

COPY

**IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
SECOND DISTRICT**

FYI Only

BARKER, RODEMS & COOK, P.A.;
a Florida corporation; and **WILLIAM
J. COOK,**

Case No.: 2D07-4530

Appellants/Petitioners,

L.T. No. 05-CA-007205

vs.

NEIL J. GILLESPIE,

**No Action
Necessary**

Appellee/Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

**On Appeal from the Circuit Court of the Thirteenth Judicial Circuit, In and
For Hillsborough County, Florida**

Robert W. Bauer, Esquire
Florida Bar No.: 11058
2815 NW 13th Street
Suite 200E
Gainesville, FL 32609
Telephone: (352) 375-5960
Facsimile: (352) 337-2518
Counsel for Respondent

Oral Argument Requested.

BASIS FOR JURISDICTION

Respondent, Neil J. Gillespie responds to Petitioners' Petition for Writ of Certiorari dated September 26, 2007, requesting that the order of the circuit court granting a Withdrawal of a Notice of Voluntary dismissal. This Court has jurisdiction pursuant to Rule 9.030(b)(2)(A). See Layne Dredging Co. v. Regus, 622 So. 2d 7 (Fla. 2d DCA 1993); Federal Insur. Co. v. Fatolitis, 478 So. 2d 106, 107 (Fla. 2d DCA 1985).

STATEMENT OF FACTS

Respondent, Neil J. Gillespie, retained Petitioners, Barker, Rodems & Cook, P.A., an established law firm, in a judicial action against AMSCOT Corporation. (Appendix p. 2). Through the course of Petitioners' handling of Respondent's claim against AMSCOT, Respondent was in communication with Petitioners regarding settlement negotiations with AMSCOT. Respondent was displeased with the settlement arrangements regarding attorney fees and failure of the petitioner to properly advocate for the Respondent. (Appendix p. 18). Respondent attempted to communicate these concerns with Petitioner, William Cook, and his requests for alternate settlement agreements were not met. (Appendix pp. 21-22). Respondent alleged in his complaint that the Petitioner breached his contract by failing to forward the Respondent's interests and then commit fraud when he misrepresented to the Respondent that the attorney's fees agreed to in the settlement

statement where due to a court award. . (Appendix pp. 1-24). Petitioners filed a counter-complaint for Libel. (Appendix p. 76).

After much litigation the Plaintiff attempted an improper Notice to Voluntary Dismissal pursuant to Florida Rules of Civil Procedure, Rule 1.420(a)(2). Shortly thereafter the Notice of Voluntary Dismissal was withdrawn. (Appendix, 194) The Circuit Court found that the Voluntary Dismissal was ineffective in dismissing the action even if it is treated as a motion to dismiss in that it was withdrawn prior to any order on the dismissal. (Appendix, 215-216)

THE NATURE OF THE RELIEF SOUGHT

The Circuit Court correctly found that Respondent's Notice of Voluntary Dismissal was not effective to dismiss Plaintiff's claims without an order of court, and allowed the Respondent's Withdrawal of Notice of Voluntary Dismissal to stand. Respondent respectfully requests that this Court uphold the Circuit Court's decision, and deny the Petitioners' Petition for Writ of Certiorari.

ARGUMENT AND AUTHORITIES

I. INTRODUCTION

Florida Rules of Civil Procedure, Rule 1.420(a)(2) provides that actions shall not be voluntarily dismissed by plaintiff without a court's order if a

counterclaim is pending. Respondent in this case attempted to dismiss his action under Rule 1.420(a)(2) while Petitioners' counterclaim for Libel was still standing; Respondent withdrew his Motion for Voluntary Dismissal prior to the Circuit Court's entry of an order on the motion. Therefore, the Circuit Court still had jurisdiction to allow the withdrawal of the Motion to Dismiss. Petitioner has argued alternatively that the Respondents withdrawal should have been found to have been entered under Rule 1.250(b). However, that Rule provides for the dismissal of defendants, but not the dismissal of the Plaintiff himself. Since Respondent (Plaintiff in original action) was attempting to withdraw himself from the action, Rule 1.250(b) was also inapplicable, and the Circuit Court maintained jurisdiction.

Furthermore, if the Circuit Court maintained jurisdiction over the counter-claim, then it still maintains subject matter jurisdiction over the original complaint, as it is a complaint arising from the same transaction or occurrence. If this Court dismisses Respondent's complaint, then Petitioners' counter-claim will take the place of the original pleading. See Orix Capital Mkts., LLC v. Park Ave. Assocs., Ltd., 881 So. 2d 646, 651 (Fla. 1st DCA 2004); see also Fred Howland, Inc. v. Gore, 13 So. 2d 303, 307 (Fla. 1942). Thus, Respondent's complaint will become a compulsory counter-claim to Petitioners' complaint. See Fla. R. Civ. P. Rule 1.170(a). As compulsory counter-claims were instituted with the purpose of

maximizing judicial efficiency (see Londono v. Turkey Creek, 609 So. 2d 14, 19 (Fla. 1992)), it makes little sense to dismiss this action now simply to re-hear the case on merits as a counter-claim later.

