

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.: 4D16-4120

L.T. No.: 502012CA013933XXXXMB

ELIOT IVAN BERNSTEIN

v. WILLIAM E. STANSBURY, et al.

Appellant / Petitioner(s)

Appellee / Respondent(s)

**APPELLANT’S MOTION FOR REHEARING AND CLARIFICATION
UNDER RULE 9.330 AND REINSTATING THE APPEAL**

1. I am the Appellant in this case acting pro se.
2. I make this motion for Rehearing under Florida Rules of Appellate Procedure 9.330 and alternatively for clarification and a written decision under this rule.
3. This motion is made and filed within 15 days of this Court’s Order on Jan. 5, 2017 which Dismissed the appeal for “lack of jurisdiction” and is therefore timely filed under the rules.
4. Appellant further moves within this motion to Rehear the denial of the motion to permit a Sur-Reply which was also denied on the same date of Jan. 5, 2017 and thus this motion to Re-hear that denial is timely.
5. Appellant respectfully submits that it was error to deny this Sur-reply as such filing clarified and corrected confusion and any misapprehension of

facts before this Court and moved to correct one of the many frauds upon the Court in these case.

6. Nonetheless, while Appellant asserts that the permission to file the Sur-reply should have been granted, the underlying facts overlooked and misapprehended by the Court are the same either way and the Re-hearing should be granted and the Appeal reinstated.
7. Appellant respectfully moves that this Court has either overlooked or misapprehended the facts and-or misapplied the law and therefore this Court's Order must be reversed and vacated and the appeal reinstated.
8. This is an Appeal of an Order of the lower Tribunal which totally disposed of a case against certain parties Robert Spallina and Donald Tescher in the underlying action brought by Creditor William Stansbury against Ted and Simon Bernstein for alleged monies owed during the course of their business relationships.
9. Appellant timely filed a Statement of Jurisdiction on Dec. 19, 2016 in response to this Court's Order to Show Cause. See, Exhibit 1.
10. Paragraph 5 of this Statement of Jurisdiction showed this Court that it has jurisdiction to hear this Appeal stating, "This Court has jurisdiction over this Appeal under Fla. R. App. P. 9.110(k), Review of Partial Final Judgments."

11. This Court may have been confused or misapprehended the facts of the case by Appellant's factual statements in Par. 6 of the Statement of Jurisdiction which showed that other parties in addition to attorneys Robert Spallina and Donald Tescher had been removed from the underlying case.
12. Appellant sought to clarify and correct any such confusion or misapprehension by the Court in a motion for permission to file a Sur-Reply which was filed on Dec. 24, 2016. See Exhibit 2.
13. Appellant attempted to clarify and correct any misunderstanding or confusion or misapprehension by this Court in the proposed Sur-reply by showing this Court in Paragraph 3 that, "This Sur Reply would be to address the Response-Objections filed by attorney Alan Rose allegedly on behalf of the Estate of Simon Bernstein."
14. Appellant further showed in Paragraph 4 that, "Appellant has reviewed the entirety of the response-objections filed by Attorney Alan Rose and the Appendix attached thereto and has reviewed the entire docket of the Lower Tribunal case and filings under L.T. Case No.: 502012CA013933XXXXMB."
15. Appellant showed in Paragraph 5 that, "A Sur Reply should be granted in this case as it is just and proper and corrects the Record of the Lower

Tribunal case below and serves to avoid further and continuing Frauds upon the Court in the cases herein.”

16. The Motion for permission to file a Sur-reply further corrected matters before the Court as follows:

“6. Attorney Alan Rose again misleads this Court in his filings and said filing essentially amounts to a further Fraud upon the Court. 7. The filing in Response by attorney Alan Rose fails to address the parties Donald Tescher and Robert Spallina by “breezing over them” in the entirety and not mentioning these Parties by name at all in his response. 8. The Response further misleads this Court by affirmatively claiming in Paragraph 3 that “the sole remaining defendants are (i) the Estate of Simon L. Bernstein ("Estate") and Bernstein Family Realty, LLC ("BFR”).” 9. Yet, as shown by the Docket in the Court below and documents filed therein, both the “Amended Complaint” filed in the Lower Tribunal by Plaintiff William Stansbury on Feb. 14, 2013 (Docket Entry No. 47) ADDED as Parties to the proceedings “Donald Tescher and Robert Spallina, as co-personal representatives of the Estate of Simon Bernstein and as co-trustees of the Shirley Bernstein Trust Agreement dated May 20, 2008” and these Parties are further continued in the Second Amended Complaint filed Sept. 4, 2013 (Docket Entry No. 154). 10. The Lower Tribunal Docket Entries further

