

No. 1-12-0360

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIRST PERSONAL BANK,)	
)	
Plaintiff-Appellee,)	Appeal from the
)	Circuit Court of
)	Cook County.
v.)	
)	No. 10 CH 32208
ANDREW A. MANGANIELLO; MARIJAYNE E.)	
MANGANIELLO, a/k/a/ MARI JAYNE E.)	Honorable
MANGANIELLO; FAITH CARTAGE, INC.; and)	Anthony C. Kyriakopoulos,
UNIQUE TESTING, INC.;)	Judge Presiding.
)	
Defendants-Appellants.)	
)	

JUSTICE R. GORDON delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where plaintiff failed to provide notice or pay costs, as statutorily required, plaintiff was not entitled to a voluntary dismissal and the trial court’s denial of defendants’ motion to vacate the dismissal order was reversed.
- ¶ 2 The instant appeal arises from plaintiff First Personal Bank’s voluntary dismissal of its

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mortgage foreclosure action against defendants Andrew A. Manganiello, MariJayne E. Manganiello, Faith Cartage, Inc., and Unique Testing, Inc. Defendants claim that the voluntary dismissal order was entered without notice to them and without requiring plaintiff to pay their costs. Additionally, defendants claim that the order included a provision that was prejudicial to defendants' rights and was not agreed to by the parties. Defendants moved to vacate the dismissal order, and the trial court denied their motion. Defendants now appeal, and we reverse, vacating the dismissal order.

¶ 3

BACKGROUND

¶ 4 On July 27, 2010, plaintiff filed a complaint to foreclose defendants' mortgages; defendants had obtained one residential loan and one commercial loan through plaintiff, both secured by mortgages on Andrew and MariJayne's residence in Lemont. On October 4, 2010, plaintiff filed a motion for summary judgment as to Andrew and a motion for default as to the other defendants. On March 17, 2011, defendants filed a motion for mediation, and, on the same day, the trial court entered an order referring the matter for mediation and appointing Chicago Volunteer Legal Services (CVLS) to represent defendants during the mediation process.

¶ 5 On August 4, 2011, plaintiff filed "Plaintiff's First Mediation Report." The report stated that the first mediation session between plaintiff and defendants took place on July 29, 2011. On June 29, 2011, defendants made a proposal during mediation that plaintiff rejected; plaintiff made a counter-proposal that defendants rejected on August 2, 2011. Defendants made a second proposal that was being considered by plaintiff; plaintiff's report stated that the parties "don't appear to be too far apart regarding monthly payments." Defendants' mediation report recited

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the same information concerning the proposals, but characterized the meeting as a settlement conference and not a mediation session, since no mediator was present and plaintiff's representative did not have settlement authority.

¶ 6 On August 5, 2011, plaintiff rejected defendants' second proposal and made a second counter-proposal.

¶ 7 On October 31, 2011, the trial court entered an order drafted by plaintiff's counsel and that read, in full:

“This matter having been fully resolved between the Plaintiff and Defendants, and the court having jurisdiction in this matter,

IT IS HEREBY ORDERED:

1. This matter is removed from mediation and placed back on the regular court docket for Calendar 63 as a result of the parties reaching a resolution.

2. This matter is hereby voluntarily dismissed without prejudice and with leave to reinstate pursuant to the forbearance agreement entered into between Plaintiff and Defendants.

3. Upon a default under the forbearance agreement, by the Defendants, Plaintiff may, but is under no obligation to, reinstate the matter and set a hearing date on the previously filed Motion for Summary Judgment.

4. Upon a future reinstatement of the matter as a result of a default under the forbearance agreement, the matter shall not be placed back in the Mediation program and shall remain on the regular court docket.” (Emphasis in original.)

¶ 8 On November 18, 2011, defendants filed a motion to vacate portions of the dismissal order pursuant to section 2-1301 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1301 (West 2010)). The motion claimed that, through mediation, the parties were able to reach a resolution to the foreclosure lawsuit. Shortly after reaching the agreement, CVLS requested to review any agreed dismissal order, but never received a draft of plaintiff’s proposed order. On October 31, 2011, without notice to defendants or CVLS, plaintiff presented the dismissal order to the court off-call, and the court entered the order. The motion claimed that the language in the order, especially paragraph four, was “highly prejudicial” to defendants and that CVLS would have objected to the language had plaintiff provided notice. On November 9, 2011, plaintiff emailed CVLS a copy of the entered dismissal order, which was the first opportunity CVLS had to review the order.

