

412249-401

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

CANDACE LOUISE CURTIS

Plaintiff,

VS.

ANITA KAY BRUNSTING, *et al*,

Defendants.

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CIVIL ACTION NO. 4:12-CV-592

**EX PARTE MOTION FOR RELIEF**

**I. MOTION**

Plaintiff Candace Louise Curtis (Curtis) respectfully moves this honorable Court, pursuant to Fed. R. Civ. P. 60(b)(6), (Rule 60(b)(6)) and Fed. R. Civ. P. 60(d)(3), (Rule 60(d)(3)) praying for relief from this Court’s order of July 22, 2014, remanding the above captioned matter to Harris County Probate Court #4.

**II. JURISDICTION**

“On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for any reason that justifies relief”, Fed. R. Civ. P. 60(b)(6). The type of relief provided by Rule 60(b) does not involve the “review” proscribed by 28 U.S.C. §1447(d).

**III. GROUND FOR PETITION**

The ground for this petition is fraud upon the court. Fraud upon the court is ground for relief under the residual clause of the rule and must be raised within a "reasonable time" after entry

of the judgment, FED. R. Civ. P. 60(b)(6); Wilson, 873 F.2d at 872, citing Rozier, 573 F.2d at 1338, but a saving clause in Rule 60(b) provides: "This rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court." See Dausuel v. Dausuel, 90 U.S.App.D.C. 275, 195 F.2d 774 (1952)." Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 n. 1 (5th Cir. 1978) A federal Court always retains the inherent jurisdiction to vindicate its dignity and authority.

#### IV. PETITIONER'S BURDEN

"[In] order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision." England v. Doyle, supra, 281 F.2d at 309. See also United States v. Standard Oil Co. of Calif., 73 F.R.D. 612, 615 (N.D.Cal. 1977). Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978).

*Brown v. Bilek, C.A. No. H-09-2193, at \*21-22 (S.D. Tex. Aug. 20, 2009) ("Rule 60(b) provides an extraordinary remedy because it can weaken the principle of finality and "the desire for a judicial process that is predictable." Carter v. Fenner, 136 F.3d 1000, 1007 (5th Cir. 1998) (quoting Bailey v. Ryan Stevedoring Company, Inc., 894 F.2d 157, 160 (5th Cir. 1990). Rule 60(b) relief based on fraud upon the court is reserved for only "the most egregious misconduct." Wilson v. Johns — Manville Sales Corp., 873 F.2d 869, 872 (5th Cir. 1998). Fraud upon the court is a narrow concept that should include only those types of fraud that do, or attempt to, defile the court itself," or frauds that are "perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. Kerwit Medical Products, Inc. v. N. H. Instruments, Inc., 616 F.2d 833, 837 (5th Cir. 1980). In First National Bank v. Lustig, 96 F.3d 1554 (5th Cir. 1996), this Court further described the kinds of conduct that could constitute a fraud on the court:*

*To describe fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision. Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such*

*as nondisclosure to the court of facts allegedly pertinent to the matter before it will not ordinarily rise to the level of fraud on the court. Id. at 1573 (internal quotation marks and citations omitted). The very first test for fraud on the court under Rule 60 is "whether the action in question prevented a party from fully and fairly litigating its case." Id."*)

The misconduct upon which this petition for relief is based is not merely an unconscionable plan preventing Petitioner from fully and fairly litigating her case, but a willful and callous scheme designed to improperly influence the court in its decision, and exactly the type of egregious misconduct by an officer of this court as will constitute a fraud on the court warranting relief within the meaning of Rule 60(b)(3).

## **V. STANDARD OF REVIEW**

RULE 60: Decisions on Rule 60 motions are reviewed for abuse of discretion. "A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Kennedy v. Texas Utilities*, 179 F.3d 258, 265 (5th Cir. 1999) (quoting *Esmark Apparel, Inc. v. James*, 10 F.3d 1156, 1163 (5th Cir. 1994)).

In general, an abuse of discretion occurs when (1) a relevant factor that should have been given significant weight is not considered, (2) an irrelevant or improper factor is considered and given significant weight, or (3) all proper factors, and no improper ones, are considered, but the trial court commits clear error of judgment in weighing those factors. The phrase "abuse of discretion" means that the court has a range of choices, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. The trial court is thus given a "zone of choice within which [it] may go either way."

