IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT,
1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

CASE NO.: 4D16-0222
L.T. No.:2011CP000653XXXXSB
2014CP003698XXXXNB

ELIOT IVAN BERNSTEIN,

Appellant / Petitioner,

Appellant's Good Faith Draft Initial Brief on Appeal and Response To Show Cause; Extension of Time

v.

TED BERNSTEIN, AS TRUSTEE, ET AL.

Appellee / Respondent(s)

Appellant-Petitioner Eliot I. Bernstein, respectfully says and moves this Court as follows:

1. I am the Appellant-Petitioner herein pro se.
2. I submit this response in good faith responding to the Show Cause Order as to why this Appeal should not be dismissed for lack of prosecution.
3. Attached hereto in good faith is a substantially completed "Draft" Initial Brief on Appeal which includes the Arguments to be submitted on Appeal, citation to over 12 relevant cases from the 4th DCA and Florida Supreme

Court, basic outline of the arguments themselves, conclusion, partially completed Citation page and related items. See Draft Brief Exhibit 1.

4. Appellant again reminds this Court of the Statewide Fraud Policy for the Courts and petitions this Court to fulfill all required obligations in reporting the fraud to the Inspector General and should stay the Appeal pending correction of the fraud below.

5. Appellant again requests for production of Full Records and Indexes on Appeal certified by the Clerk of the Court below Sharon Bock and again moves that Appellant is prejudiced without full access to such records in completing this Appeal of a Final Judgment declaring "validity" of certain Testamentary instruments and Trusts.

6. Appellant again reminds this Court that many items in the cases were never served upon Appellant throughout the cases herein and Appellant is entitled to full production of all Records and Indexes.

7. Appellant further reminds this Court from the Notice of Administration filed in the Simon Bernstein Estate case alone signed by both attorneys Donald Tescher and Robert Spallina which Only listed as Beneficiaries the 5 children of Simon Bernstein including the Appellant and NOT naming ANY grandchildren as Beneficiaries is not only further evidence of fraud in the proceedings below but a basis for a new trial since the lower Court denied

any pre-trial Discovery of these attorneys and denied sufficient time for Trial to have necessary witnesses specifically including Donald Tescher who's signed statement in the Notice of Administration fundamentally contradicts the case presented by Ted Bernstein and his attorney Alan Rose.

8. Appellant respectfully reminds this Court that attorneys Tescher and Spallina were centrally involved in the fraud that was discovered and determined in the Shirley Bernstein case herein and that such fraud was never corrected or properly heard and determined and thus the entirety of these cases should be stayed and referred to the Inspector General and all obligations under the Fraud policy discharged.
9. Appellant has further been busy in the related Oppenheimer case and has only recently received "new" Records and Indexes on Appeal from that case which is intertwined with the cases herein and has been busy reviewing those items as well.
10. As this Court should see from the substantially completed "Draft" Initial Brief on the merits, this is not a delay or dilatory tactic and well founded legal arguments have already been constructed and simply are in need of a reasonable time of 10 days for completion should this Court not simply stay such cases based upon the frauds therein.

11. It is further respectfully shown to this Court that Appellant herein was the first to identify and expose the frauds in the underlying cases resulting in an Emergency motion filed in both the Shirley and Simon Bernstein Estate cases in May of 2013 which were immediately denied by then Judge Colin who was not even Assigned to the Simon Bernstein case at the time.
12. As shown by the recent submission in the related Oppenheimer case, the frauds with Robert Spallina implicating Judge Colin go back to at least on or about June 2010 when unknown to Appellant, attorney Robert Spallina filed a Petition involving Trusts of the minor children using the name and alleged signatures of Eliot and Candice Bernstein, however such document and filings were clearly in fraud as Eliot and Candice Bernstein had never even met Robert Spallina at such time and never signed any such document during that time all of which was Reported on the Record to Judge Colin, was reported to the Palm Beach Sheriff's Office and now has been Reported by Appellant to this 4th District Court of Appeals.
13. Considering that Ted Berstein, his attorney Alan Rose and Judge Colin simply proceeded along with "business as usual" for 2 years after Appellant's original May 2013 Emergency Motion showing fraud while also calling for validation of documents and instruments with Judge Colin not correcting the fraud nor undertaking to determine "validity" for 2 years until

he mysteriously “recused” within 24 hours of denying a mandatory Disqualification, it can not reasonably be said that Appellant is the one delaying justice herein nor engaging in dilatory tactics.

WHEREFORE, it is respectfully prayed for an Order staying the cases herein until proper adjudication of fraud consistent with the Statewide Court Fraud policy occurs and until full production of all proper Records and Indexes on Appeal certified by Clerk Sharon Bock or alternatively granting a reasonable time of not less than 10 days for Appellant to finalize the substantially completed Draft Initial Brief which Appellant does in protest claiming prejudice from lack of proper Records and correction of the fraud herein and for such other and further relief as may be just and proper.

