

2017 IL App (2d) 160988-U
No. 2-16-0988
Order filed September 15, 2017

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
SECOND DISTRICT

WILMINGTON SAVINGS FUND SOCIETY,)	Appeal from the Circuit Court
FSB, DOING BUSINESS AS CHRISTIANA)	of Lake County.
TRUST, NOT IN ITS INDIVIDUAL)	
CAPACITY, BUT SOLELY AS TRUSTEE)	
FOR BCAT 2014-11TT,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CH-5433
)	
CHRISTOPHER SMITH A/K/A)	
CHRISTOPHER D. SMITH; MICHELLE)	
SMITH; PNC BANK, N.A., SUCCESSOR BY)	
MERGER TO NATIONAL CITY BANK;)	
UNKNOWN HEIRS AND LEGATEES OF)	
CHRISTOPHER SMITH, IF ANY; and)	
UNKNOWN OWNERS AND NONRECORD)	
CLAIMANTS,)	
)	
Defendants,)	
)	
(Christopher Smith A/K/A Christopher D.)	Honorable
Smith and Michelle Smith, Defendants-)	Luis A. Berrones,
Appellants).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order granting plaintiff's motion for voluntary dismissal was not an abuse of discretion. The court likewise did not abuse its discretion by denying as moot defendants' motion for leave to file a counterclaim.

¶ 2 In 2010, Astoria Federal Savings and Loan Association commenced this mortgage foreclosure action against defendants, Christopher and Michelle Smith. Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, Not in its Individual Capacity, but Solely as Trustee for BCAT 2014-11TT, was substituted as the party plaintiff. The trial court entered an order allowing plaintiff's motion for voluntary dismissal, declining to first rule on defendants' motion for summary judgment. The court then denied as moot defendants' motion for leave to file a counterclaim. Defendants appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendants filed amended affirmative defenses in the foreclosure action on November 4, 2015. Two of those defenses are relevant to this appeal. Defendants alleged that plaintiff failed to provide written notice before accelerating the mortgage and initiating foreclosure proceedings. They further alleged that plaintiff improperly accelerated the mortgage and commenced foreclosure proceedings without providing the grace-period notice required by section 15-1502.5(c) of the Code of Civil Procedure (Code) (735 ILCS 5/15-1502.5(c) (West 2014) (repealed by its own terms effective July 1, 2016)).

¶ 5 On May 12, 2016, defendants moved for summary judgment on the basis that neither plaintiff nor its predecessors sent the necessary pre-suit notices. Plaintiff did not respond to that motion. Instead, on August 16, 2016, plaintiff moved to voluntarily dismiss the case pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2016)).

¶ 6 On August 19, 2016, defendants filed a motion for leave to file a counterclaim containing three counts: (1) breach of contract for failing to provide notice prior to accelerating the

mortgage and initiating foreclosure proceedings; (2) violation of the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2016)) for failing to send an acceleration notice; and (3) violation of the Consumer Fraud Act for failing to send a grace-period notice.

¶ 7 Defendants also objected to the motion to voluntarily dismiss the case. They argued: (1) plaintiff did not pay defendants' costs, which was a requirement for taking a voluntary dismissal, and (2) plaintiff was improperly attempting to avoid a judgment on the merits of the summary judgment motion.

¶ 8 At an August 26, 2016, hearing, plaintiff's counsel conceded that plaintiff was unable to prove that a grace-period notice was sent before the commencement of the action. He maintained that this was a "technical defect" that could be corrected by taking a voluntary dismissal. Defendants' counsel responded that the motion for summary judgment should be the first motion to be heard and that it should be granted, given plaintiff's concession. When defendants' counsel addressed the issue of costs, plaintiff's counsel acknowledged that plaintiff would be responsible for costs if the court allowed the voluntary dismissal.

¶ 9 The court granted plaintiff's motion for voluntary dismissal, reasoning as follows:

"The court is aware of the cases that say generally when a plaintiff seeks to take a voluntary dismissal, he has an absolute right to take a dismissal before trial of the hearing [*sic*] and the Court is aware of the fact that when there's been dispositive motions filed, the Court has the discretion to rule on dispositive motions before deciding whether the voluntary dismissal is going to be allowed.

