IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

IN RE: ESTATE OF SEYMOUR BAUM
Deceased.

PROBATE DIVISION

ANNEEN NINA GLORIA BAUM,

Petitioner/Plaintiff,

v.

DAVID A. BAUM, *et al*.,

Respondents/Defendants.

Chief Judge John M. Harris

Case #: 05-2012-CP-048323
Case #: 05-2013-CP-028863

PETITIONER/PLAINTIFF ANNEEN NINA GLORIA BAUM'S AFFIDAVIT CLARIFYING, SUPPLEMENTING, & FURTHER SUPPORTING HER AMENDED MOTION FOR RELIEF FROM COURT ORDERS, INCLUDING FOR PURPOSES OF SUMMARY DETERMINATION THEREOF

I, Anneen Nina Gloria Baum, being duly sworn, deposes and says:

1. I am the petitioner/plaintiff herein, presently without counsel.[1] I submit this affidavit to clarify, supplement, and further support the August 13, 2014 motion

[1] The Court relieved my counsel, Hoffman & Hoffman, P.A., after a September 23, 2014 hearing on its motion to withdraw, over my objection. As that hearing has not been transcribed, the Hoffman firm's proposed order which the Court signed on September 30, 2014 is annexed (Exhibit A-1), as is my own proposed order (Exhibit A-2), which I submitted to the Court on September 24, 2014, containing, as its paragraphs 1 and 2, the following:

> "1. The Law Offices of Hoffman and Hoffman, P.A. and Becker & Poliakoff, P.A. are hereby permitted to withdraw as counsel for the Petitioner [Plaintiff], Anneen Nina Gloria Baum, effective from the date of this Order, after Wayne Alder, Esq., of the latter firm, represented that they were either securing or in discussion with successor counsel for Petitioner [Plaintiff].
>
> 2. Notwithstanding Petitioner's [Plaintiff's] evidentiary hearing on her amended motion to vacate this Court's April 2,

made by my former counsel, Hoffman and Hoffman, P.A., pursuant to Florida Rule of Civil Procedure 1.540(b), which it entitled "Amended Motion for Relief from Court Orders Due to Respondent's Misrepresentation and Misconduct" [hereinafter "Amended Vacatur Motion"]. In so doing, I am aided by the same independent reviewer of the record whose discoveries, embodied in a "Procedural History"[2], led the Hoffman firm to amend its original May 1, 2014 "Motion for Relief from Court Orders Due to Respondent's Misrepresentation and Misconduct" [hereinafter "Vacatur Motion"].

2. Although I do not waive the evidentiary hearing to which my Amended Vacatur Motion entitles me by reason of its *prima facie* showing of Mr. Hennessey's misrepresentation and misconduct, if not fraud, the record on this motion suffices for the Court's granting of the requested vacatur relief, summarily, *as a matter of law*. As hereinafter shown, Mr. Hennessey willfully led the Court into reversible error, both substantively and procedurally.

3. For the convenience of the Court, a Table of Contents follows:

> 2014 orders dropping parties based on fraud, misrepresentation, and other misconduct of Mr. Hennessey and his client is scheduled for October 21, 2014, her request that Hoffman and Hoffman, P.A. and Becker & Poliakoff, P.A. not be permitted to withdraw until successor counsel is in place and has secured turnover of files and information pertinent to the hearing, such as service of subpoenas for testimony of witnesses and for documents, is denied."

[2] The full title of the "Procedural History" is "Procedural History of William Hennessey's Fraudulent and Materially False and Misleading Orders, Signed by the Trial Court". It is Exhibit 1 to my September 8, 2014 affidavit to the Fifth District Court of Appeal, which is Exhibit I hereto.

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Clarification of the Amended Vacatur Motion as Pursuant to Fla. R. Civ. P. 1.540(b)(3) and Based on Mr. Hennessey's "Fraud", in Addition to his "Misrepresentation and Misconduct"

4. The subdivision of Fla. R. Civ. P. 1.540(b) applicable to vacatur for "misrepresentation and misconduct" of an adverse party is (b)(3). It reads:

> "b. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> …
>
> The motion shall be made within a reasonable time, and…not more than 1 year after the judgment, decree, order, or proceeding as entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court."

