2015 IL App (1st) 1142295-U

Sixth Division
Order Filed: June 5, 2015

No. 1-14-2295

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DEUTSCHE BANK NATIONAL TRUST CO., as trustee for WAMU 2005-AR-16, as Plaintiff-Appellee, v. JOHN M. HUGHES and AMY C. CEDERBAUM, Defendants-Appellants.	) Appeal from the Circuit Court of Cook County))) No. 2010 CH 54918))) Honorable Michael T. Mullen and Jean P. Rooney,) Judges Presiding

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

Held: The circuit court's order granting the plaintiff's motion to voluntarily dismiss its foreclosure action is reversed and remanded for further proceedings, where the dismissal was sought without notice to the defendants, and the defendants were prejudiced by such lack of notice.

¶ 1 On December 29, 2010, the plaintiff, Deutsche Bank National Trust Co., as trustee for Washington Mutual Bank (WAMU), filed suit against John M. Hughes, his wife Amy C. Cederbaum, JP Morgan Chase Bank (Chase Bank) and other defendants, seeking to foreclose on residential property owned by Hughes. The court granted a motion by Chase Bank, purportedly acting in its capacity as servicer of the mortgage loan, to voluntarily dismiss the foreclosure action under section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009) (West 2010). Defendants Hughes and Cederbaum now appeal, arguing that the dismissal order was void because the motion to voluntarily dismiss was brought by a defendant, Chase Bank, rather than by a plaintiff as required under section 2-1009 of the Code. Alternatively, they contend that the court abused its discretion in allowing the voluntary dismissal, because (1) the motion was made *sua sponte* and without any prior notice to the defendants, and (2) the dismissal was sought merely to avoid the effect of Hughes's and Cederbaum's pending motion for summary judgment, which would likely have disposed of the foreclosure case on its merits. We reverse and remand for further proceedings.

¶ 2 On October 24, 2005, Hughes executed a note to WAMU secured by a mortgage on his residence. The mortgage agreement (mortgage) identified the mortgagee as WAMU and the mortgagors as Hughes, and also Cederbaum, whom the mortgage stated was signing "solely to waive [her] homestead interest."

¶ 3 As of April 1, 2009, Hughes was in default on the loan and had ceased paying any further monthly installments. On December 23, 2010, the law firm of Heavner, Scott, Beyers and Mihlar (Heavner, Scott), attorneys for Deutsche Bank, as trustee for WAMU (collectively plaintiff), sent Hughes correspondence seeking to collect on the mortgage. In the letter, the servicer of the mortgage was identified as Chase Home Finance, LLC.

¶ 4 On December 29, 2010, the plaintiff brought the instant action seeking to foreclose on the mortgage. In addition to Hughes, the complaint named as defendants Cederbaum, Chase Bank, and other entities "whose interest in or lien on the mortgaged real estate is sought to be terminated." In particular, the plaintiff asserted that Chase Bank was the holder of a revolving credit mortgage on the subject property which was subordinate to that of the plaintiff, as Chase Bank had acquired "loans and other assets" of WAMU that formerly were held in receivership under federal deposit insurance laws.

¶ 5 On January 4, 201[1], in response to the collection letter of December 23, 2010, Hughes sent correspondence to Heavner, Scott disputing the claimed mortgage debt and requesting, in relevant part, that the firm provide information verifying the entity which currently held or had been assigned the mortgage, together with documentation evidencing any such assignment. On April 15, 2011, a response to Hughes's inquiry was drafted by Chase Bank, National Association. The response stated that the mortgage loan was sold into a public security fund that was managed by WAMU in the care of Deutsche Bank, as trustee, and that, "as the servicer of [Hughes's] loan, Chase is authorized by the security to handle any related concerns on their behalf." Hughes continued to dispute the validity of the mortgage debt through correspondence to Heavner, Scott. The firm subsequently responded with a letter to Hughes on June 27, 2011, stating that Chase Home Finance, LLC, had been a servicer of the mortgage loan, but as of May 1, 2011, it had merged with Chase Bank, National Association, and as such, Chase Bank is the current servicer of the subject loan.

