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4th District Court of Appeal

4th DCA gives Bank of New York Mellon a reprieve

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The 4th District Court of Appeal ruled in favor of a lender Wednesday in a foreclosure case examining the question of fraudulent court filings but asked the Florida Supreme Court to review the issue.

Bank of New York Mellon rightly escaped a claim that it committed a fraud on the court by voluntarily dismissing a foreclosure action against a Lake Worth man, the full court decided on an 8-1 split.

The central argument was whether trial courts have authority to grant relief when one party voluntarily dismisses a case after the opponent alleges that party tried to defraud the court.

"The majority's position is the traditional one — no harm, no foul. You weren't successful in committing your fraud, so we'll treat your voluntary dismissal like a reset button," said Thomas Ice, managing partner of Ice Legal, which represented the homeowner.

But the court also considered the possibility of reviving foreclosure cases after a voluntary dismissal due to fraud.

"If this is an available remedy as a sanction after a voluntary dismissal, it may dramatically affect the mortgage foreclosure crisis in this state," Judge Martha Warner wrote for the majority.

The question, she said, is "of great public important as many, many mortgage foreclosures appear tainted with suspect documents."

Homeowner Roman Pino's case raises questions about lenders who file fraudulently backdated assignments of mortgage to expedite the sale of foreclosed properties.

In 2009, Ice Legal in Royal Palm Beach sought an evidentiary hearing after dismissal in an attempt to expose the bank's alleged fraud. Palm Beach Circuit Judge Meenu Sasser ruled she couldn't reopen a case that had

been voluntarily dismissed.

Retired Judge Gary Farmer did not participate in the decision but wrote a dissent before leaving. Judge Mark Polen adopted it in full, noting a key assumption by the majority was the dismissing party gained no advantage.

The bank "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," Polen wrote.

Ice added that no one voluntarily dismisses a case they will have to refile at an additional cost of $1,900 unless they gain something.

Even if Mellon received no benefit, Polen said the court still has the authority to reopen such cases. He argued the failed attempt to commit a crime is a punishable offense in criminal cases.

Finally, he reminded his colleagues that the Supreme Court issued explicit rules last year to assure a fair process in foreclosure litigation.

The high court's expressed reasons for the rules included a desire "to give trial courts greater authority to sanction plaintiffs who make false allegations."

"We read this rule change as an important refutation of BNY Mellon's lack of jurisdiction argument," Polen said.

Katherine Giddings of Akerman Senterfitt in Tallahassee, the appellate attorney for Mellon, did not respond to a request for comment by deadline.

Bar Referral

On a side issue, the court said it would be "in order" for the Law Offices of David J. Stern, then BNY Mellon's law firm, to be reported to The Florida Bar for its role in creating the alleged false affidavit.

"That puts a finer point on the 'no harm, no foul' argument," Ice said. "The opinion essentially says there's enough evidence to report this attorney to The Bar."

Stern's Plantation law firm is one of four Florida firms under investigation by the state attorney general's office for questionable practices in foreclosure cases.