

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

ROMAN PINO,

Appellant,

v.

THE BANK OF NEW YORK
MELLON, etc., et al.,

Appellee.

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ORAL ARGUMENT BEFORE:

HONORABLE GARY M. FARMER, Presiding

HONORABLE MARTHA C. WARNER

HONORABLE MARK E. POLEN

Wednesday, November 10, 2010

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P R O C E E D I N G S:

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JUDGE FARMER: Our next case is Pino against BNY.

MR. NIEVES: Good morning.

JUDGE FARMER: Good morning. Welcome to the Fourth District to everyone.

MR. NIEVES: May it please the Court, my name is Enrique Nieves with Ice Legal, and I represent the appellant Roman Pino. I would like to reserve four minutes for rebuttal.

JUDGE FARMER: You got it. You have fifteen minutes total, so you'll have plenty of time to present your case.

MR. NIEVES: There are two main issues in this case. First, there's Roman Pino's motion to strike the bank's notice of voluntary dismissal, allege a colorable entitlement to relief when it alleged that plaintiff forged the document and filed it as evidence in this case. If so, then that would require an evidentiary hearing.

The other is an interrelated sub-issue, which is: Does a litigant that relies on forged, fabricated proof need to successfully mislead the

1 Court in order for the innocent party to strike the
2 voluntary dismissal under Rule 1.540? In other
3 words, must the fraud be successful? These are both
4 legal issues of the standard reviews of de novo.

5 And giving a little bit of background, the
6 plaintiff filed a complaint alleging that they own
7 the mortgage by virtue of an assignment to be
8 recorded. The attached mortgage showed a different
9 entity as a mortgagee, and it also claimed that the
10 promissory note had been lost, destroyed or stolen.
11 Accordingly, Pino moved to dismiss the complaint
12 because the alleged assignment wasn't attached
13 showing change of title. The bank amended the
14 complaint to fix the defect and attached an
15 unrecorded assignment of mortgage. The assignment of
16 mortgage purported to be executed five days before
17 the case was filed.

18 Pino then moved to dismiss the complaint and
19 sought sanctions because the assignment of mortgage
20 was fraudulently backdated. Pino set the deposition
21 of several notaries and witnesses, all employees of
22 the Law Office of David Stern, which is BNY Mellon,
23 the bank's counsel. And on the eve of the
24 depositions, the bank filed a notice of voluntary
25 dismissal in the case.

1 Since then, an identical action has been filed
2 against Pino with the same plaintiff suing on the
3 same mortgage. The complaints are virtually
4 identical, except it now doesn't plead that the note
5 is lost. And noticeably absent from the new case is
6 the fraudulent assignment of mortgage.

7 JUDGE POLEN: Mr. Nieves, did the new lawsuit
8 plead the same period of default? Or was it alleging
9 a new default in payments?

10 MR. NIEVES: I believe it was the same, the
11 same exact -- I believe it was identical. I don't
12 believe that it pled new defaults, as far as my
13 understanding.

14 JUDGE FARMER: In other words, they didn't
15 claim a default that arose after they voluntarily
16 dismissed their first mortgage in their second
17 lawsuit.

18 MR. NIEVES: I believe they didn't.

19 JUDGE FARMER: Okay.

20 MR. NIEVES: So, now in its place is a new
21 assignment that postdates a voluntary dismissal, but
22 does not mention or even refer to a previous
23 assignment. So, Pino then moved to strike the notice
24 of voluntary dismissal and requested an evidentiary
25 hearing to demonstrate the fraud, and that BNY

1 Mellon's counsel created, executed and filed a
2 fraudulently backdated assignment of mortgage, and
3 that there was fraud on the Court. It also sought to
4 dismiss the case with prejudice. So, ultimately,
5 this court must look to the allegations of the motion
6 to determine colorable entitlement.

7 And if it hasn't been clear from what I've
8 said, the allegations are that the Law Office of
9 David Stern forged documents, created and executed
10 and filed the fraudulently backdated assignment. The
11 other part of it is: The assignment purports to
12 transfer property interest to David Stern's own
13 client, which is, under some case law, the primary
14 evidence in one of these types of foreclosure cases.
15 Further --

16 JUDGE POLEN: I'm afraid I'm not following
17 that. David Stern's client at the time was BNY
18 Mellon Bank, right?

19 MR. NIEVES: Yes.

20 JUDGE POLEN: Okay. And that's evidence of
21 what, an assignment to a bank?

22 MR. NIEVES: Basically, the law firm
23 manufactured evidence for the client's case.

24 JUDGE POLEN: Okay.

25 MR. NIEVES: It was signed and executed by

1 Cheryl Samons, who works for David Stern, and
2 executed the assignment solely for the litigation,
3 and, in the assignment, posed as an officer of a
4 different entity.