CLEARLY ERRONEOUS: Petitioner bears the burden of establishing substantial evidence. This Court's view of the evidence is reviewed for clear error. "Review under the clearly erroneous standard is significantly deferential." *Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993). The appellate court must accept the trial court's findings unless it is left with the "definite and firm conviction that a mistake has been committed." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982).

SUBJECT MATTER JURISDICTION: Subject matter jurisdiction is reviewed de novo. *Pillow v. Bechtel Const., Inc.*, 201 F.3d 1348, 1351 (11th Cir. 2000).

#### **NATURE AND STAGE OF THE PROCEEDING**

Pro se Petitioner Candace Louise Curtis (Curtis) filed the above titled breach of fiduciary action in this court on February 27, 2012, in order to compel required accounting and fiduciary disclosures. The matter was dismissed sua sponte under the probate exception to federal diversity jurisdiction [Doc 14] then reversed by the Circuit Court [No. 12-20164] and remanded to this Court for further proceedings. *Curtis v Brunsting* 704 F.3d 406 (Jan 9, 2013).

On January 29, 2013, while Plaintiff Curtis' action was in transit between the Fifth Circuit and the Southern District of Texas, Attorney Bobbie G. Bayless (TBA No. 01940600) filed legal malpractice claims against the late Settlor's estate planning attorneys in Harris County District Court 164 [No. 2013-05455] styled:

*Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting*

*Vs.*

*Candace Kunz-Freed and Vacek & Freed, PLLC f/k/a/ the Vacek Law Firm*

Upon returning to the Southern District of Texas, Plaintiff Curtis renewed her earlier application for a preliminary injunction and hearing was had April 9, 2013. Also on April 9, 2013, Attorney Bobbie G. Bayless filed claims in Harris County Probate Court (No. 412249-401) styled:

*“Carl Henry Brunsting Individually and as Independent Executor of the Estates of Elmer H Brunsting and Nelva E Brunsting”*

*vs*

*ANITA KAY BRUNSTING f/k/a ANITA KAY RILEY, individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Anita Kay Brunsting Personal Asset Trust; AMY RUTH BRUNSTING f/k/a AMY RUTH TSCHIRHART, individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Amy Ruth Tschirhart Personal Asset Trust; CAROLE ANN BRUNSTING, individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust; and as a nominal defendant only, CANDACE LOUISE CURTIS”*

## **VI. THIS COURT’S PRELIMINARY INJUNCTION [DOC 45]**

This Court announced the decision to issue the injunction at the April 9 hearing and published the order on April 19, 2013. The preliminary injunction established the existence of a fiduciary relationship between Plaintiff and Defendants, that Defendants owed fiduciary duties to Plaintiff and that Defendants had failed to perform fiduciary duties owed to Plaintiff.

The Report of a Special Master, appointed by this Court [Doc 62] to create books and records of accounts, revealed both injury to the Plaintiff and benefit to Defendants, thus establishing the fourth and final element of a breach of trust cause of action.

## **VII. ATTORNEY OSTROM - FRAUD UPON THE COURT**

### **Procuring an Order for Remand under False Pretext**

In late 2013 Plaintiff Curtis retained Houston attorney Jason Bradley Ostrom (TBA #24027710) (Ostrom) made his appearance on January 6, 2014 [Doc 95]. Ostrom never followed his client's instructions, never sent copies of pleadings and did not respond to efforts to communicate. Plaintiff Curtis was forced to keep up with Ostrom's activities by data mining and monitoring the dockets.

Ostrom manipulated the administrative side of this Court to evade the judicial side by filing an unopposed motion [Doc 107] seeking to amend Plaintiff Curtis' complaint to add Carl Brunsting as an involuntary plaintiff, [Doc 108 ln 4] thus polluting diversity. Ostrom's professed purpose was to consolidate Plaintiff Curtis' case with state court Plaintiff Carl Brunsting's case pending in the probate court, "*in order to provide complete relief to the parties*". Ostrom thus obtained an order remanding Plaintiff Curtis' cause to Harris County Probate Court #4 [Doc 112]. It should be noted that remand is a post removal statute (28 U.S. Code § 1447). Plaintiff Curtis had never been in a state court in Texas and this case was not removed to the federal court from a probate court.

