BURR FORMAN LLP

results matter

Appellate Court Refuses to Vacate Voluntary Dismissal Undertaken With Mistaken Belief Claim Was Time-Barred

Published January 29, 2016

In *Cottrell as Trustee v. Taylor, Bean & Whitaker Mortgage Corp.,*41 Fla. L. Weekly D141f, 2D14-5885 (Fla. 2d DCA Jan. 8, 2016), Florida's Second District Court of Appeal examined the applicability of Rule 1.540(b) to notices of voluntary dismissal undertaken with the mistaken belief the plaintiff's claim was time-barred. In *Cottrell,*fraud was not alleged as the basis to set aside the dismissal. Instead, it was mistake. *See*Fla. R. Civ. P. 1.540(b)(1). The bank alleged that it dismissed its case based on advice of counsel that the claim was time-barred. However, subsequent to the dismissal, the bank learned that the borrower was active duty military, and thus the Service Member Civil Relief Act tolled the running of the statute. Therefore, the bank alleged it had filed the dismissal by mistake and sought to have it vacated. The bank relied on several appellate opinions which had permitted a notice of voluntary dismissal filed by mistake to be vacated. *See e.g. Diaz, Reus & Targ, LLP v. Bird Wingate, LLC II,*66 So. 3d 974,975 (Fla. 3d DCA 2011) (affirming order vacating voluntary dismissal where counsel intended to dismiss "without prejudice"• but paralegal prepared notice that said "with prejudice"•). The trial court agreed and vacated the dismissal. No discussion of Rule 1.540 and voluntary dismissals is complete without first discussing *Pino v. Bank of N.Y.,*121 So. 3d 23, 30-31 (Fla. 2013) where the Florida Supreme Court reaffirmed that Fla. Stat. 1.540(b) can apply (under extremely limited circumstances) to a notice of voluntary dismissal. The *Pino*case, decided in the context of a Rule 1.540(b) motion which alleged fraud on the court, set a very narrow exception to the general rule that a notice of voluntary dismissal terminates the case and divests the trial court of authority to reopen the case. The Court in *Pino*held that where fraud is the basis to set aside the dismissal a trial court set aside a voluntary dismissal and reopen the matter only if the voluntary dismissal was precluding the trial court from unwinding fraudulently obtained affirmative relief. *Id.* Otherwise, the deprivation of jurisdiction worked by the notice of voluntary dismissal precludes reopening the case on fraud grounds. *Id.* With the strong rule in *Pino*as a backdrop, appellate courts in Florida have continued to construe the grounds on which a voluntary dismissal can be set aside very narrowly. The opinion in *Cottrell*is no different. The Second DCA reversed the decision of the trail court to vacate the voluntary dismissal. The Second DCA's opinion analogized the facts of *Cottrell*to

those presented in *Randle-Eastern Ambulance Service, Inc. v. Vasta*, 360 So. 2d 68 (Fla. 1978). In *Randle-Eastern,* the Florida Supreme Court considered a plaintiff's asserted Rule 1.540 motion when she learned, after taking a voluntary dismissal, that she had lost the opportunity to relitigate against the defendant. In that case, the Florida Supreme Court held that relief was not appropriate in such circumstances because it was incumbent on counsel "to ascertain the need for and the consequence of a voluntary dismissal"• before filing the notice and "[i]t has never been the role of the trial courts . . . to relieve attorneys of their tactical mistakes."•*Id*. at 69. The Second DCA found that unlike other cases of pure scrivener's error and clerical mistake, the decision to dismiss undertaken by the bank was a tactical one, albeit a poor one. The Second DCA found that Rule 1.540(b)'s provisions for vacating based on "newly discovered evidence" rather than "mistake" was a better fit. However, the Court recognized that newly discovered evidence must be of the kind that could not have been discovered through the exercise of due diligence, which of course does not include publicly available information regarding a person's status as military personnel. Thus, the case law has created a pretty clear distinction between two types of "mistakes": clerical mistakes and tactical mistakes. A clerical mistake might be described as a blunder undertaken without an affirmative decision to do so. A tactical mistake is a blunder undertaken willingly, which later proves to have been a poor decision. While relief from a voluntary dismissal is likely available under appropriate circumstances for a clerical mistake, the case law seems uniform that tactical mistakes are outside the scope of those for which relief can be granted under Rule 1.540(b). Thus, it should go without saying, be very careful before electing to voluntarily dismiss your action.

Author

Nicholas S. Agnello

Partner

Ft. Lauderdale, FL