

**NOTICE**

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**FILED**

December 18, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

2014 IL App (4th) 140078-U

NO. 4-14-0078

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PNC BANK, a National Association,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
ELLEN A. STEPNEY,	)	No. 12CH83
Defendant-Appellant.	)	
	)	Honorable
	)	Katherine M. McCarthy,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices Pope and Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed the trial court's denial of defendant's motion to vacate the dismissal order as modified, concluding the November 21, 2013, dismissal was proper under section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)). The appellate court further awarded costs.

¶ 2 In March 2012, plaintiff, PNC Bank, a national association, filed a complaint to foreclose mortgage against defendant, Ellen A. Stepney. In May 2012, the trial court entered an order of default and judgment for foreclosure and sale. In May 2013, the court entered an order approving the foreclosure sale. In August 2013, on plaintiff's motion, the court vacated the foreclosure sale. In September 2013, defendant filed a motion to reconsider and to vacate default judgment of foreclosure. On November 12, 2013, plaintiff filed a "motion to dismiss" its complaint to foreclose. On November 21, 2013, the court vacated any judgment for foreclosure

and sale and dismissed plaintiff's complaint to foreclose mortgage without prejudice. On November 26, 2013, defendant filed a motion to vacate the November 21, 2013, dismissal order of plaintiff's complaint for foreclosure. On January 8, 2014, the trial court, in relying on section 15-1602 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1602 (West 2012)), denied defendant's motion to vacate the dismissal order.

¶ 3 On appeal, defendant argues (1) the trial court erred in applying section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012) (foreclosure reinstatement provision)) rather than section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 2-1009 (West 2012) (voluntary dismissal provision)) as plaintiff and defendant modified rather than reinstated the loan; (2) under Circuit Court Rule 2.1(f) (Sixth Judicial Circ. Ct. R. 2.1(f) (eff. Nov. 1, 1992)) and Illinois Supreme Court Rule 12 (eff. Jan. 4, 2013), plaintiff failed to give adequate notice of a section 2-1009 voluntary dismissal (735 ILCS 2-1009 (West 2012)); and (3) plaintiff failed to allege costs in its motion and failed to pay those costs as required under section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)). We affirm the trial court's denial of defendant's motion to vacate the dismissal order on grounds dismissal was pursuant to section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)). Further, as required under section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)), we award defendant \$126 as costs.

¶ 4

#### I. BACKGROUND

¶ 5 In March 2012, plaintiff filed a complaint to foreclose mortgage against defendant. In May 2012, the trial court entered an order of default and judgment for foreclosure and sale. In May 2013, the trial court entered an order approving the report of sale and distribution, confirming the sale, and order of possession. Plaintiff purchased the property.

¶ 6 In July 2013, plaintiff's counsel realized around the time the foreclosure sale and order confirming sale was entered, plaintiff and defendant had entered into a repayment plan to deal with the loan default. On July 25, 2013, plaintiff filed a motion to vacate the foreclosure sale and order confirming sale. On August 6, 2013, the court vacated the foreclosure sale and order confirming sale. At this time, attorney William C. Faber, Jr., entered an appearance on behalf of defendant.

¶ 7 On September 27, 2013, defendant filed a motion to reconsider and to vacate the May 2012 default judgment of foreclosure, asserting the default judgment was obtained by fraud and misrepresentation, the mortgage loan was reformed and no deficiency existed, errors existed in the "verification of amount due" form submitted by plaintiff, and she was diligent in bringing this motion. Additionally, defendant submitted an affidavit of Ellen A. Stepney in support of the motion. In the affidavit, Stepney made the following statements, in relevant part:

"b) I was denied for my first loan modification \*\*\*.

c) In March 2012, I was finally accepted into a repayment plan. It raised my payments to \$866.38 from \$566.00 each month. I completed the one-year repayment plan and thought my mortgage payments would go back to \$566.00 per month. I called [plaintiff] to verify this and [plaintiff] told me they had made an error calculating my payment amount and I was still behind \$2,240. [Plaintiff] did not notify me of this error earlier. Because of this circumstance, [plaintiff] placed me in a 2nd repayment plan.

d) In May of 2013, I was accepted into the second

repayment plan, again raising my payments even higher because of [plaintiff's] mistake. My payments are now \$936.28 per month.

\*\*\*

f) I am 5 months through the 9-month repayment plan."

¶ 8 On October 8, 2013, defendant filed a memorandum of law in support of the motion to reconsider and vacate default judgment of foreclosure seeking involuntary dismissal pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). On October 16, 2013, a hearing on defendant's motion was set for December 3, 2013. On October 28, 2013, defendant filed an additional memorandum of law to set aside the foreclosure default order pursuant to section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2012)).

