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

ANNEEN NINA GLORIA BAUM,

Appellant/Plaintiff,

v.

DAVID A. BAUM, individually and as Personal Representative of the Estate of Seymour Baum; PINE RIDGE PLAZA, LLC; VILLAGE GREEN PLAZA, LLC; SILVER SPRING MANOR, INC.; SILVER SPRING MANOR, LLC; BORUCH-DAVID, INC.; BORUCH-DAVID, LLC; AND DOWNTOWN MINI STORAGE OF MELBOURNE, LLC,

Appellees/Defendants.

_____/

Case No.: 5D14-1652

L.T. No.: 05-2012-CP-048323

Consolidated with

Case No.: 5D14-1683

L.T. No.: 05-2013-CP-028863

APPELLEE DAVID BAUM'S MOTION FOR RECONSIDERATION OF AUGUST 22, 2014 ORDER RELIQUISHING JURISDICTION AND RESPONSE IN OPPOSITION TO MOTION TO RELINQUISH JURISDICTION

Appellee DAVID A. BAUM, as Personal Representative of the Estate of Seymour Baum, by and through his undersigned counsel, hereby requests that this Court reconsider its August 22, 2014 Order relinquishing jurisdiction and responds to the Motion to Relinquish Jurisdiction filed by Appellant ANNEEN NINA GLORIA BAUM, and states as follows:

1. On August 22, 2014, this Court granted Appellant's Motion to Relinquish Jurisdiction filed on August 13, 2014. The Order was delivered by mail to the Personal Representative's counsel on August 25, 2014.

2. At the time this Order was entered, the time period for the Personal Representative to respond to motion had not yet run pursuant to the Florida Rules of Appellate Procedure. The response to the motion was not due until August 28, 2014 because the motion

Ex H

was originally served by email on August 13, 2014,. *See* Fla. R. App. P. 9.300(a)(providing 10 days to file a response); Fla. R. Jud. Admin. 2.516(plus an additional 5 days for service by email).

3. The Personal Representative objects to the Motion to Relinquish Jurisdiction and is entitled to an opportunity to be heard as it relates to the motion.

4. Because the Order dated August 22, 2014 was entered prior to the timeframe within which the Personal Representative had to file his response, the Personal Representative respectfully submits that the Order granting the relinquishment was entered in error and should be vacated.

5. The Order granting Appellant's motion to relinquish may have been issued prematurely and erroneously due to Appellant's representation to this Court that the trial court had scheduled a hearing for August 28, 2014 on her "Amended Motion for Relief from Court Orders Due to Respondent's Misrepresentation and Misconduct" (hereafter "Motion for Relief"). However, the hearing had been set unilaterally by the Appellant. Upon learning that the Appellant had improperly scheduled the Motion for Relief, the trial court struck the hearing from its docket on basis that it lacked jurisdiction. (DB App. 4). There is no hearing presently scheduled. Appellant did not request that the motion be considered on an emergency basis and there is no such emergency.

6. The Personal Representative has included as part of this Motion for Reconsideration his legal argument on the Motion to Relinquish Jurisdiction.

7. In the legal argument below, appellee, David Baum, as Personal Representative of the Estate shall be referred to as the "Personal Representative." Appellant, Nina Baum, shall be

referred to as "Appellant." Citations to the Appendix provided with this Response to Motion to Relinquish Jurisdiction shall be the Appendix page number as follows: (DB App. __)

Legal Standard for Granting a Motion to Relinquish on the Basis of Rule 1.540

8. The burden upon a party seeking a relinquishment of jurisdiction to file a motion for relief from an order or judgment is a heavy one. Florida appellate courts have held that motions to relinquish jurisdiction to permit the filing of Rule 1.540 motion are to be granted "*sparingly and usually for the accomplishment of ministerial matters*" and only under "*exceptional circumstances*". *See* McNulty v. BankUnited, 140 So. 3d 1041 (Fla. 3d DCA 2014)(noting that such motions are granted "sparingly"); Abifraj v. Florida Birth Related Neurological Injury Compensation Assoc., 844 So. 2d 751 (Fla. 1st DCA 2003)(noting that appellants had not identified "exceptional circumstance" necessitating relinquishing jurisdiction).

9. Further, "[t]he presumption in this court, as it is in other district courts of appeal in the state, is that judicial economy is best served by leaving jurisdiction in the appellate court until the issuance of the mandate." *See* McNulty, 140 So.3d at 1041. As it relates to a 1.540 motion, appellate courts have held that "***[r]etrying a case is not a reason relinquishment, nor is raising issues that might have been raised during the original trial***." Id. at 1042.

