

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

Appellate Case No.:

LT Case No: 502009CA040800XXXXMB AG

JEFFREY EPSTEIN,

Petitioner/Plaintiff,

v.

SCOTT ROTHSTEIN, individually, and
BRADLEY J. EDWARDS, individually,

Respondents/Defendants.

EMERGENCY PETITION FOR WRIT OF MANDAMUS

On Review of a Non-Final Order of the Circuit Court of the
Fifteenth Judicial Circuit in and for Palm Beach County, Florida

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INTRODUCTION

In this Emergency Petition for a writ of mandamus, Petitioner Jeffrey Epstein, the plaintiff/counter-defendant below, challenges the circuit court's Order entered March __, 2018, by the Honorable Donald Hafele, denying Epstein's Motion to Remove Case from Trial Docket in Order to Comply With the Mandate Set Forth in Rule 1.440. Epstein requests Emergency treatment because trial is set to commence on **March 13, 2018**.¹

BASIS FOR INVOKING JURISDICTION

This Court has original jurisdiction to issue writs of mandamus under Article V, section 4(b)(3) of the Florida Constitution, and under Rule 9.030(b)(3) of the Florida Rules of Appellate Procedure. Mandamus is "a proper vehicle to enforce the time restrictions for the setting of a trial under rule 1.440." *Campbell v. Wells Fargo Bank, N.A.*, 204 So. 3d 476, 479 (Fla. 4th DCA 2016) (citing *Genuine Parts Co. v. Parsons*, 917 So. 2d 419, 421 (Fla. 4th DCA 2006) and *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 130 (Fla. 2d DCA 2015)).

STATEMENT OF THE CASE AND FACTS

On December 7, 2009, Epstein filed his initial Complaint in this action

¹ In compliance with this Court's Administrative Order No. 2014-1, the Petitioner has contemporaneously filed a separate Request for Emergency Treatment.

against Scott Rothstein, Bradley Edwards and L.M.² Epstein alleged the following counts against Rothstein:

- a. (1) Violation of § 772.101 – Florida Civil Remedies for Criminal Practices Act
- b. (2) Violation of § 895.01 – Florida’s RICO Act
- c. (3) Abuse of Process
- d. (4) Fraud
- e. (5) Conspiracy to Commit Fraud

(App. 1).

On December 21, 2009, just 17 days after Epstein instituted the civil proceeding, Edwards filed a Counterclaim for abuse of process against Epstein. **(App. 2).** Thereafter, Edwards amended his Counterclaim several times, ultimately alleging a count for malicious prosecution against Epstein. **(App. 3).**

On January 21, 2010, a Clerk’s Default was entered against Rothstein as to all claims in the December 7, 2009 Complaint. **(App. 4).** Rothstein retained counsel, Mark Nurik, who moved to set aside the default, but an order was never entered on that motion. Mr. Nurik has not withdrawn from this case and has been on the service list since 2010.

On April 12, 2011, Epstein filed an Amended Complaint against Rothstein. The Amended Complaint asserted a single count against Defendant Rothstein for Abuse of Process. The remaining counts against Rothstein in the initial Complaint

² L.M. was dismissed from this case on August 9, 2010. (See Joint Pretrial Stipulation **(App. 12)** at p. 8, ¶¶ 43 & 44).

(Florida Civil Remedies for Criminal Practices Act, Florida's RICO Act, Fraud, and Conspiracy to Commit Fraud), were abandoned. (**App. 5**).

On August 22, 2011, Epstein filed a Second Amended Complaint (which was corrected on August 24, 2011 for a scrivener's error), bringing a claim for abuse of process against Edwards, and a claim for conspiracy to commit abuse of process against Rothstein. (**App. 6 and 7**). Rothstein never answered the Second Amended Complaint, and a default has not been entered against him on the Second Amended Complaint.

On August 16, 2012, Epstein dismissed his claims without prejudice against Edwards. (**App. 8**).

On May 24, 2017, following remand from the appellate courts, Edwards noticed this entire matter for trial. In his Motion to Set Case for Trial, Edwards requested this Court "to set the above-styled cause for trial by jury," and expressly stated: "This long delayed matter is now ripe for resolution." (**App. 9**). The trial was initially set for December 2017, and then reset to March 13, 2018. (**App. 10 and 11**).

