgage was a critical omission. BNY Mellon responded by amending the complaint only to attach a new unrecorded assignment, which happened to be dated just before the original pleading was filed.

In response to this amendment, defendant moved for sanctions. He alleged that the newly produced document of assignment was false and had been fraudulently made, pointing to the fact that the person executing the assignment was employed by the attorney representing the mortgagee, and the commission date on notary stamp showed that the document could not have been notarized on the date in the document. The defendant argued that the plaintiff was attempting fraud on the court and that the court should consider appropriate sanctions, such as dismissal of the action with prejudice. Concurrent with the filing of this motion, the defendant scheduled depositions of the person who signed the assignment, the notary, and the witnesses named on the document — all employees of Florida counsel for BNY Mellon — for the following day. Before the scheduled depositions, BNY Mellon filed a notice of voluntary dismissal of the action.

Five months later, BNY Mellon refiled an identical action to foreclose the same mortgage. The new complaint no longer claimed the note was lost and attached a new assignment of mortgage dated after the voluntary dismissal. In the original, dismissed action, the defendant filed a motion under rule 1.540(b), seeking to strike the voluntary dismissal in the original action on the grounds of fraud on the court and for a dismissal of the newly filed action as a consequent sanction, requesting an evidentiary hearing. The trial court denied the motion without an evidentiary hearing, essentially holding that, because the previous action had been voluntarily dismissed under rule 1.420, the court lacked jurisdiction and had no authority to consider any relief under rule 1.540(b).

We affirm the trial court's refusal to strike the notice of voluntary dismissal. Neither rule 1.540(b) nor the common law exceptions to that rule allow a defendant to set aside the plaintiff's notice of voluntary dismissal where the plaintiff has not obtained any affirmative relief before dismissal.

Rule 1.420(a) permits a plaintiff to dismiss an action without order of the court "at any time" before a motion for summary judgment is heard or before retirement of the jury or submission to the court if the matter is tried non-jury. "Our courts have consistently construed this rule as meaning that, at any time before a hearing on a motion for summary judgment, a party seeking affirmative relief has nearly an absolute right to dismiss his entire action once, without a court order, by serving a notice of dismissal." *Ormond Beach Assocs. Ltd. v. Citation Mortg., Ltd.*, 835 So. 2d 292, 295 (Fla. 5th DCA 2002); *see also Meyer v. Contemporary Broadcasting Co.*, 207 So. 2d 325, 327 (Fla. 4th DCA 1968). The courts have carved out narrow exceptions to this entitlement:

> 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. *See Romar Int'l, Inc. v. Jim Rathman Chevrolet/Cadillac, Inc.*, 420 So. 2d 346 (Fla. 5th DCA 1982); *Visoly v. Bodek*, 602 So. 2d 979 (Fla. 3d DCA 1992).

Ormond, 835 So. 2d at 295. In *Visoly*, the court granted a motion to strike the complaint as a sham. Finding that rule 1.150(a) operated much like a motion for summary judgment, the court concluded that the plaintiff could not voluntarily dismiss his complaint pursuant to rule 1.420(a) where the trial court had granted the motion to strike, which was equivalent to the granting of a motion for summary judgment.

The most applicable common law exception to the right to a voluntary dismissal was applied in *Select Builders of Florida, Inc. v. Wong*, 367 So. 2d 1089 (Fla. 3d DCA 1979). There, the court affirmed the trial court's striking of a notice of voluntary dismissal where the plaintiff sought to perpetrate a fraud by the filing of the notice of voluntary dismissal. Select Builders had filed suit to expunge an injunction against a condominium developer, granted in Federal Court in Illinois, and improperly filed in the public records of Dade County. The trial court issued an order expunging the document and enjoining the filing of any other like documents without domesticating the judgment in Florida. Later, it was discovered that Select Builders had perpetrated a fraud upon the court in obtaining the order expunging the document. The trial court vacated its prior order, and the appellees moved for sanctions and fees. The court also ordered Select Builders to take steps to preserve the status quo and to make payment of monies it received in connection with the sale of some of the property subject to the injunction to a third party. Select Builders then filed a notice of voluntary dismissal, which the trial court struck to retain jurisdiction over the case.

