

IN THE CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT IN AND
FOR FRANKLIN COUNTY, FLORIDA

CASE NO.: 1920-18CA-000202CA-AX-MX

PHILLIP TIMOTHY HOWARD,
and JENNIFER HOWARD,

Plaintiffs,

v.

ARTEMIS OF NAPLES, LLC,
a Florida limited liability company, and
TED DOUKAS,

Defendants.

**DEFENDANTS' MOTION TO AWARD ATTORNEYS' FEES
IN ACCORDANCE WITH FLORIDA STATUTE SECTION 57.105**

Defendants, ARTEMIS OF NAPLES, LLC (“Artemis”) and TED DOUKAS (“Doukas”) (collectively, “Defendants”), by and through their undersigned attorneys, and pursuant to § 57.105, *Florida Statutes*, hereby move this court for entry of an Order awarding attorneys’ fees to be paid, in equal parts, by Plaintiff, JENNIFER HOWARD, and one of her attorneys, Jerry L. Rumph, Jr./Sweeting & Rumph, P.A. In support hereof, Defendants respectfully state as follows:

I. Introduction and Factual/Procedural Background

This action was originally filed by Phillip Timothy Howard, appearing as Counsel for both Plaintiffs, PHILLIP TIMOTHY HOWARD (“Attorney Howard”) and his wife, JENNIFER HOWARD (“Mrs. Howard”). The original complaint sat stagnant for several months until a Verified Amended Complaint was filed in December 2018 and served on the Defendants shortly thereafter. The Amended Complaint was filed by a second attorney appearing as counsel for *both*

Plaintiffs: James Bruner, Esq. (of Tallahassee, Florida).¹ The Amended Complaint was verified and signed by both Attorney Howard and Jennifer Howard as they were both appearing as Plaintiffs.

The case was originally set for an expedited trial which was to take place on March 19, 2019. The December 17, 2018 Order setting the trial date was served by the Court on both counsel for Plaintiffs: Attorney Howard and Attorney Bruner. The parties attended mediation on February 13, 2019. Attorney Howard and Attorney Bruner both attended mediation on behalf of the Mr. *and* Mrs. Howard. The parties reached a tentative resolution at mediation which included a payment schedule. Attorneys Howard and Bruner, together with the undersigned, jointly communicated with Chambers and asked that the March 19, 2019 be removed from the calendar. Then, on April 24, 2019, the undersigned together with both attorneys representing Mrs. Howard, requested that the trial date be reset.

On May 17, 2019, this Court issued an Order Resetting Non-Jury Trial and Pretrial Conference setting the trial for Friday, August 16, 2019. This trial order was served on both of the attorneys who were appearing for Mrs. Howard: Attorney Howard and Attorney Bruner. Shortly before trial, on July 29, 2019, Plaintiffs filed a unilateral pre-trial statement. The pretrial statement contained the same spurious claims made here: that Jennifer Howard may not have signed one or more of the documents at issue. This pretrial statement was signed and filed on behalf of both attorneys who were appearing for Mrs. Howard: Attorney Howard and Attorney Bruner.

¹ There was also a third attorney whose signature also appears on the Verified Amended Complaint, Samuel T. Adams, Esq. (of Panama City, Florida). But, since then, Attorney Adams has not filed any pleadings/motions or appeared at any hearings. Attorney Adams, however, has never withdrawn or been discharged.

After an unsuccessful attempt to have this Court, and then the First District Court of Appeal, stay the trial date, the trial occurred as scheduled on August 16, 2019. Mrs. Howard did not show up for trial. She clearly knew that there was a trial scheduled for that day. At 8:03 a.m. on the morning of August 16, 2019, a Marriage and Family Therapist wrote a letter on behalf of Jennifer Howard stated that she was suffering from Post Traumatic Stress Disorder as a result of the financial stress that Attorney Howard (her husband) had caused to her and her family including the prospect of losing her beloved “beach house”. The letter asked that Mrs. Howard be excused from testifying that day. This was the explanation provided for her lack of appearance at the trial.

Nonetheless, the trial proceeded as scheduled. The issue of whether or not Mrs. Howard signed the documents at issue was presented to the Court by Plaintiffs’ evidence and testimony. At every chance he had, Attorney Howard (and the other Plaintiffs witnesses) argued that Mrs. Howard did not execute the sale closing documents. Plaintiffs refused to admit who did sign her name and, moreover, Plaintiffs’ evidence was contradicted by more convincing evidence presented by the Defense which included text messages between Mr. and Mrs. Howard as well as the deposition testimony of the notary who notarized Mrs. Howard’s signatures. As a result, the Court found for the Defendants, and against the Plaintiffs, on all issues and, on August 30, 2019, the Court entered an Order for Defendants. All of the trial evidence is currently part of the Court file available online for all to see. The trial transcript is there as well.

