

No. 1-16-0354

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

DEUTSCHE BANK NATIONAL TRUST CO., as)	Appeal from the
trustee for WAMU 2005-AR16,)	Circuit Court of
)	Cook County
Plaintiff-Appellee,)	
)	No. 10 CH 54918
v.)	
)	
JOHN M. HUGHES aka JOHN HUGHES, AMY C.)	
CEDERBAUM, STATE OF ILLINOIS-)	
DEPARTMENT OF REVENUE, STATE OF)	
ILLINOIS-DEPARTMENT OF PUBLIC AID,)	
NORTH SHORE COMMUNITY BANK & TRUST)	
CO. aka NORTH SHORE COMMUNITY BANK &)	
TRUST, JPMORGAN CHASE BANK, NATIONAL)	
ASSOCIATION, PALISADES COLLECTION, LLC,)	
AND UNITED STATES OF AMERICA-)	
DEPARTMENT OF THE TREASURY-INTERNAL)	Honorable
REVENUE SERVICE,)	Michael T. Mullen,
)	Judge, Presiding.
Defendants-Appellants.)	

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

ORDER

¶ 1 *Held:* The judgment of the circuit court is affirmed where it did not err in granting the plaintiff's motion for voluntary dismissal.

¶ 2 In December 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 others, seeking to foreclose on residential property owned by Hughes. The circuit 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)). Hughes and Cederbaum appealed, and this court reversed the voluntary dismissal and remanded for further proceedings. *Deutsche Bank National Trust Co. v. Hughes*, 2015 IL App (1st) 142295-U (*Deutsche Bank I*). On remand, the circuit court granted the plaintiff's renewed motion for voluntary dismissal. Hughes and Cederbaum appeal from that order, contending that the circuit court erred in granting the plaintiff's renewed motion for voluntary dismissal, which, they maintain, was not properly before the circuit court when it entered its order. We affirm.

¶ 3 A detailed discussion of the facts appears in *Deutsche Bank I*. Therefore, we will only set forth the background necessary to understand the instant appeal. In October 2005, Hughes executed a note to WAMU secured by a mortgage on his residence. As of April 2009, Hughes had defaulted on the loan. In December 2010, the plaintiff brought the instant foreclosure action through the law firm of Heavner, Scott, Beyers and Mihlar (Heavner, Scott). In addition to Hughes and Cederbaum (collectively, the defendants), the complaint named as defendants Chase Bank and other entities "whose interest in or lien on the mortgaged real estate is sought to be terminated." The plaintiff asserted that Chase Bank, which serviced the instant loan, also held a revolving credit mortgage on the subject property that was subordinate to the plaintiff's mortgage.

¶ 4 Hughes served the plaintiff with a request for the admission of facts and genuineness of documents (request to admit). The plaintiff's response was certified by an employee of Chase Bank as the plaintiff's "attorney in fact." In December 2013, the circuit court entered an order granting the defendants' motion to strike the plaintiff's response and deeming admitted all facts in the request to admit pursuant to Illinois Supreme Court Rule 216 (eff. July 1, 2011). The circuit court found that a limited power of attorney that the plaintiff had granted to Chase Bank did not authorize Chase Bank to procure legal representation for the plaintiff in this case, and that a conflict of interest existed between the plaintiff and Chase Bank.

¶ 5 On June 2, 2014, the defendants filed a motion for summary judgment arguing, in relevant part, that facts deemed admitted established that the plaintiff could not, as a matter of law, prove that WAMU was a valid owner of the mortgage or holder of the note. On June 23, 2014, a general appearance was filed on behalf of "defendant" Chase Bank by the law firm Burke, Warren, MacKay & Serritella (Burke, Warren).

¶ 6 At a status hearing on June 25, 2014, an attorney from Burke, Warren appeared, along with an attorney from Heavner, Scott, and identified herself as "location counsel for the plaintiff." The attorney from Burke, Warren made an oral motion for voluntary dismissal, which the circuit court granted over the objection of counsel for the defendants.

¶ 7 On appeal, this court reversed, finding that Burke, Warren lacked authority to appear or file motions for the plaintiff because the law firm "never filed any written appearance" on the plaintiff's behalf. *Deutsche Bank*, 2015 IL App (1st) 142295-U, ¶ 21. Additionally, the defendants did not receive "requisite statutory notice" of the motion for voluntary dismissal and had "no opportunity to argue the basis for their summary judgment motion." *Id.* ¶¶ 22, 25. The prejudice to the defendants was "compounded" because the facts deemed admitted under Rule

216 would have "defeat[ed]" the foreclosure action. *Id.* ¶¶ 25-26. We noted, moreover, that the circuit court had found that "the plaintiff's power of attorney did not permit Chase to provide legal representation on behalf of the plaintiffs." *Id.* ¶ 26. We stated:

"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." *Id.* ¶ 27.

