

2018 WL 9943524 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
11th Judicial Circuit
Miami-Dade County

Virginia PINO,

v.

CGH HOSPITAL, LTD., et al.

No. 14-032621 CA 05.

December 27, 2018.

Order Granting Defendant's Motion to Dismiss for Fraud on the Court

Miguel M. de la O, Judge.

***1 THIS CAUSE** came before the Court on Defendant's Motion to Dismiss for Fraud on the Court ("Motion") based on allegations of perjury and a clear and intentional effort on the part of the Plaintiff to misrepresent her claimed injuries, as well as the alleged cause of her fall. The Court has reviewed the Motion, the Response, heard testimony, viewed evidence, heard argument of Counsel, and it is fully advised in the premises. The Motion is **GRANTED**.

I. THE MOTION.

The Defendant raised two grounds in support of the Motion. The first was that surveillance films revealed that the Plaintiff's claims of limitations and post-incident condition were not true and the case should be dismissed based upon *Willie-Koonce v. Miami Sunshine Transfer & Tours Corp.* 233 So. 3d 1271 (Fla. 3d DCA 2017). The second was that the Plaintiff provided photographs allegedly of the room where she fell and then, after learning that the claimed photographs could not have been of the same room, changed her testimony in bald repudiation of her prior testimony.

II. THE EVIDENTIARY HEARING.

The Court conducted an evidentiary hearing on the Motion on September 4, 2018 ("Hearing"). Prior to the Hearing, the court was provided with all surveillance films, Plaintiff's deposition testimony with exhibits, testimony of various witness, and the Plaintiff's Notice of Filing Changes to Deposition Testimony, which the Court reviewed prior to the hearing.

The Court heard the evidence presented by the parties, including a video presentation consisting of side-by-side videos of the Plaintiff, which demonstrated the conflicts between her sworn deposition testimony and what was seen in the surveillance film. In addition, the Court heard testimony of Ms. Pino, the Investigators who took the surveillance films, and Ricardo Ramirez R.N., the former Assistant Nurse Manager and Director of ICU for the Defendant. Based upon the evidence submitted and testimony presented during the Hearing, the Court makes the following findings.

III. FINDINGS OF FACT.

A. THE FALL.

On December 13, 2014, the Plaintiff, Virginia Pino, filed the instant action for personal injuries arising from an alleged trip and fall incident occurring on or about June 18, 2012 at Coral Gables Hospital. On the date of incident, the Plaintiff was visiting her father, Jose Pino, who was a patient at the hospital. Upon her arrival at the hospital that day, the Plaintiff went to the Telemetry Unit where her father was located. Mr. Pino had been transferred to this room two days prior, on June 16, 2012 via wheelchair. *See* medical records of Jose Pino and redacted copy of an Encounter Location History from Mr. Pino's medical records (Hearing Exhibit "B"). Initially, in her sworn deposition testimony taken on July 14, 2015, Plaintiff claimed that she tripped and fell as a result of a cable, located on the floor of her father's Telemetry hospital room. *See* Dep. of V. Pino taken on July 14, 2015 at p. 43. At that time, she did not know what the cable was attached to. *See* Dep. of V. Pino taken on July 14, 2015 at p. 72.


*2 On October 24, 2017, after three years of litigation, and on the eve of trial, the Plaintiff produced twelve (12) photographs which she represented were taken of "the hospital room shortly after the fall," together with eleven (11) photos taken of her injuries. The Plaintiff was deposed on November 7, 2017 regarding the newly produced photographs. During her deposition, the Plaintiff repeatedly testified that the pictures were taken in the Telemetry room where she fell. *See* Dep. of V. Pino taken on November 7, 2017 at pp. 31 – 36, 39, and 47.

On January 11, 2018, Plaintiff's prior counsel deposed Ricardo Ramirez, R.N., Assistant Chief Nursing Officer and Director of the ICU, as well as, George Diaz, the Director of Cardiopulmonary Services, at Coral Gables Hospital. According to both Mr. Ramirez and Mr. Diaz, the photographs produced by the Plaintiff contain various items, including ICU specific beds, chairs, and critical care monitoring equipment, as well as, structural building components, including specialized flooring, a monitoring tower, and a sink and toilet, that are only found in the ICU rooms at the Hospital and not the Telemetry rooms. *See* Dep. of Ricardo Ramirez, R.N. and George Diaz.