5 JUDGE POLEN: Let me go to this because your
6 motion was denied, so there was never an evidentiary
7 hearing, obviously.

8 MR. NIEVES: No, there wasn't.

9 JUDGE POLEN: Was there anything in the motion
10 that reflects, or any record that we have, as far
11 as -- I don't know if there was a transcript of the
12 hearing on the motion before Judge Sasser.

13 MR. NIEVES: Yes, there was.

14 JUDGE POLEN: -- how your firm attained that?
15 You never got to take the depositions because they
16 dismissed three days before the depositions were
17 scheduled to be held.

18 MR. NIEVES: It's pretty interesting. I'll
19 explain to you why we knew what we knew.

20 There were a couple things that we already
21 knew, or I should say several. One, that the notary
22 on the assignment worked for Donna Evertz who was the
23 attorney who was handling the case in the litigation
24 department. We knew that the litigation department
25 did not handle cases until they were contested, and

1 we also knew that Donna Evertz was assigned all of
2 our cases once we became involved.

3 So, we began looking at records to show that
4 there's no way Michelle Grant (phonetic) would have
5 notarized these types of assignments because it would
6 have necessarily had to exist before they were ever
7 in her department. And what we found were 21 cases
8 where the notary stamp was not issued at the time of
9 the alleged assignment notarization.

10 So, basically, to explain it better, the notary
11 says it's dated in January, the stamp wasn't issued
12 until May. Those are the types of cases we found.
13 So, we knew that, given all the players in the
14 litigation department, we knew that it was clear that
15 this was one of the cases that it was a fraudulently
16 backdated assignment.

17 JUDGE POLEN: This may be going outside the
18 record. If it is, perhaps we --

19 MR. NIEVES: And I'm just answering as to how
20 we figured it out.

21 JUDGE POLEN: These matters contained in
22 Mr. Stern's law firm are the subject of an
23 investigation by the Attorney General, are they not?

24 MR. NIEVES: Yes, they are.

25 JUDGE POLEN: Okay.

1 MR. NIEVES: So, I think, at this point, it's
2 clear what the motion alleges.

3 JUDGE POLEN: Well, we need to get to the meat
4 of the matter, which is: Your opponent obviously is
5 going to argue that there is an unqualified right to
6 take a voluntary dismissal, and the Trial Court has
7 no jurisdiction to go beyond that, which is what
8 Judge Sasser has ruled.

9 MR. NIEVES: And the lower court felt its hands
10 were tied. It mistakenly relied on Bevan v.
11 D'Alessandro, which was a case where there was a lack
12 of prosecution, a motion that was an order to show
13 cause within five days, and then the plaintiff
14 voluntarily dismissed the case to avoid the lack of
15 prosecution.

16 So, that case pitted the voluntary dismissal
17 rule versus the lack of prosecution rule. And in
18 that case, the Court held that the voluntary
19 dismissal rule trumped the lack of prosecution rule.
20 And it also noted in that case, and it distinguished
21 prior cases recognizing the fraud exception, in part,
22 because the Bevan case did not rise to the level of
23 fraud, that the allegations did not rise to the level
24 of fraud. It was lack of prosecution, and there was
25

1 no allegation of fraud involved.

2 The main case that basically recognizes the
3 fraud as an exception where you can strike a
4 voluntary dismissal is the Select Builders of
5 Florida v. Wong case. And in that case, the
6 plaintiff had obtained an order expunging an
7 injunction. And it turned out that there may have
8 been fraud on the Court and certain procedural
9 irregularities, so the Court vacated the previous
10 order.

11 The defendant then moved for sanctions against
12 the plaintiff contending that it mislead the Court
13 and that there were procedural irregularities. Then
14 the Court ordered the parties to take steps to place
15 the real estate in status quo and require the deposit
16 of money that was received from the sale of the
17 property to a third party. And the plaintiff
18 voluntarily dismissed the case.

19 JUDGE WARNER: Well, in that case, the issue
20 there is whether or not you need, in one of these
21 circumstances, to attack a voluntary dismissal that
22 affirmative relief has already been obtained as a
23 result of some problem in court. I mean, isn't that
24 the basic holding of Select Builders, or at least how
25 it's interpreted, that because affirmative relief was

1 obtained, that's why they were allowed, in that case,
2 under, basically, "inherent power of the Court" kind
3 of theory, to go beyond the voluntarily dismissal?

4 MR. NIEVES: Well, the reason they were allowed
5 to was to prevent fraud on the Court. And one thing
6 that is important is that the Court had already
7 vacated the order explaining the injunction at the
8 time of the voluntary dismissal.

9 So, under most definitions of affirmative
10 relief, that would have been it. They had already
11 fixed what they had done wrong. But the whole point
12 in the court for the case to be reinstated was to
13 address the issues of fraud. The Court had the
14 discretion to deal with fraud issues and prevent
15 injustice in this court.