II. RULE 1.420(a)(2) DOES NOT ALLOW VOLUNTARY DISMISSAL OF A COMPLAINT WHEN A COUNTER-COMPLAINT IS PENDING WITHOUT COURT ORDER.

It is well settled in both the Florida Rules of Civil Procedure and subsequent jurisprudence that if a counter-complaint is pending, voluntary dismissal of an action is disallowed without court order. See Fla. R. Civ. P. Rule 1.420(a)(2); Rogers v. Publix Super Markets, Inc., 575 So. 2d 214, 215-16 (Fla. 5th DCA 1990). Because Respondent explicitly stated that he would allow Petitioners' counter-claim to remain for adjudication, this counter-claim actually served as a bar to the voluntary dismissal of Respondent's complaint. Thus, withdrawal of the voluntary dismissal was proper.

Rule 1.420(a)(2) provides for dismissal of actions if a counter-claim is pending, and states "an action shall not be dismissed at a party's instance *except on order of the court....*" (Fla.R.Civ.P. Rule 1.420(a)(2)) (emphasis added). Only when motions for dismissal are filed in strict compliance with the Rules of Civil Procedure are dismissals effective. See Scott v. Permacrete, Inc., 124 So. 2d 887, 889 (Fla. 1st DCA 1960). The Scott court held that a defendant, who had dismissed under Rule 1.420's predecessor, 1.35, was subject to a default judgment granted to

a counter-plaintiff. Id. at 890. The court reasoned that the dismissal was ineffective in releasing the defendant as a party, and thus, he was still subject to the court's jurisdiction. Id. at 889.

Rule 1.420 replaced Rule 1.35, and in its reformation, lent greater flexibility to the circumstances of voluntary dismissal. Regardless of this flexibility, the one specific instance that Rule 1.420 disallows voluntary dismissal is when a counter-claim is present. Fla.R.Civ.P. Rule 1.420(a)(2). Petitioners cite multiple cases in which Plaintiffs' Motions for Withdrawal of Plaintiff's Notice of Voluntary Dismissal were denied, but in none of those cases were counter-claims present.

The Fifth District Court of Appeal resolved this unsettled area of the law in 1990, when it denied a Plaintiff's Notice of Voluntary Dismissal while a counter-claim was pending. See Rogers v. Publix Super Markets, Inc., 575 So. 2d at 215-16. In that case, Publix attempted to voluntarily dismiss an amended complaint against a sheriff and a robber (Rogers), who had instituted counter-claims against Publix. Id. at 215. The Rogers court held that Publix's amended complaint was still pending for adjudication, despite its attempts to voluntarily dismiss, due to the counter-claims filed by the sheriff and Rogers. Id. The court stated "[b]ecause Rogers and the sheriff had filed counterclaims, Publix could not unilaterally dismiss the complaint without an order from the court." Id. at 215-16. Thus, Publix's complaint remained for adjudication. Id. at 216.

In the case at bar, Petitioners asserted a counter-claim on January 19, 2006. (Appendix pp. 29-39). This counter-claim was pending when Respondent attempted to voluntarily dismiss his claims on February 7, 2007. (Appendix 181). Before the Circuit Court judge entered an order on the dismissal, Respondent, filed a Withdrawal of Plaintiff's Notice of Voluntary Dismissal on February 15, 2007. (Appendix 193-94). Thus, applying the procedures for dismissal of an action proscribed in Rule 1.420, the complaint could not be dismissed *at the plaintiff's instance* because there was a counter-claim pending. Respondent withdrew his request for an order on dismissal before any such order was granted by the court; the only way proscribed by Rule 1.420 for his action to have been dismissed. Thus, the Circuit Court retained jurisdiction over the claim to grant the withdrawal of the voluntarily dismissal.

III. RULE 1.250(b) DOES NOT ALLOW DISMISSAL OF PLAINTIFF AS PARTY TO AN ACTION

In the alternative, the Petitioner argues that this Court should find that Respondent's Notice of Voluntary Dismissal was filed under Rule 1.250(b), the lower court's decision should be upheld because Rule 1.250(b) does not allow a party to dismiss itself from an action. If the Motion was treated as a Motion for dropping a party it is not clear who that party could be because you may only drop an adverse party. Because Respondent's Notice of Voluntary Dismissal did not particularly address who Respondent was dismissing as a party from the action

under Rule 1.250(b), this Court must make that determination. If this Court determines that the parties dismissed were the Petitioners, then 1.250(b) was the incorrect rule to apply, as there must remain at least one defendant when parties are dismissed from actions. See Biggers v. Town of Davie, 674 So. 2d 938, 939 (Fla. 4th DCA 1996).