¶ 6 On September 15, 2011, Hughes entered his *pro se* appearance in this case. Thereafter, on behalf of himself and Cederbaum (collectively defendants), he served the plaintiff with various motions and discovery requests, including the defendants' first request for the admission of facts

and genuineness of documents (request to admit). The request to admit sought concessions by the plaintiff showing that, in relevant part, the plaintiff could provide no documentation that WAMU 2005-AR 16 (WAMU trust) was a valid owner of the mortgage or in proper possession of the note at the time the instant suit was filed.

¶ 7 On November 9, 2012, the plaintiff responded to the request to admit by either objecting to or denying nearly every request. The plaintiff's response was signed by an attorney from Heavner, Scott, but the certification pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2010)) was executed by Mason Segers, an employee of Chase Bank, "as attorney in fact" for the plaintiff.

¶ 8 On December 19, 2012, the defendants filed a motion to strike the plaintiff's denials of and objections to the defendants' requests to admit (motion to strike), and also to deem all those facts admitted under Illinois Supreme Court Rule 216 (eff. July 1, 2011). The defendants argued that the plaintiff's responses to its requests to admit were invalid because they were certified by an employee of Chase Bank, which was also a defendant in this case. In response, the plaintiff initially asserted that its objections to and denials of the defendants' requests to admit were appropriate under Rule 216(c). With regard to Seger's certification of those responses, the plaintiff contended that it had granted Chase Bank a limited power of attorney, including the full power and authority to "prepare and execute documents and [perform] other actions as may be necessary under the terms of the Mortgage." Accordingly, the plaintiff maintained, Chase Bank possessed authority to certify discovery responses on the plaintiff's behalf, and the plaintiff's denials and objections with regard to the defendants' requests to admit were therefore valid. The plaintiff did not, at that point, address the defendants' position with regard to Chase Bank also being a defendant in this case.

¶ 9 Following a hearing on December 12, 2013, the circuit court entered an order granting the defendants' motion to strike and deeming as admitted all of the facts in their requests to admit, on the basis that the plaintiff's objections and denials were certified by Chase Bank, acting as "attorney in fact" for the plaintiff. The court recognized that the plaintiff had granted Chase, as servicer of the mortgage, a limited power of attorney to conduct certain transactions involving the subject mortgage. It concluded, however, based upon an interpretation of the language in the power of attorney provision, that the provision did not authorize Chase to provide legal representation on behalf of the plaintiff in this case.

¶ 10 The court further found that, as Chase Bank was also a defendant in this action, there was a direct and insurmountable conflict of interest between the plaintiff and Chase. It made reference to an argument, apparently made by the plaintiff,[*] regarding a pending federal lawsuit wherein Deutsche Bank was suing Chase Bank, among other defendants. The court stated as follows:

> "The central argument that Deutsche Bank makes is that there is another lawsuit in the federal court *** in which Deutsche Bank has claimed that the Federal [D]eposit Insurance Corporation and Chase have refused to provide documentation that Deutsch[e] Banks needs to make complete and full and proper responses to the [defendants'] 216 requests. While I understand that conflict and it is a difficult one (*sic*), that is Deutsch[e] Bank's problem and not the defendant[s']."

¶ 11 The court pointed out that, notwithstanding this circumstance, the plaintiff had made no effort to compel Chase Bank to produce the documents enabling the plaintiff to respond to the

[*] This argument as framed by the plaintiff does not appear in the record on appeal.

defendants' requests to admit in this case. Accordingly, the court struck all of the plaintiff's responses to the defendants' requests to admit, and deemed all requested facts to be admitted. In light of these substantive admissions, the court also invited the defendants to file either a motion to dismiss or for summary judgment.

¶ 12 The plaintiff moved for reconsideration of the court's order, which the court denied. In support of its motion, the plaintiff argued that, in September of 2012, Chase Bank had notified Hughes that it was cancelling the amount Hughes owed under the revolving credit account, and that, accordingly, it would be releasing its corresponding mortgage on the subject property. However, at the hearing on the motion to reconsider, the plaintiff admitted that, despite this purported release, it had not dismissed Chase Bank as a party defendant in the foreclosure action. Following the court's denial of the motion to reconsider, the defendants stated their intention to file a dispositive motion in the foreclosure action, and the court set the matter for a status hearing on June 4, 2014.

