

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, LAKELAND, FLORIDA

FRANCIS LANDRY,

Petitioner,

L.T. Case No. 2010-CA-7484

v.

Case No.: 2D13-

U.S. BANK, NATIONAL ASSOCIATION,
AS TRUSTEE,

Respondent.

PETITION FOR WRIT OF PROHIBITION

Petitioner, Francis Landry (“Landry”), by and through her undersigned counsel, petitions this Court for a Writ of Prohibition, precluding the Honorable Frank A. Gomez (“Judge Gomez”) from exercising jurisdiction over Case No. 2010-CA-7484 in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida (“the Case”), or from otherwise proceeding with the Case given the court’s lack of jurisdiction, and as grounds would show:

OVERVIEW AND BASIS FOR JURISDICTION

1. On August 21, 2013, at a duly-noticed hearing upon arguments from both sides, the lower court entered an Order of Dismissal, dismissing the Case without prejudice for lack of prosecution under Rule 1.420(e). Respondent, U.S. Bank, National Association, as Trustee (“US Bank”), did not move for rehearing within 10 days and did not appeal. Instead, on September 27, 2013, US Bank

served a Motion for Reconsideration, arguing the Order of Dismissal was legally erroneous.

2. Proceeding without notice or hearing, Judge Gomez granted the Motion for Reconsideration, vacated the Order of Dismissal, reinstated the Case, and set the Case for trial, to take place on December 10, 2013. Even when Landry presented the lower court with a Motion to Vacate that *ex parte* Order, Judge Gomez denied it without a hearing, keeping the trial on the court's trial calendar.

3. The lower court's lack of subject matter jurisdiction is appropriately challenged via a petition for writ of prohibition. See *Cantera v. District Court of Appeal, Third District*, 555 So. 2d 360 (Fla. 1990); *De Ardila v. Chase Manhattan Mortgage Corp.*, 826 So. 2d 419 (Fla. 3d DCA 2002); *Arleo v. Garcia*, 695 So. 2d 862 (Fla. 4th DCA 1997); *Capital Bank v. Knuck*, 537 So. 2d 697 (Fla. 3d DCA 1989). For the reasons set forth herein, the lower court does not have jurisdiction to proceed with trial. Quite simply, where the Case was dismissed and US Bank did not timely move for rehearing, the lower court lacked jurisdiction to grant rehearing, vacate the Order of Dismissal, or otherwise adjudicate the Case. As such, this Court should exercise its jurisdiction under Fla.R.App.P. 9.030(b)(3) and enter a Writ of Prohibition, ensuring the December 10, 2013 trial does not proceed as scheduled.

FACTS

4. US Bank initiated the lower court proceeding by suing Landry. See Appendix to Petition, 1.

5. There was no record activity, i.e. nothing at all filed, in the ten months before Landry's Notice of Intent to Dismiss filed February 12, 2013 or the 60 days thereafter. Quite simply, nothing at all was filed within this one-year period. See Appendix to Petition, 2 (Notice), 3 (copy of court docket).¹ As a result, Landry filed a Motion to Dismiss for Lack of Prosecution, seeking dismissal without prejudice under Fla.R.Civ.P. 1.420(e). See Appendix to Petition, 4.

6. On August 21, 2013, the lower court conducted a duly-noticed hearing on the Motion to Dismiss. See Appendix to Petition, 5. Given the lack of record activity and the absence of good cause, Judge Gomez entered an Order of Dismissal, dismissing the case without prejudice to US Bank filing a new lawsuit. See Appendix to Petition, 6. The Order was filed with the lower court that same day. See Appendix to Petition, 3.

7. US Bank did not move for rehearing within 10 days and did not appeal. Instead, on September 27, 2013, US Bank served a Motion for Reconsideration. Significantly, this motion did not seek relief under Rule 1.540,

¹ The only document on the docket between 04/03/2012 and 04/23/2103 is the Notice of Intent on 02/12/2013.

nor did it argue any facts (e.g. excusable neglect) which would authorize relief under that Rule. Rather, the motion sought rehearing, arguing the court's Order of Dismissal was legally erroneous. See Appendix to Petition, 7.

8. On October 14, 2013, acting without notice or hearing, Judge Gomez entered an Order granting the Motion for Reconsideration, vacating the Order of Dismissal, and reinstating the Case ("Order Reinstating Case"). See Appendix to Petition, 8. Shortly thereafter, the court set the Case for trial. See Appendix to Petition, 9.

9. Believing the Order Reinstating Case to be unauthorized and in excess of the court's jurisdiction, Landry filed a Motion to Vacate *Ex Parte* Order. See Appendix to Petition, 10. Unfortunately, Judge Gomez denied that motion without a hearing and without explanation. See Appendix to Petition, 11.

10. Landry now files the instant Petition, arguing the lower court lacks jurisdiction to proceed with trial or otherwise adjudicate the Case where the court dismissed the Case and US Bank's Motion for Reconsideration was untimely.

ANALYSIS

11. Several Florida cases have made it clear that an order dismissing a lawsuit without prejudice is a final order, divesting the lower court of jurisdiction. For instance, the First District has explained:

When the trial court dismisses an action without prejudice to amend

the complaint, the order is nonfinal and nonappealable. See e.g. Benton v. Dept. of Corrections, 782 So. 2d 981 (Fla. 1st DCA 2001). When, however, it appears that the trial court intended the plaintiff to pursue his or her claim in a different proceeding, the order is final.

