

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID POSCHMANN,

Plaintiff,

v.

Case No. 6:21-cv-1579-RBD-LHP

OCEANSIDE 99 CONDOMINIUM
ASSOCIATION, INC.,

Defendant.

ORDER

Before the Court are Defendant's motions to set aside the judgment (Doc. 19 ("Motion to Set Aside")) and for attorney's fees (Doc. 35 ("Fee Motion")). The motions are due to be granted.

In this long-closed Americans with Disabilities Act ("ADA") case, Plaintiff David Poschmann was represented by Lee D. Sarkin, Esq. and Drew M. Levitt, Esq. (*See* Doc. 1.) Poschmann was a "tester" in hundreds of ADA cases and had long been represented by Sarkin and Levitt. (Doc. 25-1, ¶ 4.) On November 12, 2021, while settlement negotiations in this case were ongoing, Poschmann died. (*See* Docs. 19-1, 19-2.) Five days later, the parties' counsel jointly filed a settlement notice with the Court. (Doc. 17.) The next day, unable to reach Poschmann (for obvious reasons), Sarkin and Levitt signed Poschmann's name to the settlement

agreement via an ink signature. (See Doc. 19-3; Doc. 25, pp. 13–17; Doc. 25-1, ¶¶ 11–21.) Defendant paid attorney’s fees to “Poschmann” –really Sarkin and Levitt’s trust account –per the settlement. (Doc. 19, p. 3.) Sarkin and Levitt claim they learned of Poschmann’s death on December 16, 2021, a month after settling the case. (Doc. 25-1, ¶ 5, Doc. 25-2, ¶ 5.)

A year and a half later, when Defendant learned of Sarkin and Levitt’s actions (and other cases they purportedly settled after Poschmann’s death), it moved to set aside the dismissal and vacate the settlement, contending that Sarkin and Levitt committed fraud on the Court. (Docs. 19, 33.) Sarkin and Levitt opposed. (Doc. 25.) The Court held a hearing on the Motion to Set Aside (Doc. 34), after which Defendant also moved for attorney’s fees (Doc. 35), at the Court’s direction. These matters are ripe.

Fraud on the court is reason to set aside a judgment. Fed. R. Civ. P. 60(d)(3). The movant must establish the fraud by clear and convincing evidence. *Booker v. Dugger*, 825 F.2d 281, 283 (11th Cir. 1987). “Only the most egregious misconduct . . . will constitute a fraud on the court.” *Galatolo v. United States*, 394 F. App’x 670, 672 (11th Cir. 2010) (cleaned up).

Here, Sarkin and Levitt signing Poschmann’s name to the settlement agreement misrepresented to opposing counsel and the Court that Poschmann not only agreed to the terms of the settlement but also physically signed it – something

that did not occur and could not possibly have occurred, as he died days prior. (Docs. 17, 19-1, 19-3.) Agreeing to a settlement when counsel has prior settlement authority is one thing—though not expressly obtaining agreement to the specific terms is bad enough, given that Sarkin and Levitt no longer had such authority once Poschmann died. *See Shannon v. Saab Training USA, LLC*, No. 6:08-cv-803, 2009 WL 2175642, at *1 (M.D. Fla. July 21, 2009) (“[T]he death of a client terminates the relationship between the attorney and . . . the attorney no longer has the authority to act on behalf of the client.”); *Bursten v. Green*, 172 So. 2d 472, 474 (Fla. 2d DCA 1965) (“[An] unauthorized compromise, executed by one’s attorney, . . . unless subsequently ratified, is of no effect and may be repudiated or ignored and treated as a nullity.”). But putting a client’s wet-ink signature on a document is a whole different ballgame.¹ *Cf. Marr v. Palm Beach Grading, Inc.*, No. 6:11-cv-712, 2012 WL 13141281, at *2 (M.D. Fla. Dec. 26, 2012), *adopted*, 2013 WL 12388546 (M.D. Fla. Jan. 23, 2013) (approving settlement agreement executed by counsel on plaintiff’s behalf where counsel signed his own name and was transparent that it was on behalf of plaintiff due to plaintiff’s inability to sign). Regardless of when Sarkin and Levitt learned of Poschmann’s death—and the Court is skeptical it was

¹ Sarkin and Levitt also signed Poschmann’s name to interrogatory responses in another case. (Doc. 25, pp. 13–17; Doc. 25-1, ¶¶ 11–21.) And they settled other cases after Poschmann’s death. (*See* Docs. 19-8, 19-9.) On this record, it is unclear how many documents Sarkin and Levitt signed Poschmann’s name to—but what is clear is that this was not an isolated instance.