After the trial, Mrs. Howard retained a divorce attorney and filed a divorce petition on September 4, 2019. Her divorce attorney, Attorney Rumph, filed a Notice of Appearance in the within case on October 9, 2019. This would make it at least three attorneys currently representing Mrs. Howard (Attorney Howard, Attorney Bruner and Attorney Rumph). There was never a

motion or stipulation to substitute counsel for Mrs. Howard and, thus, all three attorneys are currently counsel of record for Mrs. Howard.

Attorney Rumph now wants a 'do-over' on behalf of his new client, Mrs. Howard. But that is not how this works. On May 8, 2020, nearly nine months after the entry of the final order and eight months after his appearance as co-counsel in the case, Attorney Rumph, on behalf of Jennifer Howard, filed a Verified Motion for Relief From Order for Defendants. This motion is both factually and legally unsupported (and unsupportable) and this Court should award Defendants a reasonable fee to be paid in equal parts by Mrs. Howard and Attorney Rumph/his law firm for having to address and respond to this baseless and frivolous motion and litigation tactic.

II. Memorandum of Law

Section 57.105, *Florida Statutes*, provides, that a court **shall** award fees to the prevailing party if it finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts. Fla. Stat. § 57.105 (1)(a)-(b).

A § 57.105 motion can be directed to the entire action or just a single motion filed in an action if that motion is not supported by materials facts or the application of existing law. *See, i.e., Pronman v. Styles*, 163 So.3d 535 (Fla. 4th DCA2015); Indeed, this includes post-trial motions for relief under Rule 1.540(b). *Freedom Commerce Centre Venture v. Ranson*, 823 So.2d 817 (Fla 1st DCA 2002).

The legislative purpose of § 57.105, *Florida Statutes*, “is to discourage baseless claims, stonewall defenses, and sham appeals in civil litigation by placing a price tag through attorney’s fee awards on losing parties who engage in same, as such frivolous litigation constitutes a reckless waste of sparse judicial resources and prevailing litigants’ time and money.” *Sachs v. Hoglund*, 397 So. 2d 447, 448 (Fla. 3d DCA 1981) *citing Hernandez v. Leiva*, 391 So. 2d 292 (Fla. 3d DCA 1980). Further, § 57.105 specifically provides that Courts “shall” assess attorneys’ fees where if the motion is not supported by materials facts or the application of existing law. *Sykes v. St. Andrews School*, 625 So. 2d 1317 (Fla. 4th DCA 1993).

A. Mrs. Howard’s Motion Cannot Meet the Threshold Requirements of Rule 1.540(b)

Mrs. Howard (and her new co-counsel) filed her motion for relief from the final order under Rule 1.540(b). Applicable here, Rule 1.540(b) provides that the Court may relieve a party from a final judgment, decree or order based upon “fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party”. Fla.R.Civ.P. 1.540(b)(3). While Mrs. Howard’s Rule 1.540(b) motion is based on fraud, the only allegations of “fraud” in Mrs. Howard’s motion are the assertions that Defendants had procured the warranty deed by fraud and did not take reasonable steps to ensure that Mrs. Howard’s signatures on the closing documents were valid.²

This is not the type of “fraud” that is the proper subject of a Rule 1.540(b)(3) motion. The type of fraud which is the proper subject of a Rule 1.540(b)(3) motion is, for example, where the

² The other assertions by Mrs. Howard are that Mr. Howard (who was her husband, her attorney and a non-adverse co-plaintiff) misrepresented certain aspects of the litigation to her. But such claims – even if true – cannot be a basis of a Rule 1.540(b)(3) motion as it must be based upon fraud, misrepresentation, misconduct “of an adverse party”. Fla.R.Civ.P. 1.540(b)(3).

