

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

Appellate Case No.: 4D18-0762
LT Case No: 502009CA040800XXXXMB AG

JEFFREY EPSTEIN,

Petitioner/Plaintiff,

v.

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

Respondents/Defendants.

**REPLY TO RESPONSE TO 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

Confronted with Rule 1.440, a compulsory rule of Florida Civil Procedure, and unequivocal legal precedent interpreting the same clearly against him, Edwards levels false and misleading accusations against Epstein and injects impertinent allegations into his argument in an obvious attempt to divert the Court from its inevitable decision. Throughout his Response, Edwards misstates the facts and procedural posture of this complex case and the nature of the pending claims below. However, the law and the facts are clear, and Edwards' tactics should not dissuade the Court from the mandatory course of action unambiguously laid out by Rule 1.440.

Edwards is both a party and has been counsel of record for himself since March 27, 2012. Edwards repeatedly states that *Epstein* raised the Rule 1.440 issue at the last minute. (Resp. at pp. 9, 12, 13, 16). But this is patently untrue. It was *Edwards* who raised the “not at issue” objection at the eleventh hour - albeit in a calculated but misguided attempt to capitalize on that issue with a last-minute request for bifurcation of his counterclaim. (**App. 15.**)¹ Indeed, after the parties and the trial judge himself had overlooked the Rule 1.440 issue, Edwards improperly

¹“App.” refers to Epstein’s Appendix in support of his Emergency Petition for Writ of Mandamus and Appendix to Emergency Motion for Review of Order Denying Stay filed on March 8, 2018. “Supp. App.” refers to Epstein’s Supplemental Appendix filed with this Reply.

sought to use Rule 1.440 to justify eleventh-hour severance in violation of a binding joint pre-trial stipulation that was signed and filed in December 2017. However, as thoroughly addressed in Epstein’s companion Petition for Writ of Certiorari (Case No. 4D18-0787), severance was clearly waived by Edwards and was otherwise improper, and even if it were not improper, severance cannot cure the Rule 1.440 problem.

This Court is obligated to require the trial court to follow the dictates of Rule 1.440 in order to ensure that reversible error does not occur and that precious judicial resources are not wasted.

REPLY STATEMENT OF THE CASE AND FACTS

In his response, Edwards attempts to persuade the Court to ignore the legal requirements of Rule 1.440 with an inaccurate and misleading account of the circuit court’s rulings at the March 8, 2018 hearing concerning the issues raised on this appeal. A brief review of the March 8, 2018, hearing transcript reveals Edwards’ numerous misstatements regarding the trial court’s rulings.

Page 1. First, Edwards inaccurately asserts in his Response that “*the only reason* the case was allegedly not at issue was *Epstein’s* failure, over more than six years, to seek a default against Rothstein[.]” (Resp. at p. 1) [emphasis added]. However, at the March 8, 2018, hearing, Judge Hafele held *Edwards* equally responsible for the current Rule 1.440 issue because Edwards was the party who

noticed the case for trial and failed to recognize that the case was not at issue until the eleventh hour when Edwards improperly sought to exploit this Rule 1.440 problem to bifurcate his counterclaim against Epstein from Epstein's claim against Rothstein (originally against both Rothstein and Edwards). At the hearing, Judge Hafele explicitly stated:

I am not exonerating the movant here, by any means. . . . [REDACTED] **talking about Edwards. The movant** setting the case for trial.

. . .
Because Edwards has the same responsibility to the Court, to this community, to the taxpayers, to the public, to my constituency, to assiduously review the docket, to ensure that the notice is being provided in accordance with rule 1.440. So by no means am I exonerating anyone here.

(Tr. 20:10-25 – 21:1.)² Judge Hafele further admonished Edwards' counsel:

It is disappointing that a firm of your stature, an attorney of your stature, of which I have an abiding respect for all of those who are serving their clients in this case, that, again, the docket was not assiduously combed, and we are left here today with the very real possibility of this case not being tried as scheduled.

(Tr. 22:2-9.)