16 And as far as affirmative relief, the Select
17 Builders case does not make it a requirement. It
18 recognizes the exception. It nowhere says that
19 affirmative relief is required.

20 JUDGE WARNER: Well, that's one of the reasons
21 why it refers to some of the other cases here. It
22 says, We've examined the following authorities, and
23 find it applicable. And then it says, First, the
24 plaintiff in the cited cases has not received
25 affirmative relief from an equity court. And,

1 secondly, no question of fraud on the Court was
2 involved.

3 So, in other words, affirmative relief was a
4 distinguishing factor in this case.

5 MR. NIEVES: And it did say that, in part, but
6 it also -- the focus was the fraud -- to prevent a
7 fraud on the Court. And we have to allow the judges
8 to protect the judicial system. And, second, even if
9 we're looking at this voluntary dismissal, this
10 voluntary dismissal, particularly, was to cover up
11 the fraud or to hide the fraud. They're basically
12 using the rule to aid and abet their coverup.

13 JUDGE FARMER: I take it the scheduled
14 depositions did not take place after the filing of
15 the voluntarily dismissal?

16 MR. NIEVES: No, they did not.

17 So, basically, what they're trying to do by
18 using the rule is trying to pull the wool over the
19 Court's eyes.

20 And the other thing that happened, as far as
21 affirmative relief, a lot of it also can be
22 interpreted in terms of what benefit did the bank
23 get. But the bank -- the benefit the bank got was to
24 avoid any sanction whatsoever for committing fraud on
25 the Court. That was their benefit. And that's how

1 they tried to use the rule to hide their fraudulent
2 acts. And attempted fraud is still fraud. We just
3 happened to catch them.

4 And not to go too far beyond the scope, but
5 when we were researching this and we found those
6 21 cases, we just stopped. It was -- it wasn't a
7 matter of it took all year. This was, on its face,
8 this was happening everywhere. And, particularly, in
9 an area of law that is heavy on pro se defendants,
10 this is definitely an issue that needs to be
11 addressed. And it actually -- and taking any type of
12 judicial notice of the investigation, we believe it's
13 systematic. It's a policy. It wasn't -- I believe,
14 in the argument below, opposing counsel used the term
15 "empty head but not evil heart." This was their
16 policy and procedure. This is what they did on
17 purpose.

18 JUDGE FARMER: You're getting down to where you
19 only have a minute left. And I'd like to see -- you
20 asked for more time for rebuttal. So, may I suggest
21 that we -- why don't we hear from the other side now,
22 and I'll give you an extra minute or so if you need
23 it to do any summing up.

24 MR. NIEVES: Okay, that'll work.

25 JUDGE FARMER: Thank you.

1 MS. GIDDINGS: Good morning, Your Honors. May
2 it please the Court.

3 JUDGE FARMER: Good morning.

4 MS. GIDDINGS: I'm Katherine Giddings. I'm
5 here today with Kent Frazer of Akerman Senterfitt.

6 JUDGE FARMER: Good morning.

7 MS. GIDDINGS: Your Honors, this is an easy
8 case. This is not about the Court's integrity. This
9 is about when you can go and reopen a case under the
10 absolute right that a party has to take a voluntary
11 dismissal.

12 I noticed that my -- well, let me answer
13 Judge Polen's question about the new case. I think
14 you're probably getting into the fact that even if
15 this case was dismissed with prejudice, that it could
16 be refiled. The relief that is sought in the second
17 case does go back to the same default date, but there
18 is a continuing default in this case. And so,
19 because the default is continuing and there have been
20 no payments, then the suit can be refiled.

21 JUDGE POLEN: Theoretically, you could file a
22 new lawsuit every month, couldn't you?

23 MS. GIDDINGS: Yes, sir. And I believe that's
24 what the Supreme Court has held.

25 JUDGE POLEN: Here's my concern: In your

1 opening comment that this is not about the integrity
2 of the Court, I can't imagine a matter that would not
3 be more directed to the integrity of the Court if the
4 allegations in the motion to strike can be proven.

5 There was never an opportunity to have an
6 evidentiary hearing, but your client engaged a lawyer
7 by the name of David Stern. Obviously, he is no
8 longer representing him, but your client's actions
9 are governed by who they had as their agent at the
10 time.

11 MS. GIDDINGS: Yes, sir.

12 JUDGE POLEN: And if, in fact, Mr. Stern's
13 office did the things that the appellant in this case
14 is alleging they did, that's extremely detrimental to
15 the function of the courts in meting out justice,
16 particularly, in the matter that Mr. Nieves has
17 suggested, with the incredible load of foreclosure
18 cases that the court system in Florida is facing --

19 MS. GIDDINGS: Yes, sir.

20 JUDGE POLEN: -- to know that not just one, but
21 perhaps dozens or hundreds of lawsuits filed in
22 courts with fraudulent documents are being used as a
23 basis to get foreclosures against people who don't
24 have the benefit of Mr. Nieves' law firm to represent
25 them.

