

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

CASE NO. 4D16-3314

ELIOT IVAN BERNSTEIN

L.T. CASE NOS. 2014CP003698 XXXX NB

Appellant,

v.

TED S. BERNSTEIN, AS TRUSTEE, et al.

Appellee.

**APPELLEE'S, TED S. BERNSTEIN, AS TRUSTEE,
RESPONSE TO LATEST MOTION FOR EXTENSION, AND
REQUEST THAT COURT DISMISS APPEAL AND IMPOSE
NON-MONETARY SANCTIONS AGAINST *PRO SE* APPELLANT**

Appellee, Ted S. Bernstein, as successor Trustee of the Shirley Bernstein Trust ("Shirley Bernstein Trust"), responds to the Motion for Extension filed at 11:52 p.m. on the 45th day after this Court's most recent extension order. Shirley Bernstein Trust requests that this appeal be dismissed for lack of prosecution, and also seeks the imposition of reasonable and necessary non-monetary sanctions against the *pro se* Appellant, Eliot Ivan Bernstein ("Eliot"), who continues to file frivolous and wasteful appeals, and states:

Dismissal

1. The appeal in this case is completely frivolous because, among other reasons, Eliot did not object to the entry of the Order under review. There is no error

preserved for appellate review. Regardless, this is a rather simple appeal concerning \$12,457. At the time of Simon Bernstein's death, he owned all of the furniture and personal property in an oceanfront condominium owned by the Shirley Bernstein Trust.¹ When the Trust later sold the condominium, the then-serving personal representatives of Simon's Estate agreed that most of the furniture and personalty in the condominium could be included in the real estate sale, rather than paying someone to move and store it, with the understanding there would be an "even-up" later to compensate the Estate.

2. After the initial personal representatives resigned, Brian O'Connell was appointed as successor Personal Representative. The Trustee and Mr. O'Connell, as Personal Representative, agreed to "even-up" the proceeds from the condominium sale. By reviewing two appraisals, one before the sale (see footnote 1) and one after the sale, it was easy to determine which items remained and which items presumably had been sold. No one ever objected to either of the third-party appraisals, or offered any counter-evidence of value.

3. The Personal Representative and the Trustee agreed that the Trust would pay the Estate the full appraised value of the items sold, which totals \$12,457. The

¹ A reputable third-party appraisal company valued all of the personalty in the condominium at \$14,865 as of the date of death.

parties moved the probate court for approval of their agreement. Eliot did not object at the hearing, and no one presented any alternate valuations of the property. The probate court entered an Order approving this agreement, and the Trustee delivered a check to the Personal Representative.

4. Eliot filed this appeal on September 29, 2016. To date, he has not filed an Initial Brief, despite the fact that we are now *three months past the original due date*.² By Order dated December 28, 2016, this Court entered an order to show cause:

ORDERED that appellant in the above-styled case is directed to show cause in writing, if any there be, within ten (10) days from the date of the entry of this order, why the above-styled case should not be dismissed for lack of timely prosecution, in that the appellant's initial brief has not been filed with this court as of this date

5. Eliot responded on January 9, 2017, and asked for 45 more days time to file a brief. Appellee, Shirley Bernstein Trust, promptly filed an objection, expressing concern as to the length of the requested extension, asking the Court to "limit any extension to no more than 15 to 30 days and conditioned upon the Court specifying that if no Initial Brief is filed within that time, the appeal will be dismissed."

² Considering the Initial Brief was due around December 8, 2016, Eliot already has received an extra 88 days: the Court issued a show cause order 20 days after the deadline; and granted an extension 23 days later, granting 45 days.

6. By Order dated January 20, 2017, this Court granted Eliot what he asked for, 45 days:

ORDERED that upon consideration of appellant's January 9, 2017 response, this court's December 28, 2016 order to show cause is discharged; further, Upon consideration of appellee's January 11, 2017 response, it is ORDERED that appellant's January 9, 2017 motion for extension of time, found in the response, is granted, and appellant shall serve the initial brief within forty-five (45) days from the date of this order. In addition, if the initial brief is not served within the time provided for in this order, the above-styled case may be subject to dismissal or the court in its discretion may impose other sanctions.

