
IN THE SUPREME COURT OF FLORIDA

Case No.: SC11-1213

ALEX BISTRICER, as limited partner of GULF ISLAND RESORT, L.P., and
GULF ISLAND RESORT, L.P.,

Petitioners,

vs.

COASTAL REAL ESTATE ASSOCIATES, INC., a Florida corporation;
BERMAN MORTGAGE CORPORATION, a Florida corporation; DANA
BERMAN; OCEANSIDE ACQUISITIONS, LLC, a Florida limited liability
company; DBKN GULF INCORPORATED, a Florida corporation;
and STEVEN CARLYLE CRONIG,

Respondents.

ON REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL
MIAMI, FLORIDA
Case No. 3D09-3002

JURISDICTIONAL BRIEF OF RESPONDENTS
OCEANSIDE ACQUISITIONS, LLC AND DBKN GULF INCORPORATED

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STATEMENT OF THE CASE AND FACTS

Alex Bistricher and Gulf Island Resort, L.P. ("GIRL") seek discretionary review of the Third District Court of Appeal's affirmance of a trial court order striking the petitioners' pleadings as a sanction for their fraud on the court and discovery violations.

This case arose from a dispute over the ownership of real property located at the Gulf Island Resort in Hudson, Florida. The petitioners sued Oceanside Acquisitions, LLC ("Oceanside") and DBKN Gulf Incorporated ("DBKN") to quiet title in the property and for conspiracy. Oceanside and DBKN asserted several affirmative defenses and filed a counterclaim.

From the outset, the petitioners attempted to thwart the discovery process. In total, Oceanside and DBKN were forced to submit more than a dozen motions to compel production and three separate motions for contempt and sanctions. On September 18, 2003, Oceanside and DBKN served a subpoena duces tecum on Candy Smith in her capacity as a third-party defendant and as the records custodian for GIRL and GIRL's general partner, Gulf Island Resort, Inc. ("GIRI"). Smith, through counsel for Bistricher and GIRL, sought a protective order. The trial court denied the motion for protective order and directed Smith to attend the deposition and produce documents.

Thereafter, Bistricher was served with a request for production. Bistricher did

not produce any documents. At his deposition, Bistricher testified that Smith had, in fact, previously produced all responsive documents. Concerned that Smith, Bistricher, GIRL, and GIRI had not complied with the previous discovery order, Oceanside and DBKN filed a motion to compel production and for sanctions. On May 28, 2004, the trial court entered an order compelling the production of certain documents that had allegedly been overlooked. Counsel for the petitioners assured the trial court that all responsive documents had been produced except for documents relating to one bank account.

The trial began in May, 2006. Shortly after the conclusion of Bistricher's cross examination, counsel for the petitioners informed Oceanside and DBKN that some key documents relevant to the real estate transactions had been found. The petitioners explained that the documents were, for the most part, located in a filing cabinet and a briefcase at GIRL's office. Oceanside and DBKN objected to the petitioners' attempt to offer the documents into evidence. When the trial court ordered an examination of the "newly discovered" materials, it was determined that the petitioners had failed to produce over 68,000 documents.

These documents were readily accessible and maintained in GIRL's active files. Several of these documents were highly relevant to the issues and defenses in the case. Perhaps most telling, several documents contradicted the sworn testimony of Bistricher, Smith, and Robert Fireworker, another GIRI shareholder.

After discovering the full extent and ramifications of the petitioners' fraud on the court and discovery violations, Oceanside and DBKN filed another motion for contempt and sanctions. On August 8, 2006, the trial court conducted an extensive evidentiary hearing on the motion. Following the hearing, the trial court issued its contempt order in which the court found that the petitioners had engaged in deliberate and contumacious disregard of the court's authority. The court rejected the petitioners' argument that they were "merely mistaken" with respect to their false testimony, and further found that Oceanside and DBKN had presented clear and convincing evidence that the petitioners and their representatives intended to interfere with the judicial system's ability to impartially adjudicate this matter by improperly influencing the trier of fact and by unfairly hampering the presentation of Oceanside's and DBKN's claims and defenses. The trial court concluded that striking the pleadings was "the only practical alternative to resolve this matter."

On appeal, the Third District reviewed whether the trial court abused its discretion in entering the contempt order. The Third District held that the trial court's findings of fact accurately reflected the record on appeal and agreed that the petitioners had engaged in protracted discovery violations over three years. (Opinion, at 9-10.) The Third District affirmed the trial court's order, finding no abuse of discretion. (Opinion at 3, 10).