One of the interesting things in foreclosure cases, when the case is over, sometimes it's over, sometimes it's not over even if there is a dispositive motion to

defendant's side because there is some issue as to what was done pre-filing that did not comply with the statute.

It really doesn't prohibit the lender from even, I guess, if they lose it at the initial filing for [*sic*] pursuing a subsequent filing because in trying to correct whatever deficiency there was, there may be issues as far as what they deem as collectable at that point, but it doesn't really bring an end to the litigation in its normal sense.

I don't see where the pursuing on the motions that are pending in the dispositive motions are going to involve [*sic*] this case in its totality. I think that even looking at it and saying what does the prejudice do to defendants, at this point there really isn't any prejudice they have.

They've been in the house for some time, but even putting that aside as it is the issue is [*sic*] whether an exercise in the Court's discretion whether [*sic*] there's going to be any finality to any determination the Court makes with respect to the dispositive motions, I don't think there is."

¶ 10 After the court ruled, defendants' counsel added:

"With the Court's comments in regard to no prejudice to defendants, just for the record I would like to say that from the defendant's [*sic*] perspective they have been unduly prejudiced by virtue of having to incur thousands of dollars in fees when the plaintiff knew they [*sic*] didn't have a case in substance but yet they [*sic*] continued to prosecute this case for it's been five and a half years now."

The court responded: “[T]hat may be the position you take, but there is a remedy your clients have.” The court’s written order directed plaintiff to pay costs in the amount of \$220. In light of its ruling as to the voluntary dismissal, the court denied as moot all other pending motions.

¶ 11 Defendants filed a motion for reconsideration and clarification with respect to the portion of the order setting costs. The court granted this motion by agreement of the parties after plaintiff tendered a check to defendants in the amount of \$1,980.68.

¶ 12 Defendants timely appealed.

¶ 13 **II. ANALYSIS**

¶ 14 **(A) Voluntary Dismissal**

¶ 15 Defendants contend that the trial court abused its discretion when it refused to rule on their motion for summary judgment before granting plaintiff’s motion for voluntary dismissal. Defendants argue as follows. The court mistakenly concluded that granting the motion for summary judgment would not have resulted in the final disposition of the case. To the contrary, an order granting summary judgment “would have resulted in a final determination that Defendants were not liable to Plaintiff” and would have required dismissal of the case. The court also erroneously assumed that a final disposition always requires a decision on the merits. Although an order granting summary judgment in defendants’ favor here would “not have necessarily disposed of the case in its traditional sense,” it would have resolved the controversy between the parties as to whether plaintiff had complied with conditions precedent to filing suit. Such order would have been final and appealable. Even if a final disposition of the case required a decision on the merits, Illinois Supreme Court Rule 273 (eff. July 1, 1967) provides that the involuntary dismissal of an action generally “operates as an adjudication upon the merits.” Moreover, the court failed to recognize that plaintiff was attempting to avoid a decision on the

merits. To that end, defendants propose that “failure to satisfy a condition precedent was not a mere technical defect, but a breach that affected the substantive rights of the parties.”

¶ 16 Section 2-1009 of the Code provides, in relevant portion:

“(a) 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.

(b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause.” 735 ILCS 5/2-1009(a)-(b) (West 2016).

Subsection (b) was added to the statute in 1994 to codify the holding of *Gibellina v. Handley*, 127 Ill. 2d 122 (1989). *In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 259 Ill. App. 3d 231, 235 (1994). The *Gibellina* rule was intended to address the “myriad abusive uses of the voluntary dismissal statute.” *Gibellina*, 127 Ill. 2d at 136. One such abuse was that “an ever increasing number of plaintiffs [were] using a section 2-1009 motion to avoid a potential decision on the ‘merits’ or to avoid an adverse ruling as opposed to using it to correct a procedural or technical defect.” *Gibellina*, 127 Ill. 2d at 137.

¶ 17 Our supreme court has subsequently clarified that trial courts have discretion to rule on pending dispositive motions before entertaining a motion for voluntary dismissal. *Mizell v. Passo*, 147 Ill. 2d 420, 425 (1992). A court of review should not “tamper with that discretion unless it can be shown that the trial court has abused its discretion,” which “occurs 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*, 147 Ill. 2d at 425-26.