On August 1, 2018, after learning of the aforementioned testimony, Plaintiff filed a Notice of Filing Changes to her Deposition Testimony taken on November 7, 2017, which flatly and inexplicably repudiated her prior sworn deposition testimony regarding where these photographs were taken, as well as, the cause of her fall. In her Notice, the Plaintiff claims that the photographs were actually taken in an ICU room the morning after her fall

Additionally, the Plaintiff claimed that her father was transferred to Telemetry room, in an ICU bed and that the cables, as seen in the photographs, were attached to the ICU bed. However, during her deposition testimony taken on July 14, 2015, the Plaintiff did not know what the cables were connected to that allegedly caused her fall. *See* Dep. of V. Pino taken on July 14, 2015 at p. 43.

The evidence submitted to the Court reflects that Mr. Pino was transferred to the Telemetry Unit on June 16, 2012, in a wheelchair and not an ICU bed. Moreover, the former Assistant Chief Nursing Officer and Director of the ICU, Ricardo Ramirez, R.N., testified during the evidentiary hearing that, in 2012, the ICU beds were never permitted to leave the ICU and thus, were not used in the Telemetry rooms. Rather, they were only used in the ICU rooms at the hospital. In an effort to try and explain this obvious contradiction during the Hearing, the Plaintiff testified unconvincingly that that her recollection of the events in 2012 is better now, in 2018, than it was three years earlier, in 2015, when she was deposed. *See* Transcript from the Evidentiary Hearing dated September 4, 2018 at p. 76.

The Plaintiff has attempted to counter Defendant's Motion by filing a Notice of Changing Deposition Testimony repudiating her prior testimony regarding the cause of her fall and, in fact, repudiated her testimony concerning where the cables were attached to at the Hearing. In Florida, a party may not rely on an affidavit that contradicts or repudiates his/her previous deposition simply to defeat a motion for summary judgment. *See*  *Ellison v. Anderson*, 74 So. 2d 680 (Fla. 1954)(holding that "a party when met by a Motion for Summary Judgment should not be permitted by his own affidavit, or by that of another, to baldly repudiate his previous deposition so as to create a jury issue, especially when no attempt is made to excuse or explain the discrepancy").

*3 Although no case holds that a similar rule should apply when a motion to dismiss for fraud on the court is filed, this Court is nevertheless free to consider Plaintiff's contradictory and inconsistent testimony in judging her credibility. And the Court has,

in fact, considered Plaintiff's newfound memories, in addition to the corroborating evidence and testimony presented by the Defendant, in concluding that the Plaintiff has presented false testimony to this Court.

B. PLAINTIFF'S PHYSICAL CONDITION.



Plaintiff's has testified in deposition that she is unable to look up, look down, and/or to either side, which prevents her from being able to do such things as go shopping alone, unless she purchases only 1 or 2 small items, or push a shopping cart. She claimed she must always use the speaker phone on her cellphone because she cannot walk and/or drive while holding the phone to her ear because she cannot look down to see where she is walking and therefore must concentrate on her footing and, further, that it is impossible to cradle her cellphone between her shoulder and ear. In fact, during her June, 2016 deposition, the Plaintiff responded using the word "nunca" in Spanish, which means "never" in English, when asked if she was able to drive a car and talk on her cell phone at the same time.

The Defendant obtained surveillance of Plaintiff on numerous dates. On November 24, 2015, and November 25, 2015, surveillance video captured the Plaintiff completing tasks and performing activities which are in direct contradiction to her testimony regarding her current physical condition and limitations as a result. Specifically, Plaintiff was recorded pumping gas, turning her neck to the left and to the right and tilting her head and neck upward and downward several times, cradling her cell phone between her left shoulder and her left ear and repeatedly walking and driving while holding her cell phone up to ear.

On March 24, 2016, the Plaintiff was documented pushing a shopping cart, removing several bags of groceries and placing them in her vehicle, tilting her head and neck upwards, downwards, and to either side – all without limitations. She also had no limitations with driving all alone. Upon returning to her residence, the Plaintiff proceeded to remove the groceries from her car and carry them inside of her home – again without limitation.