5. Consequently, the August 13, 2014 Amended Vacatur Motion should be clarified as pursuant to Fla. R. Civ. P. 1.540(b)(3) – much as the Hoffman firm's original May 1, 2014 Vacatur Motion had identified that it was pursuant to Fla. R. Civ. P. 1.540(b)(3) (Exhibit B, at ¶4 and title heading at p. 2). The importance of this clarification may be seen from Mr. Hennessey's May 2, 2014 response to the original Vacatur Motion (Exhibit C). Notwithstanding the original Vacatur Motion was <u>expressly</u>

based on "Respondent's Misrepresentation and Misconduct" and expressly pursuant to Fla. R. Civ. P. 1.540(b)(3), Mr. Hennessey concealed both. Instead, he deceitfully pretended that the Vacatur Motion was based on "newly discovered evidence" – in other words, Fla. R. Civ. P. 1.540(b)(2) – which it was not. The Hoffman firm replied to this deceit by a May 5, 2014 motion to strike Mr. Hennessey's response as "a further misrepresentation to this Court" (Exhibit D), calendaring this, on July 25, 2014, for an August 28, 2014 evidentiary hearing, simultaneous with an evidentiary hearing on the May 1, 2014 Vacatur Motion (Exhibit E-1).

6. Additionally, the Amended Vacatur Motion must be clarified as based not only on "misrepresentation and misconduct", which are the second two grounds of Fla. R. Civ. P. 1.540(b)(3), but on the first ground, "fraud"[3]. Such is consistent with its allegations which speak of: "actual knowledge" (¶4, underlining added); "blatant misrepresentations to the Court" (¶6); "intentionally omitted" (¶8, underlining added); "***blatant misrepresentation*** of the Court's findings" (¶11, bold & italics in the original); "intentional omissions" (¶13, underlining added); and "***blatantly false***" (¶17, bold & italics in the original).

7. Indeed, demonstrated by the Amended Vacatur Motion and reinforced by the "Procedural History" on which it is based, is "fraud on the court" as that term is defined:

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[3] It is the "well-settled law of Florida that '[a] pleading will be considered what it is in substance, even though mislabelled.' *Sodikoff v. Allen Parker Co., 202 So. 2d 4, 6 (Fla. 3d DCA 1967), cert. denied, 210 So. 2d 226 (Fla. 1968). Accord Balboa Ins. Co. v. W. G. Mills, Inc., 403 So. 2d 1149, 1150-1151 (Fla. 2d DCA 1981) (*citing *Sodikoff).* Thus, 'the character of a motion will depend upon its grounds or contents, and not on its title.' *Jones v. Denmark, 259 So. 2d 198, 200 n.1 (Fla. 3d DCA 1972). Accord Concept, L. C. v. Gesten, 662 So. 2d 970, 973 n.3 (Fla. 4th DCA 1995)* ('Courts now sanction less preciseness in the labeling of motions, looking more to their substance.')…", *In Re: Estate of Willis v. Gaffney*, 677 So. 2d 949, 951 (Fla. 2d DCA 1996).

> "[The] prevention of an unsuccessful party [from] presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from the court…", *DeClaire v. Yohanan*, 453 So. 2d 375, 377 (Fla. Supreme Court 1984), quoted in *Dean v. Bentley*, 848 So. 2d 487, 489 (Fla. 5th DCA 2003);
>
> "Fraud on the court occurs where 'it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.' *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998)", *Robinson v. Weiland*, 988 So. 2d 1110, 1112 (Fla. 5th DCA 2008).