Importantly, Judge Hafele recognized that he, himself, was ultimately responsible for setting the case for trial prematurely:

Clearly, as I indicated at the inception of this hearing, I am not pleased by the events that occurred here. No court should be. The blame is several fold, including the individual who is sitting here, who ultimately is responsible for the execution of that trial order. So I have, to a degree, blame myself for the execution of that order. And ultimately I bear the

² App. 19.

responsibility of that, and I recognize that.

(Tr. 81:11-21.)

Thus, the trial court was clear that ALL parties, as well as the trial court itself, were responsible for verifying that the case was at issue before it was set for trial. The blame was not placed solely on Epstein, as Edwards suggests.

Pages 6 and 7. Edwards attempts to give this Court the false impression that Edwards' counterclaim against Epstein and Epstein's claim against Edwards' former partner, convicted felon Scott Rothstein, are separate and unrelated – i.e., that Epstein's claim against Rothstein (which was originally filed against both Rothstein and Edwards) for using Epstein case information and materials to lure investors to invest in fabricated cases and settlements, had no relationship to Edwards' counterclaim against Epstein. To do so, Edwards misrepresents to this Court that he only filed his malicious prosecution counterclaim in this action, which specifically arose out of the allegations Epstein made against Rothstein and Edwards in the claims Epstein filed against them in this action, after Epstein had dismissed Edwards from those claims. Specifically, in discussing Epstein's Notice of Voluntary Dismissal, Edwards states: "*Having favorably disposed of Epstein's false claims against him, Edwards amended his counterclaim to include a malicious prosecution claim.*" (Response, at p. 6) (emphasis added). This is undeniably false! Edwards' malicious prosecution counterclaim was filed October 4, 2011 (**Supp. App. 21**),

nearly a year before Epstein's August 16, 2012 Notice of Voluntary Dismissal without prejudice against Edwards. (**App. 9**). Edwards failed to include that "relevant proceeding" on his timeline on page 7 of his Response. Moreover, the allegations set forth in Edwards' malicious prosecution counterclaim are nearly identical to those set forth in Edwards' original count for abuse of process, filed in this action just 17 days after it commenced.

Page 9. In support of his bifurcation attempt, Edwards suggests that Epstein is pursuing his claim against Rothstein only to introduce irrelevant evidence about the Ponzi scheme which would otherwise be inadmissible against Edwards, and which would prejudice him and confuse the jury.

However, central in the damages trial of Epstein against Rothstein will be the presentation of evidence regarding the use of Edwards' clients' cases against Epstein in the Rothstein Ponzi scheme, the abusive litigation engaged in those cases in order to support that Ponzi scheme, and how much Epstein was damaged by that abusive litigation. Edwards' conduct of that abusive litigation as lead attorney on the Epstein cases while at the Rothstein firm is what provided the basis for Epstein's probable cause to file and continue his suit against Edwards. In his malicious prosecution counterclaim against Epstein, Edwards specifically must disprove that Epstein had any such probable cause. Thus, Epstein's "claim" against Rothstein and Edwards' "counterclaim" against Epstein are irrefutably and inextricably intertwined.

Edwards seeks to mislead this Court to the contrary, as he did in the trial court, despite the overwhelmingly clear evidence of the interrelationship between them.

Even if bifurcated, the *Edwards v. Epstein* jury must hear all about what convicted felon Scott Rothstein did and how he used three real cases against Epstein to fabricate dozens of claims and hundred million dollar settlements in order to lure investors in the Ponzi scheme. Once the jury understands the Ponzi scheme, they will hear evidence of Edwards' (a partner at the Rothstein firm) involvement with Rothstein to determine if Epstein had probable cause to sue Edwards.³

Edwards simply cannot deny that his counterclaim is inextricably intertwined with Epstein's originating claim. The same illegal conduct is key to Epstein's defense to the malicious prosecution counterclaim—i.e., it demonstrates that Epstein had probable cause to file suit against Edwards, who was an admitted “partner” at the Rothstein firm, the lead attorney on the three cases against Epstein, and a primary participant in the excessive and unorthodox litigation practices in the cases against Epstein that were used to support the Ponzi scheme. The interrelationship is inescapable. If Edwards truly seeks justice on his counterclaim for malicious prosecution, the context and universe in which it was given life must be explained to the jury. It is just that simple.

