

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL ACTION

SAMUEL M. BAKER, BARBARA FERRELL,
LINDA HEIN, LINDA MCARTOR,
and KRISTAL ALBERTSON,

Plaintiffs,

vs.

Case Number: 2016-CI-005227

MAYOR TRAVIS PALLADENO,
COMMISSIONER TERRY LISTER,
COMMISSIONER NANCY HODGES,
COMMISSIONER HOUSH GHOVAEE,
and COMMISSIONER ELAINE POE
all in their official capacities as the members
of the MADEIRA BEACH CITY
COMMISSION and the CITY OF MADEIRA
BEACH, a
municipal government of the State of Florida,

Defendants.

**STIPULATED MOTION TO VACATE ORDER DISMISSING
ACTION WITH PREJUDICE PURSUANT TO FLA.R.CIV.P. 1.540**

Plaintiffs and Defendants, by and through their undersigned counsel, hereby stipulate and agree to, and jointly move this Court pursuant to Fla.R.Civ.P. 1.540 for, an Order vacating the Court's Order Granting Defendant's Motion to Dismiss For Failure To State A Cause Of Action, and as grounds would state the following:

1. Plaintiffs filed the instant action.
 2. Defendants filed a Motion to Dismiss.
-

3. Without the knowledge of Plaintiff's counsel, a legal assistant in the office of counsel for Defendant submitted a proposed order to the Court dismissing the action with prejudice. The letter accompanying the proposed order erroneously recited that Plaintiff's counsel had reviewed the proposed order and had no objection to its entry. The cover letter and proposed order also recited that a copy of it was sent to Plaintiff's counsel.

4. Plaintiff's counsel had not reviewed the proposed order nor consented to its entry. Furthermore, Plaintiff's counsel was wholly unaware of the correspondence to the Court or the fact that orders were being submitted for entry and being misrepresented as being unopposed.

5. Defendant's counsel was similarly unaware of the actions of his legal assistant.

6. Based on the legal assistant's correspondence, this Court entered an order dismissing the case with prejudice on November 6, 2016.

7. Plaintiffs did previously file a motion for rehearing and to set aside the order of dismissal in this case. However, at the time the motion was filed, Plaintiff's counsel was unaware that the case was dismissed with prejudice based upon the misrepresentations of Defendant's legal assistant. Plaintiff's counsel was operating under the mistaken belief that the dismissal had occurred because Plaintiff had not submitted a brief in opposition to the motion to dismiss under the local Administrative Order. The grounds raised in the instant motion were unknown to Plaintiff at the time. See *Minda v. Minda*, 190 So.3d 1126 (Fla. 2d DCA 2016) (successive 1.540 motion permissible so long as issues were not actually litigated in prior motion).

8. This Court denied Plaintiff's prior motion to set aside the dismissal with

prejudice, opining that this action should have been filed as a certiorari proceeding.¹ Even if that were correct, the Court did not permit amendment of the pleadings nor treat the complaint as if it had sought the correct remedy, all relief to which Plaintiff would have been entitled on a first motion to dismiss but for the improper order entered by the legal assistant.

9. Plaintiffs have been surprised and prejudiced by the misrepresentations to the Court.

10. Plaintiffs and Defendants request an Order vacating the Court's Order Granting Defendant's Motion to Dismiss For Failure To State A Cause Of Action.

11. Plaintiffs request leave to file an amended pleading to clarify the grounds for relief. No party will be prejudiced by such leave, and, in the absence of futility, it would be error to dismiss Plaintiffs' case with prejudice without ever granting Plaintiffs an opportunity to amend.

12. Defendants have no opposition to the relief requested herein.

¹ The complaint sought to compel the City to put a proposed referendum on the ballot following the Clerk's determination that the petition circulated by Plaintiffs for that purpose was insufficient. The City's Charter provides for judicial review of the City's decision but does not specify the manner in which such review should be sought. Plaintiffs invoked the Declaratory Judgment Act. However, if the Court believes that to be improper, Plaintiffs suggest that mandamus, not certiorari, would be the proper remedy for such an action. Fla.R.App.P. 9.040 expressly provides "[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought." Whether Plaintiffs should have sought certiorari or mandamus, the Court should have either treated the complaint as if it had sought the correct remedy or at least granted Plaintiffs leave to amend to seek the proper remedy. The very case relied upon by Defendant in its motion to dismiss treated a petition for writ of prohibition as seeking certiorari. See *Kilgore v. Bird*, 6 So.2d 541 (Fla. 1942). In the absence of the legal assistant's misrepresentations and the procedural posture into which it forced Plaintiffs, it is highly unlikely that this Court would have dismissed Plaintiffs' action with prejudice on the first complaint under these circumstances.

WHEREFORE, Plaintiffs and Defendants respectfully request an order vacating the Court's prior order, granting Plaintiffs leave to amend, and granting such other and further relief as the Court deems proper.

Dated this 10th day of January, 2017.

<u>/s/ Kenneth L. Weiss</u> Kenneth L. Weiss, Esq. FBN: 0159021 kweiss1@tampabay.rr.com 11085 9 th Street East Treasure Island, FL 33706 (727) 367-8829 Attorney for Plaintiffs	<u>/s/ Andrew J. Salzman</u> Andrew J. Salzman, Esq. FBN: 0603929 service@unicesalzman.com Patriot Bank Building, Second Floor 1815 Little Road Trinity, FL 34655 Attorney for Defendants
--	--

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 10, 2017, I filed the foregoing using the Florida Courts E-Filing Portal, which will electronically serve Andrew J. Salzman, Esq., service@unicesalzman.com and asalzman@unicesalzman.com.

/s/ Kenneth L. Weiss
KENNETH L. WEISS, ESQUIRE
FBN: 0159021
kweiss1@tampabay.rr.com
11085 9th Street East
Treasure Island, FL 33706
(727) 367-8829
Attorney for Plaintiffs