1 MS. GIDDINGS: Yes, sir, and that is a concern.

2 But when you look at -- the Court always has
3 authority to control its courtroom. And when I said
4 this was not about the integrity of the Court, what I
5 meant was that under the facts of this particular
6 case, the Court always has remedies of holding
7 lawyers in contempt, it always can refer them to the
8 Florida Bar. There are other remedies that can be
9 taken. But the issue in this case is whether you can
10 take a voluntary dismissal.

11 And I would like you to put this in the context
12 of a motion to vacate a final judgment. When you
13 come in and ask to vacate a final judgment, you can't
14 just say fraud on the Court occurred. You have to
15 say material fraud on the Court occurred that
16 resulted in you obtaining affirmative relief. The
17 same thing would occur with a voluntary dismissal.
18 If there was no relief obtained, then you can't go
19 back and reopen that case.

20 JUDGE POLEN: But your client did get relief.
21 They didn't have to submit to depositions.

22 MS. GIDDINGS: Yes, sir, but you're -- well, we
23 have the absolute right -- you can always avoid an
24 adverse ruling from the Court by taking a voluntary
25 dismissal.

1 JUDGE POLEN: But you characterized that as the
2 issue of the case. I disagree. I don't question
3 that you can take a voluntary dismissal. The issue,
4 as I see it, is whether a Court, on subsequent
5 information, can strike that dismissal.

6 MS. GIDDINGS: Yes, sir, Your Honor. But if
7 you -- and I would call to your attention the -- we
8 filed a notice of supplemental authority yesterday.
9 I apologize for the late filing of that notice. We
10 discovered it when -- all the cases involving this
11 issue are from the '80s. We discovered this
12 particular case yesterday, and we hand-delivered a
13 copy to counsel who told me, before the oral
14 argument, that he had seen the case some time ago.

15 Your Honors, I would like to read to you from
16 this case. It says, at the bottom of page 6, in the
17 service experts case --

18 JUDGE POLEN: You're talking about service
19 experts?

20 MS. GIDDINGS: Yes, sir.

21 At the bottom of page 6 it says, Unlike Select
22 Builders, this is not a case where the plaintiff
23 engaged in fraud which resulted in affirmative relief
24 from the Court, and in obtaining that relief
25 voluntarily dismissed the case to prevent the Court

1 from taking the ill-gotten relief. Without evidence
2 of ill-gotten relief connected to the fraud
3 allegation, the defendant's allegations were
4 insufficient to support striking the notice of
5 voluntary dismissal on the basis of fraud.

6 Now, I think it's very, very important for you
7 to understand the factual situation in which this
8 occurred. Counsel moved to dismiss this case. They
9 didn't ask for a dismissal without prejudice. They
10 asked for a dismissal. And based on lack of
11 standing, due to a fraudulent assignment, a voluntary
12 dismissal was taken, and they did not move to strike
13 the voluntary dismissal. They did not move for
14 sanctions to dismiss the case with prejudice. What
15 they did was they asked for attorneys fees. And
16 after they received a determination that they were
17 entitled to attorneys fees, and after the new case
18 was filed, they said, Oh, well, we don't want the
19 Court addressing this in the second case, we're gonna
20 come back here to the first case and ask that it be
21 reopened.

22 JUDGE FARMER: But doesn't Rule 1.540 allow up
23 to a year?

24 MS. GIDDINGS: Yes, sir, it does allow up to a
25 year. But I would suggest to you that there is a

1 case, Dynasty Express Corporation, that is cited by
2 my opponents that was issued by this court in 1996,
3 in which Judge Warner and Judge Polen were on the
4 panel. And they stated that a party has an
5 obligation to raise the issue of fraud as soon as is
6 reasonably possible. And waiting until a new case is
7 filed five months later, the Court in the new case
8 could address -- you know, can look at whether this
9 issue should be material to that.

10 And we all -- I think we can take judicial
11 notice of the fact that Mr. Stern's office is being
12 thoroughly investigated. But I also think that it's
13 very, very important for you to understand, too, that
14 the assignment of mortgage in this case is not
15 ultimately material and determinative in the outcome
16 of the case, because it is the holder of the note
17 that has -- the assignment of mortgage follows the
18 note. And if, on the day that you're before the
19 Court or with your summary judgment, you submit the
20 note and the note is endorsed in blank or endorsed to
21 your client, then the assignment of mortgage does not
22 control.