¶ 9 On November 7, 2013, plaintiff sent a notice of motion to dismiss the foreclosure case by United States mail to defendant. On November 12, 2013, plaintiff filed a "motion to dismiss" requesting plaintiff's complaint to foreclose mortgage be dismissed "without prejudice" and to vacate any previously entered judgment for foreclosure sale. This motion did not state the statutory authority on which it relied.

¶ 10 On November 21, 2013, a hearing was held on plaintiff's motion. Defendant was represented by substitute counsel as her primary counsel, Faber, was unavailable. Although substitute counsel acknowledged defendant had moved for the judgment to be vacated, he did not believe Faber was ready for the case to be dismissed. In fact, defendant's substitute counsel stated that Faber sought to vacate the judgment of foreclosure in order to file additional pleadings, such as a counterclaim. Plaintiff's counsel asserted, and the trial court agreed, a plaintiff may "voluntarily dismiss" the case at any time. Defendant's substitute counsel further

questioned the court as to whether plaintiff can "voluntarily dismiss it despite there being a judgment already." Plaintiff's counsel chimed in, "Yes." The court vacated the judgment of foreclosure and dismissed the action without prejudice. The court did note, within 30 days defendant may reopen the case and bring to the court's attention any additional matter and ask the order be vacated.

¶ 11 On November 26, 2013, defendant's primary counsel filed a motion to vacate the November 21, 2013, dismissal order of plaintiff's complaint for foreclosure. In particular, defendant alleged (1) the notice of hearing was insufficient, and (2) she had a valid counterclaim to file. Defendant attached a copy of an answer, counterclaim, and third-party complaint to her motion. On December 2, 2013, defendant filed a motion for award of costs of \$126 that she was required to pay for the appearance of her attorney. On December 20, 2013, defendant filed a motion for leave to file (1) a third-party complaint against plaintiff and (2) an answer, affirmative defenses, and a counterclaim.

¶ 12 On January 2, 2014, a hearing was held on defendant's motions. The first issue was whether the November 21, 2013, order granting plaintiff's motion for "voluntary dismissal" should be vacated, for any additional motion was moot unless the dismissal of the action was vacated. Defendant argued the November 21, 2013, dismissal order should be vacated because the plaintiff's motion was deficient as it failed to give proper notice, allege costs, and actually pay those costs pursuant to the voluntary dismissal statute. 735 ILCS 2-1009 (West 2012). Due to these alleged deficiencies, defendant sought to vacate the November 21, 2013, dismissal order, therefore allowing her to ask the court for leave to file additional third-party claims and counterclaims against defendant. Defendant wished to avoid filing a separate action to preserve

local jurisdiction. Defendant thought if a separate action was filed on defendant's claims, plaintiff could "maneuver to Federal Court Jurisdiction instead of our local jurisdiction."

Defendant acknowledged, "[s]o, what we're doing is tactically and procedurally trying to protect local jurisdiction."

¶ 13 In response, plaintiff argued dismissal was pursuant to section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) rather than section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)). In fact, contrary to what the November 21, 2013, dismissal order in the record indicates, plaintiff stated to the court the case "was dismissed as stated on the order" pursuant to section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)).

Plaintiff argued, under section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)), plaintiff has an obligation to dismiss a foreclosure action if the loan is brought current and the statute did not require any allegation of costs paid, but simply that the loan had been reinstated. Therefore, plaintiff argued, because the loan was current, dismissal was appropriate.

¶ 14 On January 8, 2014, the trial court entered a written order denying defendant's November 26, 2013, motion to vacate the November 21, 2013, dismissal order. The court considered all arguments and memorandum of law in reaching its decision. The court first noted defendant's affidavit stated she had been accepted into a second repayment plan with plaintiff and was current on those payments. It then found the mortgage foreclosure statute governs the mode of procedure for mortgage foreclosures in Illinois and any inconsistent statutory provisions under the Code are inapplicable. 735 ILCS 5/15-1107(a) (West 2012). Pursuant to sections 15-1602 (735 ILCS 5/15-1602 (West 2012)) and 15-1105(b) (735 ILCS 5/15-1105(b) (West 2012)) of the Foreclosure Law, it was mandatory for plaintiff to dismiss the complaint for foreclosure