¶ 8 On October 6, 2015, the defendants filed a motion in the circuit court to reinstate the case and reinstate or redocket their motion for summary judgment. On October 13, 2015, Burke, Warren filed an additional appearance for the plaintiff, a motion for leave to withdraw its appearance for Chase Bank, and a renewed motion for voluntary dismissal on the plaintiff's behalf. Burke, Warren provided defense counsel with notice of all three filings.

¶ 9 Burke, Warren's motion for leave to withdraw its appearance for Chase Bank stated that it had been retained by Chase Bank, the loan servicer, to prosecute the foreclosure on behalf of WAMU's trustee, the plaintiff, pursuant to "contractual agreements" between Chase Bank and the plaintiff. According to the motion, Chase Bank "separately was named as a defendant in this foreclosure because of its interest in a subordinate lien on the subject property." Burke, Warren submitted that it had filed its appearance for Chase Bank in error and that Chase Bank had released its junior mortgage in January 2013. Burke, Warren's renewed motion for voluntary dismissal alleged that the plaintiff was "no longer attempting to foreclose against the

[d]efendants" because, at that time, Chase Bank, rather than the plaintiff, held the note at issue in the instant litigation.¹

¶ 10 On October 21, 2015, the defendants filed a motion to disqualify Burke, Warren from representing the plaintiff, as well as a response to Burke, Warren's motion for leave to withdraw its appearance for Chase Bank and a response to the plaintiff's motion for voluntary dismissal. In the motion to disqualify Burke, Warren, the defendants claimed that "the mandate" in *Deutsche Bank I* "requires disqualification," and maintained that the law firm was subject to a "non-waivable" conflict of interest because Chase Bank had not been dismissed as a defendant. As to Burke, Warren's motion to withdraw its appearance for Chase Bank, the defendants maintained that *Deutsche Bank I* held that "the Power of Attorney granted by [the plaintiff] to Chase did not authorize Chase to prosecute this case or perform any litigation services."

¶ 11 On October 26, 2015, the circuit court granted the defendants leave to "re-notice" their motion for summary judgment. On November 25, 2015, the defendants filed a "motion to reconsider," asking the circuit court to hear their motion to disqualify Burke, Warren prior to taking further action in the case, and to recognize that their motion for summary judgment was filed prior to the plaintiff's renewed motion for voluntary dismissal.

¶ 12 On December 7, 2015, Burke, Warren filed an amended motion for leave to withdraw its appearance for Chase Bank. The amended motion included an affidavit from Chase Bank's "authorized signer," who attested that Chase Bank consented to Burke, Warren's withdrawal from representation. The motion also included an affidavit from Burke, Warren attorney Shana Shifrin, who attested that the law firm "was never retained to represent Chase in this matter."

¹ A copy of an assignment of mortgage for the subject property, recorded with the Cook County Recorder of Deeds, appears as an appendix to the plaintiff's response brief. See *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 1 n.2 (taking judicial notice of a conveyance recorded with the Cook County Recorder of Deeds).

According to Shifrin, Burke, Warren erred in entering its appearance for Chase Bank, "who Burke Warren regularly represents."

¶ 13 All pending motions were continued to January 13, 2016. On that day, proceedings began with an evidentiary hearing on the defendants' motion to disqualify Burke, Warren from representing the plaintiff. The defense called Shifrin as a witness and introduced a letter that she sent to defense counsel, dated July 7, 2015, stating that "she represents Chase on the Hughes loan." Shifrin testified that Chase Bank had asked her to send the letter "on their behalf as servicer of the loan." She denied that Chase Bank retained Burke, Warren to represent its interests in the instant litigation, and stated, instead, that the law firm had been retained to represent the plaintiff's interests. Shifrin submitted that Burke, Warren's appearance for Chase Bank had been erroneously filed after Chase Bank had released its junior lien on the subject property in 2013. Shifrin introduced a copy of the recorded satisfaction of mortgage.

¶ 14 The circuit court denied the defendants' motion to disqualify Burke, Warren from representing the plaintiff. In its findings, the circuit court found that although Burke, Warren had filed an appearance on behalf of Chase Bank, it did so by mistake and concluded that Chase Bank had never retained Burke, Warren to represent its interests in the instant litigation. Instead, the circuit court determined that Burke, Warren had represented the plaintiff "at all times *** in this case for all litigation purposes." After considering the motion to disqualify, the circuit court denied the defendants' motion to reconsider as moot.

¶ 15 Next, the circuit court considered the plaintiff's renewed motion for voluntary dismissal. The plaintiff argued that it no longer held the note in the foreclosure action and had "no desire to proceed with this foreclosure." The defendants, in response, asked the circuit court to first rule on their pending motion for summary judgment.