³ Epstein continues to assert that the issue of probable cause is a question for the trial court and not for the jury. *Debrincat v. Fischer*, 217 So. 3d 68 (2017).

REPLY ARGUMENT⁴

A WRIT OF MANDAMUS SHOULD ISSUE TO REQUIRE THE CIRCUIT COURT TO COMPLY WITH THE MANDATE SET FORTH IN RULE 1.440.

A. Edwards' Counterclaim Against Epstein is Not Separate and Distinct from Epstein's Claim Against Rothstein. As Such, Bifurcation or Severance is Not a Viable Remedy to Cure the Defective Trial Request and Order Setting Trial.

Edwards' argument that Epstein's claim against Edwards' former partner, convicted Ponzi schemer Rothstein, is separate from and unrelated to the Edwards' counterclaim against Epstein is complete fabrication, and the Court should recognize it for the sham that it is. Epstein's claim against Rothstein (which originally included causes of action against both Rothstein and Edwards) and Edwards' counterclaim against Epstein (being based on the allegations Epstein made in his original, amended and second amended complaints against both Rothstein and Edwards) are interdependent claims, which are and always have been part of one unified action. If Epstein had not filed the original complaint against Rothstein and Edwards connecting their activities with respect to the cases Edwards was litigating against Epstein, Edwards would never have filed his counterclaim for malicious prosecution against Epstein. The Epstein claim and the Edwards counterclaim are married and have been since they were both originally filed in December 2009, the same year

⁴ Short cites will be used for cases cited in the Emergency Petition.

Edwards brought his three clients' claims against Epstein to Rothstein's firm, the same year the Ponzi scheme conducted through Rothstein's firm was uncovered and the same year the use of Edwards' clients' cases against Epstein to support the Ponzi scheme was revealed!

Edwards' counterclaim is based on the alleged "anxiety" and "emotional distress" he suffered as a result of Epstein's filing and continuation of *this lawsuit*. At the March 8, 2018 hearing, Judge Hafele himself recognized *no less than six times* that this civil proceeding initiated by Epstein was the **genesis** for Edwards' counterclaim. (Tr. 26:8-12, 18-23; 27:8-9; 38:24 - 39:1-3; 76:8-11; 77:1-3).

Although Edwards makes much of the permissive nature of his counterclaim, it is much ado about nothing. After all, it was *Edwards* who chose the vehicle in which it was to proceed and continued that combined counterclaim for over eight years until the eve of trial. Edwards could have filed a separate lawsuit, but instead chose to file his counterclaim in *this action*. Edwards filed his initial counterclaim only 17 days after Epstein sued him, and then subsequently amended it to include a cause for malicious prosecution based on the identical allegations made in the original counterclaim. Given his election to file this as a counterclaim, rather than in a separate action, Edwards cannot be heard to complain now on the doorstep of trial that his counterclaim should be severed. Nor can Edwards dispute that the claim

and counterclaim in this action have traveled together as a conjoined pair since the inception of this lawsuit over eight years ago.

Moreover, Edwards cannot get around the fact that *he* noticed this *entire* matter for trial, and the burden was his, as the movant, to make sure the case was at issue before doing so. Edwards could have just as easily moved to bifurcate last summer and then noticed his counterclaim for trial. He did not. Instead, Edwards failed to comply with the rules, then asks for a last-minute bailout from the trial court.

Importantly, that last-minute bailout is in direct violation of the binding pre-trial stipulation signed and filed by Edwards' counsel in which Edwards expressly contracted that the claim and counterclaim in this case would be tried together in one action, and in the following order: first, the "Case Against Rothstein"; second Edwards' Malicious Prosecution Counterclaim. (**App. 13** at C. 1.) If Pretrial Stipulations are to have any value, Edwards should not be allowed to escape the binding contractual commitment of his own Joint Pretrial Stipulation.