The appellate court affirmed, concluding that the court correctly retained jurisdiction to prevent a fraud on the court. "The plaintiff had obtained the affirmative relief it sought, its actions in the cause in the trial court may have been fraudulent on the court and it certainly was within its inherent power (as an equity court) to protect its integrity." *Id.* at 1091. The court distinguished other cases in which the plaintiff's right to take a voluntary dismissal was deemed absolute: "First, the plaintiff in the cited cases had not received affirmative relief from an equity court and, secondly, no question of fraud on the court was involved." *Id.*

In *Select Builders* the plaintiff obtained affirmative relief by the granting of the suspect injunction, *and* it had obtained such relief by fraud. Comparing the facts of *Select Builders* to this case, we find that the BNY Mellon had not obtained any type of affirmative relief. Even if the assignment of mortgage was "fraudulent" in that it was not executed by the proper party, it did not result in any relief in favor of BNY Mellon. *Select Builders* is thus distinguishable from the present case. In *Bevan v. D'Alessandro*, 395 So. 2d 1285, 1286 (Fla. 2d DCA 1981), the court likewise distinguished *Select Builders* on the grounds that the "plaintiff had received affirmative relief to which he was not entitled and sought to avoid correction of the trial court's error by taking a voluntary dismissal." No such circumstance is present in this case.

The appellant argues that rule 1.540(b) also provides a method to seek relief from a notice of voluntary dismissal. We disagree that the defendant/appellant may utilize that rule where the defendant has not been adversely affected by the voluntary dismissal. Rule 1.540(b) allows a court to relieve a party from a "final judgment, decree, order, or proceeding" based upon any of five grounds set out in the rule: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud 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 or released. A notice of voluntary dismissal constitutes a "proceeding" within the meaning of the rule. *See Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1224 (Fla. 1986). Therefore, the rule may be invoked, even though for all other purposes the trial court has lost jurisdiction over the cause. *Id.* Indeed, in *Shampaine Industries, Inc. v. South Broward Hospital District*, 411 So. 2d 364, 368 (Fla. 4th DCA 1982), approved by the supreme court in *Miller*, we held: "Rule 1.540(b) may be used to afford relief to all litigants who can demonstrate the existence of the grounds set out in the Rule."

The rule, however, is limited to relieving a party of a judgment, order or proceeding. "Relieve" means "[t]o ease or alleviate (pain, distress, anxiety, need, etc.) . . . to ease (a person) of any burden, wrong, or oppression, as by legal means." *The Random House Dictionary of the English Language* 1212 (1967). A defendant may obtain such "relief" when a plaintiff has obtained a ruling that has adversely impacted the defendant. Here, the defendant has not been adversely impacted by a ruling of the court. The fact that a defendant may have incurred attorney's fees and costs is not an adverse impact recognized as meriting relief. *See Serv. Experts, LLC v. Northside Air Conditioning & Elec. Serv. Inc.*, 2010 WL 4628567 (Fla. 2d DCA 2010). Therefore, because the defendant has not suffered an adverse ruling or impact from the notice of voluntary dismissal, he is not entitled to seek relief pursuant to the rule.

The dissent is certainly correct that a court possesses the authority to protect judicial integrity in the litigation process. However, the cases cited in support of a court exercising such authority all involved the court granting a motion for *involuntary* dismissal where the plaintiff had engaged in deceitful conduct during a still pending case. *See Ramey v. Haverty Furn. Co.*, 993 So. 2d 1014, 1020 (Fla. 2d DCA 2008); *McKnight v. Evancheck*, 907 So. 2d 699, 700 (Fla. 4th DCA 2005); *Morgan v. Campbell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002). In each of those proceedings, the defendant moved for the sanction of dismissal of an ongoing proceeding based upon "fraud on the court." That term has been described as follows:

> 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.

Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989). Dismissal is a remedy to be used only in the most extreme cases, as "[g]enerally speaking, … allegations of inconsistency, nondisclosure, and *even falseness*, are best resolved by allowing the parties to bring them to the jury's attention through cross examination or impeachment, rather than by dismissal of the entire action." *Granados v. Zehr*, 979 So. 2d 1155, 1158 (Fla. 5th DCA 2008) (emphasis added).