¶ 16 The circuit court granted the plaintiff's renewed motion for voluntary dismissal. In its findings, the circuit court stated that it had "given careful consideration to the case" and recognized that the defendants wished to proceed on their motion for summary judgment. After considering "the 216's that have been deemed admitted" and the content of the summary judgment motion, however, the circuit court found that it "could conclude that there is a genuine issue of material fact that exists between the parties." The circuit court expressed "concern for judicial resources" and the "expenditure of time" by counsel for both parties if the case were refiled. Additionally, the circuit court stated that it had considered the record and "certain cautionary language" from the appellate order in *Deutsche Bank I*. Despite "the uncertainty of any future litigation," the circuit court granted the plaintiff's motion for voluntary dismissal. Following the ruling, Burke, Warren withdrew its amended motion for leave to withdraw as counsel for Chase Bank. This appeal followed.

¶ 17 On appeal, the defendants contend that the circuit court erred in granting the plaintiff's renewed motion for voluntary dismissal, which was not properly before the court when it entered its order. According to the defendants: (1) Burke, Warren lacked authority to file the motion because the law firm did not seek leave of the circuit court before entering its additional appearance for the plaintiff; (2) the circuit court exceeded the mandate in *Deutsche Bank I*, rendering void its action on the renewed motion; and (3) the law of the case required a hearing on the motion for summary judgment and precluded granting the renewed motion for voluntary dismissal. We address each argument in turn.

¶ 18 Section 2-1009 of the Code controls motions for voluntary dismissal of a plaintiff's claims. 735 ILCS 5/2-1009 (West 2014). In order to voluntarily dismiss a case as of right under section 2-1009, a plaintiff must: (1) file a motion for voluntary dismissal prior to the beginning

of trial; (2) give proper notice; and (3) pay costs. *In re Marriage of Tiballi*, 2014 IL 116319, ¶ 19. When a plaintiff complies with section 2-1009, the "right to a dismissal without prejudice is, with very limited exceptions, unfettered." *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 328 Ill. App. 3d 255, 265 (2002). These exceptions include: (1) "where a previously filed defense motion could result in a final disposition of the cause of action if ruled upon favorably by the court" and (2) where the circumstances of the case are such that a voluntary dismissal would directly conflict with a supreme court rule. *Morrison v. Wagner*, 191 Ill. 2d 162, 165 (2000). In the former scenario, as in the case at bar, the circuit court has discretion to hear and decide the pending defense motion before ruling on the plaintiff's motion for voluntary dismissal. *Id.* An order granting a plaintiff's motion for voluntary dismissal is reversible only if the circuit court abused its discretion. *Mizell v. Passo*, 147 Ill. 2d 420, 425-26 (1992). Here, the defendants do not claim that the circuit court abused its discretion in granting the plaintiff's renewed motion for voluntary dismissal, but, rather, advance three theories as to why the motion was not properly before the circuit court when it entered its order.

¶ 19 First, the defendants argue that Burke, Warren lacked authority to file the plaintiff's renewed motion for voluntary dismissal because the law firm did not seek leave of the circuit court before entering its additional appearance.

¶ 20 The plaintiff argues, correctly, that the defendants forfeited review of this issue on appeal. "[A]rguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal." *K & K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688,

¶ 25. The record indicates that the defendants never argued, at any point in proceedings before the circuit court, that Burke, Warren lacked authority to file the plaintiff's renewed motion for voluntary dismissal because the law firm did not seek leave of the circuit court before entering its

additional appearance. Instead, the defendants simply argued that Burke, Warren was subject to a nonwaivable conflict of interest and that *Deutsche Bank I* "mandate[d]" the law firm's disqualification. The defendants' argument on appeal differs from their argument before the circuit court, and, therefore, is forfeited. See *Richardson v. Economy Fire and Casualty Co.*, 109 Ill. 2d 41, 47 (1985) ("an appellant who fails to prevail on one theory in the court below is not at liberty to argue a different theory on appeal").

¶ 21 Next, the defendants contend that the circuit court exceeded the mandate in *Deutsche Bank I* by granting the plaintiff's renewed motion for voluntary dismissal. The defendants reason that because *Deutsche Bank I* held that the circuit court "abused its discretion" in granting the original motion for voluntary dismissal, a hearing on the motion for summary judgment was required on remand and the ruling on the renewed motion for voluntary dismissal was void.

¶ 22 When a reviewing court issues a mandate, the circuit court's jurisdiction is limited to "such action as conforms to that mandate." *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276 (1982). Illinois courts have held that an order issued by a circuit court that exceeds the scope of the mandate is void for lack of jurisdiction. See *id.* at 276-77; *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 28. Where, as here, the reviewing court remands a cause for proceedings consistent with its opinion, "the trial court must look to the opinion for directions and will of necessity construe the language of the opinion when needed." *People v. Palmer*, 148 Ill. 2d 70, 81 (1992). "Whether the trial court complied with the mandate is a question of law, subject to *de novo* review." *Emerald Casino, Inc. v. Illinois Gaming Board*, 377 Ill. App. 3d 930, 935 (2007).