¶ 13 On June 2, 2014, the defendants filed a motion for summary judgment arguing that, based upon the facts deemed admitted by the plaintiff, the plaintiff could not, as a matter of law, demonstrate that the WAMU trust was a valid owner of the mortgage or holder of the note. The defendants also pointed to admissions proving that the plaintiff had failed to provide the defendants with advance notice of their alleged breach of the mortgage agreement prior to initiating this action, in violation of section 1502.5(c) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1502.5(c) (West 2010)) and of the terms of the mortgage itself. At the status hearing on June 4, the plaintiff requested additional time to review the motion for summary judgment, and the court continued the matter until June 25, 2014.

¶ 14 On June 23, 2014, a general appearance was filed on behalf of "defendant" Chase Bank, by attorney Shana Shifrin of the law firm Burke, Warren, MacKay & Serritella.

¶ 15 At the June 25 status hearing, with a new judge presiding, Shifrin appeared, along with an attorney from Heavner, Scott, and identified herself as "a location counsel for the plaintiff." The following colloquy ensued:

"THE COURT: Good afternoon to everyone. It says the matter is here on the defendant's motion for summary judgment. Is there any objection to it?

MS. SHIFRIN: There is. Actually, we would like to voluntarily dismiss.

THE COURT: Is there any objection to that?

[DEFENSE COUNSEL]: Oh, yes, Judge.

THE COURT: There is?

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[DEFENSE COUNSEL]: We happen to have a dispositive motion.

THE COURT: It's up to my discretion and my discretion is being exercised in an equitable manner. Case is dismissed."

The court then entered an order granting the motion to voluntarily dismiss this case without prejudice, and continued the matter until July 21, 2014, for a determination of the requisite costs under section 2-1009 of the Code.

¶ 16 On July 21, 2014, Shifrin again appeared, claiming to be counsel for the plaintiff, and the court reaffirmed its dismissal of the case under section 2-1009. However, no determination of costs was ever sought or made. Instead, counsel for the defendants asserted that they would likely be filing a motion for reconsideration of the order allowing the plaintiff's voluntary dismissal. No motion for reconsideration was ever filed. This appeal followed on July 25, 2014.

¶ 17 Under Section 2–1009(a) of the Code, a plaintiff may voluntarily dismiss its action without prejudice at any time before trial or hearing begins, upon the giving of notice to each party of record and the payment of costs. 735 ILCS 5/2–1009(a) (West 2010). The plaintiff then may refile its complaint within one year of the voluntary dismissal, and the refiled complaint will constitute a new and separate action. 735 ILCS 5/13–217 (West 2004); see *Kahle v. John Deere Co*., 104 Ill. 2d 302, 305 (1984); *Resurgence Financial., LLC v. Kelly*, 376 Ill. App. 3d 60, 61-62 (2007). An order granting a plaintiff's motion for a voluntary dismissal is final and appealable by the defendants. *Valdovinos v. Luna–Manalac Medical Center, Ltd*., 307 Ill. App. 3d 528, 535 (1999), citing *Kahle*, 104 Ill. 2d at 307; see also *Resurgence Financial*, 376 Ill. App. 3d at 61-62 (2007). This is so even where the dismissal is without prejudice, as the refiling of the case will constitute new cause of action, and the defendant must not be denied its right to obtain review of the preceding order granting voluntary dismissal. *Kahle*, 104 Ill. 2d at 307. The decision to allow a voluntary dismissal rests within the sound discretion of the trial court, and is subject to reversal only for an abuse of that discretion. *Bochantin v. Petroff*, 145 Ill. 2d 1 (1991).

¶ 18 The defendants advance three reasons why the order granting voluntary dismissal in this case must be reversed. First, they contend that the dismissal order is void because the motion to voluntarily dismiss was not made by a plaintiff but rather by Chase, a defendant in the foreclosure action, and was therefore in violation of the requirements of section 2-1009. In the alternative, the defendants argue that the dismissal amounted to an abuse of discretion, because (1) they were not provided with the requisite notice of the motion, and (2) the purpose of the motion to dismiss was to avoid the effect of their pending motion for summary judgment, which would have disposed of the case on its merits.