and to vacate all previously entered judgments upon reinstatement of the mortgage. Finally, the court held reinstatement procedures do not require notice or payment of costs prior to dismissal as is required by the voluntary dismissal statute set forth in the Code (735 ILCS 5/2-1009(a) (West 2012)). Therefore, the trial court denied defendant's November 26, 2013, motion to vacate the dismissal order.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues (1) the trial court erred in applying section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) rather than section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)) as plaintiff and defendant *modified* rather than *reinstated* the loan; (2) under Circuit Court Rule 2.1(f) (Sixth Judicial Cir. Ct. R. 2.1(f) (eff. Nov. 1, 1992)) and Illinois Supreme Court Rule 12 (eff. Jan. 4, 2013), plaintiff failed to give adequate notice of a section 2-1009 voluntary dismissal (735 ILCS 2-1009 (West 2012)); and (3) plaintiff failed to allege costs in its motion and failed to pay those costs as required under section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)). Defendant asks this court to reverse the trial court's denial of defendant's November 26, 2013, motion to vacate the November 21, 2013, dismissal order and vacate the order of dismissal of plaintiff's complaint and remand with directions for the trial court to either consider defendant's pending motions or determine whether plaintiff reinstated the loan.

¶ 18 In response, plaintiff does not present any argument as to why the trial court's application of section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) was correct. Rather, plaintiff argues (1) this court, and perhaps even the trial court, lacked

jurisdiction to hear the case once defendant cured any default as the controversy became moot; (2) the agreement to cure the default served as a settlement to all claims, therefore making section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)) inapplicable as a settlement is not considered nonsuit; and (3) even if section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)) applies, proper notice was given and defendant was not prejudiced by the dismissal. Plaintiff requests we affirm the trial court's judgment.

¶ 19 We begin by addressing plaintiff's mootness and settlement arguments as they would be determinative if followed.

¶ 20 A. Mootness

¶ 21 Plaintiff asserts this court, and perhaps even the trial court, had no reason to hear the case because it became moot once defendant cured any default. We disagree.

¶ 22 A reviewing court will decide only actual controversies in which the interests or rights of the parties can be granted relief. *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill. 2d 108, 116, 601 N.E.2d 704, 708 (1992). "When a case is moot, a court's decision on the merits cannot afford either party relief and any decision is merely an advisory opinion." *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 335, 744 N.E.2d 877, 885 (2001). The issue before this court revolves around whether the trial court properly dismissed plaintiff's complaint for foreclosure. Plaintiff argued, and the trial court found, dismissal pursuant to section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) does not require notice or costs. Plaintiff does not dispute dismissal pursuant to section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)) does require notice, or at least an opportunity to be heard, and costs. Defendant is arguing the trial court applied the wrong statute. A determination of which statute applies affects



the rights of the defendant and the relief afforded. Therefore, there is an actual controversy in which the interests or rights of the parties can be granted relief.

¶ 23

#### B. Settlement

¶ 24

For the first time on appeal, plaintiff asserts the agreement to cure the default served as a settlement to *all* claims, therefore making section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)) inapplicable as a settlement is not considered nonsuit. The record and trial court transcripts do not indicate whether the repayment plans entered into contained clauses to settle any and all outstanding claims. In fact, the record is void of any documentation of the repayment plans. Plaintiff has failed to present factual evidence to back up its legal argument. Therefore, we decline to address this argument further.

¶ 25

#### C. Standard of Review: Motion To Vacate Voluntary Dismissal

¶ 26

A motion to vacate a judgment of voluntary dismissal that is filed within 30 days is governed by section 2-1203(a) of the Code (735 ILCS 2-1203(a) (West 2012)). See *Hawes v. Luhr Brothers, Inc.*, 212 Ill. 2d 93, 106, 816 N.E.2d 345, 352 (2004) (holding an order allowing voluntary dismissal is a final judgment under section 2-1203(a) of the Code (735 ILCS 2-1203(a) (West 2002))). The movant has the burden of establishing grounds to vacate a judgment. *Day v. Curtin*, 192 Ill. App. 3d 251, 254, 548 N.E.2d 670, 672 (1989). "The trial court's decision to grant or deny a motion to vacate is discretionary and will not be reversed on appeal unless that discretion has been abused." *Day*, 192 Ill. App. 3d at 254, 548 N.E.2d at 672. " 'Abuse of discretion' is a versatile standard of review in that, depending on what the underlying issue is, it can lead to other standards of review." *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 22, 983 N.E.2d 1124. A court can abuse its discretion by making or adhering to factual findings that are