On December 22, 2017, the parties entered into a Joint Pretrial Stipulation, listing the Stipulated Facts and Statement of Issues of Fact for Determination at Trial. (**App. 12**). Pursuant to the stipulation, the first issue to be tried is the "Case Against Rothstein". Second, is Edwards' malicious prosecution counterclaim.

(App. 13 at C. 1.).

Apparently, Edwards did not realize that the matter was not yet ripe until almost the eve of trial. On March 2, 2018, at 5:12:19 p.m., in a “Supplement” to his Motion for Separate Trials filed just the day before, Edwards asserted for the first time that Epstein’s case against Rothstein may not proceed based on Florida Rule of Civil Procedure 1.440. (App. 14).

Rule 1.440 provides:

(a) **When at Issue.** An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading. The party entitled to serve motions directed to the last pleading may waive the right to do so by filing a notice for trial at any time after the last pleading is served. The existence of crossclaims among the parties shall not prevent the court from setting the action for trial on the issues raised by the complaint, answer, and any answer to a counterclaim.

(b) **Notice for Trial.** Thereafter any party may file and serve a notice that the action is at issue and ready to be set for trial. . . .

(c) **Setting for Trial.** If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial. By giving the same notice the court may set an action for trial. In actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with rule 1.080.

Fla. R. Civ. P. 1.440. Pursuant to the clear language of the rule, if the action involves a main claim or counterclaim which has neither been answered nor defaulted, then the entire action (excluding only crossclaims) is not at issue. *See*

id.

Upon receiving Edwards' Supplement to his Motion for Separate Trials, Epstein's counsel immediately researched the Rule 1.440 issue raised by Edwards. Regrettably, Epstein agrees that, despite Edwards' request to set the cause for trial, the "action" is not "at issue." Florida law is clear: "strict compliance with rule 1.440 is mandatory." *Bennett v. Cont'l Chemicals, Inc.*, 492 So. 2d 724, 727 (Fla. 1st DCA 1986) (emphasis added). *Accord Teelucksingh v. Teelucksingh*, 21 So. 3d 37, 37 (Fla. 2d DCA 2009). *See also Melbourne HMA, LLC v. Schoof*, 190 So. 3d 169, 170 (Fla. 5th DCA 2016) ("Strict compliance with rule 1.440 is required and failure to adhere to it is reversible error."); *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 131 (Fla. 2d DCA 2015) ("[A] party is absolutely entitled to strict conformance with the terms of rule 1.440, including its mandated fifty-day hiatus between the service of the last pleading and the trial date."); *Genuine Parts Co. v. Parsons*, 917 So. 2d 419 (Fla. 4th DCA 2006) (granting mandamus to enforce Rule 1.440(c), which prohibits the setting of a trial less than thirty days after service of a notice for trial).

At the earliest opportunity on the following Monday, March 5, 2018, Epstein filed his to motion to remove the case from trial docket in order to comply with

mandate set forth in Rule 1.440. (**App. 12**).³ The circuit court denied the motion in its Order dated March __, 2018. (**App. 14**). This mandamus petition follows.

ARGUMENT

I. A WRIT OF MANDAMUS SHOULD ISSUE TO REQUIRE THE CIRCUIT COURT TO REMOVE THE CASE FROM THE TRIAL DOCKET IN ORDER TO COMPLY WITH THE MANDATE SET FORTH IN RULE 1.440.

In violation of Florida Rule of Civil Procedure 1.440, this case was not “at issue” when Edwards filed his Motion to Set Case for Trial. Therefore, the circuit court’s ensuing Order setting a trial date was a nullity. This defect cannot be cured. A writ of mandamus is required because strict compliance with Rule 1.440 is mandatory,⁴ and the circuit court has refused to remove the case from the trial docket.

The purpose of mandamus is “to enforce the respondent’s unqualified obligation to perform a clear legal duty.” *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 131 (Fla. 2d DCA 2015). The petitioner need demonstrate only that (1) the respondent is duty-bound to act under the law, and (2) the respondent has failed or refused to do so. *Id.* (citing *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009)). “A third

³ Epstein simultaneously filed his Motion for Default Against Defendant Rothstein on the Second Amended Complaint. (**App. 13**). Pursuant to Rule 1.440, the “action” will be at issue 20 days after the circuit court grants Epstein’s motion for default. Thereafter, any party can notice the case for trial and trial shall be set no less than 30 days from service of the notice for trial.