show these “Parties”, Donald Tescher and Robert Spallina, were issued Summons filed Feb. 22, 2013 (Docket No. 53 - Exhibit 1) as Personal Representatives of the Estate of Simon Bernstein with Verified Return of Service filed on March 1, 2013 (Docket No. 57 - Exhibit 2). 11. Further, Summons for these “Parties” Donald Tescher and Robert Spallina as Co-Trustees of the Shirley Bernstein Trust were filed on April April 19, 2013 (Docket No. 77 - Exhibit 3) with Service Return filed on April 23, 2013 (Docket No. 81 - Exhibit 4). 12. The Docket in the Lower Tribunal below shows these parties were represented by Counsel Mark Manceri who filed Notices of Appearance and the parties actively participated in the litigation. 13. Contrary to Attorney Rose’s filings in Response to this Court, none of the filings referencing a Settlement and Stipulation and Order dismissing parties referenced or reflected any Dismissal whatsoever against Donald Tescher or Robert Spallina in any capacity. (See, Rose filing: Stansbury filed a Notice of Dropping Parties [App. 2; DE 212] and a Stipulation for Dismissal with Prejudice. [App. 3; DE 213] The trial court entered an "Order of Dismissal with Prejudice of Certain Parties and Claims," rendered on June 23, 2014 [App. 4; DE 213]). 14. To the contrary, the Lower Court Docket further reflects that as recently as a few months ago and years after the alleged “Settlement”, Plaintiff Stansbury was Noticing both Parties Donald

Tescher and Robert Spallina for Depositions and Subpoenas being issued. See, Docket Number Entries 233-236. 15. These “Parties” Donald Tescher and Robert Spallina appear in the Caption of the Motion filed by Attorney Rose allegedly for the Estate of Simon Bernstein in the very Motion to Alter the Caption filed on Nov. 4, 2016 under Docket Entry No. 285 and yet nowhere in the Motion are these Parties Donald Tescher or Robert Spallina mentioned by attorney Rose, nor is there any Order or Stipulation which Dismissed these parties from the litigation. 16. Thus, contrary to the Response by Attorney Rose, this Court has Jurisdiction under Florida Rule of Appellate Procedure 9.110(k) “Review of Partial Final Judgments” which provides that “ If a partial final judgment totally disposes of an entire case as to any party, it must be appealed within 30 days of rendition.” 17. The Order appealed from even if not expressly stating it certainly purports to Dismiss and Remove the Parties Donald Tescher and Robert Spallina not just from the Service List but further Dismissed from the Action altogether even though no Stipulation nor Order nor motion ever sought such relief or granted such relief and thus this Appeal and Statement of Jurisdiction by Appellant is not frivolous. 18. Appellant, does, however, move to correct the original Statement of Jurisdiction by filing such Sur Reply and corrects the prior submission in noting that other parties originally mentioned in the

Statement of Jurisdiction as the parties mentioned in said Statement in Paragraph 6 being LIC Holdings, Inc., and Arbitrage International Holdings, LLC, do appear from the Docket to have been removed years before Appellant and his wife were added to the case as “Owners” of BFR and thus any Appeal on those parties would have to await Final Judgment or some other action in the Lower Tribunal on a motion to vacate. 19. Appellant further clarifies the original Statement of Jurisdiction by showing that the Sept. 8, 2016 Order of Judge Oftedal not only added Appellant and his wife as parents and Guardians of the minor children who “own” BFR but further named Appellant and his Wife as “owners” stating “all papers to be served upon BFR shall be served upon its owners, Eliot and Candice Bernstein, as parents and natural guardians of Joshua, Jake and Daniel Bernstein, 2753 N.W. 34th Street, Boca Raton, FL 33434-3459;” See Sept. 8, 2016 Order. 20. While Appellant and his wife have Objected to the process which forced this responsibility of BFR on Appellant and his wife and even sought to appeal which was denied without prejudice by this Court as premature as a Non-final order, clearly this Order affords Appellant “Standing” to file the Notice of Appeal and Statement of Jurisdiction herein at minimum on behalf of the minor children who are beneficiaries and owners with standing. 21. Further, it is Attorney Alan Rose’s ability to act on Appeal which should be