It is obvious to this Court that Plaintiff, who stated under oath that she cannot look up, down, to the side, push a shopping cart, carry groceries, walk and/or drive while holding the cell phone to ear, run errands alone, or cradle her cell phone between her shoulder and her ear, was untruthful when testifying under oath as to her current physical condition. During Hearing, upon being confronted with her prior deposition testimony, the Plaintiff once again attempted to change her testimony and stated that she could do those things, but with limitations, which is not supported by her deposition testimony.

IV. CONCLUSIONS OF LAW.

The trial court has broad discretion in imposing sanctions arising from serious abuses of the judicial process, including the dismissal of a case. See *Diaz v. Home Depot USA, Inc.*, 196 So. 3d 504, 505 (Fla. 3d DCA 2016);  *Leo's Gulf Liquors v. Lakhani*, 802 So. 2d 337, 342-43 (Fla. 3d DCA 2001). The trial court's authority to dismiss an action as a result of serious misconduct of a party – including perjury – derive from the inherent power of the court to preserve the integrity of the judicial system. See *Diaz*, 196 So. 2d at 505;  *Young v. Curgil*, 358 So. 2d 58, 59 (Fla. 3d DCA 1978).

*4 The Third District has taken a strong stand against serious litigation abuses, especially when a party commits perjury. Although the result in this case may seem rough justice, the courts must deal firmly and publicly with a litigant's fraud on the very judicial system the litigant asks to render justice. Over 2,000 years ago, Roman law recognized the deterrent effect of harsh penalties in the phrase "*Ut poena ad paucos, metus ad omnes perveniat*"—"That punishment may come to a few, the fear of it should affect all."

Willie-Koonce v. Miami Sunshine Transfer & Tours Corp., 233 So. 3d 1271, 1274 (Fla. 3d DCA 2017), *rev. denied*, 2018 WL 2251788 (Fla., May 17, 2018). See *Mendez v. Blanco*, 665 So. 2d 1149, 1150 (Fla. 3d DCA 1996) (holding that the trial court did not abuse its discretion in dismissing the plaintiff's complaint where he "committed serious misconduct by repeatedly lying

under oath during a deposition”); *O’Yahey v. Miller*, 644 So. 2d 550, 551 (Fla. 3d DCA 1994) (holding that the plaintiff’s repeated lies in discovery, uncovered only by the “assiduous efforts of opposing counsel,” “constituted such serious misconduct” that dismissal of the case was required); *Austin v. Liquid Distrib., Inc.* 928 So. 2d 521 (Fla. 3d DCA 2006) (noting that when plaintiff makes misrepresentations about pre-incident accident and medical history in interrogatories and during deposition, those misrepresentations and omissions go to the heart of the claim and subvert the integrity of the action); *Long v. Swofford*, 805 So. 2d 882 (Fla. 3d DCA 2002) (trial court is obligated to dismiss a cause of action based on fraud when a plaintiff concealed a pre-existing injury during deposition); *Metropolitan Dade County v. Martinsen*, 736 So. 2d 794, 795 (Fla. 3d DCA 1999). In *Cabrerizo v. Fortune International Realty*, 760 So. 2d 228 (Fla. 3d DCA 2000), the Court explained: In this case, Cabrerizo has mindfully undermined the integrity of the courts by creating a mockery of the principles of justice through his deceitful misconduct. Such underhanded tactics in full derogation of our legal processes should be met with swift measures. Total expulsion from the category of persons who may avail themselves of the benefits of our court system should not be an afterthought, but should instead be the direct result of such egregious misconduct.

Id. at 230.

The standard to be applied by a trial court in determining whether an action should be dismissed was articulated by the Fifth District in *Cox v. Burke*, 706 So. 2d 43 (Fla. 5th DCA 1998), and cited with approval by the Third DCA in *Middleton v. Hager*, 179 So. 3d 529, 532-33 (Fla. 3d DCA 2015). In *Burke*, the court reasoned that the movant must demonstrate by clear and convincing evidence that the opposing 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.” 706 So. 2d at 46-47.

Cox further explained:

When reviewing a case for fraud, the court should “consider the proper mix of factors” and carefully balance a policy favoring adjudication on the merits with the competing policies to maintain the integrity of the judicial system. *Id.* at 1117-18.

