MEDIATION ALERT

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Dismissal with Prejudice Too Severe a Sanction for Failure to File Mediation Certification of Authority

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In my mediation experience, the requirements of Rule 1.720 (e), Florida Rules of Civil Procedure, are sometimes ignored by parties. Rule 1.720 (e) requires that each party, to a court-ordered mediation, file a certification identifying who will attend the mediation conference with full authority to settle the case. The rule requires that the certification be filed 10 days prior to the mediation. Litigants sometimes overlook this requirement and fail to file the certification. As a courtesy, I include a reminder about Rule 1.720 (e) in my mediation confirmation letter, but the parties should not rely on such courtesies. The mediator is not obligated to ensure compliance with Rule 1.720. Parties must police themselves and, as a decision of the Second District Court of Appeal earlier this month shows, much turmoil can be inflicted upon a party who does not abide by this simple mediation rule.

In *H&R Block Bank v. Perry*, 2016 WL 4722544 (Fla. 2d DCA, September 9, 2016), the circuit court entered a final order dismissing a residential foreclosure case with prejudice due to H&R Block Bank's alleged failure to attend mediation. The court also entered a final judgment against H&R Block for attorney's fees and costs pursuant to section 57.105, Florida Statutes. The sole reason given for this sanction: H&R Block had technically failed to attend court-ordered mediation because H&R Block did not timely file a certification of settlement authority required by Rule 1.720.

The complaint was filed on behalf of H&R Block by Nationstar Mortgage, LLC, a mortgage servicer, acting as H&R Block's attorney-in-fact against Denise H. Perry. At the outset of the case, H&R Block had filed a required form which stated that a representative of Nationstar would attend any mediation on behalf of H&R Block with authority to settle the case. The trial court subsequently entered an order referring the case to mediation. Three days before mediation, H&R Block filed a certification of settlement authority under rule 1.720 (e) stating (1) its representative at mediation would be Rachel Hook of Nationstar, (2) Hook would appear by telephone and would have full authority to settle the case, and (3) H&R Block's counsel would attend the mediation in person and have full authority to sign any settlement agreement. H&R Block's certification was filed seven days later than Rule 1.720 requires.

Hook and H&R Block's counsel, Ms. Sinclair, appeared at the mediation conference. At the mediation, Perry questioned their authority to settle the case on behalf of H&R Block and Hook, and Sinclair explained that Nationstar was acting on behalf of H&R Block pursuant to a power of attorney, which had been attached to the verified amended complaint. Perry rejected this explanation and "declined to begin the mediation conference and the negotiation process." Personally, I think Perry's reaction was somewhat overzealous since servicing agents are very commonplace in today's mortgage world and the comments to Rule 1.720 provide that a party may delegate full authority to settle to another person who can serve as final decision maker at mediation.

Rather than mediate, Perry filed a motion to dismiss based on H&R Block's alleged failure to comply with Rule 1.720. She argued that H&R Block's late filing of the certification constituted a failure to appear at mediation under Rule 1.720(f) and further questioned Hook's authority to settle the case on behalf of H&R Block at all. She requested that the action be dismissed or, alternatively, that H&R Block be held in contempt. The motion was argued before a foreclosure magistrate the next day. H&R Block admitted that its certification was untimely but

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argued that under the power of attorney attached to its verified amended complaint, Nationstar had full authority to settle on its behalf.

The magistrate agreed with H&R Block and entered a recommended order denying Perry's motion. Perry filed written exceptions to the recommended order asserting that the magistrate should have determined that H&R Block failed to appear at mediation because its certification of settlement authority was not timely filed. H&R Block failed to appear at the hearing on the exceptions. After the hearing, the trial court entered an order granting Perry's motion to dismiss and provided H&R Block with ten days in which to show cause why the action should not be dismissed. H&R Block filed a timely response to that order providing an affidavit stating that its failure to appear at the hearing was the result of a calendaring error and arguing that dismissal was inappropriate on the merits.

Perry filed a memorandum in opposition to H&R Block's response, a motion for sanctions under § 57.105(1) alleging that H&R Block's response to the show cause order was made in bad faith, and a motion for attorney's fees and costs under § 57.105(7) based on a fee-shifting provision in the mortgage. The trial court granted both motions. Two days before the hearing, H&R Block filed a motion for clarification requesting a ruling on whether it had shown cause why the case should not be dismissed. The trial court thereafter entered both an order dismissing the case based on a finding that H&R Block had failed to show cause why the action should not be dismissed and a final judgment that fixed the amount of fees and costs awarded.