as late as they claim²—they knew they could not reach him and they knew he was not in the room putting his signature on that document. These egregious misrepresentations are sufficient to constitute a fraud on the Court, so the dismissal is due to be set aside. *See* Fed. R. Civ. P. 60(d)(3); *Fla. Bar v. Kickliter*, 559 So. 2d 1123, 1124 (Fla. 1990) (disbarring attorney who committed fraud on the court by signing deceased client’s name to a will and submitting the will to probate). And because the settlement was reached after Poschmann’s death (Doc. 19-2, p. 7), Sarkin and Levitt no longer had authority to act on Poschmann’s behalf, so the settlement was unauthorized and must be vacated. *See Shannon*, 2009 WL 2175642, at *1;³ *Bursten*, 172 So. 2d at 474.

As members of the Florida Bar and officers of the Court, Sarkin and Levitt’s

² Another similar case in which the parties are represented by the same counsel calls into question exactly when Sarkin and Levitt discovered Poschmann was dead. *See Lugo v. Sea Cottages of Amelia, LLC*, No. 3:21-cv-1272 (M.D. Fla. Feb. 13, 2023) (Doc. 40). There, at a hearing, the defendant questioned if that plaintiff, Daniel Lugo, actually visited the alleged ADA-noncompliant website at issue because the screenshots provided by Sarkin and Levitt were dated three weeks before Lugo claimed to visit the site. (*Id.* at 14:22–15:14.) To explain the discrepancy, Sarkin told the court that the site was originally brought to his attention by Poschmann and that he had taken the screenshots to prepare a case for Poschmann, not Lugo. (*Id.* at 16:20–17:7.) But after finding out that Poschmann died, Lugo and Sarkin discussed pursuing similar cases, so Sarkin showed Lugo the screenshots, and Lugo went to the site himself on December 8. (*Id.* at 17:8–20.) If all of this is true, then Sarkin and Levitt must have learned of Poschmann’s death on or before December 8 (the evidence strongly suggests before)—which directly conflicts with the date Sarkin and Levitt now claim to have learned of Poschmann’s death, December 16. (Doc. 25-1, ¶ 5; Doc. 25-2, ¶ 5.)

³ Defendant also asks to be reimbursed for expenses to modify its website to comply with the settlement agreement, but such relief would be inappropriate. Per the settlement agreement, Defendant had a choice either to comply with the requirements outlined in 28 C.F.R. § 36.302(e)(1) or to include a disclaimer on the site, and it chose the former. (*See* Doc. 19-3.) Defendant will not be compensated for bringing its site into compliance with the law.

actions are unacceptable. An attorney's duty of candor is no less in an ADA tester case or other high-volume practice than in any other. Fla. Bar Reg. R. 4-3.3, 4-3.4. Sarkin and Levitt's disregard for their ethical obligations reflects poorly on the legal profession and is inconsistent with their sworn duties. So the Court will forward a copy of this Order to the Florida Bar and post it on the Court's public website. The case will also be referred to the Grievance Committee for the Middle District of Florida, Orlando Division, to further evaluate Sarkin and Levitt's misconduct. Sarkin and Levitt also stipulated to Defendant's authorized fee request in the amount of \$11,287.40; this payment will add to Sarkin and Levitt's sanction. (*See* Doc. 35, ¶ 7.)

Accordingly, it is **ORDERED AND ADJUDGED**:

1. The Motion to Set Aside (Doc. 19) is **GRANTED**.
 - a. The Order dismissing the case (Doc. 18) is **SET ASIDE**.
 - b. The settlement agreement (Doc. 19-3) is **VACATED**.
 - c. Attorneys Lee D. Sarkin, Esq. and Drew M. Levitt, Esq. are **DIRECTED** to return to Defendant the attorney's fees paid pursuant to the settlement agreement in the amount of \$6,500.00.
2. The Fee Motion (Doc. 35) is **GRANTED**.
 - a. Attorneys Lee D. Sarkin, Esq. and Drew M. Levitt, Esq. are

SANCTIONED in the form of Defendant's attorney's fees in litigating this matter, the amount of which is fixed by stipulation.

- b. Sarkin and Levitt are **DIRECTED** to pay Defendant \$11,287.40.
3. The Clerk is **DIRECTED** to post a copy of this Order on the Court's website and to provide copies to the Florida Bar and the Grievance Committee for the Middle District of Florida, Orlando Division. The file is to remain closed.

DONE AND ORDERED in Chambers in Orlando, Florida, on April 27, 2023.





ROY B. DALTON JR.
United States District Judge