Hollingsworth v. Brown, 788 So. 2d 1078, 1079 n.1 (Fla. 1st DCA 2001); see also Carlton v. Wal-Mart Stores, Inc., 621 So. 2d 451, 452 (Fla. 1st DCA 1993) (“While the dismissal is “without prejudice,” it is clear that it is “without prejudice to file another, separate, action, rather than “without prejudice” to file an amended complaint in the first action.”) (citing cases).

12. Here, the August 21, 2013 Order of Dismissal was plainly a final Order, as it dismissed the case “without prejudice to Plaintiff filing a new lawsuit.” See Appendix to Petition, 6.

13. When US Bank did not move for rehearing within ten days, the lower court lacked jurisdiction to grant the Motion for Reconsideration or to otherwise reconsider its Order of Dismissal. See Fla.R.Civ.P. 1.530; Galvez v. Ramos, 941 So. 2d 475 (Fla. 3d DCA 2006) (lower court was without jurisdiction where motion for rehearing was not served within 10 days); Fuller v. Fuller, 706 So. 2d 57 (Fla. 4th DCA 1998) (same); Kirby v. Speight, 217 So. 2d 871 (Fla. 1st DCA 1969) (same).²

² There are legions of published appellate decisions which dismiss appeals as untimely where the motion for rehearing was untimely and hence did not toll the time to appeal. See e.g. Bader v. Crosby, 902 So. 2d 140 (Fla. 2d DCA 2005).

14. As Galvez, Fuller, and Kirby all explain, the only way the lower court could have had jurisdiction to do anything once the ten-day deadline for rehearing passed was under Rule 1.540. The Motion for Reconsideration, however, was plainly not brought under Rule 1.540. US Bank did not cite Rule 1.540 in its motion, nor did US Bank argue any “excusable neglect” or anything else which could possibly fall within the ambit of Rule 1.540. As a result, the Motion for Reconsideration, served on September 27, 2013 and directed to an Order of Dismissal filed on August 21, 2013 (36 days prior), was plainly untimely. See Galvez, Fuller, and Kirby, supra.

15. Florida is replete with appellate decisions granting prohibition where a lower court purported to grant a rehearing not authorized under Rule 1.530 and in excess of its jurisdiction. See Cantera, 555 So. 2d at 361; Arleo, 695 So. 2d at 862; Knuck, 537 So. 2d at 697. That is precisely how this Court should rule in the case at bar. Quite simply, there was no jurisdiction for the lower court to grant rehearing or vacate the Order of Dismissal where the Motion for Reconsideration was served some 36 days after the Order of Dismissal was filed.³ The lower

³ Whether the court was correct in entering the Order of Dismissal really does not matter at this point. After all, US Bank did not timely seek rehearing or appeal, so even if the Order of Dismissal had been legally erroneous, Rule 1.540 is not an authorized vehicle for relief from an erroneous order. See Curbelo v. Ullman, 571 So. 2d 443 (Fla. 1990) (“Mistakes which result from oversight, neglect, or accident are subject to correction under rule 1.540(b)(1). However, judicial error such as

court's Orders otherwise are in excess of its jurisdiction, and prohibition is appropriate to ensure the court does not go forward with trial on December 10, 2013.

16. "Questions of subject matter jurisdiction are reviewed *de novo*." Stanek-Cousins v. State, 912 So. 2d 43 (Fla. 4th DCA 2005). Applying a *de novo* standard of review, this Court should grant the instant Petition, precluding the lower court from proceeding with the Case given the court's absence of jurisdiction.

'mistaken view of the law' is not one of the circumstances contemplated by the rule.").

That said, the Order of Dismissal was eminently correct. There was no record activity in the ten months before the Notice of Intent or the 60 days after, nor did US Bank show good cause to avoid dismissal. See Chemrock Corp. v. Tampa Elec. Co., 71 So. 3d 786 (Fla. 2011) (setting forth standard for lack of prosecution under Rule 1.420(e)). This was, quite simply, a run-of-the-mill dismissal for lack of prosecution.

Notably, US Bank's only arguments otherwise in its Motion for Reconsideration were to: (i) point to filings which occurred after the pertinent, one-year period, after the Motion to Dismiss for Lack of Prosecution had already been filed; and (ii) argue, without any case citations, it should avoid dismissal based on principles of judicial economy and expense. Of course, both reasons are not a basis to deny a motion to dismiss for lack of prosecution. See Rule 1.420(e) ("shall"); Curtin v. Deluca, 886 So. 2d 298, 300 (Fla. 4th DCA 2004) ("Dismissal is mandatory if it is demonstrated that no action toward prosecution has been taken within a year. The trial judge has no discretion in the enforcement of this aspect of the rule."); Chrysler Leasing Corp. v. Passacantilli, 259 So. 2d 1 (Fla. 1972) (explaining at length why a party cannot avoid dismissal for lack of prosecution by filing papers after the one-year period of inactivity).

CONCLUSION

This Court should issue a Writ of Prohibition, precluding the lower court from proceeding with trial or otherwise adjudicating the Case given its lack of jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Honorable Frank A. Gomez, 800 Twiggs St., Tampa, FL 33607 and via email to Morales Law Group, P.A., aservice@moraleslawgroup.com on this 27th day of November, 2013.

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