Procedural Background

10. This consolidated appeal stems from the Estate of Seymour Baum (the "Decedent"), who died in Brevard County on June 17, 2012. Appellee, David A. Baum, is the Decedent's son and serves as Personal Representative of the Decedent's Estate. The Appellant is the Decedent's disinherited daughter. The other parties to this appeal are the charities who are beneficiaries of the Decedent's Estate, who were aligned with the Personal Representative in the proceedings below.

11. The trial court in this action dismissed Appellant's will contest filed in connection with pending probate proceedings and dropped parties in a separate independent action filed by Appellant after Appellant failed to serve her pleadings for over ten months and failed to comply with multiple court orders and warnings from the trial court requiring her to complete service. (DB App. 9, 18, 138, 140, 146, 150). The trial court specifically found that the Appellant wholly failed to show any good cause for her failure to comply with the trial court's previous orders and that the Appellant was intentionally engaging in dilatory behavior and stall tactics. (DB App. 9, 18).

12. The Appellant requests this Court to relinquish jurisdiction to the trial court so that she can seek relief pursuant to Fla. R. Civ. P. 1.540(b)(3). The Appellant asserts that the orders on appeal should be vacated due to "misrepresentation and misconduct" on the part of the Personal Representative and his counsel.

Argument

The Motion for Relief Contains Nothing Which Was Not Already Addressed by the Trial Court

13. The Appellant has presented no exceptional circumstances to overcome the presumption against relinquishing jurisdiction to the trial court. *See* McNulty, 140 So.3d at 1041; Abifraj, 844 So. 2d at 753.

14. The Motion for Relief was attached to the Motion to Relinquish Jurisdiction. The alleged evidence which Appellant would proffer is not new or newly discovered. Indeed, the grounds cited in the Motion for Relief were *already* argued to the trial court. The grounds raised in the Motion for Relief are the same as those already raised in Appellant's Motions for Rehearing, which were denied and which are currently on appeal. (DB App. 64). The same affidavits which Appellant attaches to the Motion for Relief were attached to the Motions for

Rehearing. (DB App. 112-116). The Motions for Rehearing were considered by the trial court and denied before this consolidated appeal was filed. (DB App. 12, 21).

15. Appellant has simply recast and repackaged her Motion for Rehearing as a Motion for Relief under Rule 1.540 by claiming that the Personal Representative's factual and legal positions, about which she disagrees are "misrepresentations and misconduct". The trial court already rejected these arguments.

16. The Motion for Relief raises no new issues which were not already considered by the trial court or which Appellant could not have raised at the final hearing. *See* McNulty, 140 So.3d at 1041. The affidavits submitted by the Appellant in support of the Motion for Relief are from the process server she retained and her own attorney-- evidence (albeit false) that was always readily available. If Appellant or her attorneys felt that the Personal Representative was "actively avoiding service" as she now contends, she could have brought that to the attention of the Court at the November 12, 2013 hearing (wherein her counsel specifically approved the November 15, 2013 Orders setting a deadline for service and agreeing that 45 days would be sufficient) (DB App. 138, 140), the December 11, 2014 hearing (wherein Appellant's new hired counsel sought to withdraw and requested an extension of the deadlines) (DB App. 142), December 17, 2013 hearing (wherein the Court warned Appellant that she needed to serve and demonstrate good cause for the delay) (DB App. 150), or the March 18, 2014 hearing (wherein Appellant failed to present evidence of good cause) (DB App. 18).

17. It is the movant's burden under Rule 1.540(b) to establish the exercise of due diligence. It is not sufficient to merely show that the evidence was not known or discovered by counsel prior to trial. Brown v. McMillian, 737 So. 2d 570, 571 (Fla. 1st DCA 1999); *see also* King v. Harrington, 411 So.2d 912, 915 (Fla. 2d DCA 1982) ("The party applying must make his

vigilance apparent; for if it is left even doubtful that he knew of the evidence, or that he might, but for the negligence, have known of and produced it, he will not succeed in his application").

18. In this case, Appellant is contending that she attempted to serve the Personal Representative but was unable to do so. [1]

19. As set forth in McNulty, retrying a case is not a reason for relinquishment, nor is raising issues that *might* have been raised during the original trial. McNulty, 140 So. 3d 1042. In this case, all of the grounds raised by the Appellant in the Motion for Relief not only *could* have been raised in the trial court, they *were* raised in the trial court. The trial court found that Appellant was intentionally engaging in dilatory and stall tactics.