in question if anything as not only did the Plaintiff below move for a Stay on Oct. 26, 2016 (See Docket Entry No. 283) as Plaintiff moved to Disqualify Attorney Rose based on conflicts of interest with the Estate, but the Court below granted a Stay on Dec. 8, 2016 on such grounds under Docket No. 299 which reflects in the Docket “ ORDER ON CASE MANAGEMENT CONFERENCE CASE WILL BE SET FOR TRIAL DISCOVERY STAYED UNTIL THE PROBATE COURT RULES ON THE DISQUALIFICATION OF COUNSEL FOR THE ESTATE DTD 12/07/16 C CARACUZZO”. 22.It does not appear that Alan Rose has filed a Notice of Appearance in the case either and been accepted to make any pleadings to this Court or the Lower Court and represents further a Pattern and Practice of Sharp Practices and more by Rose. 23. The Probate Court has scheduled hearings to Disqualify Attorney Rose and other hearings for February of the upcoming year 2017. 24. Thus, clearly there is both Jurisdiction to hear such appeal and standing and this Appeal should go forward and Sur Reply granted and filings by Alan Rose stricken.” See Exhibit 2.

17. As Appellant showed this Court in the original Statement of Jurisdiction in Paragraphs 7-8, “The Florida Bar has recognized and published authority for an appeal in such cases under the heading of “Partial Final Judgments and Multiple Parties or Causes of Action” in the article “Review of Non-final

Orders — An Exception to the Requirement of Finality” by Jack R. Reiter
March, 2008 Volume 82, No. 3. 8. This Court reinstated an Appeal on a
motion for rehearing finding an Order final for purposes of Appeal under the
circumstances. See, Elkind v. Knox, 933 So. 2d 1264 (Fla. 4th D.C.A. 2006)
(order appealable as final order when it disposed of claim as to appellant and
pending cross-claim did not affect appellant).” See, Exhibit 1.

18. Appellant further showed this Court in the original Statement of Jurisdiction
in Par. 20 that, “Because the Order sought to be appealed herein completely
disposes of the lawsuit as to multiple parties such as Tescher & Spallina,
Ted Bernstein, LIC Holdings Inc., etc, the Order is final as to these parties
and is appropriate for Appeal under Fla. R. App. P. 9.110(k), Review of
Partial Final Judgments.” See, Exhibit 1.

19. Because this Court has overlooked or misapprehended the facts of the case
in that the Order appealed which was timely appealed permanently removed
Robert Spallina and Donald Tescher as parties to the underlying case, this
Court in fact has jurisdiction under Fla. R. App. P. 9.110(k), Review of
Partial Final Judgments and Re-Hearing should be granted and the Appeal
reinstated.

CLARIFICATION

20. Appellant otherwise moves for this Court to Clarify the Jan. 5, 2017 Order and ruling under Fla. R. App. P 9.330 and state with specificity why Jurisdiction is not present under Fla. R. App. P. 9.110(k) as Appellant is prejudiced in moving for re-hearing in the first instance without such clarification and as shown by the facts and records of the lower tribunal, clearly Robert Spallina and Donald Tescher were still actively in the case until the recent Order on appeal.

WHEREFORE, it is respectfully prayed for an Order granting Rehearing and Reinstating the Appeal herein and alternatively granting Clarification under Rule 9.330 with leave to further brief on rehearing based upon such clarification by this Court and for such other and further relief as may seem just and proper.

Respectfully submitted,

Dated: January 20, 2017

/s/ Eliot Ivan Bernstein
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the within has been served upon all parties on the attached Service List by E-Mail Electronic Transmission, Court ECF on this 20th day of January, 2017.

Dated: January 20, 2017

/s/ Eliot Ivan Bernstein

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EXHIBIT 1

Statement of Jurisdiction on Dec. 19, 2016

EXHIBIT 2

Motion for Permission to File a Sur-Reply December 24, 2016