23 So, there are numerous reasons why the alleged
24 fraud in this case does not impact the outcome of
25 this case. So, even if you went back and you --

1 JUDGE FARMER: Well, they sure went to a lot of
2 trouble to make up an instrument that they didn't
3 need to do anything with.

4 MS. GIDDINGS: Well, Your Honor, if you look at
5 the allegations that they have made, almost all of
6 those allegations pertain to a different case.
7 They're not this particular case. I don't know what
8 that document -- what occurred in that document. But
9 I think this court is probably going to have a number
10 of cases that come up before it where that issue
11 is -- it may be at issue in subsequent proceedings.
12 And when you reopen -- if you're going to reopen
13 those cases, you have to make sure that you're
14 reopening it for something that is material.

15 JUDGE FARMER: Fraud on the Court is not
16 material?

17 MS. GIDDINGS: Your Honor, fraud on the
18 Court --

19 JUDGE FARMER: Publishing false documents is
20 not material?

21 MS. GIDDINGS: Fraud on the Court did not occur
22 in this case.

23 JUDGE FARMER: It didn't.

24 MS. GIDDINGS: A document was filed, but
25 nothing was ever heard before the Court. And if you

1 look at the service expert's case --

2 JUDGE FARMER: Let's just confront that for a
3 minute. I mean, to the extent that the cases that
4 you talk about, Select, and the others talk about,
5 and that is, achieving affirmative relief and all
6 that stuff, I'm wondering if they're not just talking
7 about two different things as two separate grounds.
8 In other words, obtaining or using voluntary
9 dismissal after you've already gotten relief in some
10 way may be one kind of piece of voluntary dismissal,
11 but not under an entirely separate kind may be fraud
12 or attempted fraud on the Court.

13 I don't know why we would adopt a rule of our
14 inherent powers to deal with fraud in the Court, why
15 we would engage in a reading that says only if the
16 fraud proves to have been successful. And that is to
17 say if the representee relied, to its detriment, on
18 the fraud and changed their position and did stuff,
19 only then would we allow relief of any kind. That
20 strikes me as not --

21 MS. GIDDINGS: Well, Your Honor, look at the
22 standard for vacating a judgment. It doesn't say
23 that you can vacate a judgment if any fraud occurred.
24 It says that the fraud must be material.

25 JUDGE FARMER: Well, I thought what we were

1 dealing with here was, really, jurisdiction. I
2 thought the Trial Court basically said that she had
3 lost jurisdiction to consider this case because it
4 was a voluntary dismissal, and, therefore, did not
5 receive evidence and wouldn't allow an evidentiary
6 hearing to proceed.

7 MS. GIDDINGS: Your Honor, if you look at the
8 Miller case from the Florida Supreme Court, it says
9 the Court has jurisdiction to determine whether it
10 has jurisdiction to open the case. And in this case,
11 if the Court had -- if they had obtained affirmative
12 relief, if they had gone all the way through, this
13 fraud would never have been discovered. And they
14 went all the way and got a judgment. And then after
15 the judgment was obtained and the fraud was
16 discovered later, you could not go back and vacate
17 that judgment unless the fraud was relevant to the
18 affirmative relief that they obtained.

19 JUDGE FARMER: And a false assignment would not
20 have been relevant?

21 MS. GIDDINGS: It would depend on the
22 individual circumstances.

23 JUDGE FARMER: So, why don't we need an
24 evidentiary hearing in this case? Why don't we need
25 a trial judge to go through (a) if there was a fraud,

1 and (b) what its effects were?

2 MS. GIDDINGS: Because there was no affirmative
3 relief obtained in this case, Your Honor. And, in
4 fact, the relief was that Mr. Pino has been living in
5 the house for a long time, apparently without making
6 any payments.

7 And I understand your concerns, Your Honor.
8 But I'm urging you to consider this case in the grand
9 scheme of things. If you allow courts to go back and
10 open up all of these cases, when it's clear on the
11 face that there was no affirmative relief obtained,
12 or that the affirmative relief would not have been
13 material, then you're going to create chaos in the
14 court system.

15 JUDGE FARMER: So, are you suggesting that this
16 fraud has been that widespread that it --

17 MS. GIDDINGS: Your Honor, I'm not
18 acknowledging that any fraud occurred. I think that
19 there is -- we all know --

20 JUDGE FARMER: Why would we shrink -- as a
21 court system, why would we shrink, no matter how many
22 cases it might involve, from looking out for attempts
23 to defraud courts to publish and utter and use false
24 instruments? Why wouldn't we be most vigilant?

25 MS. GIDDINGS: And, Your Honor, I think that if

1 a judge believes that that has occurred, there are
2 numerous remedies that can occur.