8. Thus the Amended Vacatur Motion chronicles:

(a) that at the Court's November 12, 2013 case management conference, Mr. Hennessey, as attorney for the personal representative, David Baum, knowingly misrepresented the law as to service of pleadings in probate proceedings and purported, in his October 15, 2013 dismissal motion, that his client had not been served "[a]s a result of Nina's delay", concealing that my former attorney, Kenneth Manney, Esq., had repeatedly endeavored, through a process server, to effect service, which his client actively evaded and that he himself was not accepting service (Amended Vacatur Motion: ¶¶3, 6-8, 13);

(b) that Mr. Hennessey wrote orders for the Court to sign – which, on November 15, 2013, the Court did sign – brazenly misrepresenting its oral rulings at the November 12, 2013 case management conference so as to transform the Court's flexible target date for service into an inflexible deadline that would result in unserved parties being dropped (Amended Vacatur Motion: ¶¶4, 5, 9-12);

(c) that at the Court's December 17, 2013 hearing, Mr. Hennessey affirmatively misrepresented what the Court had orally ruled on November 12, 2013 and that its November 15, 2013 "Order[s] Compelling Service" were consistent with that oral ruling (Amended Vacatur Motion: ¶¶16-17);

(d) that at the Court's March 18, 2014 hearing, Mr. Hennessey falsely asserted that "Nina Baum, because of all the – the uncooperative (sic) with her lawyers, this case was never served" and that David Baum was "not ducking or dodging service" and that he himself, as resident agent, "ha[d] to accept service" (Amended Vacatur Motion: ¶¶8, 18-24).

9. There is no prejudice to Mr. Hennessey by this two-fold clarification that the Amended Vacatur Motion is pursuant to Fla. R. Civ. P. 1.540(b)(3) and seeks relief based on "fraud" in addition to "misrepresentation and misconduct". Each is implicit in the Amended Vacatur Motion.

Supplementing and Further Substantiating the Amended Vacatur Motion by my September 8, 2014 Affidavit to the Fifth District Court of Appeal, Including by its Three Exhibits

10. On August 13, 2014, the same day as the Hoffman firm filed and served its Amended Vacatur Motion, it filed and served a motion to the Fifth District Court of Appeal for it to relinquish jurisdiction to allow this Court to determine the Amended Vacatur Motion (Exhibit E-2)[4]

11. The Fifth District Court of Appeal granted the motion by an August 22, 2014 Order (Exhibit E-3), following which Mr. Hennessey made an August 25, 2014 motion (Exhibit H) for it to reconsider and withdraw the Order. In so doing, he concealed virtually ALL the allegations of the Amended Vacatur Motion and ALL its allegations pertaining to his fraud, and falsely made it appear that the Amended Vacatur Motion was identical to the original Vacatur Motion, which it is not.

[4] The following day, August 14, 2014, Mr. Hennessey filed with this Court a "Motion to Strike Notice of Hearing for August 28, 2014" (Exhibit F-1), identifying only the original Vacatur Motion, not the Amended Vacatur Motion, and annexing, as its sole exhibit, his response to the original Motion (Exhibit C) – the same as was the subject of the Hoffman firm's motion to strike as "a further misrepresentation to this Court" (Exhibit D). Accompanying Mr. Hennessey's motion was a proposed order granting his motion, which the Court signed, the next day (Exhibit F-2), without affording the Hoffman firm notice and opportunity to be heard. As a consequence, the Court did not have the benefit of a presentation of the deceits in his motion and proposed order. Suffice to note Mr. Hennessey's motion included the claim (Exhibit F-1, ¶11) that because of an e-mail glitch at his office, he did not know of the August 28, 2014 evidentiary hearing until August 13, 2014, upon receiving my counsel's August 13, 2014 motion to the Fifth District Court of Appeal for its relinquishment of jurisdiction (Exhibit E-2). If so, this would mean Mr. Hennessey did not fully read the Hoffman firm's August 4, 2014 mediation memo, which it sent him in connection with the following day's mediation/settlement conference, expressly identifying the August 28, 2014 evidentiary hearing date (Exhibit G, p. 10).

12. This and the mountain of other deceits pervading Mr. Hennessey's August 25, 2014 motion (Exhibit H) were comprehensively demonstrated by the September 8, 2014 opposing affidavit that I filed with the Fifth District Court of Appeal on September 9, 2014 (Exhibit I).