¶ 19 As an initial matter, we reject the argument that the court's order is void. The question of whether a judgment is void or voidable presents an issue of jurisdiction. A judgment in a civil action is void only where there is a "total want of jurisdiction in the court which entered the judgment, either as to the subject matter or as to the parties", rendering the judgment subject to collateral attack. *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174 (1998) (quoting *Johnston v. City of Bloomington*, 77 Ill. 2d 108, 112 (1979)). A voidable judgment, by contrast, is one entered after the court has acquired jurisdiction, and is premised upon an arguable error of law, fact, or both. *Mitchell*, 181 Ill. 2d at 174-75. A court does not lose jurisdiction over the parties or subject matter merely because it makes a mistake in the interpretation of applicable statutory conditions. See *Graf v. Village of Lake Bluff*, 206 Ill. 2d 541 (2003); *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325 (2002); *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514 (2001).

¶ 20 Here, there is no dispute that the trial court had jurisdiction over the parties as well as authority to entertain a motion under section 2-1009. Accordingly, the court's order deciding that motion is not void, but merely voidable upon a showing that the court erred in its application of the statutory strictures. In support of their claim that the section 2-1009 motion to dismiss was made by defendant Chase, the defendants point to the June 23, 2014, appearance form filed by Shifrin on behalf of "Chase Bank," wherein she checked a box designated "defendant." In response, the plaintiff argues that the report of proceedings for June 25 and July 21, 2014, respectively, demonstrate that Shifrin actually appeared on behalf of the plaintiff and not Chase Bank, and that the representation on the appearance form was merely a drafter's error.

¶ 21 We cannot agree with the plaintiff's contention. Although Shifrin identified herself at the June 25 and July 21 hearings as "counsel for plaintiff," she never filed any written appearance to

this effect. Her client, Chase Bank, remained at all times a defendant in this case and made no motion to substitute in as a party plaintiff. The only appearance of record for the plaintiff was filed by the firm of Heavner, Scott, which also had counsel present at the June 25 hearing. Although there were no attorneys from Heavner, Scott present at the hearing on July 21, there is no indication that the firm had withdrawn as counsel for the plaintiff or that Shifrin moved to substitute as the plaintiff's counsel at any point. As such, Shifrin was without authority to file any motions or make any other appearance on behalf of the plaintiff.

¶ 22 We also agree with the defendants that they were not provided with the requisite statutory notice of the plaintiff's motion to voluntarily dismiss. In order to voluntarily dismiss a suit as of right, the moving plaintiff must first provide the defendants of record with proper notice, and then pay costs. 735 ILCS 5/2–1009 (West 1996); *Vaughn v. Northwestern Memorial Hospital*, 210 Ill. App. 3d 253, 257 (1991). The notice requirement is governed under Rule 2.1 of the circuit court of Cook County, which requires that notice of any motion hearing be given *in writing* to all parties of record. (Emphasis added.) See Cook Co. Cir. Ct. R. 2.1(a). If notice is by personal service, it must be given no later than 4 p.m. on the second court day preceding the hearing on the motion, and if it is by mail, it must be deposited on or before the fifth court day prior to the hearing. See Cook Co. Cir. Ct. R. 2.1(a); *Vaughn*, 210 Ill. App. 3d at 257. This court has repeatedly held that the failure to comply with the notice requirement can deprive the plaintiff of its right to voluntarily dismiss its case, particularly where it is shown that the defendant suffered prejudice as a result of such lack of notice. See *Valdovinos v. Luna-Manalac Medical Ctr., Ltd.*, 328 Ill. App. 3d 255, 267 (2002); *Lewis v. Collinsville Unit No. 10 School District*, 311 Ill. App. 3d 1021, 1027–28 (2000) (reversing grant of voluntary dismissal and remanding for new hearing on motion where plaintiff had not given proper notice prior to ex

parte hearing); *Vaughn*, 210 Ill. App. 3d 253; *Crawford v. Schaeffer*, 226 Ill. App. 3d 129 (1992) (reversing grant of motion for voluntary dismissal and remanding for determination as to whether plaintiff gave requisite notice); contra *Metcalfe v. St. Elizabeth's Hospital*, 160 Ill. App. 3d 47, 54 (1987) (affirming grant of motion for voluntary dismissal absent notice where no prejudice to defendants).

¶ 23 The plaintiff does not dispute that it neither filed a written motion nor served the defendants with any notice of its motion to voluntarily dismiss its case. It is also undisputed that the defendants were not informed by the plaintiff that such a motion could be forthcoming. The plaintiff nonetheless asserts that the defendants suffered no prejudice resulting from the lack of notice, because they objected to the voluntary dismissal, but did not request a continuance to further contest the motion.