⁴ See *Bennett*, 492 So. 2d at 727; *Teelucksingh*, 21 So. 3d at 37; *Gawker Media, LLC*, 170 So. 3d at 131; *Genuine Parts Co.*, 917 So. 2d at 421.

and final element is that the petitioner must have no adequate legal remedy for the respondent's failure to carry out its duty." *Id.*

These elements are met here. *Compare Gawker Media, LLC*, 170 So. 3d at 129–30 (granting mandamus to enforce Rule 1.440 and holding that an appeal after final judgment would be insufficient to remedy the rule's provisions requiring a fifty-day hiatus between trial and service of the last pleading).

Florida Rule of Civil Procedure 1.440 provides that a case may be set for trial when it is "at issue." First, however, "[a]n **answer must be served by or a default entered against all defending parties before the action is at issue.**" Thus, where a defendant has not yet answered the complaint, and the plaintiff has failed to obtain a default, the action is not yet at issue.

Reilly v. U.S. Bank Nat. Ass'n, 185 So. 3d 620, 621 (Fla. 4th DCA 2016) (emphasis added; internal citations omitted). The rule "exempts only cross-claims from the determination of when an action is at issue." *Bennett*, 492 So. 2d at 727 (emphasis added).

Here, while a default was entered against the original Complaint, Epstein later amended his complaint twice. As such, the Second Amended Complaint is the operative complaint. *See State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992, 995 (Fla. 4th DCA 2001) ("An amended complaint supersedes an earlier pleading where it does not express an intention to save any portion of the original pleading.") (citation and internal quotation marks omitted). Defendant Rothstein did not file an answer to the Second Amended Complaint, and a default has not

been entered on the Second Amended Complaint. Therefore, the circuit court's Order on Edwards' Motion to Set "Cause" for trial was a nullity, and it would be reversible error if this action proceeds to trial on March 13, 2018.

Appellate Courts are Clear: Strict Compliance with Rule 1.440 is Mandatory and the Circuit Court's Failure to Follow the Rule Warrants Mandamus Relief.

This Court, in particular, has spoken on the "mandatory" nature of the timing of Rule 1.440, and reversal if not followed. *See Genuine Parts Co. v. Parsons*, 917 So. 2d 419, 421 (Fla. 4th DCA 2006) (issuing a writ of mandamus is appropriate when the mandatory timing provisions of Rule 1.440 are not complied with). Unlike an order denying a continuance request that does not rise to the level required for certiorari, this Court recognizes that compliance with the mandatory nature of Rule 1.440 is so fundamental that it warrants mandamus relief. *Id.* at 421.

The Second District also has recognized that strict compliance with Rule 1.440 is required, and has granted mandamus relief absent such compliance. *See Gawker Media, LLC v. Bollea*, 170 So. 3d 125 (Fla. 2d DCA 2015). In *Gawker*, following an extensive analysis of mandamus relief and concluding it appropriate when the objection to a premature 1.440 notice is made *before* trial, the Second District ordered that the circuit court:

"...shall straightaway rescind its June 19, 2015, order setting this action for trial and remove the action from the July 6, 2015, trial

docket. This direction is effective immediately, and it shall remain in force notwithstanding the filing of a motion for rehearing, if any.”

Id. at 133 (emphasis added).

Gawker, like this case, involved an action that was not at issue. Bollea dismissed one defendant, Blogwire, but amended to seek punitive damages against the remaining defendant. Determined to maintain the trial date, Bollea also filed a “notice that action is still at issue” and asked the court to reset the case for trial. *Id.* at 127. The next day, the circuit court entered an order stating that no further pleading in response to the punitive damages amendment was required and *Gawker* was deemed to have denied it. *Id.* Meanwhile, *Gawker* filed an objection, noting that, under Rule 1.440, the case was not at issue until twenty days had elapsed after the pleadings closed. *Id.* The circuit court was unpersuaded and errantly believed it could disregard *Gawker*’s objection as “innocuous technicalities.” *Id.* Three days later *Gawker* appealed to the Second District.

Finding no waiver and reiterating the longstanding tenet in Florida that Rule 1.440 must be strictly adhered to, the Second District granted the writ of mandamus — meant to enforce the circuit court’s unqualified obligation to perform a clear legal duty. *Id.* at 131.