13. I expressly incorporate herein by reference my September 8, 2014 affidavit to the Fifth District Court of Appeal (Exhibit I) as a supplement to my Amended Vacatur Motion and, specifically, its three exhibits, as they are dispositive of my entitlement to vacatur, *as a matter of law*. These three exhibits are:

Exhibit 1: the "Procedural History" that gave rise to the Amended Vacatur Motion;

Exhibit 2: a chain of e-mails between myself and my first attorneys, Kenneth Manney, Esq. and Patrick Roche, Esq.

Exhibit 3: a chain of e-mails between myself and Mr. Guralnick, Esq., purportedly representing me.

14. My September 8, 2014 affidavit describes its Exhibit 1 "Procedural History" as "chronicling Mr. Hennessey's fraud on the trial court" (Exhibit I, ¶25), stating:

> "The 'Procedural History' (Exhibit #1) shows how Mr. Hennessey manipulated the lower court – misrepresenting the law as to service, the facts about the status of the case and my conduct herein, and furnishing the trial court with orders that were materially false, both as to facts and law. Again and again, Mr. Hennessey inflamed and prejudiced the trial court with assertions, innuendos, and aspersions that I had been 'uncooperative' and 'uncommunicative' with my attorneys and had masterminded a 'game plan' of delay – for which he had NO evidence. The result was the trial court's April 2, 2014 orders (Exhibits C-1, C-2) – with its handwritten addition that it had 'previously noted' my 'dilatory and stall tactics', when the record shows NOTHING of the sort." (Exhibit I, ¶27, capitalization in the original).

15. The "Procedural History" (Exhibit 1) is a "bill of particulars" to the Amended Vacatur Motion and its accuracy is uncontested by the Hoffman firm, to whom I furnished prior drafts so that its attorneys could flag any errors and misstatements. The extent of their corrections was as to a single aspect, which was thereupon modified. Based thereon and what I now know from my own examination of the record and applicable law, I am confident in attesting to its truth and accuracy.

16. As identified throughout the "Procedural History" (Exhibit 1, pp. 4, 5, 7, 8, 22, 27), Mr. Hennessey had NO evidence to support his false claim to the Court that I, not my attorneys, was responsible for the failure to effect service of the pleadings in my two cases. That is why, to support his baseless accusations, he flooded the Court with prejudicial and inflammatory materials about me, having nothing to do with my conduct in my cases before the Court.

17. Mr. Hennessey's pretense that I was responsible for the failure to serve was a material fraud upon this Court without which he could not have procured dismissal of my will contest, as failure to serve is, for all intents and purposes, not grounds for dismissal, unless the client is culpable for what is an attorney responsibility. The caselaw on the subject is black-letter – and includes *Pixton v. Scottsman*, 924 So. 2d 37 (5th DCA 2006) (Exhibit K-2), and *Kozel v. Ostendorf*, 629 So. 2d 817 (1993) (Exhibit K-3), cited and quoted in the "Procedural History" (Exhibit 1, pp. 24-25, 27-28). Mr. Hennessey's knowledge of these two cases is reflected by his inclusion of them in the binder he handed up to the Court in advance of the March 18, 2014 hearing on his motions to drop parties (Exhibit K-1). Even still, this did not prevent him from misrepresenting *Pixton* to the Court at the March 18, 2014 hearing (Exhibit K-4). *Pixton* does not

"ultimately…say" that where good cause and excusable neglect are not shown for failure to serve or where there is noncompliance with orders and rules, a court can blithely dismiss the case (Exhibit K-4, pp. 22-23). Rather it says – and the holding is set forth prominently at the outset of the decision in Mr. Hennessey's binder:

> "that trial court was required, in determining whether dismissal was warranted, to conduct evidentiary hearing and to consider factors set forth in *Kozel v. Ostendorf*, including whether plaintiffs were involved or complicit in attorney's conduct in misrepresenting to trial court the basis for requested extension of time for service process." (Exhibit K-2, at p. 1).