¶ 24 We disagree, and find that the defendants did suffer prejudice. Despite their obvious surprise at the plaintiff's motion, the court proceeded to dismiss the case *instanter*, effectively overruling the defendants' objection. It reaffirmed this ruling at the next hearing on July 21, 2014, inviting argument solely on a motion for costs, which the defendants elected not to file. In contrast to the cases of *Mizell v. Passo*, 147 Ill.2d 420 (1992), and *Valdovinos*, 328 Ill. App. 3d 255, upon which the plaintiff heavily relies, the defendants here were not offered any opportunity to respond to the plaintiff's motion. In *Mizell*, our supreme court affirmed the grant of a voluntary dismissal without prejudice despite the fact that the plaintiff had not given notice or tendered costs. The court determined that, because the defendant had been permitted a short recess to review the motion and an opportunity to present argument thereon, no prejudice had resulted. *Id.* at 428–29. This rationale was followed in *Valdovinos*, based upon a similar factual scenario. See *Valdovinos*, 328 Ill. App. 3d at 267-68 (order granting voluntary dismissal affirmed

despite failure to strictly comply with statutory notice requirement, where defendants given opportunity to respond to plaintiff's motion.)

¶ 25 The prejudice to the defendants in this case was compounded by the fact that they were provided no opportunity to argue the basis for their summary judgment motion. In general, section 2-1009(b) vests the trial court with discretion to hear and decide a motion that has been filed prior to a motion to voluntarily dismiss, when that prior motion, if favorably ruled upon by the court, could result in a final disposition of the cause. 735 ILCS 5/2–1009(a)(b) (West 2010). However, our supreme court has condemned the use of a voluntary dismissal when sought solely as a means to circumvent the effect of a pending motion which could dispose of the case based upon its merits. *Gibellina v Handley*, 127 Ill.2d 122, 137-38 (1989); see also *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54, 67 (1990). The court has observed that unrestricted allowance of the mechanism of voluntary dismissal "in the face of" a potentially dispositive motion not only results in undue delay and abuse of judicial resources, but also "infringe[s] on the authority of the judiciary to discharge its duties fairly and expeditiously." *Gibellina*, 127 Ill. 2d at 137. Accordingly, the court has endorsed the trial court's determination to deny a plaintiff's motion for voluntary dismissal, where such motion "was plainly made 'in the face of' a potentially dispositive motion and was used to 'avoid a potential decision on the merits'." *Fumarolo*, 142 Ill. 2d at 69, quoting *Gibellina*, 127 Ill. 2d at 137.

¶ 26 We agree with the defendants' contention that the voluntary dismissal was clearly sought to avoid the impending disposition of this case on the motion for summary judgment. The summary judgment motion was based upon substantive facts contained in the defendants' request to admit, which were deemed admitted by the trial court under Rule 216. Such "deemed admissions" are considered binding judicial admissions and, therefore, incontrovertible, and may

provide a basis for summary judgment. *Zwicky v. Freightliner Custom Chassis Corp.*, 373 Ill. App. 3d 135 (2007). Here, the admitted facts amounted to concessions by the plaintiff that, among other things, the WAMU trust lacked valid ownership of the subject mortgage or possession of the note, circumstances which, in and of themselves, defeat their cause of action for foreclosure. Further, and significantly, the defendants had obtained a ruling on December 12, 2013, of which the court granting the voluntary dismissal apparently was unaware, that the plaintiffs' power of attorney did not permit Chase to provide legal representation on behalf of the plaintiffs. Notwithstanding this ruling, however, the court allowed an attorney for Chase, purporting to represent the plaintiffs, to seek and obtain voluntary dismissal without authority.

¶ 27 In this case, the voluntary dismissal motion was made without the required notice to the defendants under section 2-1009, by an attorney lacking the authority to make it, in an attempt to avoid a dispositive motion previously filed by the defendants. We find that these circumstances resulted in substantial prejudice to the defendants, and accordingly, conclude that the court abused its discretion in granting the motion to voluntarily dismiss. We reverse and remand this case for further proceedings consistent with this order.

¶ 28 Reversed and remanded.