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

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

Appellants/Petitioners,

vs.

NEIL J. GILLESPIE

Appellee/Respondent.

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Case No.: 2D07-4530

L.T. No. 05-CA-007205

PETITIONERS' REPLY

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

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I. RESPONDENT ADMITS HE INTENDED TO DISMISS HIS CLAIMS AND DROP PETITIONERS AS PARTIES

Respondent admits that "[a]fter much litigation," he decided to dismiss his claims against Petitioners. "Respondent's informally, pro se drafted Notice of Voluntary Dismissal intended to drop *all* defendants as parties . . .." Response to Petitioner for Writ of Certiorari at 3, 8-9 (emphasis in original). After doing so, Respondent apparently felt he made a tactical error. Thus, he attempted to withdraw his dismissal, which the circuit court permitted, leading to this petition for writ of certiorari.

Respondent dropped his claims against both Petitioners, which was Respondent's right under Rule 1.250(b).[1] In his Response, Respondent acknowledges Petitioners' clear argument that Respondent's dismissal was

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[1] Respondent argues that Respondent could not dismiss the action under Rule 1.420(a)(2) because Petitioners filed a counterclaim, citing *Rogers v. Publix Super Markets, Inc.*, 575 So. 2d 214, 215-16 (Fla. 5th DCA 1990). Response at 5-6. This is not disputed. The *Rogers* Court, however, did not address whether Rule 1.250(b) could be used to drop claims when a counterclaim is pending. The reason Rule 1.420(a)(2) prohibits dismissals of the entire action without court approval is to protect the counterclaimant, not the plaintiff. "The obvious intent of Florida Rule of Civil Procedure 1.420(a)(2) . . . is to prevent a plaintiff from unilaterally terminating litigation when his defendant countersues." *Federal Ins. Co. v. Fatolitis*, 478 So. 2d 106, 109 (Fla. 2d DCA 1985). Because a counterclaimant's right to adjudication is not affected when the counterdefendant drops his claims or parties from the action under Rule 1.250(b), court approval is not necessary.

effective under Rule 1.250(b), but then concocts a bizarre argument that Respondent was actually dismissing "himself," and that Rule 1.250(b) would not permit him to do so. Response at 4, 7-10. Respondent's argument that "Rule 1.250(b) does not allow a party to dismiss itself from an action," Response at 7, borders on absurdity. Rule 1.250(b) allows a party to drop claims against other parties and that is clearly what Respondent did. Respondent wanted to drop his claims against Petitioners quickly and without the delay of seeking court approval. Apparently, he feared another adverse ruling or sanctions.[2]

Respondent also claims his notice of dismissal does not adequately state who is being dropped: "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." Response at 7-8. This assertion is frivolous. Respondent's notice of dismissal made clear he wished to drop his claims against Petitioners: "YOU ARE NOTIFIED that

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[2] At the time Respondent dismissed his claims against Petitioners, the circuit court had already awarded attorneys' fees against Respondent for discovery violations. A motion for sanctions under section 57.105, Florida Statutes was also pending against Respondent. Rules 1.250(b) and 1.420(a)(1) "endow[s] a plaintiff with unilateral authority to block action favorable to a defendant which a trial judge might be disposed to approve. The effect is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of 'jurisdiction'." *Randle-Eastern Ambulance Service v. Vasta*, 360 So. 2d 68, 69 (Fla. 1978).

plaintiff pro se dismisses this action without prejudice pursuant to Rule 1.420(a). Defendants' counterclaim can remain for adjudication." Appendix, 181.