against the manifest weight of the evidence, as well as by applying the wrong legal standard. *Shulte*, 2013 IL App (4th) 120132, ¶ 23, 983 N.E.2d 1124. When a factual question is raised, we will give due deference to the finding of the trial court. An abuse of discretion will be found, however, "where the court's decision is against the manifest weight of the evidence such that no reasonable person could take the view adopted by the trial court." *Mizell v. Passo*, 147 Ill. 2d 420, 425-26, 590 N.E.2d 449, 451 (1992). When a question as to whether the trial court erred in its application of law is raised, we review the court's application *de novo*. *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 259, 890 N.E.2d 592, 598 (2008). Moreover, when "we must construe the subject statutes to determine whether the trial court applied the correct legal criteria in the exercise of its discretion, a question of law is presented, and our review is *de novo*." *People ex rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541, 549, 795 N.E.2d 281, 285 (2003). If it is found that the court applied the wrong statute or imposed the incorrect legal criteria but still came to the correct result, we may affirm the court's decision on other grounds as our review is *de novo*. *People v. Hamilton*, 364 Ill. App. 3d 721, 724, 847 N.E.2d 761, 763 (2006).

¶ 27 Here, we are presented with a factual and legal question on appeal. We must determine whether the trial court was correct in applying section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) rather than section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)). To determine if the trial court correctly applied section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)), we must look to the statute. Section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) mandates that certain factual conditions must be met before reinstatement is allowed. We review these factual determinations,

giving due deference to the findings of the trial court.

¶ 28 D. Section 15-1602 of the Foreclosure Law: Reinstatement

¶ 29 In denying defendant's November 26, 2013, motion to vacate the November 21, 2013, dismissal order, the trial court relied upon section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)). Plaintiff argued reinstatement for the first time at the January 2, 2014, hearing on the November 26, 2013, motion to vacate the dismissal order. Defendant maintains that plaintiff properly sought dismissal pursuant to section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)). Defendant contends the mortgage was *modified* rather than *reinstated*, and a loan that is modified cannot be reinstated. We decline to address this definitional argument as we find the conditions mandated for reinstatement by section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) were not met, making it inapplicable.

¶ 30 Section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) creates a statutory right during foreclosure proceedings where a mortgagor may reinstate his or her mortgage if certain conditions are met. We are presented with the question of whether these conditions have been met, and thus whether section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) is applicable. In determining whether a statutory provision is applicable, we first look to the statutory language to determine the intentions of the legislature. *County Of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill. 2d 546, 556, 723 N.E.2d 256, 263 (1999). "When the statutory language is clear, it must be given effect without resort to other tools of interpretation." *County Of Knox ex rel. Masterson*, 188 Ill. 2d at 556, 723 N.E.2d at 263. Section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) states, in relevant part:

"Reinstatement is effected by [(1)] curing all defaults then existing, other than payment of such portion of the principal which would not have been due had no acceleration occurred, and [(2)] by paying all costs and expenses required by the mortgage to be paid in the event of such defaults, [(3)] provided that such cure and payment are made prior to the expiration of 90 days from the date the mortgagor or, if more than one, all the mortgagors (i) have been served with summons or by publication or (ii) have otherwise submitted to the jurisdiction of the court. When service is made by publication, the first date of publication shall be used for the calculation."

Therefore, in order for section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) to apply, the then-existing default and all costs and expenses to be paid as mandated by the mortgage must be paid within 90 days of the date the mortgagor is served with a summons or submits to the jurisdiction of the court. This is a factual determination that will be followed absent an abuse of discretion.

¶ 31 Here, the trial court's written order stated it relied on section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)). To rely on this statute, it had to make a factual finding the conditions of the statute were met. The court based its written ruling on all arguments and memoranda of law in reaching its decision. The record indicates defendant was served with a summons and complaint of foreclosure on March 7, 2012. Defendant's uncontradicted affidavit stated in March 2012, she entered into a one-year repayment plan with

plaintiff. It further stated in May 2013, a second repayment plan was entered into. Based on all of the evidence presented, we find the record devoid of evidence to demonstrate defendant's default, including all costs and expenses required to be paid under the mortgage, was cured within 90 days of defendant being served with a summons. Therefore, the trial court abused its discretion in finding the mortgage was reinstated under the section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)).

¶ 32 E. Section 2-1009 of the Code: Voluntary Dismissal

¶ 33 Having determined section 15-1602 of the Foreclosure Law (735 ILCS 5/15-1602 (West 2012)) was inapplicable, we look to whether dismissal of plaintiff's complaint to foreclose was in fact pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2012)). Section 2-1009 of the Code provides, in relevant part, the following:

"The 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 (West 2012).

