

NOTICE
Decision filed 06/06/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0627
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

BAYVIEW LOAN SERVICING, L.L.C.,)	Appeal from the
)	Circuit Court of
Plaintiff,)	White County.
)	
v.)	No. 04-CH-40
)	
DENISE A. NELSON, Nonrecord Claimants,)	
Unknown Tenants, and Unknown Owners,)	
)	
Defendants,)	
)	
and)	
)	
JEFFREY EDEN NELSON,)	
)	
Defendant and Third-Party Plaintiff-Appellant,)	
)	
v.)	
)	
IRA T. NEVEL,)	Honorable
)	Thomas H. Sutton,
Third-Party Defendant-Appellee.)	Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

RULE 23 ORDER

Held: The trial court properly dismissed the third-party claim against the third-party defendant for an alleged violation of the Fair Debt Collection Practices Act as being barred by the expiration of the applicable statute of limitations.

Defendant and third-party plaintiff, Jeffrey Eden Nelson, filed a third-party claim, under the Fair Debt Collection Practices Act (Act) (15 U.S.C. 1692 *et seq.* (2006)), against Ira T. Nevel, third-party defendant. Nevel moved to dismiss the third-party claim on the grounds of the running of the Act's one-year statute of limitations. The circuit court of White

County granted the motion to dismiss and, pursuant to Supreme Court Rule 304(a) (eff. Jan. 1, 2006), certified the dismissal for an appeal. Nelson argues on appeal that the court's decision finding that the statute of limitations began to run from the first violation of the Act is in error. We affirm.

This is the second time the parties have been to our court. Their dispute stems from a mortgage foreclosure action filed on November 22, 2004, by Bayview Loan Servicing, L.L.C. (Bayview), against Nelson and others who are not included in this appeal and were not included in the first appeal. In the complaint, Bayview alleged that it was the assignee of Old National Bank, to whom Nelson had executed and delivered a mortgage and promissory note secured by a parcel of real estate, and that Nelson's payment default entitled it to foreclose the mortgage. The circuit court entered a summary judgment in favor of Bayview. After the court denied Nelson's motion to reconsider, Nelson appealed the entry of the summary judgment, arguing that Bayview was not a proper party to the lawsuit because it had never established how it came into possession of the mortgage. Old National Bank in fact had assigned its interest in the subject mortgage to Bayview Financial Trading Group, L.P. We determined that Bayview was not the correct legal entity to which Old National Bank assigned the mortgage and note and that Bayview was not the correct plaintiff to have filed the complaint to foreclose the mortgage. Because Bayview was not the correct legal entity to have brought the action, we concluded that the entry of the summary judgment and the orders of foreclosure and sale were improper as a matter of law, and we remanded the cause for further proceedings. See *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184, 890 N.E.2d 940 (2008).

On July 8, 2008, Nelson filed a motion for leave to file a counterclaim and a third-party claim against Nevel, the debt collector, alleging violations of the Act. On July 20, 2009, Nevel filed his motion to dismiss claiming that the statute of limitations had expired.

The circuit court agreed, finding that the one-year statute of limitations ran from the first alleged violation of the Act. The claims against Nevel were therefore dismissed with prejudice. Nelson now argues on appeal that the court erred in dismissing his third-party complaint on the basis of the statute of limitations. According to Nelson, Nevel has, over the course of several years, continued to make false statements and persist in a case that had no merit to collect a debt that his client was not entitled to collect.

All the parties agree that the statute of limitations under the Act is one year. See 15 U.S.C. 1692k(d) (2006). The question before us then is whether the statute of limitations is computed from the date of the original violation, thereby time-barring any claims for subsequent violations even if they occur after the expiration of the original limitation period. In other words, can the continuing violation doctrine apply to extend the limitations period for claims under the Act? We do not have to decide this question today, however, for we do not see any continuing violations that could extend the statute of limitations in this instance.

Nelson alleges that Nevel persisted in a pattern of repeated conduct violating the Act over several years in his efforts to foreclose the mortgage. We are not dealing, however, with discrete prohibited acts, such as threatening phone calls late at night. The alleged repeated conduct was a part of the litigation process that commenced with the filing of the initial foreclosure complaint in 2004. Nelson argues in his third-party complaint as follows:

"[I]t is unfair and unconscionable for a debt collector to file suit on behalf of a person or company who does not own a mortgage, and to seek, and obtain a summary judgment in favor of same, and when same is pointed out to said attorney, to refuse to correct the error, and to persist in such claim thereafter."

Nelson is complaining about false assertions and false representations that Nevel wrongfully filed in the underlying foreclosure action on behalf of Bayview, which had no interest in the mortgage. He is not complaining about Nevel wrongfully filing, for instance, new suits or

even new claims within the original foreclosure action that arguably could be considered to be new violations of the Act. Continuing to pursue the initial foreclosure action does not constitute "unfair or unconscionable means to collect or attempt to collect any debt" (15 U.S.C. 1692f(2006) under the circumstances presented here. See *Naas v. Stolman*, 130 F.3d 892 (9th Cir. 1997) (the alleged violation of the Act was not a reviewing court judgment, but the bringing of the suit itself). We agree with the circuit court that the purported violation occurred in 2004 with the filing of the wrongful foreclosure complaint. Even giving Nelson the benefit of the doubt to extend the time for filing his claim for alleged violations of the Act under a discovery theory, Nelson was aware that the alleged violation of the Act had occurred by the time he filed his amended answer and affirmative defenses in the underlying action claiming that Bayview was not the proper party plaintiff. The statute of limitations for violations of the Act using this later time frame, if even allowable, had also expired. Because Nelson's third-party complaint against Nevel was filed after the statute of limitations for such actions had expired under the circumstances alleged, the court properly dismissed Nelson's third-party complaint in this instance.

For the foregoing reasons, we affirm the judgment of the circuit court of White County.

Affirmed.