Dated: July 5, 2016

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to parties listed on attached Service List by E-mail Electronic Transmission; Court ECF; this 5th day of July, 2016.

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EXHIBIT 1 – Draft Brief

DRAFT

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

CASE NO.: 4D16-0222
L.T. No.: 2011CP000653XXXXSB
2014CP003698XXXXNB

ELIOT IVAN BERNSTEIN v. TED BERNSTEIN, AS TRUSTEE, ET AL.

Appellant / Petitioner(s) Appellee / Respondent(s)

INITIAL BRIEF OF APPELLANT

NOTICE: Appellant-Petitioner Eliot I. Bernstein, having raised and shown direct fraud upon the Court in the lower tribunal, and having notified this 4th District Court of Appeals the fraud in the case including but not limited to fraud in the Records of the lower tribunal, and having motioned this 4th District Court of Appeals to take corrective action in compliance with the Statewide Fraud Policy of the Courts, files this Initial Brief herein under protest and prejudiced by the failure of the fraud to be corrected below and further prejudiced by the failure of this 4th District Court of Appeals to Order Full Records and Indexes in all relevant cases, and repeats and renews this request for this District Court of Appeals to take all necessary and proper corrective action in compliance with said fraud policy including but not limited to reporting said case to the Inspector General.

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VII. The lower tribunal abused its discretion in failing to grant a new trial particularly where signed statements by the core attorneys involved in other fraud in the case, Tescher and Spallina, signed as attorneys at law and filed with the Court below in the Notice of Administration of the Estate of Simon Bernstein showed Appellant is a Beneficiary and where No Minor Children were ever Noticed as Beneficiaries and where Donald Tescher should have been allowed to be Deposed pre-trial but at minimum should have been a Witness at trial.

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401 So.2d 1310 (1981)..

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15-2813 (Fla. Dist. Ct. App. 2016)..

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RULES:

Florida Rules of Civil Procedure 1.200

September 27, 2012 - Office of the State Courts Administrator - State Courts System Fraud Policy[1]

PRELIMINARY STATEMENT

STATEMENT OF THE CASE AND FACTS

Nature of the Appeal and Standard of Review

This is an appeal from a final judgment

Factual Background

SUMMARY OF ARGUMENT

ARGUMENT

I. The lower tribunal acted illegally and in violation of Florida Rules of Civil Procedure by Ordering a Trial in a case not noticed to be heard,

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[1] http://www.jud6.org/News/StateCourtsSystemFraudPolicy.pdf

abusing its discretion and violating procedural and substantive due process including but not limited to denying Appellant the fair right and opportunity to be heard at a Case-Management Conference.

Florida Rules of Civil Procedure 1.200 provides in part that, "**PRETRIAL PROCEDURE** (a) Case Management Conference. At any time after responsive pleadings or motions are due, the court may order, or a party, by serving a notice, may convene, a case management conference. ***The matter to be considered shall be specified in the order or notice setting the conference.***" (emphasis added). Procedural due process is a constitutional guarantee. See, e.g., Vollmer v. Key Dev. Props., 966 So.2d 1022 (Fla. 2 nd DCA 2007).

In this case, the lower tribunal clearly Ordered a Trial in a case that was not noticed for Case-Management in violation of the Rules of Procedure, procedural due process and then denying Appellant a fair opportunity to be heard to clarify the matter violating substantive due process.

"Fundamental to the concept of due process is the right to be heard. The right to be heard assures a full hearing before a court having jurisdiction of the matter, the right to introduce evidence at a meaningful time and in a meaningful manner, and judicial findings based upon that evidence. It includes also an opportunity to cross-examine witnesses, to be heard on questions of law, and the right to have judgment rendered after trial." (citations omitted) Brinkley v. County of Flagler, 769 So.2d

468 (Fla. 5th DCA 2000).

The right to be heard is so instrumental that error need not be preserved. "[T]he denial of a party's right to be heard — even if unpreserved — constitutes per se reversible error and, therefore, can be raised at any time."K.G. v. Fla. Dep't of Children & Families, 66 So. 3d 366 (Fla. 1st DCA 2011), citing Vollmer v. Key Dev. Props., Inc., 966 So. 2d 1022, 1027 (Fla. 2d DCA 2007).

"The constitutional guarantee of due process requires that each litigant be given a full and fair opportunity to be heard… The violation of a litigant's due process right to be heard requires reversal." Vollmer v, Key Dev. Props., 966 So.2d 1022, 1027 (Fla. 2nd DCA 2007). See also, Minakan v. Husted, 27 So. 3d 695 (Fla. 4th DCA 2010)".