¶ 34 Here, on November 12, 2013, plaintiff filed a "motion to dismiss," asking the court to vacate any previously entered judgment for foreclosure sale and to dismiss plaintiff's complaint to foreclose the mortgage "without prejudice." At the hearing to dismiss, plaintiff's counsel asserted, and the trial court agreed, plaintiff may "voluntarily dismiss" the case at any time. Defendant's substitute counsel further questioned the court as to whether plaintiff can "voluntarily dismiss it despite there being a judgment already." Plaintiff's counsel chimed in,

"Yes." The court granted plaintiff's November 12, 2013, motion to vacate the May 2012 judgment of foreclosure and to dismiss the action without prejudice.

¶ 35 Although the November 12, 2013, motion to dismiss did not present the statutory authority on which it relied, the language of the motion and the arguments made during the hearing on the motion to dismiss leads us to conclude dismissal of the complaint of foreclosure was pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2012)). See *Clyde Savings & Loan Ass'n v. May Department Stores*, 100 Ill. App. 3d 189, 194, 426 N.E.2d 955, 960 (1981) (finding, although plaintiff's motion to withdraw its complaint was improperly styled, it was equivalent to a motion to voluntarily dismiss its action).

¶ 36 *1. Notice*

¶ 37 Having determined section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2012)) applies, we next address whether plaintiff complied with the statutory requirements of voluntary dismissal. First, defendant argues pursuant to Circuit Court Rule 2.1(f) (Sixth Judicial Circ. Ct. R. 2.1(f) (eff. Nov. 1, 1992)) and Illinois Supreme Court Rule 12 (eff. Jan. 4, 2013), plaintiff failed to give adequate notice of a section 2-1009 voluntary dismissal (735 ILCS 2-1009 (West 2012)).

¶ 38 On November 7, 2013, plaintiff sent notice of its motion to vacate and dismiss by United States mail to defendant. On November 21, 2013, with defendant's substitute counsel present, the trial court heard and granted plaintiff's November 7, 2013, motion to vacate and dismiss. On November 26, 2013, defendant filed a motion to vacate the dismissal order. On January 2, 2014, a hearing on this motion was held with defendant's primary counsel present.

¶ 39 Regardless of the statutory interplay between Circuit Court Rule 2.1(f) (Sixth

Judicial Circ. Ct. R. 2.1(f) (eff. Nov. 1, 1992)) and Illinois Supreme Court Rule 12 (eff. Jan. 4, 2013) and the notice requirements they set forth, even if, *arguendo*, notice was inadequate, we fail to see how defendant was prejudiced in this case. In *Mizell*, 147 Ill. 2d at 428-29, 590 N.E.2d at 552-53, our supreme court affirmed the grant of a motion for voluntary dismissal despite the fact the plaintiff failed to give notice because defendant was given an opportunity to review the motion and be heard, and thus no prejudice resulted.

¶ 40 Here, prior to granting the motion to dismiss, the trial court was adamant in assuring substitute counsel that if attorney Faber had additional matters to bring to the court's attention, he could do so within 30 days and the order to dismiss could be vacated. Five days after the dismissal order was granted, attorney Faber filed a motion to vacate the dismissal. On January 2, 2014, defendant had the opportunity to present argument on why the court should vacate the dismissal. Even if, *arguendo*, notice was inadequate, defendant had a sufficient opportunity to be heard by the court and was therefore not prejudiced. See *Metcalfe v. St. Elizabeth's Hospital*, 160 Ill. App. 3d 47, 54, 513 N.E.2d 12, 16-17 (1987) (finding defendant's motion to reconsider the court's grant of plaintiff's motion for voluntary dismissal and the court's hearing on the motion prevented prejudice to the defendant); *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 328 Ill. App. 3d 255, 267-68, 764 N.E.2d 1264, 1274 (2002) (affirming the trial court's order granting voluntary dismissal as defendants were not prejudiced, despite the lack of notice, as they were given an opportunity to respond to plaintiffs' motion).

¶ 41 *2. Costs*

¶ 42 Second, defendant argues plaintiff failed to allege costs in its motion and failed to pay those costs as required under section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)).

We agree.

¶ 43 Pursuant to section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)), the plaintiff must pay costs to voluntarily dismiss the case. Plaintiff failed to allege costs in its motion and failed to pay those costs. On December 2, 2013, after plaintiff's dismissal was granted, but prior to the hearing on defendant's motion to vacate the dismissal order, defendant filed a motion for award of costs of \$126 that she was required to pay for the appearance of her attorney. These costs should have been paid pursuant to the voluntary dismissal statute. We order plaintiff to pay the appearance costs of \$126 to defendant.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the trial court's January 8, 2014, denial of defendant's motion to vacate the dismissal order but conclude dismissal was proper pursuant to section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)). Further, as required under section 2-1009 of the Code (735 ILCS 2-1009 (West 2012)), we award costs of \$126 to defendant.

¶ 46 Affirmed as modified.