H&R Block argued on appeal that dismissal was error in this case because (1) the untimely filing of the certification does not constitute a failure to attend mediation under rule 1.720(f), (2) dismissal is not authorized by rule 1.720 as a sanction for failure to appear at mediation, and (3) dismissal was too extreme a sanction.

The appellate court recognized that a dismissal with prejudice is an extreme sanction, and a trial court has discretion to impose it only in extreme cases in which the trial court makes findings supported by the record that the conduct involved was willful, persistent, or otherwise aggravated and that no lesser sanction would be just under the circumstances. *Rohlwing v. Myakka River Real Props., Inc.*, 884 So. 2d 402, 406 (Fla. 2d DCA 2004) ("Because a dismissal with prejudice is the ultimate sanction in the civil justice system, it is reserved for the most aggravating circumstances."); *Marr v. Dep't of Transp.*, 614 So. 2d 619, 620–21 (Fla. 2d DCA 1993) ("As this court has observed, dismissal with prejudice is the most severe of sanctions and should be reserved for the most egregious conduct); *See Kinney v. R.H. Halt & Assocs., Inc.*, 927 So. 2d 920, 921 (Fla. 2d DCA 2006) (finding an abuse of discretion in the dismissal with prejudice because "explicit findings of willful or flagrant disregard are absolutely essential"); *see also Watson v. First Fla. Leasing, Inc.*, 537 So. 2d 1370, 1371–72 (Fla. 1989) (finding no basis to support a dismissal where "dismissal of an action is the most significant penalty possible and is not generally utilized in rule violations when less severe but just penalties exist"). The order of dismissal in *H&R Block* did not make such findings. The *H&R Block* court concluded that the trial court could not have made such findings even if it had tried. The record did not disclose any facts, such as a protracted history of abuses, significantly prejudicial misconduct, or other extreme circumstances, that would be legally sufficient to support a finding that the untimely filing in this case was willful, persistent, or otherwise aggravated. The trial court described H&R Block's late filing of the certification of authority as a "technical" failure to appear for mediation.

The *H&R Block* court also reasoned that H&R Block's failure to timely file the certificate of authority was immaterial because Nationstar's role on behalf of H&R Block in the case in general and the mediation in particular was disclosed to Perry many months before the mediation and the Nationstar representative actually appeared at the mediation conference prepared to negotiate. The *H&R Block* court acknowledged that there had been "some sloppy lawyering," but this was not sufficient to support a finding of a willful, persistent, or aggravated violation of the civil rules. *See, e.g., Jimenez*, 879 So. 2d at 13 (reversing order of dismissal where record established only neglect of counsel); *see also Hastings v. Estate of Hastings*, 960 So. 2d 798, 801 (Fla. 3d DCA 2007) (holding that dismissal with prejudice is inappropriate for violations resulting from negligence or inexperience).

The *H&R Block* court noted that there are sanctions short of dismissal with prejudice that could have sufficiently addressed the technical failure to appear at mediation. Rule 1.720(f) authorizes a court to award sanctions that

include attorney's fees and costs and mediator expenses resulting from a party's failure to appear. Violations of Rule 1.720 have typically been addressed with that type of sanction. *See, e.g., Aurora Bank v. Cimbler*, 166 So. 3d 921, 926 (Fla. 3d DCA 2015) (finding that award of $1,250 monetary sanction for mortgagor's failure to appear was warranted); *Carbino v. Ward*, 801 So. 2d 1028, 1031 (Fla. 5th DCA 2001) (finding, under a previous version of the rule, that party's failure to appear at mediation without good cause warranted the imposition of sanctions in the form of mediator costs and attorney's fees). For these reasons, the *H&R Block* court reversed both the trial court's order of dismissal and the judgment for attorneys' fees and costs.

It seems to me that the take home from this is that an entirely reasonable reaction by Perry could have been to proceed with the mediation, despite H&R Block's untimely certification, since H&R Block's agent and counsel were present at mediation and purportedly had full settlement authority. Perry chose not to proceed in this fashion for reasons unknown. Moreover, of course, this all could have been avoided had H&R Block timely filed its Rule 1.720 certification. So, file your certifications folks. Dismissal with prejudice might be too extreme a sanction but you could end up liable for the other side's mediator costs and attorneys' fees.

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