In the concluding words of the *Pixton* decision:

> "an evidentiary hearing is mandated to determine the clients' involvement or complicity in the attorney's conduct. *See, e.g., Schlitt v. Currier*, 763 So. 2d 491 (Fla. 4th DCA 2000). Lacking such involvement or complicity by the client, the attorney's misconduct should not result in a dismissal of the action. *E.g., Rose v. Fiedler*, 855 So. 2d 122 (Fla. 4th DCA 2003). Indeed, this court has held that '[b]ecause dismissal is the ultimate sanction, it should be reserved for those aggravated cases in which a lesser sanction would fail to achieve a just result.' *American Express Co. v. Hickey*, 869 So. 2d 694, 695 (Fla. 5th DCA 2004). Further, 'it is essential that attorneys adhere to filing deadlines and procedural requirements, sanctions other than dismissal are appropriate in those situations when the attorney, and not the client, is responsible for the error.' *Id.* at 695. Accordingly, we reverse and remand to the trial court for purposes of reconsideration under *Kozel*." (Exhibit K-2, at p. 3).

18. Exhibits 2 and 3 to my September 8, 2014 affidavit (Exhibit I) – the e-mail chains to my attorneys – are the documentary proof of my constant efforts and entreaties to counsel to effect service and to expeditiously advance my will contest. They are summarized by my September 8, 2014 affidavit as follows:

> "29. My e-mails with Mr. Manney [] establish my constant requests to him for status updates, including as to service. These include the following:
>
> - <u>My July 13, 2013 e-mail</u>: "Please advise asap…that you served the amended petition – as we agreed you were

to serve the petition immediately and not delay or wait at all or use any cushion time …"

- My July 17, 2013 e-mail: "i have ny (sic) gotten a response from my 7/13 email below - please respond

- My July 19, 2013 e-mail: "i sent you 2 emails that you have not yet responded…Also confirm the papers have been served"

- My July 20, 2013 e-mail: "this is the forth email I am sending and I have also left you a message on your answering machine – but have not heard back from you
please provide me the stays (sic) of the case…"

- My July 22, 2013 e-mail: "also, just give me confirmation that the parties were served and we are moving forward full speed ahead…"

- My July 31, 2013 e-mail: "…just want to follow up – 2) make sure papers were served"

- My September 5, 2013 e-mail: "Subject: fyi - service of process -- poease advise status"

- My September 10, 2013 e-mail: "…1) please advise of the status of service of the papers…"

- My September 12, 2013 e-mail: "…did you serve the papers?"

- My September 26, 2013 e-mail: "Subject: tell me status – it has been over 2 months –"

- My September 27, 2013 e-mail: "you didn't answer any of my questions not even the basic one - did you serve my mother? bruce? david?"

- My November 4, 2013 e-mail: "i phoned you back kenneth - and left a few messages but you did not pick up and you did not call back
maybe you should get a land line - as you clearly are having way too many issues with your telephone
in addition - as you remember i tried so hard to reach you i even made a trip up to your place and waited hrs until you surfaced (that was after we were disconnected the prior

> thursday from talking with the accountant and you never did call back) and never did return the many calls i placed (remember - when you told me that you were putting an umbrella out on your terrace for your elderly mother - and you had me wait in that building in the back of your house that you are renovating) and you had NOTHING to tell me except you did not get to any discovery and you did not have the petition served yet - and you told me that you still could not find the PR (david Baum)"

30. Indeed, established by the e-mails is that I was not only communicative and cooperative, but that I did everything in my power to expedite the litigation, not the least reason because I desperately required the monies from a successful litigation to support myself – including to pay for essential medical care. Thus, I stated to Mr. Manney, on May 30, 2013, at the very outset of the retention:

> "IF you need help of another lawyer – lets get them on board!!!" (capitalization in the original)

31. Nor did I ever fail or refuse to cooperate with Messrs. Manny and Roche either in furnishing documents in response to Mr. Hennessey's September 25, 2013 notice for document production, due on October 30, 2013, or in scheduling my deposition. As for my attorneys' October 2, 2013 motion for a continuance of the hearing on David Baum's petition to strike my creditor claims, I was unaware of it – and showed up for the October 3, 2013 hearing, the only one to do so!