unsuccessful party was prevented from presenting her case “by fraud or deception practiced by his adversary, keeping the opponent away from court, falsely promising a compromise, ignorance of the adversary about the existence of the suit or the acts of the plaintiff, or fraudulent representation of a party without his consent and connivance in his defeat; in other words, extrinsic fraud occurs where a defendant has somehow been prevented from participating in a cause.” *Voce v. Wachovia Mortg., FSB*, 174 So.3d 545 (Fla. 4th DCA 2015) (defining “extrinsic fraud” and quoting *DeClaire v. Yohanan*, 453 So.2d 375, 377 (Fla.1984)). For purpose of rule permitting attack on judgment on basis of fraud, the fraud can also be intrinsic fraud which is fraudulent conduct that arises within proceeding and pertains to issues in case that have been tried or could have been tried. *See Southeast Bank, N.A. v. Almeida*, 693 So.2d 1015 (Fla. 3d DCA 1997). Either way, the fraudulent conduct must related to the court proceeding themselves.

It is well-established that Rule 1.540(b)(3) motions are improper if they are -- like here -- simply “attempts to rehash a matter fully explored at trial” and that any matter asserted in the Rule 1.540(b) motion that was before the trial court prior to the entry of the final judgment/order is improperly raised in a Rule 1.540(b) motion. *See Flemenbaum v. Flemenbaum*, 636 So. 2d 579, 580 (Fla. 4th DCA 1994); *Ricardo Lopez, et al. v. Wilmington Trust, N.A.*, 2020 WL 2463060, at *1 (Fla. 3d DCA 2020). The only assertions of fraud by Defendants raised by Mrs. Howard in her motion (i.e., that Defendants procured the warranty deed and property by fraud and did not obtain her signature) were fully presented at trial and cannot be the proper subject of a Rule 1.540(b)(3) motion. The alleged fraud against Defendants do not relate to alleged fraudulent conduct in the court proceedings themselves.

Additionally, under Florida law, any allegations of fraud which are the subject of a Rule 1.540(b)(3) motion must be alleged with particularity and must not be mere legal conclusions.

Flemenbaum v. Flemenbaum, 636 So. 2d at 580. The motion needs to both specify the fraud *and* explain why the fraud, if it exists, would entitle the movant to have the final order set aside. *Id.* Mrs. Howard's motion is unsupported and fails for this reason as well.

B. All of the Issues Raised in Mrs. Howard's Rule 1.540(b)(3) Motion Were Litigated and Adversely Decided After a Bench Trial

One would expect that if Mrs. Howard and her new co-counsel were to attempt to raise issues in a Rule 1.540(b)(3) motion, that they would first at least review the trial transcript and the exhibits presented at trial. This is all available online via the Clerk's website. Had they done so, the trial transcript would have demonstrated that (1) Attorney Howard raised the claim that Mrs. Howard did not sign the closing documents; (2) the deposition testimony of Ms. Crusaw (the notary who notarized Mrs. Howard's signature and testified under oath that she was in front of her when she signed the documents) was presented at trial and (3) Mrs. Howard's text messages with Attorney Howard (also in evidence) demonstrated that Mrs. Howard was aware of the closing and was aware that they needed to close on the transaction because they needed to collect the hundreds of thousands of dollars to pay bills to support their affluent lifestyle. Thus, this assertion of 'fraud' as the basis of a Rule 1.540(b)(3) motion is not grounded in the facts or the law as these issues were all presented at trial and were adversely decided by the Court. Thus, there is no factual or legal basis to re-hash them nine months later in a motion filed under Rule 1.540(b)(3). Mrs. Howard and Attorney Rumph should know that this is a frivolous motion.

C. The Trial Court Lacks Jurisdiction to Consider Mrs. Howard's/Attorney Rumph's Rule 1.540(b) Motion During the Pendency of the Appeal

This Court does not have jurisdiction to consider the Rule 1.540(b) motion filed by Mrs. Howard and Attorney Rumph. As summarized in *Jallali v. Knightsbridge Village Homeowners' Ass'n, Inc.*:

When an appeal is taken, “the lower court [is] divested of jurisdiction to proceed with matters related to the final judgment.” *Hudson v. Hofmann*, 471 So.2d 117, 118 (Fla. 2d DCA 1985) (citing *Wilson Realty, Inc. v. David*, 369 So.2d 75 (Fla. 2d DCA 1979)). During the appeal’s pendency, the trial court lacks jurisdiction “to modify or amend the judgment on appeal,” *Brown v. Brown*, 931 So.2d 251, 251 (Fla. 1st DCA 2006), or “entertain ... motion[s] pursuant to Florida Rule of Civil Procedure 1.540(b).” *State ex. rel. Schwartz v. Lantz*, 440 So.2d 446, 449 n. 3 (Fla. 3d DCA 1983) (citations omitted); *see, e.g., Zuckerman v. Alex Hofrichter, P.A.*, 630 So.2d 210, 211 (Fla. 3d DCA 1993) (“[A] trial court lacks jurisdiction to proceed on a motion for relief from judgment once appellate jurisdiction is invoked” (citations omitted)); *Flemenbaum v. Flemenbaum*, 636 So.2d 579, 580 n. 1 (Fla. 4th DCA 1994) (“The pendency of the appeal divested the trial court of jurisdiction to hear the rule 1.540 motion.” (citation omitted)).