Here, we do not view it as an appropriate exercise of the inherent authority of the court to reopen a case voluntarily dismissed by the plaintiff simply to exercise that authority to dismiss it, albeit with prejudice. Only in those circumstances where the defendant has been *seriously prejudiced,* as noted in *Romar International*, should the court exercise its inherent authority to strike a notice of voluntary dismissal. The defendant in this case does not allege any prejudice to him as a result of the plaintiff's voluntary dismissal of its first lawsuit. Indeed, he may have benefitted by forestalling the foreclosure.

The appropriate procedure is to follow Rule 1.420. Upon the voluntary dismissal, Pino would be entitled to his costs and possibly his attorney's fees. *See Fleet Servs. Corp. v. Reise*, 857 So. 2d 273 (Fla. 2d DCA 2003). The court can require payment as a precondition to the second suit. *See* Fla. R. Civ. P. 1.420(d). Moreover, a referral of the appellee's attorney for a violation of the Code of Professional Responsibility for filing the complaint with the alleged false affidavit is in order.

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

defendant has requested a denial of the equitable right to foreclose the mortgage at all. If this is an available remedy as a sanction after a voluntary dismissal, it may dramatically affect the mortgage foreclosure crisis in this State. Accordingly we certify the following question to the Florida Supreme Court as 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?*

Affirmed.

GROSS, C.J., STEVENSON, TAYLOR, MAY, DAMOORGIAN, CIKLIN, GERBER and LEVINE, JJ., concur.
HAZOURI, J., recused.
POLEN, J., dissents with opinion.

POLEN, J., dissenting.[2]

Rule 1.420(a)(1) allows a plaintiff to voluntarily dismiss a case simply by serving a notice at any time before trial or hearing on summary judgment. Initially in *Randle-Eastern Ambulance Service v. Vasta*, 360 So. 2d 68 (Fla. 1978), the court held that such a dismissal took the case out of the power of the court for all purposes, explaining:

> "The right to dismiss one's own lawsuit during the course of trial is guaranteed by Rule 1.420(a), endowing a plaintiff with unilateral authority to block action favorable to a defendant which the trial judge might be disposed to approve. The effect is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of 'jurisdiction'. If the trial judge loses the ability to exercise judicial discretion or to adjudicate the cause in any way, it follows that he has no jurisdiction to reinstate a dismissed proceeding. The policy reasons for this consequence support its apparent rigidity."

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[2] This dissent was actually written by Judge Gary M. Farmer, who retired from this court December 31, 2010. As Judge Farmer can no longer participate in this matter, and since I concurred with his proposed dissent, I now adopt in total his writing. Although I thoroughly agree with this dissent, I want the record to reflect that the words are those of Judge Farmer.

360 So. 2d at 69. But later in *Miller v. Fortune Insurance Co.*, 484 So. 2d 1221 (Fla. 1986), the court retreated from its statement in *Randle-Eastern Ambulance* about the "remov[ing the cause] completely from the court's consideration the power to enter an order." Instead the *Miller* court specified an exception in rule 1.540(b) to the complete loss of jurisdiction from a voluntary dismissal:

> "A trial judge is deprived of jurisdiction, not by the *manner* in which the proceeding is terminated, but by the sheer finality of the act, whether judgment, decree, order or stipulation, which concludes litigation. Once the litigation is terminated and the time for appeal has run, that action is concluded for all time. There is one exception to this absolute finality, and this is rule 1.540, which gives the court jurisdiction to relieve a party from the act of finality in a narrow range of circumstances." [e.s.]

484 So. 2d at 1223. *Miller* explicitly held that "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."[3] In this case, defendant contends that the court had authority here to consider his motion for relief on the merits because he asserted a specific basis authorized by rule 1.540(b).

Rule 1.540(b)(3) provides:

> "On motion and upon such terms as are just, the court may relieve a party … from a final judgment, decree, order, *or proceeding* for … *fraud* (whether … intrinsic or extrinsic), *misrepresentation, or other misconduct of an adverse party*." [e.s.]