¶ 9 The motion to vacate claimed that section 2-1009(a) of the Code (735 ILCS 5/2-1009(a) (West 2010)) required notice to each party prior to a voluntary dismissal. The motion further noted that the trial court’s standing orders for off-call motions permitted voluntary dismissals without notice in cases where the mortgagor has not filed an appearance, answer, or other motion but that the exception did not apply to the case at bar, since defendants had filed all three. The motion requested that the trial court vacate paragraph four in the dismissal order.

¶ 10 Defendants' bystander's report, certified by the trial court on March 15, 2012, recounted the December 2, 2011, hearing on defendants' motion to vacate. The bystander's report stated that the parties participated in the Cook County foreclosure mediation program and had agreed to enter into a forbearance agreement¹ and dismiss the case. After the agreement had been executed, defendants' counsel contacted plaintiff's counsel and invited plaintiff's counsel to work on an agreed dismissal order together; plaintiff's counsel responded that he had already prepared the order and dropped it off with the court. When defendants' counsel received the entered order, he noticed that plaintiff's counsel had included language that would deny defendants the opportunity to re-enter the mediation program should they default on the forbearance agreement. Defendants' counsel then filed the motion to vacate the order.

¶ 11 Both parties agreed that the forbearance agreement did not contain a provision that would address the issue of whether defendants would be able to return to the mediation program and also agreed that plaintiff's filing of the dismissal order was not done in bad faith. On January 3, 2012, the trial court entered an order *nunc pro tunc* to December 7, 2011, denying defendants' motion to vacate. This appeal follows.

¶ 12 ANALYSIS

¶ 13 On appeal, defendants claim that the trial court erred in denying their motion to vacate the voluntary dismissal order because: (1) the order was not a proper dismissal order because it was entered without notice to defendants and without paying their costs and (2) the order contained a provision prejudicial to defendants' legal rights that was not agreed-to by the parties.

¹ The forbearance agreement is not included in the record on appeal.

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¶ 14 As an initial matter, we note that plaintiff failed to file an appellee’s brief in this case. In such a circumstance, a court of review has essentially two choices. “When the record is simple, and the claimed errors are such that this court can easily decide them on the merits without the aid of an appellee’s brief, this court should decide the appeal on its merits.” *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088 (1995). “Otherwise, if the appellant’s brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record, the judgment of the trial court may be reversed.” *Plooy*, 275 Ill. App. 3d at 1088 (citing *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976)). In the case at bar, we conclude that the record and the issues before us are clear enough that the appeal should be decided on its merits.

¶ 15 We also note that, although a voluntary dismissal without prejudice is not an appealable order by plaintiff, it is a final and appealable order by defendants. *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 307 (1984) (a voluntary dismissal is a final and appealable order by the defendants, whose “rights may have been prejudiced by the plaintiff’s voluntary dismissal”). Accordingly, we proceed to the merits of defendants’ claims on appeal.

¶ 16 Section 2-1301(e) of the Code provides that a trial court “may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.” 735 ILCS 5/2-1301(e) (West 2010). The trial court’s decision to deny a motion to vacate is reviewed for an abuse of discretion. *Standard Bank & Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 8. A trial court abuses its discretion “when it acts arbitrarily without the

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employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.” *Marren Builders v. Lampert*, 307 Ill. App. 3d 937, 941 (1999). “ ‘If reasonable persons could differ as to the propriety of the trial court’s actions, then the trial court cannot be said to have exceeded its discretion.’ ” *Standard Bank*, 2011 IL App (1st) 103516, ¶ 8 (quoting *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 930 (1997)). “When ruling on a motion to vacate, the predominant concern is whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to proceed to trial on the merits. [Citation.] The court should consider all of the events leading up to judgment and should decide what is just and proper based on the facts of the case.” *Larson v. Pedersen*, 349 Ill. App. 3d 203, 207-08 (2004) (citing *Mann v. The Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001)).

¶ 17 In the case at bar, defendants argue that the trial court abused its discretion in denying their motion to vacate the voluntary dismissal order because (1) plaintiff was not entitled to a voluntary dismissal and (2) the dismissal order contained language that was prejudicial to defendants. Under section 2-1009 of the Code, “[t]he plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party’s attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.” 735 ILCS 5/2-1009(a) (West 2010). “The statute thus provides the three requirements which must be satisfied in order for the plaintiff to qualify for and receive voluntary dismissal. Those requirements are (1) no trial or hearing shall have begun; (2) costs must be paid; and (3) notice must be given.” *Vaughn v. Northwestern Memorial*

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Hospital, 210 Ill. App. 3d 253, 257 (1991). The trial court must grant a plaintiff's motion for voluntary dismissal as long as the requirements of section 2-1009 are satisfied. *Lewis v. Collinsville Unit 10 School District*, 311 Ill. App. 3d 1021, 1024 (2000).