*5 [W]here a party lies about matters pertinent to his own claim, or a portion of it, and perpetrates a fraud that permeates the entire proceedings, dismissal of the whole case is proper. *Savino v. Florida Drive In Theatre Management, Inc.*, 697 So. 2d 1011 (Fla. 4th DCA 1997).

Id.

The *Willie-Koonce* case concerning surveillance films and the Plaintiff’s current condition is very similar to this case. There is no dispute that Ms. Willie-Koonce sustained serious injuries, including a ten-day hospital stay for treatment of a fractured femur. The treatment included implanting a titanium rod and several screws to repair the bone, followed by extensive physical therapy to regain as much of her pre-injury mobility as possible.

Three months after the accident, Ms. Willie-Koonce sued Miami Sunshine and the individual operator of the vehicle which towed the trailer for negligence. During pretrial discovery, Ms. Willie-Koonce provided sworn answers to interrogatories and deposition testimony that included statements that she had a “permanent limp,” that she needs a cane to get around, and that when she walks a “few steps” to her car without a cane, she limps. She also testified that

she could not walk without a cane carrying large boxes, had not tried carrying heavy or bulky items, and had to use a handrail to walk up steps without a cane.

Unbeknownst to her at the time, apparently, Ms. Willie-Koonce had been surveilled for some seven hours in March 2016, and videotaped for much of that time, by a defense investigator. She was videotaped while moving into a townhome in North Carolina, and the videotape clearly shows her walking continuously up and down steps without using a cane or handrail, carrying large and bulky items (of indeterminate weight) without assistance, up and down the front steps without using a cane or a handrail. The videotape of Ms. Willie-Koonce shows her walking to the back of her automobile, opening the trunk, and carrying packages (again, without the assistance of another person) into the townhome without using a cane or limping.

[233 So. 3d at 1272-73](#). The Third DCA concluded that such a fact pattern “presents precisely the egregious misconduct warranting dismissal.” *Id.* at 1274.

The Court concludes that the Plaintiff has sentiently set in motion a scheme to defraud. While the Court does not reach this conclusion lightly, the Plaintiff's actions here warrant dismissal. The combination of false testimony and evidence about both the alleged accident and the Plaintiff's physical condition presents a case more egregious than *Willie-Koonce* even. Under the circumstances of this case, no sanction short of dismissing the Plaintiff's case for fraud would be adequate to punish the Plaintiff's wrongdoing, while preserving the integrity of the judicial process. Because the fraud is so central to this claim, there is no evidence-based sanction available which would serve to eliminate the taint of the wrongdoing and permit a fair trial on the issues.

The evidence presented establishes that the Plaintiff consciously decided to fabricate events and give false testimony in order to influence the jury. All of this testimony was offered to establish the alleged damages occasioned by the Plaintiff's fall. All of this testimony was false. This is not a case where Ms. Pino “fudged” a few facts to make herself look better in the eyes of the jury. The Court concludes that Virginia Pino consciously set out to mislead the Court and the jury, with the only possible motivation being pecuniary gain.

*6 The Court thus finds, by clear and convincing evidence, that Plaintiffs' material misrepresentations and fraud have permeated the entire proceeding and dismissal of the Plaintiffs' entire lawsuit with prejudice is warranted for the fraud perpetrated upon the Court and the Defendant. See [Papadopoulos v. Cruise Ventures Three Corp., 974 So. 2d 418, 419-20 \(Fla. 3d DCA 2007\)](#) (“Papadopoulos has forfeited his right to seek redress for his claimed injuries based upon his material misrepresentations and omissions that go to the heart of his claims.”). The Court has carefully balanced our State's policy in favor of adjudicating cases on the merits with the competing policy of the need to maintain the integrity of the judicial system.

The Court is entering the foregoin[Text redacted in copy.]erent authority due to the Plaintiffs' fraud on the Court, and because the Court finds that its own inherent authority is the only means by which to fully redress the prejudice inflicted on Defendant by Plaintiffs' conduct. Therefore, it is

ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss for Fraud On The Court is **GRANTED**. This case is **DISMISSED WITH PREJUDICE**. The Court reserves jurisdiction to award costs and, if appropriate, attorney's fees.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 11/09/18.

<<signature>>

MIGUEL M. DE LA O

CIRCUIT JUDGE

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall

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