

No. 1-14-3913

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

COMMERCE BANK, a Missouri Banking Corporation,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	
v.)	No. 13 M1 171757
)	
ALITA M JONES RICHARD,)	Honorable
)	Israel A. Desierto,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in denying the plaintiff's motion to voluntarily dismiss its action without prejudice and in dismissing the matter with prejudice.
- ¶ 2 The plaintiff, Commerce Bank (Commerce), appeals from an order of the circuit court, dismissing its complaint against the defendant, Alita M Jones Richard, with prejudice. For the reasons which follow, we reverse and remand with directions.
- ¶ 3 Commerce filed the instant action against the defendant on December 30, 2013, seeking damages in the sum of \$18,977.63 for failure to pay a credit card debt. The defendant was

served with summons and filed a *pro se* appearance on January 21, 2014. On August 20, 2014, after having appeared on the court's trial call on four prior dates, the matter was continued for trial on November 20, 2014.

¶ 4 On November 13, 2014, Commerce filed a motion to dismiss its action, without prejudice. Commerce noticed its motion for hearing on November 20, 2014, and according to the certificate of service contained in the notice of motion, mailed a copy of the motion and the notice to the defendant on November 13, 2014. When the matter came before the trial court on November 20, 2014, counsel for Commerce presented the motion. The defendant, appearing *pro se*, indicated that she had not received the notice of motion and was ready for trial. Counsel for Commerce indicated that, based upon its motion for a voluntary dismissal without prejudice, it was not ready for trial. Thereafter, the trial court entered an order finding that Commerce had not acted in "good faith and with due diligence in pursuing this matter." Additionally, the trial court found that Commerce violated "issues of fundamental fairness" and that granting Commerce's motion would prejudice the defendant. The trial court denied Commerce's motion and, instead, dismissed the action with prejudice. This appeal followed.

¶ 5 Section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2012)) provides that a plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared, and upon payment of costs, dismiss its action, without prejudice. By its very terms, the statute "confers on plaintiffs an unfettered right to voluntarily dismiss their claims without prejudice, upon proper notice and payment of costs, 'at any time before trial or hearing begins.' " *Morrison v. Wagner*, 191 Ill. 2d 162, 165 (2000). Only two exceptions to a plaintiff's right to dismiss its action without prejudice prior to the commencement of trial exist. First, where a previously filed defense motion could result in a final disposition of the cause if

favorably ruled upon, the trial court has the discretion to hear and decide that motion before ruling on the plaintiff's motion for a voluntarily dismissal. 735 ILCS 5/2-1009(b) (West 2012). The second exception exists in circumstances where a dismissal pursuant to section 2-1009 would directly conflict with a specific rule of our supreme court. *Morrison*, 191 Ill. 2d at 165; *Catlett v. Novak*, 116 Ill. 2d 63, 69 (1987). Neither circumstance existed in this case.

¶ 6 The record reveals that, on November 13, 2014, Commerce mailed the defendant a copy of its motion to take a voluntarily dismissal of this action, without prejudice, along with a notice setting the motion for hearing on November 20, 2014. The motion and notice were mailed to the defendant at 12215 S. Elizabeth St., Chicago, IL 60643, the same address which is listed on the defendant's *pro se* appearance. Consequently, pursuant to Illinois Supreme Court Rule 12(c) (eff. Sept. 19, 2014) service of the motion was "complete four days after mailing." Further, no costs were due to the defendant as the record reflects that she was allowed to file her appearance without paying a fee.

¶ 7 The bystander's report of proceedings filed in this case reveals that Commerce presented its motion to voluntarily dismiss its action on November 20, 2014, prior to the commencement of trial. As the motion was in proper form with proper notice having been served and no costs due to the defendant, the trial court erred in denying Commerce's motion to dismiss without prejudice and in dismissing the action with prejudice. Consequently, we reverse the trial court's order dismissing this action with prejudice and remand the matter to the trial court with directions to grant Commerce's motion and dismiss this action without prejudice.

¶ 8 Reversed and remanded with directions.