"The goals of these procedural rules are "to eliminate surprise, to encourage settlement, and to assist in arriving at the truth." *Spencer v. Beverly,* 307 So.2d 461, 462 (Fla. 4th DCA 1975) (Downey, J., concurring), *cert. denied,* 314 So.2d 590 (Fla. 1975). We recently reiterated those goals. "*A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics.*
Dodson v. Persell, 390 So.2d 704, 707 (Fla. 1980).",

See, BINGER v. KING PEST CONTROL, 401 So.2d 1310 (1981).

A. The lower tribunal abused its discretion and abandoned the truth seeking policy of the Courts and law of the Florida Supreme Court by

failing to determine outstanding Discovery and the need for pre-trial Depositions.

Full and fair discovery is essential to the truth-finding function of our justice system, and parties and non-parties alike must comply not only with the technical provisions of the discovery rules, but also with the purpose and spirit of those rules.

The search for truth and justice as our court system and constitution demand can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise or superior trial tactics.

Courts should not countenance or tolerate actions during litigation that are not forthright and that are designed to delay and obfuscate the discovery process. See, Bainter v. League of Women Voters of Fla., 150 So. 3d 1115, 1129 (Fla. 2014).

An orderly trial is most likely to occur when the judge enforces discovery and pretrial orders strictly and requires each party to make full and proper disclosure before trial.

The Fourth District Court of Appeal in Central Square Tarragon LLC v. Great Divide Insurance Company, reiterated the need to “strictly enforce” provisions of pretrial stipulations. This prevents last minute gamesmanship, and makes disruption of the trial and error on appeal less likely. Generally, last-minute

additions of witnesses and substantial changes to testimony should not be admissible at trial. Failure to exclude such testimony prejudices the opposing party and constitutes reversible error.

In this case, there was no Orderly pre-trial procedures which were abandoned in their entirety by the lower tribunal who Ordered a Trial in a case not even Noticed for Case Management.

B. Pre-Trial Depositions in Trust and Will validity cases are proper.

Pre-trial depositions in Trust and Will construction and validity cases are proper and the lower tribunal abused its discretion by denying these pre-trial Discovery procedures. Although in the following case there existed the additional factor of witnesses in jeopardy of passing away before trial to also support the pre-trial deposition request, the Court noted, "The depositions were plainly within the general scope of discovery relating to the allegations in the second amended complaint. Fla. R. Civ. P. 1.280(b).". See, Toomey *v.* the Northern Trust Co., Etc., 15-2813 (Fla. Dist. Ct. App. 2016).

II. The lower tribunal abused its discretion by failing to grant a continuance for Appellant to have Texas counsel admitted pro hac vice for Trial denying counsel to minor children at the hearing…

"Factors to be considered in determining whether the trial court abused its discretion in denying the motion for continuance include whether the denial of the

continuance creates an injustice for the movant; whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance." Fleming v. Fleming, 710 So.2d 601 (Fla. 4th DCA 1998).

In Strader v. Zeide, 796 So.2d 591 (Fla. 4th DCA 2001) although the trial court granted Plaintiff's attorney's motion to withdraw, it denied the request to stay the proceedings until the Plaintiff could obtain new counsel. The Appellate Court found that the "Plaintiff was prejudiced as a result of the trial court's refusal to grant a continuance or allow the Plaintiff additional time to retain new counsel." Id at 593.

Without the benefit of counsel, the court found that the Plaintiff was unable to conduct a meaningful cross-examination. "This Court has noted that there are special circumstances which exist where the denial of a motion for continuance creates an injustice for the moving party and in such cases, it is the court's obligation to rectify the injustice." Strader at 593.

"While trial courts necessarily enjoy broad discretion in deciding whether to grant or deny a motion for continuance, the exercise of that discretion is not absolute." Rice v. NITV, LLC, 19 So.3d 1095 (Fla. 2nd DCA 2009); Baron v. Baron, 941 So.2d 1233 at 1236 (Fla. 2nd DCA 2006).

In determining whether the trial court has abused this broad discretion, the appellate courts consider the following three factors stated previously:

"1) whether the movant suffers injustice from the denial of the motion; 2) whether the underlying cause for the motion was unforeseen by the movant and whether the motion is based on dilatory tactics; and 3) whether prejudice and injustice will befall the opposing party if the motion is granted. Baron v. Baron, 941 So.2d 1233, 1235-36 (Fla. 2d DCA 2006) (quoting Myers v. Seigel, 920 So.2d 1241, 1242 (Fla. 5 th DCA 2006))."

In this case, not only did the lower tribunal abuse its discretion and act outside and in violation of established Florida Civil Procedure law by Ordering a Trial in a case which was not noticed to be heard, the Trial Court further abused it's discretion in denying a Continuance where Appellant had outside counsel attempting to come into the case pro hac vice denying Appellant counsel and more importantly, denying counsel to Appellant's minor children.