In *Select Builders of Florida v. Wong*, 367 So. 2d 1089 (Fla. 3d DCA 1979), the Third District agreed that rule 1.540(b) affords a basis to strike a notice of voluntary dismissal filed to avoid sanctions for relief from the dismissal on account of fraudulent conduct. In explaining its decision, the court noted that in that instance "plaintiff had obtained the affirmative relief it sought, its actions in the cause in the trial court may have been fraudulent on the court and it certainly was within its inherent power (as an equity court) to protect its integrity." 367 So. 2d at 1091. I do not read *Select Builders* to explicitly hold that "affirmative relief" is required to establish grounds under rule 1.540(b) for

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[3] 484 So.2d at 1224 (citing *Shampaine Indus. v. S. Broward Hosp. Dist.*, 411 So. 2d 364 (Fla. 4th DCA 1982)).

relief from a voluntary dismissal done to prevent examination into an attempted fraud on the court.[4]

In *U.S. Porcelain, Inc. v. Breton*, 502 So. 2d 1379 (Fla. 4th DCA 1987), we tacitly recognized the *Select Builders* exception but found it inapplicable where "[t]here are no findings nor conclusions in this case of fraud, deception, irregularities, nor any misleading of the court." 502 So. 2d at 1380. Our agreement with the holding in *Select Builders* evinces no attempt to narrow the exception to traditional common law fraud, indeed adding as other forms of fraudulent conduct "deception, irregularities, []*or any misleading of the court*." [e.s.]

The fact that the fraud exception applied in *Select Builders* is now commonly recognized as valid under *Miller v Fortune Insurance* is seen in the following exposition on the subject from the standard Florida legal encyclopedia:

> "In exercising its inherent power to protect its integrity, the trial court is authorized to reinstate a matter and retains jurisdiction over the cause, in order to prevent a fraud on the court, where it appears the plaintiff has perpetrated fraud upon the court to obtain a voluntary dismissal. The original jurisdiction over the dismissed cause first acquired continues for the purpose of entertaining and deciding all appropriate proceedings brought to reopen the case, either by means of an independent equity suit directed against the fraudulently induced order or judgment to have it set aside or by means of a direct motion filed in the case itself praying that the order of dismissal be vacated and the cause returned to the docket of pending cases."

1 FLA.JUR.2D, *Actions* § 231 (citing *Select Builders*); *see also* Roger A. Silver, *The Inherent Power Of The Florida Courts*, 39 U. MIAMI L. REV. 257, 287 (1985) ("Florida courts have…inherent power…to strike a voluntary dismissal" (citing *Select Builders*)); Henry P. Trawick Jr., TRAWICK'S FLORIDA PRACTICE & PROCEDURE § 21:2 (citing *Select Builders*); 25 TRIAL ADVOCATE QUARTERLY 22, 23 (discussing *Select Builders*). All the texts base the court's authority to grant relief on the inherent power of the judges to protect the integrity of the court system in the litigation process.

In opposing defendant's motion for relief under rule 1.540(b), BNY Mellon relies on *Bevan v. D'Alessandro*, 395 So. 2d 1285 (Fla. 2d DCA 1981). There the court recognized the fraud exception to the voluntary dismissal rule but held it inapplicable where plaintiff did not obtain any relief and the act of filing

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[4] *See also Romar Int'l v. Jim Rathman Chevrolet/Cadillac, Inc.*, 420 So. 2d 346, 347 (Fla. 5th DCA 1982) (recognizing "narrow exception exists where a fraud on the court is *attempted* [e.s.] by the filing of the voluntary dismissal").

the voluntary dismissal did not actually rise to the level of a fraud on the court.[5] BNY Mellon argued that, similarly, it had obtained no relief or benefit at that point in the action from the filing of the revised assignment. In denying defendant's motion for relief under rule 1.540(b), the trial judge appeared to rely heavily on *Bevan* and that argument of BNY Mellon. Curiously neither *Bevan* nor BNY Mellon makes any attempt to argue why, as a matter of simple jurisprudence, courts should be precluded from scrutinizing the use of a voluntary dismissal after an unsuccessful attempt to deceive, mislead or defraud a court by producing and filing spurious documents and instruments on which to base a claim in suit.