¶ 23 We need not determine whether the circuit court's action was void because the circuit court did not exceed its mandate in granting the plaintiff's motion for voluntary dismissal. The mandate in *Deutsche Bank I* consisted of this court's order without further instruction. We stated:

"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." (Emphasis added.)

Deutsche Bank, 2015 IL App (1st) 142295-U, ¶ 27.

¶ 24 This mandate is broader than the defendants' suggestion that the only "further proceedings" consistent with the order would be a hearing on their motion for summary judgment. Our decision described the circumstances under which the plaintiff's original motion for voluntary dismissal prejudiced the defendants, but did not foreclose the possibility that, under different facts, the circuit court could consider the motion and properly exercise its discretion in granting relief. During proceedings on remand, Burke, Warren filed an additional appearance on behalf of the plaintiff, a motion for leave to withdraw its appearance for Chase Bank, and a motion for voluntary dismissal, and served notice of all three filings on defense counsel. These actions cured the defects in the original motion. Given these considerations, the circuit court did not exceed the mandate in *Deutsche Bank I* by ruling on the plaintiff's renewed motion for voluntary dismissal.

¶ 25 Finally, the defendants contend that the circuit court violated the law of the case by not hearing their motion for summary judgment and, instead, granting the plaintiff's renewed motion for voluntary dismissal. The defendants submit that *Deutsche Bank I* established that: (1) the plaintiff's judicial admissions defeated its cause of action; (2) the defendants' motion for

summary judgment was dispositive; (3) the plaintiff's motion for voluntary dismissal sought to avoid a decision on the merits; (4) the motion caused prejudice; (5) Burke, Warren did not represent the plaintiff and lacked authority to file motions on its behalf; and (6) Chase Bank's power of attorney agreement did not allow Chase Bank to provide legal services for the plaintiff. According to the defendants, these "subsidiary holdings," taken together, required the circuit court to hear their motion for summary judgment.

¶ 26 The plaintiff, in response, argues that the defendants' brief misstates the holding in *Deutsche Bank I*, which merely recognized that when the circuit court granted the original motion for voluntary dismissal, the defendants incurred prejudice because they lacked notice and Burke, Warren did not have authority to file the motion.

¶ 27 "The law-of-the-case doctrine prohibits the reconsideration of issues that have been decided by a reviewing court in a prior appeal." *In re Christopher K.*, 217 Ill. 2d 348, 363 (2005). The doctrine recognizes that, " 'where an issue is once litigated and decided, that should be the end of the matter and the unreserved decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit.' " *Stickler v. American Augers, Inc.*, 325 Ill. App. 3d 506, 576-77 (2001) (quoting *Continental Insurance Co. v. Skidmore, Owings & Merrill*, 271 Ill. App. 3d 692, 696-97 (1995)). The doctrine applies to a court's "explicit decisions, as well as those issues decided by necessary implication." *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 39. Because the law-of-the-case doctrine is a question of law, our standard of review is *de novo*. *Christopher K.*, 217 Ill. 2d at 363-64.

¶ 28 We find that the defendants have misstated the law of the case. *Deutsche Bank I* did not hold that granting the plaintiff's motion for voluntary dismissal would be an abuse of discretion under any circumstances, but, rather, constituted an abuse of discretion in the situation *sub*

judice. Deutsche Bank, 2015 IL App (1st) 142295-U, ¶ 27. As we have established, the defects in the plaintiff's original motion for voluntary dismissal are not present in the renewed motion. See *People v. Williams*, 138 Ill. 2d 377, 392 (1990) ("invoking the law of the case might still not preclude reconsideration of an earlier judge's order if the facts before the court changed or error or injustice were manifest"). Moreover, irrespective of the possible merits of the defendants' motion for summary judgment, the circuit court retained discretion under section 2-1009(b) of the Code to consider the plaintiff's renewed motion for voluntary dismissal. 735 ILCS 5/2-1009(b) (West 2014); *Morrison*, 191 Ill. 2d at 165. As section 2-1009(b) provides, the circuit court "may hear and decide a motion" for voluntary dismissal even where a pending motion for summary judgment "could result in a final disposition of the cause." 735 ILCS 5/2-1009(b) (West 2014). Therefore, the defendants' construal of *Deutsche Bank I* and its effect on the instant appeal is not well taken and we reject their claim of error.

¶ 29 For the foregoing reasons, we affirm the order of the circuit court granting the plaintiff's motion for voluntary dismissal.

¶ 30 Affirmed.