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Real Estate

Dismissed but Not Excused

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Dubrovay: The Second District Court of Appeals' sanctioning of voluntary dismissals in residential mortgage foreclosure actions.

TAKEAWAYS

- In *Dubrovay*, the Second District of the Illinois Appellate Court provides plaintiffs with a roadmap to get around the Illinois Supreme Court's application of the single refiling rule in mortgage foreclosure cases.
- Defense counsel can deploy numerous strategies to blunt the *Dubrovay* pathway: argue the mortgage lender has waived its right to demand payment; look to Illinois Supreme Court cases such as *Weisguth* and *Gibellina* for guidance; and cite the precedent set by the First District in *Sigler*.
- Plaintiffs can respond by pointing to *Dubrovay*, citing their right to take a voluntary dismissal, decelerate any mortgage obligation, demand missed payments, and uphold any mortgage obligation by filing a subsequent lawsuit.

Arecent opinion out of the Second District of the Illinois Appellate Court represents a departure from First District and Illinois Supreme Court precedent by enabling mortgage lenders to accelerate and decelerate a homeowner's mortgage obligation at will by taking an endless number of voluntary dismissals, coming back orders of magnitude stronger, and refiling an endless number of lawsuits.

Defense counsel is encouraged to argue the mortgage lender has waived its right to demand payment in the future of any of the purported "missed monthly payments" of principal, interest, taxes, and insurance that the homeowner "missed," as well as all escrow

disbursements of real estate taxes and insurance premiums, together with any other corporate advance the foreclosing mortgage lender made during litigation. The Second District never addressed the issue of waiver, which was not raised by the parties to the action.

Voluntary dismissals: The set-up

From time immemorial, the Illinois Supreme Court has warned against the abuses inherent in the voluntary dismissal statute. Consider *Weisguth v. Supreme Tribe of Ben Hur*:

If a plaintiff by his deliberate and voluntary act secures the dismissal of his suit he must be held to have anticipated the effect and necessary results of his action and *should not be restored to the position and the rights which he voluntarily abandoned. Having taken a non-suit, his only recourse is to begin his action anew*.[1]
The Second District, in a relatively recent two-to-one decision, has sanctioned the use of the voluntary dismissal statute in residential mortgage foreclosure actions, virtually ensuring that mortgagees will have endless opportunities to try a mortgage foreclosure case.[2] The Second District majority in *Dubrovay* elected not to follow the First District in *Deutsche Bank Trust Co. Americas v. Sigler*[3] and has set forth a roadmap for the plaintiff's bar to get around the Illinois Supreme Court precedent of *First Midwest Bank v. Cobo*.[4] Perhaps most concerning is that the decision has apparently spawned proposed legislation that, if passed, would eviscerate *Cobo* in its entirety, codify *Dubrovay,* and likely guarantee that foreclosing lenders will never lose another mortgage foreclosure case ever again.[5]

Rather than sanction the use of the voluntary dismissal statute, the authors suggest the real problem lies in the abuse of the statute.

Illinois mortgage foreclosure litigation: A brief primer

Illinois is a judicial mortgage foreclosure state. In other words, a mortgage lender who is not getting paid must go through a formal judicial foreclosure process to prove it is entitled to a judgment of foreclosure and sale. That process is governed by the Illinois Mortgage Foreclosure Law (IMFL).[6]

The Illinois Supreme Court, in *ABN AMRO v. McGahan*, described mortgage foreclosure actions as being *quasi in rem* proceedings, which are *ex contractu* in nature.[7] The *ABM AMRO* Court put it this way:

Moreover, in foreclosure actions, the property is not the instrumentality of the wrong, nor is it responsible for the plaintiff's injury. The mortgagor is the instrumentality of the wrong. It was he or she who breached the contract by defaulting on the note secured by the mortgage. The foreclosure action is based on the note, the vehicle which gives the plaintiff the legal right to proceed against the property. *The object of the foreclosure action is to enforce the obligation created by that contract, through the property, but against a specific person.*[8]