3 JUDGE FARMER: Well, why isn't this one of
4 them? Why isn't 1.540, the relief, five months
5 afterwards?

6 MS. GIDDINGS: Your Honor, there was a long
7 delay in bringing this. They were interested in
8 their attorneys fees rather than bringing this case.
9 And their now second case has been refiled, and the
10 judge can consider in that case whether this is
11 relevant. But you don't want to get into -- you
12 know, we all know that bad facts make for bad law.
13 And I don't think that this Court --

14 JUDGE FARMER: Only if we let it.

15 MS. GIDDINGS: I don't think that you want to
16 let bad facts cause you to carve out an exception
17 here to the absolute right to take a voluntary
18 dismissal.

19 JUDGE WARNER: But you talked about other
20 sanctions. But if you don't open it up, how can you
21 sanction them in the second case for what's
22 happened -- or let's say they want their attorneys
23 fees. How do they get their attorneys fees for all
24 the time and expense that occurred in the first case
25 when you voluntarily dismiss?

1 MS. GIDDINGS: They've already been awarded
2 attorneys fees in the first case, Your Honor.

3 JUDGE WARNER: Oh, they were?

4 MS. GIDDINGS: Yes, ma'am.

5 JUDGE WARNER: After the voluntary dismissal?

6 MS. GIDDINGS: That's why I said when the
7 voluntary dismissal was taken, they moved for
8 attorneys fees. They acknowledged the voluntary
9 dismissal was without prejudice. They asked for a
10 multiplier award based on the fact that they had
11 forced Bank of New York to file involuntarily
12 dismissals. They took no action asking --

13 JUDGE FARMER: How did they know they were
14 going to refile?

15 MS. GIDDINGS: Pardon?

16 JUDGE FARMER: How did they know that BNY was
17 going to refile? Why weren't they entitled to
18 assume, because they had moved to dismiss, period,
19 that that would be the end of the claim?

20 MS. GIDDINGS: Well, Your Honor, if that was
21 the case, they should have asked to dismiss with
22 prejudice.

23 JUDGE FARMER: I see.

24 JUDGE WARNER: If the voluntary dismissal
25 divests the Court of jurisdiction, how did the Court

1 of jurisdiction award attorneys fees?

2 MS. GIDDINGS: Because attorneys fees would
3 have been collateral, Your Honor.

4 And I'll be happy to address that issue through
5 supplemental briefing, if the Court would like. But
6 I think that that's probably an issue that will come
7 up before the Court -- it could come up before the
8 Court once there's a final judgment. It's my
9 understanding that the entitlement to attorneys fees
10 has been determined, but an evidentiary hearing --

11 JUDGE WARNER: In the first case?

12 MS. GIDDINGS: In the first case, Your Honor.

13 JUDGE WARNER: So, there's some continuing
14 jurisdiction to do these things in the first case.

15 MS. GIDDINGS: Well, Your Honor, I believe a
16 Court always has continuing jurisdiction to determine
17 attorneys fees in a case when it's collateral to --

18 JUDGE FARMER: So, using these jurisdictional
19 notions, will jealous regard the right of attorneys
20 to get fees, but not protect against fraud on the
21 Court?

22 MS. GIDDINGS: Your Honor, that's not what I'm
23 saying. I'm just telling Your Honors what occurred
24 in this case. The records --

25 JUDGE FARMER: Maybe we should clear up the law

1 in that regard.

2 MS. GIDDINGS: Your Honor, I would suggest that
3 if you're going to hold that you don't have to have
4 affirmative relief in a case, that you're going to
5 have to certify conflict with the service expert's
6 case that was issued four weeks ago.

7 JUDGE POLEN: Unless it's distinguishable.

8 MS. GIDDINGS: Pardon?

9 JUDGE POLEN: Unless it's distinguishable.

10 MS. GIDDINGS: Well, Your Honor, I would assert
11 that that case is on all fours with this case.

12 JUDGE POLEN: I see a number of distinguishing
13 factors, most important of which the alleged fraud
14 that occurred in that case pertained to two
15 affidavits which were filed by the appellee which the
16 appellant suggested were fraudulent in furtherance of
17 a motion for summary judgment, but only because
18 they're contesting the factual allegations and
19 apparent inconsistencies that may have existed in
20 those affidavits.

21 Now, that may be considered some kind of fraud.
22 But it's not the kind of fraud on the Court that
23 would be if the appellant here could prove their
24 allegations, where documents filed in support of a
25 mortgage foreclosure proceeding were fraudulently

1 generated by employees of the attorney hired by your
2 client. I think that's one important distinction.
3 There are others, but be that as it may, we can
4 always certify conflict with the District Court.

5 MS. GIDDINGS: Yes, Your Honor. I would point
6 out that it says that those affidavits were filed to
7 establish that a good faith basis existed to file the
8 suit, and that is exactly what the assignment was
9 done here.