Jallali v. Knightsbridge Village Homeowners' Ass'n, Inc., 152 So.3d 808, (Fla. 4th DCA 2014).

Here, Mr. and Mrs. Howard are the appellants in an appeal seeking review of the final order which is the subject of Mrs. Howard’s/Attorney Rumph’s Rule 1.540(b) motion. *See Phillip Timothy Howard and Jennifer Howard, Appellants v. Artemis of Naples, LLC and Ted Doukas, Appellees*, First District Court of Appeal Case No. 1D19-4563. Thus, this Court has no jurisdiction to consider the motion.

Additionally, the appeal itself undermines many of the matters raised by Mrs. Howard/Attorney Rumph in the Rule 1.540(b) motion. Specifically, they seem to complain about Attorney Howard and the veracity of his statements to Mrs. Howard about the transaction and the proceeding in the within case. But, Attorney Howard is presently representing Mrs. Howard in the appeal. *See, i.e., Amended Initial Brief of Appellants* filed on April 28, 2020 where Attorney Howard is appearing and filing the Initial Brief on behalf of both Appellants (himself and Mrs. Howard) in a brief filed within the past 30 days. Attorney Rumph has not entered an appearance in the appeal (or the other pending appeal, Case No. 1D19-2741). This leaves us to wonder how

many attorneys are representing Mrs. Howard (we count that there are three, Attorney Howard, Attorney Bruner and Attorney Rumph) and why they are not coordinating better. Either way, the subject Rule 1.540(b) motion filed by Attorney Rumph/Mrs. Howard is fatally defective as this Court has no jurisdiction to hear such motion.³

**D. Fees Should be Assessed In Equal Parts
Against Mrs. Howard and Attorney Rumph**

Section 57.104(1) states that when fees are awarded under this statute, they are to be paid in equal amounts by the losing party and the losing party's attorney. While the undersigned is always hesitant to pursue fees under § 57.105 against an opposing attorney, it is clear in this case that Attorney Rumph is at least 50% at fault. He should coordinate better with his co-counsel, should have at least read the trial transcript, should have reviewed the trial exhibits (which undermine his entire motion) and should be well aware of relevant Florida law.

³ Mrs. Howard and Attorney Rumph also completely ignore that fact that in addition to Attorney Howard (her husband), at all times, Mrs. Howard was represented by Attorney Bruner whose name/signature appeared on most documents filed with the Court and who appeared at many of the hearings/conferences.

III. CONCLUSION

For all of the grounds set forth above, and in accordance with the provisions of § 57.105, *Florida Statutes*, Defendants request entry of an Order awarding attorneys' fees to be paid in equal parts by Plaintiff, JENNIFER HOWARD, and Plaintiff's Counsel, Jerry L. Rumph, Jr./Sweeting & Rumph, P.A.

Respectfully submitted,

GERSHMAN & GERSHMAN, P.A.

2160 W. Atlantic Avenue, 2nd Floor

Delray Beach, Florida 33445

Telephone: (561) 684-8898

Facsimile: (561) 998-5868

Primary e-mail: robert@rglawfirm.us

Secondary e-mail: michael@rglawfirm.us

By: /s Robert S. Gershman

ROBERT S. GERSHMAN

Florida Bar No. 917397

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on May 15, 2020 via e-mail to James Bruner, Esq. (james@jamesbrunderlaw.com), Phillip Timothy Howard (tim@howardjustice.com) and Jennifer L. Sweeting/Jerry L. Rumph, Jr. (Jennifer@sweetingrumph.com; jerry@sweetingrumph.com). The Motion will not be filed with the Court until twenty-one (21) days later (on or after Monday, June 8, 2020).

By: */s Robert S. Gershman*
ROBERT S. GERSHMAN

UNOFFICIAL
DOCUMENT