

No. 14-1296

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 DISTRICT

THE BANK OF NEW YORK MELLON,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 11 CH 40338
)	
JACQUELINE SMITH and UNKNOWN)	
OCCUPANTS,)	
)	
Defendant-Appellant.)	Honorable Orville E. Hambright, Jr.
)	Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred when it allowed the plaintiff to voluntarily dismiss the case.

¶ 2 Plaintiff obtained an order to evict defendant from her home following a foreclosure.

After we vacated that order and remanded the case for an evidentiary hearing, plaintiff moved to voluntarily dismiss its case. The trial court allowed the voluntary dismissal. Defendant appeals, and we again reverse and remand for an evidentiary hearing.

¶ 3

BACKGROUND

¶ 4 On June 22, 2010, following a foreclosure and a judicial sale, plaintiff Bank of New York Mellon obtained an order declaring it to be the owner of 111 E. Chestnut Street, Unit #4400C in Chicago. The property was formerly owned by defendant Jacqueline Smith. On July 11, 2011, plaintiff filed this case, a forcible entry and detainer action, to eject defendant from the premises. Multiple attempts were purportedly made to personally serve defendant with process, but she was never served. The trial court entered an order allowing plaintiff to serve defendant by posting and, after plaintiff still did not appear, the trial court entered an order directing the sheriff to evict defendant from the premises. In January 2012, plaintiff appeared in court. Plaintiff's appearance was made after the order of eviction was entered. Plaintiff thereafter challenged service by filing two motions accompanied by an affidavit, but her motions were denied. Emails, elevator records, and records from the sheriff show that defendant was evicted from the premises in January 2012 and that her belongings were removed from the premises in March 2012.

¶ 5 Defendant appealed the trial court's order. In particular, defendant argued that the trial court's decision to allow for service by posting was improper, especially in light of the fact that defendant had filed an affidavit concerning the adequacy of plaintiff's diligence to effect personal service. We vacated the trial court's orders and remanded the case, directing the trial court to hold an evidentiary hearing on the sufficiency of plaintiff's inquiry while serving process. *Bank of New York Mellon v. Smith*, 2013 IL App (1st) 120398-U (June 25, 2013). On remand, the trial court set an evidentiary hearing on the issue. The parties all appeared at the evidentiary hearing, but, before it began, plaintiff moved to voluntarily dismiss the case. The trial court allowed plaintiff to voluntarily dismiss the case without prejudice and denied defendant's motion for costs.

Prior to the time at which the evidentiary hearing was to occur, plaintiff made no indication it was going to voluntarily dismiss the case. Defendant later moved for reconsideration of the trial court's order insofar as the dismissal was "without prejudice," and again requested that costs be awarded to her. Her motion was denied and she now appeals. Throughout the course of the proceedings, defendant has apparently alternated between being represented by counsel and representing herself. She is acting *pro se* in this appeal.

¶ 6

ANALYSIS

¶ 7 The parties dispute the standard of review that we are to apply when reviewing a trial court's allowance of a voluntary dismissal. Defendant advocates for *de novo* review, and plaintiff argues that we should review for an abuse of discretion. There is some lack of clarity regarding the appropriate standard to apply, but we need not address the matter in depth here, because even if the standard is abuse of discretion, we would hold that the order must be reversed.

¶ 8 Although the trial court did not make it clear, based on the circumstances and on the argument presented in plaintiff's appellate brief, it is apparent that the voluntary dismissal was granted as a matter of right. Under the Illinois Code of Civil Procedure, three requirements must be met in order for a plaintiff to voluntarily dismiss a case without prejudice as of right: (1) the plaintiff must move for the voluntary dismissal prior to the beginning of trial or hearing; (2) the plaintiff must give proper notice; and (3) the plaintiff must pay costs. 735 ILCS 5/2-1009(a); *Valdovinos v. Luna–Manalac Medical Center, Ltd.*, 328 Ill. App. 3d 255, 267 (2002). Plaintiff concedes that it did not give proper notice. The first time defendant or the court had any idea that plaintiff would be seeking a voluntary dismissal was when the parties appeared for the evidentiary hearing. Additionally, plaintiff objected to (and still does), and the trial court rejected,

defendant's motion for costs. Therefore, two of the three requirements to entitle a plaintiff to a voluntary dismissal as of right were not met. The voluntary dismissal should not have been allowed.