The Waiver Cases are ALL from FINAL APPEALS and Inapplicable to This Mandamus Proceeding.

In *Gawker*, the Second District recognized that a party may waive its objection to an order setting trial, “notwithstanding the compulsory nature of rule 1.440.” 170 So. 3d at 130. “For example, in *Parrish v. Dougherty*, 505 So. 2d 646 (Fla. 1st DCA 1987), the appellant’s attorney appeared at the trial and participated without objecting to the manner in which it had been set,” and “[i]n *Correa v. U.S. Bank National* [REDACTED], 118 So. 3d 952 (Fla. 2d DCA 2013), the appellant agreed to a rescheduled trial date, participated in the trial, and made no objection to any deviation from rule 1.440.” *Id.* (emphasis added). “In both instances, the appellants were deemed to have waived their assertions of error based on the rule.” *Id.*

But the *Gawker* Court distinguished the waiver cases in two ways. First, in the waiver cases, the appellants had not objected until *after* the trials, in which they appeared without objection, whereas the *Gawker* defendants insisted on compliance with Rule 1.440 in advance of trial, and consistently objected to the trial date. *Id.* Second, the waiver cases “were plenary appeals from final judgments,” “whereas this is a mandamus proceeding.” *Id.* (emphasis added). The appellate court then explained:

The two types of proceedings serve very different purposes, entailing very different requirements. In an appeal from a final judgment the lower court’s rulings are reviewed for reversible legal error. Generally speaking, a judgment may be reversed only for an error that has been preserved by timely objection in the lower court and that has prejudiced the complaining party in a way that likely

affected the result. Thus, the appellant's failure to make a timely objection waives the issue on appeal, as happened in *Parrish* and *Correa*. [internal citations omitted.]

Mandamus is a different animal altogether. Its purpose is not to review a lower court ruling for prejudicial error; rather, it is meant to enforce the respondent's unqualified obligation to perform a clear legal duty. *State ex rel. Buckwalter v. City of Lakeland*, 112 Fla. 200, 150 So. 508 (1933). **If the petitioner is entitled to demand performance of the duty, he or she need not preserve the issue beyond making the demand. Further, it is unnecessary for the petitioner to suffer prejudice as a result of the respondent's dereliction.** All that must be shown is that (1) the respondent is duty-bound to act under the law, and (2) the respondent has failed or refused to do so. *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009). A third and final element is that the petitioner must have no adequate legal remedy for the respondent's failure to carry out its duty. *Id.* . . .

By this point in our discussion **it is obvious that the first two elements have been satisfied here. The third element is present, as well.** It is true that the Gawker defendants have available to them the legal remedy of pursuing an appeal from any future final judgment, in which they could complain of the errant order scheduling the trial. But **owing to the mentioned differences between a mandamus proceeding and an appeal, the appellate remedy is not an adequate one.** As we have established, a party is absolutely entitled to strict conformance with the terms of rule 1.440, including its mandated fifty-day hiatus between the service of the last pleading and the trial date. **Whereas a writ of mandamus can preserve and effectuate this right in full, an appeal following entry of final judgment is inherently incapable of doing so because the appellant already will have been forced to trial in violation of the rule.**

Id. at 130-31 (bold and underline emphasis added).

The waiver cases distinguished by *Gawker* are similarly distinguishable from the proceeding at bar. Like the Gawker defendants, Epstein has adamantly voiced his objection *before* trial in a *mandamus petition* when the circuit court

denied his request to remove the case from the trial docket. As *Gawker* makes clear, an appeal from any future final judgment would not be an adequate remedy. *See id.* Thus, while Edwards was first to raise the issue, Epstein was left with no option but to seek relief and strict compliance with Rule 1.440.

A waiver also may occur where—unlike in this case—an amended pleading is filed subsequent to an otherwise compliant order setting trial under Rule 1.440. *See Labor Ready Se. Inc. v. Australian Warehouses Condo.* [REDACTED], 962 So. 2d 1053 (Fla. 4th DCA 2007). *Labor Ready* was another final appeal, not a mandamus proceeding. The appellant in that case argued that the amended pleading removed the case from its “at issue” status under Rule 1.440, and required reversal of the final order. This Court disagreed, holding:

This is not a case where the case had never been at issue. This is not a case where the parties did not have sufficient time to prepare. This is not a case where anyone was prejudiced by the technical amendment to the complaint. In situations where the parties have received actual, timely notice of the trial, they are precluded from arguing prejudice based upon a technical violation.