32. Suffice to note that Messrs. Manny and Roche never claimed I was 'uncommunicative' or 'uncooperative', including in their November 6, 2013 motion to withdraw after I terminated their services. This, however, did not prevent Mr. Hennessey from purporting the contrary. Thus, for example, at the outset of the November 12, 2013 case management conference (Exhibit G)[5], which was also a hearing on Messrs. Manney and Roche's withdrawal motion, Mr. Hennessey falsely stated:

> 'And through no fault of Mr. Manney or Mr. Roche, <u>their client has been uncommunicative with them in terms of scheduling things before the Court</u>…' (Exhibit G: pp 4-5, underlining added).

And, at the March 18, 2014 hearing (Exhibit L), Mr. Hennessey also falsely stated:

[5] All exhibits identified in this quotation from my September 8, 2014 affidavit (Exhibit I) are annexed to that affidavit.

> '…the purpose of [the November 12, 2013] hearing was to facilitate scheduling of discovery to require Ms. Baum to participate in scheduling of things, because we hadn't been able to get that accomplished' (Exhibit L: p. 8, underlining added);
>
> 'her two lawyers again were permitted to withdraw. Mr. Guralnick comes into that case and he files the motions to withdraw and the motions for extension in that case as well, two weeks later, alleging the exact same issues.' (Exhibit L: p. 15, underlining added);
>
> 'But Nina Baum, because of all the – the uncooperative with her lawyers, this case was never served…' (Exhibit L: p. 20, underlining added);
>
> '….we have a serial litigant who abuses process. And I have stood before you, Your Honor, flabbergasted over the fact that I can't schedule simple hearings with her counsel…You set deadlines in this case because we are dealing with a litigant who is being incredibly uncooperative.' (Exhibit L: p. 41, underlining added).

33. This is utterly false. Messrs. Manney and Roche had never alleged anything of the sort – and the e-mails establish the true facts of my cooperation at every turn.

34. As for Mr. Guralnick, whose November 26, November 29, and December 16, 2013 motions to withdraw and extend deadlines Mr. Hennessey distorted to say what they did not, my e-mails with Mr. Guralick (Exhibit #3) expose those distortions and malicious innuendos. The e-mails show that I pressed Mr. Guralick to effectuate service – and to comply with the trial court's November 15, 2013 orders for my production of documents and deposition. They also show that it was Mr. Guralnick – not I – who terminated his representation of me (November 25, 2013), doing so in the context of my entreaties for his cooperation in furnishing an appropriate production of documents, pursuant to the trial court's order, which, in the absence of his assistance, I then furnished myself."

19. Moreover, clear from the "Procedural History" (Sidetab Exhibit 1, pp. 24, 13-14) is that Messrs. Manney and Roche's failure to effect service of my Amended Petition and Amended Complaint and Mr. Guralnick's failure to comply with the Court's

November 15, 2013 "Order Compelling Service"[6] were not the result of any willful, deliberate or contumacious conduct on their part – a *sine qua non* for any order that would, as here, effectively dismiss my will contest case with prejudice because the statute of limitations would prevent refiling. The caselaw on the subject is black-letter, including *Kozel* (Exhibit K-3) and decisions of the Fifth District Court of Appeal based thereon.

20. Mr. Hennessey, as a seasoned practitioner, may be presumed familiar with this black-letter law as, for instance, *Erdman v. Bloch*, 65 So. 3d 62 (5th DCA 2011) (Exhibit L-1); *Sanders v. Gussin*, 30 So. 3d 699 (5th DCA 2010) (Exhibit L-2); *Shortall v. Walt Disney World Hospitality*, 997 So. 2d 1203 (5th DCA 2008) (Exhibit L-3); *Scallan v. Marriott International, Inc.*, 995 So.2d 1066 (5th DCA 2008) (Exhibit L-4), *American Express v. Hickey*, 869 So. 2d 694 (5th DCA 2004) (Exhibit L-5).