### **Failure to Serve Citation**

Ostrom's amended complaint [Doc 108] portends to have added Petitioner's brother, Carl Brunsting, as an involuntary plaintiff thus polluting diversity and depriving this Court of subject matter jurisdiction. The amended complaint also stated that "*it is anticipated Carl will waive service of summons*".

Examination of the Clerk's record in this Court reveals that a summons to involuntary Plaintiff Carl Brunsting was never issued and no proof or waiver of service of citation was ever perfected and made a part of this Court's record.

### **Colorable Transfer and Criminal Conversion**

Ostrom never had the docket of this Court prepared for certification to the state court. Instead, Ostrom filed a motion in the probate court asking to enter a transfer order, not as the above captioned cause but as "*Estate of Nelva Brunsting 412249-401*" (Exhibit A). Cause Number 412249-401 is the case brought by *Carl Henry Brunsting Individually and as Independent Executor of the Estates of Elmer H Brunsting and Nelva E Brunsting*. Plaintiff Curtis was named a nominal defendant in that cause. (Exhibit B)

Moreover, the motion for remand was granted by this Court on May 15, 2014, but a docket entry for the case was not created in the probate court until February 15, 2015, nine months later. The cause was also styled "*Estate of Nelva Brunsting No. 412249-402*".

On February 19, 2015, four days after the ancillary case was opened, Carl Brunsting resigned as independent executor due to lack of capacity.

*"the estate is an "indispensable party" to any proceeding in the probate court. The estate's presence is required for the determination of any proceeding that is ancillary or pendent to an estate." Goodman v. Summit at West Rim, Ltd., 952 S.W.2d 930, 933 (Tex. App. 1997) Smith's Inc. v. Sheffield No. 03-02-00109-CV (Tex. App. Jan. 30, 2003), Johnson v. Johnson, No. 04-19-00500-CV (Tex. App. Jan. 15, 2020)*

March 9, 2015, with the office of executor vacant, the 412249-402 file was closed under the auspice of an agreed order to consolidate "*Estate of Nelva Brunsting 412249-402*" with "*Estate of Nelva Brunsting 412249-401*". (Exhibit C)

This agreed order completed the apparent disappearance of “federal Plaintiff Curtis” and completed her conversion into “probate court Defendant Curtis”, a “nominal” defendant of Carl individually and a “nominal” defendant of the Estate of Nelva Brunsting.

Plaintiff terminated Ostrom when data mining revealed the conversion agreement. Unfortunately, the damage had already been done. Plaintiff was left without a pending lawsuit and everything that followed was a game of attrition, obstruction, evasion, intimidation, and abuse, but nothing that could be legitimately called litigation. Ostrom did not surrender the file when terminated and an examination of the docket reveals that he never even bothered to file an appearance in the state court.

## **VIII. CONCLUSION**

Carl Brunsting is a cross plaintiff, not a co-plaintiff. Citation to involuntary Plaintiff Carl Brunsting was not issued, served or waived. An involuntary plaintiff was not added to the above styled action and diversity was not polluted. The record was never certified for transfer to the state court, was never transferred to the state court and was never received by the state court. Candace Louise Curtis vs. Anita and Amy Brunsting No. 4:12-cv-592 never left this court as a matter of law or as a matter of fact.

November 11, 2019 marked the eighth year since the passing of the last Settlor, when rights in property vested equally in each of the five beneficiaries, and the eighth consecutive year that not one dime has been distributed to any income beneficiary of the Brunsting trusts.

February 27, 2020 marked eight years since trust beneficiary Candace Curtis filed suit against Anita and Amy Brunsting in the Southern District of Texas seeking required accounting



and mandatory fiduciary disclosures in order to obtain information about her beneficial interest in an inter vivos trust.

February 19, 2020 marked the fifth consecutive year that the office of independent executor for the Estate of Nelva Brunsting has been vacant. There has been no personal representative for either estate for more than five years and it is not debatable that without an estate there have been no proceedings in the probate court since before Petitioner terminated Ostrom in March of 2015.

