

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

CASE NO.: 4D16-1449  
Consolidated with Case Nos. 4D16-1476 and  
4D16-1478

L.T. CASE NO. 2014CP002815XXXXNB  
2014CP003698XXXXNB

ELIOT IVAN BERNSTEIN,

Appellant,

vs.

OPPENHEIMER TRUST COMPANY OF  
DELAWARE, in its capacity as Resigned  
Trustee of the Simon Bernstein Irrevocable  
Trusts created for the benefit of Joshua, Jake  
and Daniel Bernstein,

Appellee.

**APPELLEE'S RESPONSE TO APPELLANT'S MOTION  
FOR REHEARING, CERTIFICATION AND TO VACATE ORDER DISMISSING  
THE APPEAL HEREIN AND ACCEPT LATE FILING OF INITIAL BRIEF**

Appellee, Oppenheimer Trust Company of Delaware ("Oppenheimer"), responds to Appellant's Motion for Rehearing, Certification, and to Vacate Order Dismissing Appeal Herein and Accept Late Filing of Initial Brief, and states as follows:

1. After the Court granted Appellant's four successive motions for extension of time to file initial brief, and after Appellant failed to comply with any of the Court's deadlines and warnings that the appeal would be dismissed for failure to comply, this Court finally dismissed this appeal. Appellant now files an untimely motion for rehearing along with a proposed initial brief. For the reasons asserted in response to Appellant's previous motions, and for the additional reasons set forth herein, Appellant's motion should be denied, and this appeal should not be reinstated.

2. On November 3, 2016, after Appellant had filed a series of motions for extension, constantly making the same unsubstantiated excuses for his failure to file a brief, and after this Court granted Appellant multiple previous extensions, this Court afforded Appellant one more extension of ten days to file the brief. However, the Court warned Appellant that failure to comply with the order “will result in dismissal of this appeal for lack of prosecution without further notice.”

3. After Appellant ignored that deadline and express warning and filed yet another motion for extension, this Court entered another order on November 17, 2016, which, while denying the motion for extension of time, gave Appellant yet another 10 days to file the initial brief “or the appeal WILL be dismissed” (emphasis in original). This Court noted that “Appellant has previously filed motions for extension of time even when this court has indicated that no further extensions would be granted, or has filed untimely responses to this court’s orders,” and gave examples. This Court concluded, **“Accordingly, it is ORDERED that Appellant shall file the initial brief by November 22, 2016, or this appeal WILL be dismissed. No motions or other filings shall toll the time to file the brief, and no further extensions will be granted.”**

4. In disregard of the above order, Appellant did not file the initial brief, and on November 29, 2016, this Court entered its order dismissing the appeal. On December 15, 2016, Appellant filed an untimely motion for rehearing, acknowledging that the motion was untimely. (See Motion at ¶ 21).

5. The deadline for a motion for rehearing under Fla. R. App. P. 9.330 is 15 days after the order disposing of the appeal or within such other time set by the court. In this case, the deadline for filing a motion for rehearing was December 14, 2016.

6. Appellant's motion for rehearing should be denied because it was untimely, because Appellant did not request an extension of the rehearing deadline, because Appellant did not show good cause for extending the rehearing deadline, and because Appellant failed to identify any points of law or fact that this Court overlooked in dismissing the appeal.

7. While an appellate court has the authority to set a rehearing deadline different from the default 15-day deadline, a party must request that relief, should request the relief before the period expires, and in requesting the relief, should demonstrate "good cause" for the extension of the rehearing deadline. *See Pinecrest Lakes, Inc. v. Shidel*, 802 So. 2d 486, 489 (Fla. 4th DCA 2001).

8. Appellant did not file a motion for rehearing by December 14, 2016, nor did he request an extension of the rehearing deadline. For that reason alone, Appellant's motion for rehearing should be denied.

9. Even if this Court were to construe some statement in Appellant's motion for rehearing as a request for an extension of the deadline to file the motion, Appellant wholly fails to allege any "good cause" for such an extension. Appellant recites that the 15 day time period for a motion for rehearing is "not a jurisdictional time period" (Motion at ¶ 21) and that a motion for rehearing may be filed within 15 days of an order "or within such other time set by the Court." (See Motion at ¶ 23). However, neither of those statements purport to establish, or have the effect of establishing, good cause. They merely recite the law.

10. Even if the motion for rehearing had been timely, it should be denied on its merits because Appellant does not assert anything different in his motion for rehearing than he asserted in previous motions. Nothing in the motion demonstrates any different circumstances from those which existed for the last many months, and which caused this Court to grant

Appellant multiple extensions. Appellant’s motion for rehearing fails to comply with the basic requirement of Fla. R. App. P. 9.330 that the motion “state with particularity the points of law or fact that, in the opinion of the movant, the Court has overlooked or misapprehended...”

WHEREFORE, based upon the foregoing and all of the proceedings that led to the dismissal of this appeal, Appellant’s motion should be disregarded as untimely, and this appeal should not be reinstated.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via e-mail to all parties on the attached Service List this 27<sup>th</sup> day of December, 2016.

/s/ Steven A. Lessne  
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