

# LIAR LIAR PANTS ON FIRE

## *Why we should file more Motions to Dismiss for Fraud*



Elizabeth “Betsy” Burgess and Christopher Barkas Carr Allison

Historically, Motions to Dismiss for Fraud on the Court have been known as difficult, if not impossible, motions to win. This is primarily because the ultimate sanction sought is the fatal dismissal with prejudice – the harshest sanction a Court can issue. This understanding discourages some attorneys from spending the time and effort to pursue such a Motion, even when armed with demonstrable proof of a plaintiff lying or engaging in misrepresentation about a material issue.

However, recent national trends suggest Judges and Appellate Courts are becoming more receptive to these Motions, signaling a new lack of judicial tolerance for litigants playing “fast and loose” with the truth. The fraud we are talking about is fairly common: testimony that conflicts with surveillance, incomplete or evasive testimony that conflicts with medical or employment records, fabricated evidence, and half-truths or partial omissions on critical

matters central to the case.

Additionally, and importantly, there are strategic benefits to filing these Motions, regardless of the outcome, that may justify the time and expense many times over. This article will explore both the changing legal landscape and the strategic advantages a movant may consider when contemplating filing a Motion to Dismiss for Fraud.

### **RECENT NOTABLE RULINGS ON MOTIONS TO DISMISS FOR FRAUD IN STATE AND FEDERAL COURTS**

#### **1. State Courts**

Florida Courts are leading the way in granting and upholding dismissals for fraud. In a recently upheld dismissal for fraud, the plaintiff’s deposition testimony conflicted with medical records obtained by subpoena. The plaintiff blamed “poor memory” among other excuses for the discrepancies. The judge found the deposition testimony patently false, and found

the plaintiff had “fraudulently concealed” evidence directly related to his claim for damages. The Appellate Court affirmed the dismissal and noted the false testimony about prior injuries was “at the very heart” of the case. The Court further stated the plaintiff’s attempt to conceal the information was nothing less than an “unconscionable scheme calculated to interfere” with the proper adjudication of the matter.<sup>1</sup>

In Florida, even an attempt to obfuscate the discovery of facts relating to causation or damages, whether ultimately successful or not, warrants dismissal with prejudice.<sup>2</sup> Additionally, only full and complete honesty is acceptable. “Being truthful about some facts while denying or omitting others does not constitute the truthful disclosure of facts on which the integrity of the civil litigation process depends.”<sup>3</sup> So in Florida, if a plaintiff is even partially dishonest about a relevant matter, the case may be dismissed for fraud.

Other states are also signaling increasing intolerance for fraud. To highlight a few, in October 2017, a Texas Appeals Court upheld a dismissal for fraud where the plaintiff's affidavit conflicted with bankruptcy filings, showing how easily accessible (even public) records can assist in identification and reliable proof of fraud.<sup>4</sup> In November 2018, a New York Appeals Court vacated a Judgment due to plaintiff's fraud and entered monetary sanctions. The Court's language revealed its frustration, as the ruling states, "The Plaintiff hopes that the fraud it has perpetrated on this Court can be concealed under the guise of a wordy Settlement Agreement and the Defendants' purported waiver of their rights. The Court hereby shatters any such hope by the Plaintiff..."<sup>5</sup> Additionally, in December 2018, an Ohio Appeals Court upheld a finding of dismissal for fraud on the Court where a litigant forged a signature on a document. Again, the Court again voiced its distaste for the fraudulent conduct with choice words, stating, "falsification of documents ...embarrasses the court as well as brings it into disrespect."<sup>6</sup>

## 2. Federal Courts

A Motion to Dismiss for Fraud typically is more difficult to prevail upon in Federal Court. The federal standard for dismissal for fraud is more stringent than many state court standards, as it requires a showing of actual prejudice to the movant and highly favors lesser sanctions. However, despite the heightened bar, the federal judiciary recognizes there are circumstances when dismissal is reasonable and appropriate. Penalizing fraudulent conduct "is necessary to the integrity of the courts, for tampering with the administration of justice in this manner involves far more than an injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public."<sup>7</sup>

Examples of the type of fraudulent conduct which has justified dismissal under Rule 41(b) include the following separate situations: 1) where a plaintiff engaged in "a pattern of deception" and filed pleadings and motions under a false name, 2) where a plaintiff failed to produce or destroyed record evidence and intentionally misidentified a witness, 3) where a plaintiff fabricated evidence and committed perjury, and 4) where plaintiff engaged in obstruction

of access to discoverable evidence by failing to disclose a treating physician and subsequently lying at his deposition when questioned on the same subject.<sup>8</sup> These cases show that where fraud is demonstrable on a material issue, and the defendant has been prejudiced, defense attorneys should not be reluctant to file a Motion to Dismiss for Fraud in Federal Court.