Rule 1.250(b) states, “[p]arties may be dropped by an adverse party....” Fla.R.Civ.P. Rule 1.250(b). Without dispute, this provides that a party must be dismissed by another party on the opposing side of the dispute. If a party was allowed to dismiss himself, then it would be very simple for defendants to remove themselves from litigation. Furthermore, the adverse party requirement provides that a plaintiff cannot dismiss himself. Thus, Respondent would have been unable to dismiss himself under Rule 1.250(b), and the withdrawal of that notice of dismissal was proper in order to rectify a procedural error.

If this Court determines that Respondent’s Notice of Voluntary Dismissal meant to dismiss the defendants, this Court should still find that it was incorrectly applied. Petitioners set forth the argument that because Rule 1.250(b) refers only to Rule 1.420(a)(1) and not 1.420(a)(2), the drafters of the Rules intended to allow plaintiffs to drop a defendant from actions when counterclaims remain. Regardless of the intent of the drafters, this argument is inapplicable to the case at bar. Respondent’s informally, pro se drafted Notice of Voluntary Dismissal intended to

drop *all* defendants as parties, which, as explained above, is disallowed. If a plaintiff intends to drop all parties, the appropriate vehicle in the Rules is Rule 1.420.

Similarly, Petitioners' argument that all defendants may be dropped using Rule 1.250(b) is fallacious. Petitioners cite the dicta of Nat'l Bank of Commerce v. Jupiter Mortgage Ass'n, in which the court stated that Rule 1.250(b) was appropriate in cases in which the plaintiff wished to drop only one of several defendants, but if the plaintiff wished to drop all of the claims against all parties, 1.420(a) is the appropriate rule. Petitioners go on to conclude that because the Nat'l Bank of Commerce court did not address the situation in which a plaintiff wishes to dismiss his claims without a court order, but cannot under Rule 1.420(a)(1), the appropriate vehicle in which plaintiff might be able to do so is Rule 1.250(b). Petitioners ignore that this is not the stated purpose or within the judicially interpreted scope of Rule 1.250(b), and that, in fact, if a plaintiff wishes to voluntarily dismiss his claims against defendants, but cannot under Rule 1.420(a)(1), it is impossible to voluntarily dismiss without court order, as described in Rule 1.420(a)(2).

Thus, because Rule 1.250(b) does not allow plaintiffs to dismiss either themselves or all of the defendants in an action, Respondent's Notice to Voluntarily Dismiss, if interpreted to have been filed under Rule 1.250(b), was

filed incorrectly and without regard to the rules of procedure. The Withdrawal of the Notice to Voluntarily Dismiss was the appropriate step in rectifying this mistake, and the Circuit Court did not lose jurisdiction because of an improperly drafted motion. The Circuit Court retained jurisdiction sufficient to grant the withdrawal, and to further hear the case.

IV. BY MAINTAINING JURISDICTION OVER THE COUNTER-CLAIM, THE CIRCUIT COURT MAINTAINS JURISDICTION OVER THE ORIGINAL COMPLAINT.

Petitioners assert that Respondent's Notice of Voluntary Dismissal deprived the Circuit Court of jurisdiction, and thus, the Circuit Court's granting of the Withdrawal of Notice of Voluntary Dismissal to Respondent was extra-judicial. Petitioners cite Randle-Eastern Ambulance Service, Inc. v. Vasta, which set forth the maxim that a plaintiff's voluntary dismissal of a case divests the trial court of jurisdiction to grant a withdrawal of that dismissal. See Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So. 2d 68, 69 (Fla. 1978).

Randle-Eastern is distinguishable from the case at bar, as the defendant did not have a counter-claim pending. Petitioners in the case at bar have a counter-claim pending, which allows the court to retain both personal and subject matter jurisdiction over the dispute and the parties. Generally, jurisdiction is a matter of totality: if jurisdiction exists over one part of an action, then it exists over the whole action, and conversely, if the court lacks jurisdiction over one portion, then

it lacks jurisdiction over the remainder. If the Circuit Court lacks the jurisdiction to grant Respondent's Withdrawal of Notice of Voluntary Dismissal, then it follows that the Circuit Court would also lose jurisdiction to hear the pending counter-claim. Since it is known that the Circuit Court retains the jurisdiction over the counter-claim (see Orix Capital Mkts., LLC v. Park Ave. Assocs., Ltd., 881 So. 2d at 651 (holding that when a complaint is dismissed, the counter-claim takes the place of the original pleading)), the Circuit Court also retains jurisdiction over Respondent's complaint.