It is apparent to me that BNY Mellon actually did achieve some benefit by its dismissal. In voluntarily dismissing the case at that point, it thereby avoided the scheduled depositions of the persons who might have direct knowledge of an attempted fraud on the court. In fact, it is fair to conclude that the only purpose in dismissing was to shelter its agents from having to testify about the questionable documents. It continued to use the voluntary dismissal to stop the trial court from inquiring into the matter, arguing the absence of jurisdiction to do so. To the extent that *Miller v Fortune Insurance* can be read to require, as a precondition to relief under rule 1.540(b) from a voluntary dismissal, that the false document benefited the filer in some way, we conclude that any necessary benefit has been shown in this case.

Nor do I find the recent decision in *Service Experts LLC v. Northside Air Conditioning & Electric Services,* 2010 WL 4628567 (Fla. 2d DCA Nov. 17, 2010), apposite to the issue in this case. There, plaintiff filed a voluntary dismissal of the action "after almost two years of litigation, after [defendants] served offers of judgment, after the close of discovery, and after [defendants] moved for summary judgment." 2010 WL 4628567 at *1. Defendants moved *under rule 1.420*[6] to strike the voluntary dismissal, arguing that earlier in the case plaintiff had filed "fraudulent affidavits." The trial court did not determine whether a fraud on the court had occurred. Instead it found that defendants had satisfied the common law exception to rule 1.420 allowing for voluntary dismissals by showing they "acquired substantive rights in the outcome of [the] matter by the filing of the motion for summary judgment, by making offers of judgment and by setting forth convincing allegations of fraud, all of which would be lost if the dismissal without prejudice were allowed to stand." 2010

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[5] We note that *Bevan* was decided several years before the supreme court decided *Miller v. Fortune Insurance*.

[6] Defendants said that their motion to strike the notice of voluntary dismissal was not made under rule 1.540 because that rule applies to final judgments, decrees, orders, or proceedings, and the voluntary dismissal they sought to set aside was not a final judgment, decree, or order. The Second District agreed with that "procedural assessment."

WL 4628567 at *1. Accordingly, it gave the parties the option of going to trial or scheduling an evidentiary hearing on whether there had actually been any fraud on the court. Plaintiff thereupon appealed that order on the grounds that it infringed its right of voluntary dismissal. Because *Service Experts* is obviously based solely on rule 1.420, rather than on a showing of fraud for relief under rule 1.540(b), it is not dispositive of the issue presented in this case.

But, in any event, I disagree with *Select Builders*, *Bevan* and *Service Experts* to the extent of any holding that affirmative relief or even some other benefit is necessary for relief from a voluntary dismissal filed after an attempted fraud on the court has been appropriately raised. Nothing in the logic of *Miller v. Fortune Insurance* allowing rule 1.540(b) to be used to avoid a voluntary dismissal on the grounds of fraud requires that such fraud must actually achieve its purpose. The purpose served by punishing a fraud on a court does not lie in an indispensable precondition of *detrimental reliance* — i.e., in successfully deceiving a court into an outcome directly resulting from fraud — but in the mere effort itself to try to use false and fraudulent evidence in a court proceeding.[7] As with criminal law, where the failed attempt itself is an offense punished by law,[8] the power of courts to grant relief from presenting false or fraudulent evidence and imposing sanctions is not confined solely to instances when fraud directly results in an unjust, erroneous judgment.

Indeed there are a number of reported decisions by Florida courts imposing sanctions on a party presenting false or fraudulent evidence *without* any affirmative relief or a final determination on the merits. *See, e.g., Ramey v. Haverty Furn. Co.*, 993 So. 2d 1014, 1019 (Fla. 2d DCA 2008) (upholding sanction of dismissal for misrepresentations in discovery about prior medical treatment "directly related to the central issue in the case"); *McKnight v. Evancheck*, 907 So. 2d 699, 700 (Fla. 4th DCA 2005) (affirming dismissal for

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[7] *See Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984) (common law fraud requires showing that defendant deliberately and knowingly made false representation actually causing detrimental reliance by the plaintiff); *see also Palmas y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565, 573 (Fla. 3d DCA 2004) (when fraudulent misrepresentation is alleged direct causation can be proved only by establishing detrimental reliance).