Relinquishment Should be Denied Due to Appellant's Undue Delay

20. Appellant's prior and continued delay tactics are also relevant in connection with the instant Motion to Relinquish Jurisdiction. The presumption against relinquishment is intended to prevent delay. Id. at 1042. As stated in paragraph 2 of the Appellant's Motion to Relinquish Jurisdiction, the Motion for Relief upon which the Appellant seeks relinquishment was initially filed with the trial court on May 1, 2014. (DB 25). All of the facts alleged in the Motion for Relief occurred prior to November of 2013. Despite this, the Appellant delayed more than 3 months, until August 13, 2014, to seek relinquishment from this Court.

21. Appellant should not be permitted to delay distribution of this Estate to the Decedent's named beneficiaries by sitting on a Motion for Relief and setting it for hearing to avoid filing her initial brief. *See also* In re Estate of Clibbon, 735 So. 2d 487, 489 (Fla. 4th DCA

[1] The Amended Motion for Relief attaches the same affidavits and makes the same legal argument as the Motion for Rehearing and the original (un-amended) Motion for Relief with one glaring omission: the Motion for Rehearing had attached an email from counsel for the Personal Representative wherein counsel provided instructions as to where counsel could be served, discrediting the entire basis for the instant Motion for Relief. (DB App. 58, 111)

1998), *quoting* In re Williamson's Estate, 95 So. 2d 244, 246 (Fla. 1956)(it is a "matter of public policy in this state that the estates of decedents shall be speedily and finally determined with dispatch").

22. The undue delay caused by Appellant should prevent Appellant from overcoming the presumption against granting motions to relinquish due to delay. McNulty, 140 So. 3d at 1041-42.

Relinquishment Should Be Denied Because the Motion is Futile

23. Finally, the Motion to Relinquish should be denied because it is futile. As a general rule, courts look with disfavor upon Rule 1.540 motions based upon evidence which was available prior to the hearing. Brown, 737 So. 2d at 571 (holding that it is the movant's burden under Rule 1.540(b) to establish the exercise of due diligence and that it is not sufficient to merely show that the evidence was not known or discovered by counsel prior to trial; "rather, the movant must make his or her vigilance apparent"); *see also* King, 411 So.2d at 915 (Fla. 2d DCA 1982) ("The party applying must make his vigilance apparent; for if it is left even doubtful that he knew of the evidence, or that he might, but for the negligence, have known of and produced it, he will not succeed in his application"). If the motion for relief from judgment "does not set forth a basis for relief on its face, then an evidentiary hearing is unnecessary, the time and expense of needless litigation is avoided, and the policy of preserving the finality of judgments is enhanced." *See* Freemon v. Deutsche Bank Trust Company Americas, 46 So. 3d 1202, 1204 (Fla. 4th DCA 2010).

24. The affidavits submitted by the Appellant in support of the motion are from the process server she retained and her own attorney- evidence that was always readily available. If Plaintiff or her attorneys felt that the personal representative was "actively avoiding service" as

she now contends, she could have brought that to the attention of the Court at the November 12, 2013 hearing, the December 11, 2013 hearing, the December 17, 2013 hearing, the March 18, 2014 hearing, or at any point between.

25. Appellant grossly distorts the facts in an effort to accuse the undersigned counsel of misconduct as a part of a last effort to place blame on others. The Motion for Relief from Order will ultimately be denied because the arguments were already rejected by the trial court as false.

WHEREFORE, Appellee, Appellee DAVID BAUM, as Personal Representative of the Estate of Seymour Baum, respectfully request this Court to reconsider its August 22, 2014 relinquishment jurisdiction and moves this Court for entry of an order denying Appellant's Motion to Relinquish Jurisdiction and granting such other and further relief as may be just and appropriate under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of August, 2014, the foregoing document is being e-filed with the Clerk of the Court for the Fifth District Court of Appeal and served by e-mail to **Teresa Abood Hoffman, Esq.,** Law Office of Hoffman & Hoffman, P.A., 848 Brickell Ave., Suite 810, Miami, FL 33131, Eservice@hoffmanpa.com, Teresa@hoffmanpa.com, Christina@hoffmanpa.com; **William E. Boyes, Esq.,** 3300 PGA Boulevard, Suite 600, Palm Beach Gardens, FL 33410, bboyes@boyesandfarina.com, asabocik@boyesandfarina.com, czill@boyesandfarina.com; **David H. Jacoby, Esq.,** P.A., 2111 Dairy Road, Melbourne, FL 32904, d.jacoby@davidhjacobypa.com, j.bentley@davidhjacobypa.com; **Kimberly L. Boldt, Esq. and Jeffrey D. Mueller, Esq.,** Boldt Law Firm, 160 W. Camino Real, Boca Raton, FL 33432, eservice@boldtlawfirm.com; and **Wayne Alder, Esq.,** Becker & Poliakoff, PA, 625 N.