Labor Ready Se., 962 So. 2d at 1055 (emphasis added). In so holding, this Court recognized the well-established case law “emphasizing the mandatory nature of rule 1.440. . . *e.g.*, *Genuine Parts Co.* [and] *Bennett*,” and explicitly clarified:

We do not quarrel with those cases or their holdings. However, we point out that none of them involved cases that had been pending and at issue for years before a last minute technical amendment to a complaint. And even in those cases where the case is first at issue,

any error “may be waived if the aggrieved party appears at trial and raises no objection to the noncompliance.” [e.a.]

Id. at 1055 (quoting *Parrish*, 505 So. 2d at 648).

The case at bar is distinguishable from *Labor Ready*, too. In addition to arriving at this Court as a mandamus proceeding versus a final appeal, this case did not involve a last minute technical amendment to a complaint in a case that was already (and properly) “at issue.” Rather, this case was not at issue when noticed and set for trial. Furthermore, the operative Second Amended Complaint, which had neither been answered nor defaulted, did not contain a mere technical amendment, but asserted a “brand-new” count—as Edwards aptly pointed out in first bringing this issue to light. (See **App. 14** at ¶ 6).

Bifurcation or Severance is Not a Viable Remedy to Cure the Defective Trial Request and Order Setting Trial.

Not only can we not go back in time to cure the defective notice for trial and resulting order setting trial, but we cannot go into the future to retroactively cure those defects either. Severing the claim from the counterclaim is not a solution.

On May 24, 2017, when Edwards noticed this entire matter for trial following remand from the appellate courts, he requested this Court “to set the above-styled cause for trial by jury,” and expressly stated: “This long delayed matter is now ripe for resolution.” (App. 9). “This matter,” this “above-styled cause,” since its inception over eight years ago, has always proceeded as one

lawsuit. Therefore, severing Edwards' counterclaim from Epstein's originating claim does not make the action "at issue." Indeed, absent strict compliance with Rule 1.440, even Edwards' counterclaim cannot yet proceed.⁵

In short, Epstein has established a clear legal right to performance of the act requested, an indisputable legal duty and no adequate remedy at law. Accordingly, Epstein is entitled to mandamus relief, and respectfully requests this Court to grant the writ, strike the Order setting trial for March 13, 2018, and direct the circuit court to remove the case from the trial calendar.

Epstein has already filed a motion for default against Rothstein with the circuit court. Pursuant to Rule 1.440, either party must calculate out 20 days from the date a default is entered, for when the notice setting trial can be signed, and then the circuit must wait a minimum of 30 days for setting a trial date. If each of

⁵ Bifurcation is improper in any event. "Although the matter of separation of the issues to be tried rests in the trial court's discretion, a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and the courts have emphasized that **separate trial should not be ordered unless such disposition is clearly necessary, and then only in the furtherance of justice.**" *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 710 So. 2d 1022, 1024 (Fla. 1st DCA 1998) (emphasis added; citation and internal quotation marks omitted). For example, "It is improper to sever a counterclaim . . . from the plaintiff's claim, when [as in this case] the facts underlying the claims of the respective parties are inextricably interwoven." *Id.*

Bifurcation is improper here, because the issues presented by the claim and counterclaim are so inextricably intertwined that it would cause the lower court to try the case twice with the same underlying issues, witnesses, exhibits, and testimony.

these tasks occurs posthaste, this action could conceivably proceed to trial by the end of April 2018.

CONCLUSION

In light of the well-established case law interpreting Rule 1.440's mandatory nature and strict compliance requirement, this action was not at issue when Edwards filed his Motion to Set Case for Trial, which prematurely prompted the circuit court to set a trial date of March 13, 2018 (reset from December 2017). This is because the superseding Second Amended Complaint was not answered by Defendant Rothstein and no default was entered against him as to that operative complaint. A writ of mandamus should issue to require the circuit court to remove the case from the trial docket in order to comply with the strict mandate set forth in Rule 1.440.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition was furnished **via email and U.S. MAIL** this XXXX day of March, 2017:

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CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Petition is 14 point
Times New Roman.

/s/ Kara Berard Rockenbach
KARA BERARD ROCKENBACH, ESQ.