¶ 18 Defendants argue that an order granting summary judgment in their favor would have been final and appealable and would have brought an end to the case on the merits as it related to the issue of whether plaintiff sent the required pre-suit notices. This is a straw man argument, as the trial court never disputed that proposition. Defendants make a compelling argument that this court would have had jurisdiction over an appeal from an order granting summary judgment in their favor. But there was never any doubt as to that issue. Instead, the trial court's primary reason for allowing plaintiff to take a voluntary dismissal was that, irrespective of whether the court ruled on and granted defendants' motion for summary judgment, there would almost certainly be further litigation between the parties. Specifically, had the court granted summary judgment in defendants' favor, plaintiff could still have issued the necessary notices and commenced a new action to foreclosure on the mortgage. Contrary to defendants' suggestion, the trial court was not operating under any mistake of law when it granted plaintiff's motion for voluntary dismissal. When the court questioned the finality of the motion for summary judgment, it was contemplating the practical implications of its potential rulings; the court was not commenting on the more technical issue of appealability.

¶ 19 Defendants also contend that the trial court failed to recognize that plaintiff was attempting to avoid a decision on the merits. We are mindful that there are no established guidelines for determining when a defendant's motion is potentially dispositive or when a plaintiff is attempting to abuse the voluntary dismissal process. See *Mizell*, 147 Ill. 2d at 425. In lieu of crafting any broadly applicable rules, the supreme court "intentionally left such matters to the discretion of the trial court." *Mizell*, 147 Ill. 2d at 425. The trial court's comments here

confirm that it understood that it had such discretion. The court also adequately explained its reasons for exercising its discretion in the chosen manner. The court found it significant that granting summary judgment in defendants' favor would not have brought true finality to the litigation between the parties, given that plaintiff could re-file a mortgage foreclosure action upon providing the necessary notices. Rather than challenge that premise, defendants acknowledge in their appellant's brief that "an order granting their motion would have not have [sic] necessarily disposed of the case in its traditional sense." In their reply brief, they similarly recognize that "[p]laintiff might be able to file a new, different lawsuit based on a perceived new cause of action."

¶ 20 Defendants insist that "[p]laintiff's failure to satisfy a condition precedent was not a mere technical defect, but a breach that affected the substantive rights of the parties." There are two problems with this argument. First, the trial court never made a finding that there was a "mere technical defect." Moreover, even if defendants are correct that this was not a technical defect, that fact, in itself, would not have *required* the trial court to rule on the summary judgment motion before granting a voluntary dismissal. We reiterate that a court has discretion to rule on a pending dispositive motion before allowing a plaintiff to take a voluntary dismissal. The corollary is that the court has discretion *not* to rule on a pending dispositive motion.

¶ 21 For all of these reasons, we hold that the trial court acted reasonably under the circumstances and did not abuse its discretion. See *Mizell*, 147 Ill. 2d at 423, 426 (the trial court did not abuse its discretion by declining to rule on the defendant's "motion for judgment" prior to granting the plaintiff's motion for voluntary dismissal).

¶ 22 (B) Counterclaim

¶ 23 Defendants also argue that the trial court abused its discretion by denying them leave to file a counterclaim. According to defendants, allowing the counterclaim would not have prejudiced plaintiff or required additional discovery.

¶ 24 In light of its decision to permit plaintiff to take a voluntary dismissal, the court found that defendants' motion for leave to file a counterclaim was moot. On appeal, defendants do not specifically address the finding of mootness. Defendants have forfeited any arguments that could have been raised along those lines. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (points not raised in the appellant's brief are waived and may not be raised in a petition for rehearing).

¶ 25 Defendants instead rely on *Marsh v. Nellessen*, 235 Ill. App. 3d 998, 1002 (1992), to support their contention that a court should grant leave to file a counterclaim when such counterclaim is substantially similar to previously filed affirmative defenses. *Marsh* is distinguishable, as it did not involve a defendant seeking leave to file a counterclaim after the plaintiff had already moved for voluntary dismissal. Defendants have failed to demonstrate that the denial of leave to file a counterclaim under such circumstances constitutes an abuse of discretion.

¶ 26 **III. CONCLUSION**

¶ 27 For the reasons stated, we affirm the judgment of the Circuit Court of Lake County.

¶ 28 Affirmed.