7. The deadline for serving the Initial Brief was March 6, 2017. No brief was filed. Instead, at 11:52 p.m. on the last day, Eliot moved yet again for a further extension, by filing a 236-page Motion including exhibits. This is the same pattern of dilatory behavior Eliot demonstrated in Case 4D16-222 (where the Court eventually ruled the appeal would proceed with no Reply Brief) and in consolidated Cases 4D16-1449, -1476 and -1478 (where the Court eventually dismissed the appeal for lack of prosecution when Eliot failed to file a brief despite numerous extensions).

8. Likewise, this appeal should be dismissed for lack of prosecution, as the Court warned in its January 20th Order, which reads: "if the initial brief is not served within the time provided for in this order, *the above-styled case may be subject to dismissal*" Eliot has demonstrated in this Court, in a series of related cases (*see*

e.g. 4D16-1449), a pattern of delay and stagnation designed not to challenge orders, but simply to create expense and delay.

9. Therefore, the pending Motion for Extension should be denied and the appeal dismissed for lack of prosecution.

Sanctions

10. The January 20th order further provides: "*the court in its discretion may impose other sanctions.*" Eliot has demonstrated in this Court, in a series of related cases in this Court and in the Supreme Court, a pattern of filing appeal after appeal, and then extension after extension.

11. As has been the Trustee's position in other appeals, Eliot has no good cause or excusable neglect for not filing a brief— he is fully aware of the Court's orders and deadlines. In response to the prior Order to Show Cause, which invited Eliot to file an Initial Brief within 10 days to automatically discharge the Order, Eliot sought and was granted 45 additional days. Now, that time has come and gone, and still no brief. Just yet another request for delay.

12. Eliot persists in continuing to file appeal after appeal, with no merit and for the most part without filing a brief. This pattern of abusive conduct has persisted

for a lengthy time period, through more than a dozen appeals and counting.³ Thus, the time has come for this Court to impose some reasonable sanctions to prevent future abuse and violations of the court's rules. In this regard, the Shirley Bernstein Trust seeks only non-monetary sanctions, and suggests the Court consider: (i) prohibiting any further appellate filings by Eliot Bernstein which are not signed by an attorney licensed by the Supreme Court to practice law in Florida; and/or (ii) terminating his ability to file appeals while paying no filing fee on the basis of his indigent status.

13. Each of these appeals is somehow related to the trusts and estates of Eliot Bernstein's parents. The probate court has determined Eliot Bernstein was acting in a manner adverse and destructive to the interests of his children, who are indirect beneficiaries through trusts, and has appointed a guardian ad litem to protect the children's beneficial interests in certain trusts. The guardian ad litem orders are final as the appeals (SC16-29; 4D16-1449, -1476, -1478) have been dismissed.

14. Eliot continues to file these numerous appeals on a *pro se* basis, claiming indigent status so he does not have to pay any filing fee. While no one has ever

³In the last few years, and without paying any filing fees, Eliot Bernstein has filed at least the following appeals: SC15-1077; SC16-29; SC17-229; 4D15-3849; 4D16-64; 4D16-222; 4D16-1449; 4D16-1476; 4D16-1478; 4D16-2249; 4D16-3162; 4D16-3314; 4D16-4120.

contested his claimed indigency status, *nor do we now*, the opposing parties to each of his appeals is a trust or an estate which is not indigent yet, but is moving in that direction as a result of ongoing, continuing, and never ending litigation. Eliot has gotten a free ride at the expense of the interests of his children and the beneficiaries of his parents' trusts and estates.

15. Eliot has been sanctioned by one court,⁴ essentially branded a vexatious litigant. In this Court, there now is a clear record of frivolous, harassing, and vexatious appellate proceedings by this party.

WHEREFORE, Appellee, Shirley Bernstein Trust, requests this Court dismiss this appeal, and impose some reasonable non-monetary sanctions, either entering an order prohibiting any further *pro se* filings by Eliot Bernstein which are not signed by an attorney licensed to practice in Florida; and/or requiring Eliot Bernstein to pay filing fees to dissuade him from filing meritless and frivolous appeals which are draining the trusts and estates of substantial sums of money.