10 JUDGE WARNER: Going back to this thing about
11 the attorneys fees and this residual jurisdiction,
12 did they go back in and get awarded on the same
13 theory that when you voluntarily dismiss in the face
14 of a summary judgment, it's like a determination of
15 merits or something like that?

16 MS. GIDDINGS: Yes. They assert they were the
17 prevailing party. And I believe that they received
18 those attorneys fees under the contract. The
19 attorneys fees issue was not before the Court.

20 JUDGE WARNER: I find that problematic, because
21 you say, on the one hand, the judge said, I have no
22 jurisdiction to do this, and yet, she's asserting
23 jurisdiction, continues to assert jurisdiction, to
24 award fees to a prevailing party.

25 MS. GIDDINGS: Well, Your Honor, it would be

1 the same as when you get a judgment. The Court loses
2 jurisdiction over that judgment after the time for
3 appeal has run or the time for rehearing, but the
4 judge still has jurisdiction for collateral issues
5 regarding attorneys fees.

6 JUDGE WARNER: To enter any type of judgment
7 also, you would have 1.540(b) relief, which is what
8 they're asking for.

9 MS. GIDDINGS: Yes, ma'am.

10 JUDGE FARMER: And a judgment is a judgment,
11 not a voluntary dismissal. The Court isn't being
12 involved in the judgment. The Court has actually
13 entered a judgment based on something that came in
14 front of them.

15 MS. GIDDINGS: Yes, Your Honor. And I would
16 say that going forward with the fraud and obtaining a
17 judgment, if you cannot vacate that judgment unless
18 the fraud goes to the heart of the judgment, then you
19 could not do so with a voluntary dismissal when there
20 was no affirmative relief obtained.

21 JUDGE WARNER: Well, if you're saying they're
22 getting fees because they were a prevailing party or
23 something, then --

24 JUDGE FARMER: Then the case was over.

25 JUDGE WARNER: Well, not only -- but, clearly,

1 that's a decision that has to relate somehow to a
2 decision on merits, i.e., that they would be
3 successful in showing that this was fraud, and it was
4 material and everything else.

5 MS. GIDDINGS: No, no, Your Honor, they asked
6 for a dismissal based on -- what they were asking for
7 was a dismissal based on lack of standing. They did
8 not ask for a dismissal with prejudice based on a
9 sanction. They simply said that our client had not
10 established --

11 JUDGE WARNER: I know, but you voluntarily
12 dismissed it. Then they come in and ask for
13 attorneys fees on what basis?

14 MS. GIDDINGS: On a prevailing party basis.

15 JUDGE WARNER: Under contract?

16 MS. GIDDINGS: Yes.

17 JUDGE WARNER: But if you voluntarily dismiss
18 it, are you entitled to seek your contractual fees?
19 I thought that you're stuck, aren't you?

20 MS. GIDDINGS: Your Honor, I can't speak to the
21 validity of the order determining entitlement at this
22 point in the proceeding. That might be before this
23 Court --

24 JUDGE WARNER: Well, I'm just saying that she
25 said she doesn't have jurisdiction and then she does

1 have jurisdiction. So, how can it be both ways?

2 MS. GIDDINGS: Because you always have
3 jurisdiction over collateral issues.

4 JUDGE WARNER: But if it's a voluntary
5 dismissal, what collateral issues would there be?

6 MS. GIDDINGS: According to the Ice Legal firm,
7 the issues are that they were the prevailing party,
8 and that's how they sought the fees, because they
9 successfully convinced our client to voluntarily
10 dismiss the case.

11 And, Your Honors, I understand your concerns.
12 I do --

13 JUDGE FARMER: Let me ask you to sum up because
14 you're well over and you've consumed a lot of time.
15 Go ahead and finish your thought.

16 MS. GIDDINGS: Yes, Your Honor.

17 I just would like to reiterate to this Court
18 that there are any number of reasons for affirming
19 this case: The delay in bringing the motion to
20 vacate the dismissal; the fact that the second suit
21 has been filed, and the Court can consider things in
22 that suit; and I do not believe that the fraud was --
23 if any fraud did occur, which we do not know at this
24 point whether it did, that it's not material.

25 JUDGE FARMER: Thank you very much, Counsel.

1 Mr. Nieves.

2 MR. NIEVES: Your Honor, just to begin, to
3 address the attorneys fees issue --

4 JUDGE FARMER: I'm going to give you at least
5 three minutes.

6 MR. NIEVES: Okay, thank you, Your Honor.

7 We have to move within 30 days of a voluntary
8 dismissal, by rule. That's something we just have to
9 do.

10 JUDGE FARMER: 1.525?

11 MR. NIEVES: It has nothing to do with the
12 issues here. Any delay is totally irrelevant. And
13 as far as asking for a multiplier, we certainly have
14 different clientele than Akerman. So, we have to
15 find other ways to take some of these cases where we
16 can't throw as much money into it as Akerman. And I
17 guess that's what I'll say about that.