Even if Petitioners' assertions regarding the loss of jurisdiction are true, the court will still hear Respondent's claims of Breach of Contract and Fraud, since they will arise as compulsory counter-claims to Petitioners' complaint of Libel. When a complaint with a pending counter-claim is dismissed, the counter-claim effectively takes the place of the original pleading. See id. Thus, Petitioners will become the plaintiffs to the new action, and Respondent will become the defendant. As the defendant, Respondent will be entitled to raise compulsory counter-claims as defined in Rule 1.170(a). According to Rule 1.170(a), compulsory counter-claims arise from the same transaction or occurrence as the original complaint. Fla.R.Civ.P. Rule 1.170(a). Since Respondent's claims for Breach of Contract and Fraud arose from the services rendered to Respondent by Petitioners' during the AMSCOT litigation, and Petitioners' claim of Libel arises

from Respondent's correspondence with AMSCOT representatives regarding that representation, Respondent's claims satisfy the requirements set forth by Rule 1.170(a).

The Florida Supreme Court adopted the federal "logical relationship test" in order to determine if claims satisfy the "same transaction or occurrence" requirement of compulsory counterclaims. See Londono v. Turkey Creek, Inc., 609 So. 2d at 20. The Londono court held:

[A] claim has a logical relationship to the original claim if it *arises* out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.

Id. (emphasis in original)(citation omitted). The instant case falls under the first category of aggregate of operative facts. Since one of the primary justifications for compulsory counter-claims is to maximize judicial expediency and efficiency by adjudicating claims simultaneously (id. at 19), it makes little sense to deny Respondent's complaint now, and for the Circuit Court to address the myriad pre-trial motions and adjudicatory hearings that will have to be repeated, with Respondent serving as Defendant. Thus, this Court should find that the Circuit Court did not lose jurisdiction over Respondent's Withdrawal of Plaintiff's Notice of Voluntary Dismissal, and should uphold the Circuit Court's decision.

V. CONCLUSION

Respondent commenced this action against his former attorneys after he felt that they breached their contractual and fiduciary duties, and that they misrepresented settlement offers and negotiations. After lengthy court proceedings the Plaintiff attempted to dismiss his action under 1.420(a)(2). However, the Petitioner continued to forward their counter-claim. After Respondent realized that he filed an improper motion he properly withdrew the voluntary dismissal prior to a court order.

Because Petitioners' counter-claim was pending, under Rule 1.420(a)(2), Respondent's action could not be dismissed without court order. Because no court order had been issued on Respondent's Notice, the Circuit Court still had jurisdiction over the matter, and was within the power of its judicial scope to grant Respondent's Withdrawal of Plaintiff's Notice of Voluntary Dismissal.

Even applying Rule 1.250(b), it is evident that the Circuit Court was acting within its limits in granting the Withdrawal. Because parties must be dismissed by adverse parties, Respondent could not have dismissed himself from the action. Additionally, because there must remain at least one defendant under Rule 1.250(b), Respondent could not have dismissed both Petitioners. Because he did not indicate which defendant he would have left to pursue his action against, it may be inferred that he meant to dismiss both parties; an action that is disallowed. The

Circuit Court would have been left no choice but to deny such an action, and would have retained jurisdiction.

Regardless of which rule is found to be applicable, it is inevitable that Respondent's claims will be heard in conjunction with Petitioners' claim of Libel. If Respondent's claims are dismissed by this Court, then they will be re-instated as compulsory counter-claims, but will have cost the judicial system and all parties involved a great deal more in time and resources. It makes little sense to waste resources, and to promote judicial inefficiency in this manner.

Thus, Respondent respectfully requests that this Court uphold the Circuit Court's granting of Respondent's Withdrawal of Plaintiff's Notice to Dismiss, and find that the Circuit Court did, in fact, retain jurisdiction over the action.


Respectfully submitted this 13th day of November, 2007.



Robert W. Bauer, Esq.
Florida Bar No.: 11058
2815 NW 13th St.
Suite 200E
Gainesville, FL 32609
Telephone: (352) 375-5960
Facsimile: (352) 337-2518
Counsel for Respondent-Appellee

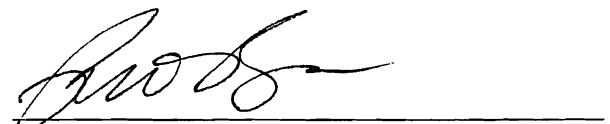
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail and electronic mail to Ryan C. Rodems, Esq., 400 N. Ashley Drive, Suite 2100, Tampa, Florida, 33602, rodems@barkerrodemsandcook.com this 13 day of November, 2007.


Robert W. Bauer, Esquire

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the font of this brief is Times New Roman 14-point.


Robert W. Bauer, Esquire