SUMMARY OF THE ARGUMENT

The petitioners have failed to identify the existence of an express and direct conflict supporting this Court's exercise of its discretionary jurisdiction.

First, the Third District applied the proper standard of review to the trial court's decision to strike the petitioners' pleadings as a sanction for their fraud on the court. Even a cursory analysis of the case law indicates that a dismissal for fraud on the court is reviewed under a narrowed abuse of discretion standard. Although a party seeking dismissal must prove the existence of fraud by clear and convincing evidence, the selection of an appropriate sanction to be imposed as a result of that fraud rests in the trial court's discretion. The Third District properly applied the narrowed abuse of discretion standard.

Similarly, the petitioners have failed to identify any conflict with this Court's decisions requiring a trial court to consider alternative sanctions to dismissal. As the Third District noted in its opinion, the trial court considered, but rejected, a lesser sanction.

Finally, the petitioners have likewise failed to establish the existence of a conflict with decisions holding that one party cannot be sanctioned for another party's discovery violations. The trial court sanctioned the petitioners for their own misconduct and not the conduct of any other party. This Court should decline to exercise its discretionary jurisdiction in this case.

ARGUMENT

The Petitioners Have Identified No Conflict Based on the Third District's Review of the Trial Court's Sanction for the Petitioners' Fraud on the Court.

The petitioners' fundamental misconception of the Third District's decision is evident in their contention that "[t]he Third District applied an abuse of discretion standard in reviewing J. Cobb's determination that Petitioners had committed a fraud on the Court, instead of analyzing whether that determination was supported by clear and convincing evidence." Petitioners' Brief, pg. 5. Contrary to the petitioners' contention, the Third District applied the correct standard of review in this case.

The Third District's opinion is wholly consistent with the decisions cited by the petitioners, as well as other Florida law. A trial court's dismissal for fraud on the court is subject to a narrowed abuse of discretion standard. *See, e.g., Ramey v. Haverty Furniture Companies, Inc.*, 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008); *Gilbert v. Eckerd Corp. of Florida, Inc.*, 34 So. 3d 773, 775 (Fla. 4th DCA 2010); *Jacob v. Henderson*, 840 So. 2d 1167, 1168 (Fla. 2d DCA 2003); *Arzuman v. Saud*, 843 So. 2d 950, 952 (Fla. 4th DCA 2003) (quoting *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1988)). A trial court does not abuse its discretion in striking a party's pleadings as a sanction for fraud on the court so long as the underlying finding of fraud is supported by clear and convincing evidence. *See, e.g., Ramey*, 993 So. 2d at 1018 (explaining that the narrowed abuse of discretion standard takes

into account the clear and convincing evidence requirement applicable to fraud allegations); *Jacob*, 840 So. 2d at 1168; *Gilbert*, 34 So. 3d at 775-76; *Arzuman*, 843 So. 2d at 952¹; *Kubel v. San Marco Floor Wall, Inc.*, 967 So. 2d 1063, 1064 (Fla. 2d DCA 2007); *Villasenor v. Martinez*, 991 So. 2d 433, 435-36 (Fla. 5th DCA 2008).

The Third District properly applied the narrowed abuse of discretion standard in this case. The trial court conducted an evidentiary hearing during which the court determined that Oceanside and DBKN had presented clear and convincing evidence that the petitioners intended to interfere with the judicial system's ability to impartially adjudicate this matter by improperly influencing the trier of fact and by unfairly hampering the presentation of Oceanside's and DBKN's claims and defenses. The Third District set forth the evidence of the false testimony by Bistricher, Smith, and Fireworker as determined by the trial court, and further concluded that the trial court's findings were supported by the evidence in the record. (Opinion, at 3, 6-7.) In light of the trial court's finding of fraud on the court, which was supported by clear and convincing evidence in the record, the

¹ *Arzuman* cites to a number of cases in which dismissal with prejudice was upheld. The court notes that the common theme in these cases, much like this case, involved claimants "attempting to conceal information by making statements under oath which were revealed to be false when the defendants uncovered the truth." 843 So. 2d at 952.

Third District properly concluded that the trial court did not abuse its discretion in striking the petitioners' pleadings as a sanction for fraud. The Third District's decision is a correct application of, and entirely consistent with, Florida law on this point.

The petitioners also argue that the Third District's decision conflicts with *Villasenor* because the trial court did not take testimony on the issue of whether the petitioners' false testimony was deliberate or the "product of forgetfulness."