May 22, 2020 marked the sixth year since Attorney Jason Ostrom had Candace Curtis' **non-probate matter** transferred from the Southern District of Texas to Probate Court #4 and the end of the sixth year in Probate Court #4 without an evidentiary hearing to resolve even one substantive issue relating to the trust.

The Circuit Court in No. 12-20164 held the trust property in question to be non-estate property before any state court cases were filed, and held this case (*Candace Louise Curtis vs. Anita and Amy Brunsting 4:12-cv-592*) to be outside the probate exception to federal diversity jurisdiction, *Curtis v Brunsting 704 F.3d 406* (Jan. 2013).

April 9, 2020 marked the seventh anniversary of the filing of Ancillary Matter 412249-401 in probate court #4 and the seventh year in which no dispositive issue has been determined in that Court beginning with:

- a. What are the instruments that created the trust the estate poured over into at the death of Nelva Brunsting November 11, 2011?
- b. Who are the trustees?

- c. What affirmative obligations does the trustee owe the beneficiary in relation to the trust property?
- d. Have the trustees performed those obligations?

April 19, 2020 marked the seventh consecutive year in which the portion of this Court's preliminary injunction commanding that income be deposited into an "*appropriate account for the beneficiary*" has been ignored.

On April 12, 2019 Plaintiff sought remedy in this Court, seeking to enforce this Court's injunctive order [Doc 124]. The Court denied the petition for remedy [Doc 127] stating:

*"The Court is of the opinion that, having transferred the case to the Harris County Probate Court, it no longer has jurisdiction of the case. Therefore, the relief requested is Denied."*

Plaintiff/Petitioner has been trapped in a procedural purgatory and a substantive Hades where she has been subjected to threats, (Exhibit D) sanctions for seeking to enforce this Court's injunction in this Court, (Exhibit E) and where her property has been held hostage to Defendants' attorney fee ransom demands, while Defendants defalcate, flout accountability and disrespectfully ignore this Court's injunctive Order [Doc 45].

At the injunction hearing April 9, 2013, this Court stated at page 40:

8        *THE COURT: "That's it.*  
9        *So, I want this resolved within 90 days. And*  
10       *if I have to appoint a trustee or somebody to handle this*  
11       *and get it done, I'll do it. It will cost the estate. And*  
12       *if I find that there has been mischief, it is going to cost*  
13       *individuals. And that will be a separate and distinct*  
14       *hearing.*  
15       *So what I am telling the parties, and I am*  
16       *saying to you and to all those who have ears to hear, that*

17 *this matter is going to get resolved. It's not going to turn*  
18 *into one of these long, drawn-out episodes like the ones we*  
19 *see on TV that go on for years where lawyers make money and*  
20 *people walk away broke”*

Not only was that more than seven years ago, but that is exactly the kind of case attorneys Jason Ostrom (TBA #24027710), Bobbie G. Bayless (TBA 01940600) , Stephen Mendel (TBA#13930650), Neal Spielman (TBA#00794678) and others have worked in concert to make of it, under the label “*Estate of Nelva Brunsting*”.

Notwithstanding Petitioner having been sanctioned by the state court for seeking to have this Court’s injunction enforced in this Court, (Exhibits F and G) Petitioner herein renews her March 20, 2019 Application for Orders to Show Cause with Motion for Sanctions, [Doc 124] incorporated herein by reference, because this Court is the only court of competent jurisdiction in which Plaintiff Curtis has a docketed action.

This Court’s Plaintiff, Candace Curtis, does not have a cause in probate court #4. There have been no dispositive rulings on any relevant substantive issue, favorable or otherwise, in any court but this Court. Those determinations established the law of the case and are entitled to full faith and credit.

For the above stated reasons Petitioner prays this Honorable Court will vacate and set aside the first Amended Complaint filed by Attorney Ostrom [Doc 108], vacate the Order approving Ostrom’s Motion for Remand [Doc 112], and restore the above styled cause to the active docket.

Respectfully submitted,            July 15, 2020

*Candice Schwager*

Candice Leonard Schwager

**PROOF OF SERVICE**

Pursuant to Fed. R. Civ. P. 5(a)(1)(D) an ex parte pleading may be heard without notice to opposing parties.

*Candice Schwager*

Candice Leonard Schwager