II. RESPONDENT'S CLAIM OF A RIGHT TO PLEAD A "COUNTER-COUNTER COMPLAINT" IS WRONG AND IMMATERIAL TO THE ISSUES PENDING

Arguing "judicial expediency and efficiency," Respondent argues that even if the Court reverses the circuit court's order reviving the dismissed claims, the Respondent is still entitled to file what he referred to below as a "counter-counter complaint,"[3] and therefore "this Court should find that the Circuit Court did not

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[3] Below, Respondent argued that if the withdrawal of the dismissal was not permitted, then he should be allowed leave to amend his answer to the counterclaims and plead what Respondent termed a "confusingly titled Counter-Counter Complaint." Appendix, 197. Disguised in his Response as a "compulsory counterclaim," Respondent revives the so-called "counter-counter complaint" argument. Response at 11. There is no such thing. Rule 1.100(a) states:

> There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned as a third-party defendant; and a third-party answer if a third-party complaint is served. If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed.

Fla. R. Civ. P. 1.100(a). There is no "counter-counter complaint." Rule 1.100(a)could not be any more plain.

lose jurisdiction . . .." Response at 12.

Respondent's suggestion conflicts with due process. "Our rules prevent several filings and dismissals against a defendant for the same claim, and they provide authority for defendants to recoup their court costs when a voluntary dismissal has been taken. There is no recompense, however, for a defendant's inconvenience, his attorney's fees, or the instability to his daily affairs which are caused by a plaintiff's self-aborted lawsuit. Nor is there any recompense for the cost and inconvenience to the general public through the plaintiff's precipitous or improvident use of judicial resources." *Randle-Eastern Ambulance Service*, 360 So. 2d 68, 69 (Fla. 1978).

"Once a plaintiff announces it is taking a voluntary dismissal as against one of more than one defendants, the trial court is divested of in personam jurisdiction over the dropped defendant. . . . However, the plaintiff may refile the action against the voluntarily dismissed party, if not otherwise time barred, and regain in personam jurisdiction over that once dropped party by service of process." *Biggers v. Town of Davie*, 674 So. 2d 938, 939 (Fla. 4th DCA 1996).

If Respondent wishes to pursue the claims he dismissed, then he must file a new action, pay Petitioners' costs, pay a new filing fee and establish that his claims are not time barred. *Id.* In *Biggers*, the plaintiffs sued several defendants,

including "Five Star." *Id.* Then, believing Five Star was not liable, plaintiffs dismissed Five Star. Months later, plaintiffs changed their mind, and believed once again that Five Star had liability. *Id.* Unlike here, the plaintiffs in *Bigger* did not try to withdraw the dismissal; instead, the plaintiffs "sought leave to amend the complaint to add Five Star as a party, which leave was granted by the trial court," serving Five Star with process of the amended complaint, "within the statutory limitations period prior to being rejoined." *Id.*[4]

III. CONCLUSION

Respondent filed claims, dismissed them, thought better of it, and sought to revive the claims. Departing from the essential requirements of law, the circuit court allowed Respondent to revive them. However, once the claims were dismissed, the circuit court lost jurisdiction over those claims. The fact that a counterclaim was pending when Respondent chose to dismiss his claims against Petitioners does not limit or prohibit dropping claims or parties under Rule

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[4] The plaintiffs in *Bigger* had the option to move for leave to amend their complaint because even with the dismissal of Five Star, the plaintiffs had claims against other defendants. Here, once Respondent dropped Petitioners, he had no claims. Because Rule 1.100(a) does not allow a "counter-counter complaint," Respondent's only option was to file a new action. Although Respondent bemoans that this would be inefficient, Response at 12, due process and adherence to the Florida Rules of Civil Procedure mandate it, and it is a bed of Respondent's making.

1.250(b). That Respondent cited the wrong rule does not alter his intent or void his action. The circuit court erred in allowing the revival of dismissed claims, and the order approving the revival of the dismissed claims should be reversed.

Respectfully submitted this 20th day of November, 2007.

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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 and electronic mail to Robert W. Bauer, Esquire, 2815 N.W. 13th Street, Suite 200E, Gainesville, Florida 32609, rwb@bauerlegal.com, this 20th day of November, 2007.

Ryan Christopher Rodems, Esquire

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

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

Ryan Christopher Rodems, Esquire