18 And as far as service experts, I did look
19 through the case, and one -- first, it's not final
20 subject to revision. And even if it is final, what
21 it held was the common law exception to strike
22 involuntary dismissal did not apply. Anything about
23 fraud was dicta. And if you read the opinion, they
24 say right in the beginning what they're ruling on.
25 They're ruling on the common law exception.

1 Now, when they do talk about fraud, you can
2 also distinguish that, and it's distinguishable,
3 because the affidavits were filed in response to a
4 57.105 motion. It did not apply to all the claims.
5 In other words, for the Court, it was just not a big
6 part of the case. Here, we're talking about -- if
7 you look at the Taylor case from the Fifth DCA, the
8 assignment is paramount. This is their evidence.
9 And their only bit of evidence to prove their case,
10 they manufactured it.

11 And as far as our client not paying the --
12 usually when they accelerate, they don't accept
13 payments anyway. We haven't been notified that they
14 were reinstating the loan or anything like that. And
15 generally, what they do is they don't accept
16 payments. And if they do accept them, they accept
17 them on a trial modification, which they usually
18 don't grant anyway.

19 JUDGE FARMER: If they accept the payment, they
20 waive the acceleration; is that what you're saying?

21 MR. NIEVES: Well, I'm not even getting to
22 that. I'm just saying they don't accept it.

23 JUDGE FARMER: That's their argument.

24 MR. NIEVES: And as far as this absolute right,
25 we've been talking the whole time about fraud

1 exception. It's been recognized. And even the cases
2 that are distinguished and used as affirmative
3 relief, none of them dealt with fraud. Bevan dealt
4 with lack of prosecution. Romar was a case where
5 there was a deposition set, and I believe nobody
6 showed, and they were going to get their cost and
7 fees for that, and they voluntarily dismissed.

8 None of these cases dealt with fraud. Even the
9 services which I already spoke of was they had to
10 consider it a writ of prohibition. It was kind of a
11 different posture. But even that being said, any
12 alleged fraud there didn't have anything, really, to
13 do with the claims. And as far as finality being a
14 factor in any of these cases, it's not. They're
15 always going to refile. The only purpose in
16 voluntarily dismissing is to use it as a shield to
17 cover up the fraud.

18 And as far as being more cases, there will be
19 the original case, the fraudulent case, the refiled
20 second case, the potential claims against the
21 plaintiff as far as anybody who's been wronged,
22 foreclosures, anything like that. These can keep
23 coming back. It's something that we're better served
24 by allowing our judges to deal with it right in that
25 case. And as far as handling the second case, of

1 course we would raise the issue in the second case.
2 But it happened in this case. And those cases --

3 JUDGE WARNER: If you're obtaining -- you're
4 saying that in this case you did receive your
5 attorneys fees, or you are receiving attorneys fees
6 as prevailing party. But you want to strike --

7 MR. NIEVES: I'll tell you the truth, I do not
8 know. I just know that the rule -- I know that we
9 have to move within 30 days. I'm not sure I didn't
10 work on any of the attorneys fees motion. So, I'm
11 not privy to that.

12 JUDGE WARNER: Okay.

13 JUDGE FARMER: Wasn't it just an order allowing
14 entitlement and setting a fee? You don't know.

15 MR. NIEVES: I'm pretty sure entitlement wasn't
16 even disputed. There's case law where if you take a
17 voluntary dismissal, you're clearly not the
18 prevailing party.

19 JUDGE FARMER: Do you want to bring it to a
20 close? I'll give you a minute to sum it up.

21 MR. NIEVES: And as far as any jurisdiction
22 arguments, the Court relied on the Bevan case, which
23 is clearly distinguishable.

24 To sum everything up, if this Court affirms the
25 Trial Court, it's basically saying that it's okay to

1 lie, cheat and steal, as long as, when you get
2 caught, you voluntarily dismiss the case. And that's
3 what they're trying to do, just allow the judges of
4 Florida to put a little sunshine in these issues, and
5 you can allow the courts to address the prevailing
6 fraud. By itself, that would deter a lot of these
7 abuses, when you empower our judges and allow them to
8 deal with the issues. Thank you.

9 JUDGE FARMER: Thank you. Thank you both very
10 much. We'll take it under advisement.

11 Court will be in recess until tomorrow.

12
13 (Thereupon, the hearing was concluded at 11:23
14 a.m.)

C E R T I F I C A T E

I, Lucille Huttie, Registered Professional Reporter, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 10th day of November, 2010.

LUCILLE HUTTIE, RPR, FPR