As stated by the Fifth District Court of Appeal in *Shortall*:

> "The law is well-settled that '[b]efore dismissing a complaint based on the failure to follow a court order, the trial court must consider the factors set forth in *Kozel*.' *Scallan v. Marriott Int'l, Inc.*, 995 So. 2d 1066, 33 Fla. L.Weekly D2704 (Fla. 5th DCA Nov. 21, 2008) (citing *Pixton v. Williams Scotsman, Inc.*, 924 So. 2d 37, 39 (Fla.5th DCA 2006)). In *Kozel*, our supreme court stated:
>
> > To assist the trial court in determining whether dismissal with prejudice is warranted, we have adopted the following set of factors . . . : 1) whether the attorney's disobedience was willful,deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created

[6] The "Procedural History" (Sidetab Exhibit 1) annexes the November 15, 2013 "Order[s] Compelling Service" as its Exhibits A-1 and A-2.

> significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.
>
> 629 So. 2d at 818. This Court has recognized that '[a] trial court's *failure to consider the Kozel factors* in determining whether dismissal is appropriate *is, by itself, a basis for remand for application of the correct standard.*' *Pixton*, 924 So. 2d at 39-40." (Exhibit L-3, italics in original *Shortall* decision, underlining added).

21. Mr. Hennessey's knowledge of this "well-settled", black-letter caselaw may be gleaned from his January 28, 2014 "Motion[s] Dropping Parties"[7], devoid of ANY caselaw for its requested relief. Indeed, not only was caselaw absent from his motions, but so, too, the material facts, of which Mr. Hennessey had knowledge, establishing my counsel's good faith efforts to effect service. These were, *at minimum*:

(a) what his client, David Baum, had presumably communicated to him as to Mr. Manney's attempts to effect service *via* process server (Sidetab Exhibit 1: "Procedural History", pp. 24, 28);

(b) his own phone conversations and e-mails with Mr. Manney pertaining to service (Sidetab Exhibit 1: "Procedural History", pp. 19, 24);

(c) Mr. Guralnick's efforts to effect service, as stated by Mr. Guralnick, on the record, at the December 17, 2013 hearing (Sidetab Exhibit 1: "Procedural History", pp. 13-14).

22. Indeed, just as Mr. Hennessey had NO evidence that I was in any way culpable for the failure to effect service, so too he had NO evidence of ANY willful, deliberate and contumacious conduct by my attorneys with respect thereto.[8]

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[7] My "Procedural History" (Sidetab Exhibit 1) annexes Mr. Hennessey's January 28, 2014 "Motion[s] Dropping Parties" as its Exhibits K-1 and K-2.

[8] *See*, *Roberts v. Stidham*, 19 So. 3d 1155, 1158 (5th DCA 2009):

23. For that matter, Messrs. Manney and Roche had never had the opportunity to offer any explanation with respect to service – a fact Mr. Hennessey was duty-bound to identify in the context of alerting the Court that such would be requisite to sustain the draconian sanction of "dropping parties" that would foreclose my will contest.

24. Pursuant to *Kozel* (Exhibit K-3), Mr. Hennessey was also required to establish "prejudice" to his client – and the estate – by reason of the supposed non-service. Yet, his January 28, 2014 "Motion[s] Dropping Parties" were devoid of even an allegation of "prejudice" and plainly any "prejudice" was self-inflicted by David Baum's failure to make himself available for service and by Mr. Hennessey's own reluctance and caginess with respect to service,[9] including his willful and deliberate failure to identify, at the outset, that service did not require anything more than "formal notice", which could be accomplished by a certified mailing (Sidetab Exhibit 1: "Procedural History", p. 19). Mr. Hennessey confined his passing claim of "prejudice", not even identified as such, to a false oral representation at the March 18, 2014 hearing on his "Motion[s] Dropping Parties" ("Procedural History", pp. 18-19), not thereafter embodied in any finding or determination by the Court.

> "Additional steps can always be taken to effect service of process. While what was not done may be relevant, the affirmative steps taken in this case were clearly adequate to avoid a dismissal with prejudice. REVERSED."