Unlike the court in *Villasenor*, the trial court in this case conducted an evidentiary hearing on the petitioners' fraud. At the conclusion of that hearing, the trial court considered, and rejected, the suggestion that the petitioners' false testimony was the result of mere mistake. The trial court found it unreasonable and implausible that Bistricher, Smith, and Fireworker would each have been similarly mistaken in their testimony. The Third District's decision does not conflict with *Villasenor* because, in this case, the trial court conducted an evidentiary hearing and concluded, as a result of that hearing, that the petitioners committed fraud on the court.

The Third District's Decision Does Not Conflict with this Court's Prior
Decision Requiring Consideration of Alternative Sanctions.

Next, the petitioners inaccurately claim that the Third District's decision conflicts with this Court's decision in *Ham v. Dunmire*, 891 So. 2d 492 (Fla.

2004).² The petitioners' argument both mischaracterizes the Third District's decision and misapprehends the Third District's role as an appellate court.

Contrary to the petitioners' claim, and in accord with *Ham*'s mandate, the Third District determined that the trial court considered alternative sanctions to dismissal, but found them to be inadequate. (Opinion, at 8.) The trial court found that striking the petitioners' pleadings was "the only practical alternative to resolve this matter." (Opinion, at 8.) The Third District concluded that, in light of the record evidence, the trial court did not abuse its discretion in imposing the sanction of dismissal. (Opinion, at 3, 10.) Thus, the Third District properly followed Florida law by ensuring that the trial court considered the imposition of lesser sanctions, and by evaluating whether the trial court abused its discretion in rejecting those sanctions in favor of dismissal.

The petitioners' argument seems to suggest that the Third District should have substituted its judgment for that of the trial court in the determination of whether an alternative sanction would have been appropriate. The Third District's role was not to determine *de novo* whether a lesser sanction should have been imposed. Rather, the Third District was to determine if the trial court abused its discretion in imposing the sanction of dismissal. Reviewing courts apply a "reasonableness test" to determine if the trial court abused its discretion. If

² Unlike the *Ham* decision, which addressed only attorney misconduct, the present case involves substantial litigant misconduct.

reasonable people could differ as to the propriety of the sanction, then the sanction is not unreasonable, and the trial court has not abused its discretion. *See Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983). Based on the egregiousness of the petitioners' conduct, the Third District concluded that the trial court's decision fell within the bounds of its discretion. The petitioners may disagree with that conclusion, but they cannot identify any conflict created by the decision.

The Third District's Decision Does Not Conflict with Decisions Precluding Sanctions Against One Party for the Discovery Violations of Another.

Finally, the Third District's decision does not conflict with cases holding that one party cannot be sanctioned for discovery violations committed by another party. In short, the trial court sanctioned the petitioners here for their own conduct, and not anyone else's. Again, although the petitioners may disagree with the trial court's findings, they have done nothing to identify any express and direct conflict.

According to the petitioners, the only discovery order that was violated was directed to third-party defendant Smith. Thus, the petitioners argue, they cannot be subject to sanctions based on that order. The problem with the petitioners' argument is that the trial court disagreed with its underlying factual premises. For example, the court found that Smith was the records custodian for GIRL, and that GIRL was bound by the court's order requiring production of documents. Similarly, Bistricher adopted Smith's production as his own and testified that she had produced all responsive documents on his behalf. The petitioners' argument

also ignores their own repeated misrepresentations to the court that all responsive documents were produced, and the fact that their failure to produce the documents concealed false testimony offered by Bistricher and GIRL's representatives.

In sum, the Third District affirmed the trial court's decision based on the petitioners' own repeated and egregious discovery violations, the false testimony offered by the petitioners, and the cumulative impact these actions had on Oceanside's and DBKN's ability to prepare and present their case. The Third District's decision creates no conflict warranting this Court's exercise of its discretionary jurisdiction.

CONCLUSION

For all the foregoing reasons, this Court should decline to exercise jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this 14th day of July, 2011, to James D. Gassenheimer, Esq. Berger Singerman, 200 South Biscayne Boulevard, Suite 1000, Miami, FL 33131; Deborah Poore Fitzgerald, Esq., Walton, Lantaff, Schroeder & Carson, LLP, Corporate Center, Suite 2000, 110 East Broward Boulevard, Fort Lauderdale, FL 33301; and Maurice J. Baumgarten, Esq., Anania, Bandklayder, Baumgarten & Torricella, Suite 4300, Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131-2144.

Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for respondents, Oceanside Acquisitions, LLC, and DBKN Gulf Incorporated, certifies that this Jurisdictional Brief is typed in 14-point (proportionately spaced) Times New Roman.

Attorney