## STRATEGIC REASONS TO FILE MOTIONS TO DISMISS FOR FRAUD

### 1. Availability of Alternate Sanctions

While a Motion to Dismiss for Fraud may be legally viable, due to the severity of the ultimate sanction, judges may be understandably hesitant to dismiss the case altogether. Fortunately, dismissal is not the only sanction available or worth seeking. Judges may use their discretion to issue lesser sanctions they deem appropriate. Defense counsel should be proactive in suggesting alternate sanctions if the judge is receptive to the fraud arguments, but perhaps is signaling he or she feels dismissal would be too harsh. This tactic is helpful where a material misrepresentation may not raise to the level of outright dismissal, but may justify alternate sanctions, such as striking portions of pleadings or claims for certain categories of damages (for example, if a plaintiff has lied about post-accident income, ask the court to strike the plaintiff's wage claims).

### 2. Educating the Judge about the Weaknesses of Plaintiff's Case

A clearly drafted Motion to Dismiss for Fraud will, even if not fully granted, serve the purpose of educating the judge about the weaknesses of a plaintiff's case that will be pursued through cross-examination at trial if not dismissed, and will certainly be the subject of motions in limine nearer to trial. If a judge is educated about the nature of the fraud in advance, and the relevance of such fraud to the defense of the case, the judge will be more prepared to address (and deny) objections and motions in limine by plaintiff's counsel than if the judge is learning about the issue for the first time at the pre-trial hearing.

### 3. Flushing out Plaintiff's Arguments Defending or Minimizing the Fraud

A viable Motion to Dismiss for Fraud requires a plaintiff to fully explain the

fraud to the judge in an evidentiary hearing, subject to cross-examination and direct questioning by the judge. It is valuable to know in advance how the plaintiff intends to rationalize discrepancies and/or misrepresentations to a jury if the case is allowed to move forward to trial, and how he or she will respond to cross examination on these subjects.

### 4. Leveraging a Reasonable Settlement

A well-supported Motion to Dismiss for Fraud puts a plaintiff and his or her attorney in an uncomfortable position. A plaintiff's attorney may be unaware of the fraud until the Motion is filed, but should recognize the importance of credibility and the potentially serious implications with a jury, even if the case is not dismissed for fraud. Both the plaintiff and his or her counsel may be more willing to discuss reasonable or nominal settlement when faced with the prospect of a dismissal or, at the least, a potentially devastating cross-examination at trial. If settlement negotiations have stalled or plaintiff's counsel refuses to negotiate in a reasonable range, a Motion to Dismiss for Fraud can get attention and apply valuable pressure.

## CONCLUSION

Fraudulent conduct occurs frequently in litigation, yet the Motion to Dismiss for Fraud is an underused tactic because it is viewed as nearly impossible to win. However, recent cases show not only that they are winnable, but are a valuable device for positioning a defendant for the best resolution of a case.



*Elizabeth "Betsy" Burgess is a shareholder at Carr Allison in Tallahassee, Florida. She primarily defends retail, construction, employment, and professional liability cases. She graduated from Auburn University and Florida State*

*University College of Law, and is licensed to practice in all State and Federal Courts in Florida.*



*Christopher Barkas is a shareholder with Carr Allison in Tallahassee, Florida. He started his career as a prosecutor in Miami, Florida. He now defends employment, professional liability, transportation, and retail cases.*

*He graduated from Florida State University and Cumberland School of Law, and practices in Florida State and Federal Courts.*

<sup>1</sup> *Wallace v. Keldie*, 2018 Fla. App. LEXIS 8301

<sup>2</sup> *ICMFG & Assocs v. Bare Bd. Grp., Inc.*, 42 Fla. L. Weekly D648, \*19-20 (Fla. 2d DCA March 17, 2017)

<sup>3</sup> *Id.*

<sup>4</sup> *Poff v. Guzman*, 532 S.W.3d 867

<sup>5</sup> *Richmond Capital Group v. Orion Megivern*, 2018 N.Y. Misc. LEXIS 6052, \*8

<sup>6</sup> *In re Poletti*, 2018-Ohio-5275, P1

<sup>7</sup> *Chambers v. NASCO*, supra, 501 U.S. at 44.

<sup>8</sup> *Parcher v. Gee*, 2016 U.S. Dist. LEXIS 179454