[9] *See*, *Crystal Lake Golf Course v. Kalin*, 252 So. 2d 379 (4th DCA 1971):

> "Under our system of pleading and practice we are no longer concerned with the tricks and technicalities of the trade:
>
> > 'The trial of a lawsuit should be a sincere effort to arrive at the truth. It is no longer a game of chess in which the technique of the maneuver captures the prize.' *Cabot v. Clearwater Construction Company*, Fla.1956, 89 So.2d 662, 664."

25. In fact, because *Kozel* (Exhibit K-3) was so determinative that the Court could not do what Mr. Hennessey was importuning it to do, he was duty-bound to demonstrate that all the factors that *Kozel* required the Court to determine were satisfied. Instead, his proposed "Order[s] Dropping Parties" that he proffered to the Court and which the Court signed on April 2, 2014[10] were insufficient, *as a matter of law*, as they did not include the written findings that the Court would have to make, consistent with *Kozel*. As stated by the Fifth District Court of Appeal in *Erdman*, in reversing:

> "This Court, along with the other district courts, has also interpreted *Kozel* to require written findings addressing the *Kozel* factors in an order of dismissal. *Arkiteknic, Inc. v. United Glass Laminating, Inc.*, 53 So. 3d 366, 367 (Fla. 3d DCA 2011); *Sanders v. Gussin*, 30 So. 3d 699, 703 (Fla. 5th DCA 2010); *Smith v. City of Panama*, 951 So. 2d 959, 962 (Fla. 1st DCA 2007); *Pixton v. Williams Scotsman, Inc.*, 924 So. 2d 37, 40 (Fla. 5th DCA 2006); *Rohlwing v. Myakka River Real Props., Inc.*, 884 So. 2d 402, 407 (Fla. 2d DCA 2004); *Fla. Nat'l Org. for Women, Inc. v. State*, 832 So. 2d 911, 914 (Fla. 1st DCA 2002).
>
> Here, the trial court's order failed to make the required findings." (Exhibit L-1, underlining added).

26. Moreover, clear from *Erdman*, citing the Florida Supreme Court in *Ham v. Dunmire*, 891 So.2d 492, 495-96 (Fla. 2004), reinforcing the six-fold criteria of *Kozel*, is that the "written findings" are findings of fact – not bald conclusory statements. As stated with respect to the first *Kozel* criteria: "whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience":

> "express written findings of fact supporting the conclusion that the failure to obey the court order demonstrated willful or deliberate disregard. *Ham v. Dunmire*, 891 So.2d 492, 495-96 (Fla. 2004). Express findings are required to ensure that the trial judge has determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation. *Id.* at 496. …the trial court must make a 'finding that the

[10] The "Procedural History" (Sidetab Exhibit 1) annexes the "Order[s] Dropping Parties" as Exhibits C-1 and C-2.

> conduct upon which the order is based was equivalent to willfulness or deliberate disregard.' *Id*." (Exhibit L-1, p. 3, underlining added).

27. At bar, based on Mr. Hennessey's proposed orders for the dropping of parties, the Court failed to make the required factual findings – because, as Mr. Hennessey knew, the facts in the record RESOUNDINGLY did not lend themselves to the findings necessary to support the dropping of parties that would result in the dismissal of my will contest.

28. Although I do not waive the evidentiary hearing to which the *prima facie* showing of my Amended Motion entitles me, its cited law, caselaw, and appended transcript exhibits suffice for the summary granting of vacatur for misrepresentation and misconduct, if not fraud. Especially is this so in the absence of any rebuttal by Mr. Hennessey, including to the dispositive "Procedural History" and e-mail chains annexed to my September 8, 2014 affidavit (Exhibit I) and to the further showing made by this affidavit.

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Sworn to before me this
14th day of October 2014

ROSARIO SIINO
Notary Public - State of New York
NO. 01SI6258696
Qualified in Westchester County
My Commission Expires 04-02-2016

Notary Public

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document is being served on October 15, 2014, *via* an automatic email generated by the Florida Courts E-Filing Portal to:

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TABLE OF EXHIBITS

Due to size restrictions for e-filing, only the most important exhibit – Exhibit I, with its attached Exhibits 1, 2, & 3 – is herewith attached.