This is particularly true in a case where over 2 years had gone by from the time Appellant first notified the lower Court, then Judge Martin Colin, of direct fraud upon the Court involving the very attorneys and fiduciaries who allegedly prepared the documents sought to be validated until the time that Judge Martin Colin "suddenly" and "mysteriously" "Recused" within 24 hours of denying a Mandatory Disqualification motion.

Clearly there had been no "rush" to validate the alleged testamentary and trust documents for that 2 year period and the brief delay of a 30 day continuance to allow counsel to be admitted pro hac vice would not have caused any undue delay or prejudice to the other parties.

The Trial transcript is clear that Appellant was prejudiced by the denial of the continuance in being a non-attorney acting pro se during the complexities of a trial and there is nothing in the record to show Appellant had engaged in any dilatory tactics nor that any of the other parties would be prejudiced.

Under these circumstances, the denial of the motion for continuance was an abuse of discretion that must now be reversed and a new trial ordered.

III. The lower tribunal abused its discretion by failing to mandatorily Disqualify both pre-trial and at trial.

Judicial neutrality is critical to our legal system. Florida judges have the obligation to voluntarily recuse themselves for a variety of reasons, including bias or prejudice regarding a party or an economic interest in the matter. Canon 3E of the Florida Judicial Conduct Code applies to all.

IV. The lower tribunal abused its discretion in failing to grant a new trial particularly where signed statements by the core attorneys involved in other fraud in the case, Tescher and Spallina, signed as attorneys at law and filed with the Court below in the Notice of Administration of

the Estate of Simon Bernstein showed Appellant is a Beneficiary and where No Minor Children were ever Noticed as Beneficiaries and where Donald Tescher should have been allowed to be Deposed pre-trial but at minimum should have been a Witness at trial.

A. **The lower tribunal committed reversible error by failing to hold a hearing to determine the fraud.**

Factors the trial court should consider in determining whether to reopen the case to allow presentation of additional evidence include whether the opposing party will be unfairly prejudiced and whether it will serve the best interests of justice. Amador v. Amador, 796 So. 2d 1212 (Fla. 3d DCA 2001); Hernandez v. Cacciamani Dev. Co., 698 So. 2d 927 (Fla. 3d DCA 1997); Silber; Bieley v. Bieley, 398 So. 2d 932 (Fla. 3d DCA), review denied, 411 So. 2d 380 (Fla. 1981); Akins v. Taylor, 314 So. 2d 13 (Fla. 1st DCA 1975); see also Register v. State, 718 So. 2d 350 (Fla. 5th DCA 1998).

“ Moreover, given the allegations of fraud made by Robinson to support her motion, we think an evidentiary hearing was essential for the trial court to properly determine whether to grant the request to present the testimony of Adams. See Robinson v. Kalmanson, 882 So. 2d 1086, 1088 (Fla. 5th DCA 2004) ("A court can seldom determine the presence or absence of fraud without a trial or evidentiary proceeding.").” See,

“This court and others have held that if a party files a motion pursuant to rule 1.540(b)(3), pleads fraud or misrepresentation with particularity, and shows how that fraud or misrepresentation affected the judgment, the trial court is required to conduct an evidentiary hearing to determine whether the motion should be granted.[7]See Seal v. Brown, 801 So. 2d 993, 994-95 (Fla. 1st DCA 2001); St. Surin v. St. Surin, 684 So. 2d 243, 244 (Fla. 2d DCA *782 1996); Estate of Willis v. Gaffney, 677 So. 2d 949 (Fla. 2d DCA 1996); Dynasty Exp. Corp. v. Weiss, 675 So. 2d 235, 239 (Fla. 4th DCA 1996); Townsend v. Lane, 659 So. 2d 720 (Fla. 5th DCA 1995); S. Bell Tel. & Tel. Co. v. Welden, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) ("[W]here the moving party's allegations raise a colorable entitlement to rule 1.540(b)(3) relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required."); Kidder v. Hess, 481 So. 2d 984, 986 (Fla. 5th DCA 1986); Stella v. Stella, 418 So. 2d 1029 (Fla. 4th DCA 1982); see also Robinson. Moreover, the courts have held that the hearing requirement applies when fraud is asserted as a grounds for relief under either rule 1.530 or 1.540, Florida Rules of Civil Procedure. See Stella. The motion filed by Robinson sufficiently alleges fraud and demonstrates how it affected the judgment, thereby satisfying the requirement for an evidentiary hearing under either rule 1.530 or 1.540.”

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Final Judgment dated December 16, 2015 and remand the proceedings to the lower tribunal Disqualifying Judge John Phillips and ensuring the case is assigned to a non-conflicted Judge or other venue and non conflicted jurisdiction consistent with fundamental due process and for such other and further relief as may be just and proper.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to parties listed on attached Service List by E-mail Electronic Transmission; Court ECF; this 5th day of July, 2016.

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