⁴On August 29, 2013, a New York federal judge sanctioned Eliot Bernstein for repeatedly filing frivolous papers. *Eliot I. Bernstein v. State of New York, et al*, Case No. 1:07-cv-11196 (DE 54), Order on Motion for Sanctions (S.D. N.Y. August 29, 2013). He was ordered to pay \$3,500. No monetary sanctions are sought here.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been served by e-mail on all parties listed on the attached service list, this 7th day of March, 2017.

MRACHEK, FITZGERALD, ROSE,
KONOPKA, THOMAS & WEISS, P.A.
505 South Flagler Drive, Suite 600
West Palm Beach, FL 33401
(561) 655-2250 Telephone/(561) 655-5537 Facsimile
email: arose@mrachek-law.com
Attorneys for Ted S. Bernstein

By: /s/ Alan B. Rose
Alan B. Rose (Fla. Bar No. 961825)

SERVICE LIST

Eliot Bernstein, individually
and Eliot and Candice Bernstein,
as Parents and Natural Guardians of
D.B., Ja. B. and Jo. B, Minors
2753 NW 34th Street
Boca Raton, FL 33434
(561) 245-8588 - Telephone
(561) 886-7628 - Cell
(561) 245-8644 - Facsimile
Email: ivewit@ivewit.tv

John P. Morrissey, Esq.
330 Clematis Street, Suite 213
West Palm Beach, FL 33401
(561) 833-0766 - Telephone
(561) 833-0867 - Facsimile
Email: John P. Morrissey
(john@jmorrisseylaw.com)
Counsel for Molly Simon, Alexandra
Bernstein, Eric Bernstein, Michael
Bernstein

Lisa Friedstein
2142 Churchill Lane
Highland Park, IL 60035
lisa@friedsteins.com
Individually and as trustee for her
children, and as natural guardian for
M.F. and C.F., Minors

Peter M. Feaman, Esq.
Peter M. Feaman, P.A.
3695 W. Boynton Beach Blvd., Suite 9
Boynton Beach, FL 33436
(561) 734-5552 - Telephone
(561) 734-5554 - Facsimile
Email: service@feamanlaw.com;
mkoskey@feamanlaw.com
Counsel for William Stansbury

Pam Simon
303 E. Wacker Drive, Suite 2725
Chicago, IL 60601
psimon@stpcorp.com

Gary R. Shendell, Esq.
Kenneth S. Pollock, Esq.
Matthew A. Tornincasa, Esq.
Shendell & Pollock, P.L.
2700 N. Military Trail, Suite 150
Boca Raton, FL 33431
(561) 241-2323 - Telephone
(561) 241-2330 - Facsimile
Email: gary@shendellpollock.com
ken@shendellpollock.com
matt@shendellpollock.com
estella@shendellpollock.com
britt@shendellpollock.com
grs@shendellpollock.com
robyne@shendellpollock.com

Diana Lewis, Esq.
ADA & Mediations Services, LLC
2765 Tecumseh Drive
West Palm Beach, FL 33409
(561) 758-3017 - Telephone
Email: dzlewis@aol.com
Guardian *Ad Litem* for
Eliot Bernstein's minor children,
Jo.B., Ja.B., and D.B.

Steven A. Lessne, Esq.
GUNSTER, YOAKLEY &
STEWART, P.A.
*Counsel for Oppenheimer Trust
Company of Delaware*
4855 Technology Way, Suite 630
Boca Raton, FL 33431
Telephone: (561) 961-8085
Email: slessne@gunster.com

Jill Iantoni
2101 Magnolia Lane
Highland Park, IL 60035
jilliantoni@gmail.com
Individually and as trustee for her
children, and as natural guardian for
J.I. a minor

Brian M. O'Connell, Esq.
Joielle A. Foglietta, Esq.
Ciklin Lubitz Martens & O'Connell
515 N. Flagler Dr., 20th Floor
West Palm Beach, FL 33401
561-832-5900 - Telephone
561-833-4209 - Facsimile
Email: boconnell@ciklinlubitz.com;
jfoglietta@ciklinlubitz.com;
service@ciklinlubitz.com;
slobdell@ciklinlubitz.com