Lastly, the trial court's severing Edwards' counterclaim from Epstein's originating claim does not make the action "at issue" in any event. Under the strict requirements of Rule 1.440 once severed, the parties must wait 20 days before serving a notice that the counterclaim is at issue and ready for trial, and the Court may not set a trial date that is less than 30 days after the date of such notice.

Therefore, even if Edwards' counterclaim were properly severed (and Epstein maintains that it was not), a trial cannot immediately proceed.

B. Denying Mandamus Relief Would Be Unprecedented—Epstein has not Waived Reliance on Rule 1.440.

Edwards cites no case—and Epstein cannot find one—in which a party voiced a Rule 1.440 objection *before* trial and was unsuccessful in seeking mandamus relief when the circuit court denied the party's request to remove the case from the trial docket. Edwards noted the Rule 1.440 violation, and Epstein agreed and objected *before* trial occurred.

Edwards' attempt to pigeon-hole this case to fit within the purview of *Labor Ready Se. Inc. v. Australian Warehouses Condo. [REDACTED]*, 962 So. 2d 1053 (Fla. 4th DCA 2007), and *HSBC Bank USA, [REDACTED] v. Serban*, 148 So. 3d 1287 (Fla. 1st DCA 2014), is unavailing. In fact, the instant case is readily distinguishable from both *Labor Ready* and *Serban*, which were final appeals, rather than mandamus proceedings like the instant proceeding here.

In the instant case, Epstein objected before the start of trial, and immediately filed his emergency mandamus petition when the circuit court denied his request to remove the case from the trial docket. Epstein protected his right by seeking an emergency stay in order for this Court to review the issue first raised by Edwards. Thus, Epstein made his objection in advance of trial at the earliest opportunity once Edwards made him aware of the Rule 1.440 issue. Unlike Epstein, in both *Labor*

Ready and *Serban*, the aggrieved party waited until *after* trial had commenced to object to the trial deficiency. In *Labor Ready*, “[a]ll parties fully participated in the hearing without objection.” 962 So. 2d at 1055. And in *Serban*, the objecting party “waited until the parties and the court had assembled [on the day of trial] to seek a later trial date.” 148 So. 3d at 1290. The appellate court noted the trial court’s “finding that counsel *could have filed a written motion for continuance prior to the day of trial*,” but did not. *Id.* (emphasis added). Both of those cases “illustrate the inadequacy of an appeal from a final judgment as a remedy for a trial court’s failure to perform its duties under the rule.

Moreover, the instant action was not “at issue” under Rule 1.440 when the movant, Edwards, improperly noticed it and the circuit court improperly set it for trial. However, neither *Labor Ready* nor *Serban*, in which both actions were at issue before setting them for trial, involved a case like this one, “a case where the case had never been at issue.” *Serban*, 148 So. 3d at 1291 (quoting *Labor Ready*).

Furthermore, Epstein’s operative Second Amended Complaint, which had neither been answered nor defaulted, contained a “brand-new” count alleged in response to the trial court’s order dismissing the prior amended complaint with leave to amend. Thus, Epstein’s Second Amended Complaint was not a mere “technical” amendment. (See **App. 15** at ¶ 6). In stark contrast, both *Labor Ready* and *Serban* involved mere technical amendments to the pleadings at the last minute. In *Labor*

Ready, the case was properly at issue when the plaintiff merely amended its complaint to conform the pleadings to the position it had taken during the summary judgment hearing. And in *Serban*, the case was properly at issue, too, when there was a “last-minute [technical] amendment to the answer, to which plaintiff replied prior to trial.”

Finally, the trial court asked Epstein to waive the deficiency, but Epstein did not agree to waive it. (Tr. 49:15-50:10.) Under these “circumstances,” the mandatory provision of Rule 1.440 was repeatedly preserved and never waived. *Cf. Labor Ready*, 962 So. 2d at 1056.

C. Mandamus Applies to Non-Discretionary Nature of Rule 1.440, But Even Inapplicable “Equities” Analysis Weighs in Favor of Granting the Petition.