¶ 9 The procedural posture of the case likewise makes the allowance of the voluntary dismissal troubling. At the point of the voluntary dismissal, there was no valid forcible entry order supporting the eviction. The trial court originally ruled in plaintiff's favor and plaintiff ejected defendant from the property under color of that order. But that order was vacated. The parties' current legal relationship should be no different than before plaintiff filed the complaint.

¶ 10 In addition, we remanded the case and directed the court to hold an evidentiary hearing. The mandate is the judgment of this court. Ill. S. Ct. R. 369. Where the direction contained in the mandate is precise and unambiguous, it is the duty of the trial court to carry it into execution and not to change its direction. *David v. Russo*, 119 Ill. App. 3d 290, 295 (1983). A trial court must obey precise and unambiguous directions on remand. *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 28. Here, we unambiguously directed the trial court to conduct an evidentiary hearing. The trial court should not have permitted plaintiff to subvert that holding through a voluntary dismissal.

¶ 11 This is not a case where plaintiff is acknowledging that the eviction was wrongful and returning the property to defendant or settling for wrongful eviction. Plaintiff is, of course, content to have its case dismissed because it has already achieved the result for which the case was filed—to evict defendant. Plaintiff sold the property to a third party during the pendency of this

appeal.¹ But, as explained in the order disposing of the previous appeal, plaintiff has not, in the face of defendant's counter-affidavit, succeeded in proving that it made sufficient efforts to personally serve defendant. Therefore, plaintiff has not yet prevailed in its forcible entry and detainer action because it has never proved service was proper under the Forcible Entry and Detainer Act's requirements for constructive service. 735 ILCS 5/9-107. Defendant has a continuing right to contest service and her arguments are not mooted by the plaintiff taking possession of the property. *Bank of Ravenswood v. King*, 70 Ill. App. 3d 908, 914 (1979). The voluntary dismissal usurped defendant's right to challenge jurisdiction despite the fact that plaintiff failed to meet its shifted-burden to prove that it conducted the necessary inquiry in order to be entitled to effect service constructively.

¶ 12 The trial court proceedings and the current disposition of this case are incoherent. It is not all that surprising that defendant, acting *pro se*, had some difficulty forming her arguments on appeal. Plaintiff effectively succeeded on the merits and obtained the result it desired by losing on appeal and then dismissing its case. That cannot follow. We have already held that plaintiff is required to demonstrate the sufficiency of its efforts to serve defendant before it is entitled to relief under the Forcible Entry and Detainer Act. Plaintiff cannot subvert our decision by simply dismissing its case. Plaintiff has taken advantage of a now-vacated order and then used its supposed right to voluntarily dismiss the case to avoid its burden of proving the sufficiency of its service-inquiry. And somehow even avoided paying costs. It is an unconscionable result.

¶ 13 Unfortunately, we are in the exact same place as we were more than two years ago when we issued our last decision in this case. Plaintiff has still failed to prove that it made sufficient

¹ We take judicial notice of the Cook County Recorder of Deeds' records which demonstrate that a conveyance of the subject property from Bank of New York Mellon to Zadeyan Yannik was recorded on July 17, 2014 (Document No. 1419842060).

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efforts to serve defendant and, therefore, failed to prove that it is entitled to relief on its complaint for forcible entry and detainer. The case is again remanded for an evidentiary hearing.

¶ 14

CONCLUSION

¶ 15 Accordingly, the trial court's judgment is reversed. The case is reinstated and remanded for further proceedings consistent with this order.

¶ 16 Reversed and remanded.