[8] *See* § 777.04(1), Fla. Stat. (2010) (criminalizing and punishing attempts to commit an offense prohibited by law even though the accused fails in the perpetration or is intercepted or prevented in the execution thereof); *see also* § 817.54 Fla. Stat. (2010) (third degree felony to — with intent to defraud — "obtain[] the signature of any person to any mortgage, mortgage note, promissory note or other instrument evidencing a debt by color or aid of fraudulent or false representation or pretenses, or obtain[] the signature of any person to a mortgage, mortgage note, promissory note, or other instrument evidencing a debt, the false making whereof would be punishable as forgery").

fraud on the court where trial court found plaintiff "lied about his extensive medical history, which had a direct bearing on his claim for damages"); *Morgan v. Campbell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002) (false testimony in discovery "directly related to the central issue in the case"). We are hard pressed to distinguish in substance the imposition of sanctions in those cases from the one at hand.

One federal appellate decision makes the point well. In *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115 (1st Cir.1989), the plaintiff filed a complaint based upon a bogus contract and attached that bogus document to its complaint. When the defendant became aware of the falsity of the contract sued upon, it moved to dismiss the case for the attempted fraud on court. The trial court granted the motion. When plaintiff later refiled its claim and attached the real contract, defendant again moved to dismiss, arguing that the dismissal of the first case barred the claim permanently. The trial court again granted the motion. The court of appeals affirmed both holdings. In an appeal plaintiff argued that the attempted fraud arising from the use of the bogus agreement had no effect ultimately on defendant's ability to litigate the case or on the court's ability to make a just decision on the merits. The court rejected the argument on appeal that the attempt to defraud the court had failed and thus could escape punishment, responding:

> "The failure of a party's corrupt plan does not immunize the defrauder from the consequences of his misconduct. When [plaintiff] concocted the agreement, and thereafter when he and his counsel annexed it to the complaint, they plainly thought it material. That being so, '[t]hey are in no position now to dispute its effectiveness.' "

892 F.2d at 1120.

So, too, BNY Mellon's attempt to allege and file the assignment of the mortgage was undeniably based on a belief in the necessity for — and the materiality of — a valid assignment of mortgage. Defendant's colorable showing of possible fraud in the making and filing of the assignment led to the scheduling of the depositions of those involved in making the document and the notice of depositions led directly to the voluntary dismissal to avoid such scrutiny for an attempted fraud. As *Aoude* forcefully makes clear, a party should not escape responsibility and appropriate sanctions for unsuccessfully attempting to defraud a court by purposefully evading the issue through a voluntary dismissal.

This issue is one of unusual prominence and importance. Recently, the Supreme Court promulgated changes to a rule of procedure made necessary by the current wave of mortgage foreclosure litigation. *See In re Amendments to*

Rules of Civil Procedure, 44 So. 3d 555 (Fla. 2010). In approving one amendment, the court pointedly explained:

> "[R]ule 1.110(b) is amended to require verification of mortgage foreclosure complaints involving residential real property. The primary purposes of this amendment are (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*." [e.s.]

44 So. 3d at 556. I think this rule change adds significant authority for the court system to take appropriate action when there has been, as here, a colorable showing of false or fraudulent evidence. We read this rule change as an important refutation of BNY Mellon's lack of jurisdiction argument to avoid dealing with the issue founded on inapt procedural arcana.

Decision-making in our courts depends on genuine, reliable evidence. The system cannot tolerate even an attempted use of fraudulent documents and false evidence in our courts. The judicial branch long ago recognized its responsibility to deal with, and punish, the attempted use of false and fraudulent evidence. When such an attempt has been colorably raised by a party, courts must be most vigilant to address the issue and pursue it to a resolution.

I would hold that the trial judge had the jurisdiction and authority to consider the motion under rule 1.540(b) on its merits and — should the court find that a party filed a false and fraudulent document in support of its claim — to take appropriate action, including (without limitation) the striking of a voluntary dismissal filed in aid of such conduct.

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Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Meenu Sasser, Judge; L.T. Case No. 50 2008 CA 031691 XXXXMB.

Enrique Nieves III and Chris T. Immel of Ice Legal, P.A., West Palm Beach, for appellant.

Nancy M. Wallace, Katherine E. Giddings and William P. Heller of Akerman Senterfitt, Tallahassee and Fort Lauderdale, for appellee.

Not final until disposition of timely filed motion for rehearing.