¶ 18 In the case at bar, defendants claim that they were not provided notice and plaintiff did not pay or tender defendants' costs. In order to determine whether defendants received proper notice, we examine the local court rules. *Lewis*, 311 Ill. App. 3d at 1028 ("Local court rules govern the notice requirement."); *Vaughn*, 210 Ill. App. 3d at 257. The rules of the circuit court of Cook County provide that "[e]xcept in actions appearing on the daily trial call or during the course of trial, written notice of the hearing of all motions shall be given to all parties who have appeared and have not theretofore been found by the court to be in default for failure to plead, and to all parties whose time to appear has not expired on the date of notice." Cook Co. Cir. Ct. R. 2.1(a) (Aug. 21, 2000). The court rules do provide an exception to the notice requirement for certain motions: "Emergency motions and motions which by law may be made ex parte may, in the discretion of the court, be heard without giving prior notice and without calling the motion for hearing." Cook Co. Cir. Ct. R. 2.2(a) (July 1, 1976).

¶ 19 In the case at bar, we agree with defendants that the notice requirement was not satisfied. First, we note that the record does not indicate that a motion to voluntarily dismiss the action was ever filed; the only document in the record concerning the voluntary dismissal is the dismissal order itself. Thus, there is likewise no notice of the motion in the record. Moreover, the record does not demonstrate that defendants were notified that plaintiff was planning on presenting the order to the trial court; indeed, the motion to vacate claims that defendants' counsel was

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anticipating the opportunity to review any proposed agreed order prior to its being presented to the trial court. During the hearing on the motion to vacate, plaintiff's counsel did not argue that defendants had notice of the contents of the proposed agreed order but instead "explained that he had no intention to deceive the Defendants – he simply did not believe this would be an issue."

¶ 20 Additionally, it is clear from the contents of the order that the order was presented as being the "result of the parties reaching a resolution" and "pursuant to the forbearance agreement entered into between Plaintiff and Defendants." However, it is equally clear that the parties did not agree on the substance of the order, especially paragraph four, and that as soon as defendants' counsel was made aware of the contents of the order, he indicated that it contained a term that had not been agreed to by both parties. Thus, the order was not an agreed order and defendants should have received notice that plaintiff was seeking to voluntarily dismiss the case.

¶ 21 Additionally, another of the requirements in order to voluntarily dismiss an action is that costs must be paid. *Vaughn*, 210 Ill. App. 3d at 257. In the case at bar, the record is silent on the matter of costs, and the dismissal order does not provide for the payment of costs. Consequently, the voluntary dismissal was erroneously granted on this basis, as well. *Juen v. Juen*, 12 Ill. App. 3d 284, 287 (1973) (noting that where there was no indication that the appellant paid or tendered the payment of costs, a motion to voluntarily dismiss was properly denied "[o]n this basis alone").

¶ 22 Finally, defendants were prejudiced by the lack of compliance with the statutory requirements. A paragraph was included in the dismissal order stating that "[u]pon a future reinstatement of the matter as a result of a default under the forbearance agreement, the matter

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shall not be placed back in the Mediation program and shall remain on the regular court docket.”

Defendants were not afforded the opportunity to make any arguments against the inclusion of this provision in the dismissal order prior to the entry of the order. Thus, cases upholding a voluntary dismissal in the absence of compliance with the Code are inapposite. See, e.g., *Valdovinos v. Luna-Manalac Medical Center*, 328 Ill. App. 3d 255, 267-68 (2002) (no prejudice because the defendants were given an opportunity to respond to the motion and the court order required the plaintiffs to pay costs).

¶ 23 As noted, “[w]hen ruling on a motion to vacate, the predominant concern is whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to proceed to trial on the merits. [Citation.] The court should consider all of the events leading up to judgment and should decide what is just and proper based on the facts of the case.” *Larson*, 349 Ill. App. 3d at 207-08 (citing *Mann*, 324 Ill. App. 3d at 377). In the case at bar, the voluntary dismissal order was entered without notice to defendants, there is no evidence that plaintiff tendered defendants their costs, and the order included a provision that is prejudicial to defendants. Defendants should have been permitted the opportunity to contest the inclusion of paragraph four in the dismissal order, and we cannot find that “substantial justice [was] being done” (*Larson*, 349 Ill. App. 3d at 207) by the trial court’s denial of defendants’ motion to vacate. Accordingly, we reverse the trial court’s decision and vacate the voluntary dismissal order.

¶ 24

CONCLUSION

¶ 25 Since plaintiff did not comply with the statutory requirements for a voluntary dismissal,

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the voluntary dismissal was erroneously granted and the trial court abused its discretion in denying defendants' motion to vacate.

¶ 26 Reversed; dismissal order vacated.