Requiring strict compliance before the trial takes place does not provide for the discretionary analysis of “equities” as Edwards suggests. Nonetheless, contrary to Edwards’ argument, the equities, also weigh decidedly in favor of issuing the writ. Edwards inexcusably failed to ensure the case was at issue before filing his motion. He then improperly sought to capitalize on his own failure in a last-minute attempt to secure bifurcation in violation of the joint pre-trial stipulation filed in December 2017. Neither action should be condoned by this Court.

Although Edwards would have this Court believe that his claim has been at issue for years, Edwards did not move to set it for trial until May 24, 2017, when the

case was remanded to the trial court after being up before the Fourth District Court of Appeal for one and a half years and waiting for the Florida Supreme Court to rule for another year and a half. (**App. 10.**) The Order setting trial resulting from that Motion was not entered until July 20, 2017. (**App. 11.**)

Case law supports placing this burden on Edwards, not Epstein. The burden is on *the movant* to make sure the case is at issue before serving a notice for trial, and the trial judge is ultimately responsible for ensuring compliance with the rule. The following excerpt from the First District's *Bennett* decision "succinctly encapsulates" what occurred here:

The requirement of notice is mandatory. . . . The procedure for setting actions for trial is simple, but many attorneys are careless about it. They serve a notice for trial prematurely. This requires a motion to strike the notice or an informal request to the court to remove the action from the calendar. There is no excuse for failing to follow the rule. Some judges are equally careless about requiring an order setting the action for trial. Apparently they believe the rule is directory, rather than mandatory. Such is not the case.

Bennett, 492 So. 2d at 727 (citing *Trawick's Fla. Practice and Procedure*, 1980 Edition section 22-2) (emphasis added).

Thus, it is Edwards who has the unclean hands and has unreasonably delayed seeking relief from his defective and premature motion to set case for trial. On the other hand, irreparable harm will result if the trial proceeds, as "[s]trict compliance with rule 1.440 is required and failure to adhere to it is reversible error." *Melbourne HMA, LLC*, 190 So. 3d at 170 (emphasis added). *See also Tucker*, 175 So. 3d at 306

(final judgment reversed because case noticed for trial before answer to counterclaim was filed); *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 50-day hiatus between trial and service of the last pleading); *Precision Constructors, Inc.*, 825 So. 2d at 1063 (judgment vacated because failure to adhere strictly to the mandates of Rule 1.440 is reversible error).

Absent mandamus relief, two trials will occur instead of one, resulting in prejudice to the circuit court and the public, too. Indeed, “**a single trial generally tends to lessen the delay, expense and inconvenience to all concerned**, and the courts have emphasized that separate trials 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).

Inconsistent verdicts present an additional basis for prejudice if the trial does not proceed combined as it has been since 2009. In short, one jury could find that Epstein was damaged by Rothstein’s conspiracy utilizing the fruits of abusive litigation in the client cases Edwards was litigating against Epstein in order to sustain Rothstein’s Ponzi scheme. Another jury hearing only the Edwards’ counterclaim against Epstein would lack the benefit of Epstein’s presentation in the trial of his

damages claim against Rothstein, without which it might not fully understand the direct connection between Rothstein's fraudulent activities in the Ponzi scheme, the abusive litigation practices supporting the Ponzi scheme that were suffered by Epstein in the client cases Edwards was litigating against him, and the damages that Epstein incurred defending against that abusive litigation. Lacking that full understanding, a second jury could find that Epstein had no probable cause to originally sue both Rothstein and his partner Edwards because Epstein had no damages.

In short, for both legal *and* equitable reasons, the writ of mandamus should issue.

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 premature Motion to Set Case for Trial. The case will not be at issue until after a default is entered at which point twenty days must pass before either party may file and serve a notice that the action is at issue. The circuit must then set a trial date that is not earlier than thirty days following the date of such notice. Accordingly, a writ of mandamus should issue to require the circuit court to comply with the strict mandate of Rule 1.440.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Reply was furnished
via email this 19th day of March, 2018:

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CERTIFICATE OF TYPE SIZE & STYLE

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