An Illinois homeowner who is current on his mortgage obligation is a party to "an installment contract" with his mortgage lender. The term of that installment contract is normally 30 years or 360 months. To the homeowner, that means he or she must make monthly installment payments of principal and interest on the loan, which are usually coupled with a monthly escrow payment for property insurance and property taxes. The mortgage lender, its successor or assign, or its designated loan servicer, will accept these monthly installment payments and disburse the payments of principal and interest to the holder of the mortgage note, escrow the property insurance and property tax portion of the monthly payment, and disburse those funds to the insurance company and county taxing authority at designated times throughout the year.

Should an Illinois homeowner fail to make three monthly mortgage payments, consecutive or not, most mortgage lenders have the right to declare a breach of the note and mortgage by sending the homeowner a "notice of default and intent to accelerate." This notice gives the homeowner a minimum period of 30 days to pay the arrearage, get caught up, and resume making his or her monthly installment payments. This notice is a condition precedent to foreclosure.[9]

If the homeowner fails to pay his arrearage in full and reinstate his mortgage within the allotted time, the lender may exercise its option to "accelerate" all future payments by "calling the note due" and demanding immediate payment of the principal balance. This is an election to which most mortgage lenders are entitled under the note and mortgage. Should the mortgage lender make this "election of remedies," it cannot and will not accept any more monthly mortgage installment payments from the homeowner because at that point, *the installment contract is transformed into a single indivisible contract.* The First District in *Sigler* put it this way: "… [T]he contract became indivisible, and the obligations to pay each installment merged into one obligation to pay the entire balance on the note."[10]

This is as it should be. Once the lender "calls the note," it has elected "to go all in" and confirms its election of remedies by filing an action to foreclose on the borrower's mortgaged property. It is now incumbent upon the mortgage lender, like any other litigant, to prove its case. As the Illinois Supreme Court recognized in *First Midwest Bank v. Cobo*, if a mortgage lender is unable to prove its case, it should not be allowed multiple opportunities to do so by taking multiple voluntary dismissals and refiling its case a multiple number of times.[11] Like all other litigants, the *Cobo* Court recognized mortgage lenders are only allowed a single refiling under section 13-217 of the Illinois Code of Civil Procedure.[12]

The Second District majority in *Dubrovay* chose not to follow the First District in *Sigler* and provided the plaintiff's bar with a roadmap to get around the Supreme Court's application of the single refiling rule in *Cobo.*

It is no surprise the plaintiff's bar will cite *Dubrovay* going forward and attempt to use it as a cudgel where necessary to ensure it never loses another mortgage foreclosure case.

The authors respectfully recommend that defense counsel blunt the deployment of this legal strategy by arguing the foreclosing mortgage lender, by moving for a voluntary dismissal, has waived its right to demand payment of: all so-called "monthly payments" of principal, interest, taxes, and insurance that the homeowner "missed"; all escrow disbursements of real estate taxes and insurance premiums; and all other corporate advances the foreclosing mortgage lender made during the course of the litigation.

The "Dubrovay deceleration"

Consider the following hypothetical fact pattern.

An Illinois homeowner with a monthly mortgage payment of $1,500 misses three payments, is served with a "notice of default and intent to accelerate," and fails to reinstate his mortgage within 30 days. By the time the 30 days expires, the homeowner is another month in arrears, and the mortgage lender exercises its right to declare a default and accelerate the note and mortgage. The mortgage lender then confirms this election of remedies by filing the mortgage foreclosure complaint. At that point, the arrearage will consist of $4,500, plus attorney fees and court costs, which, for the sake of argument, will likely amount to another $2,000, for a total of $6,500.[13]

Let us assume our hypothetical homeowner has a mortgage that is insured by the Federal Housing Administration (FHA), whose regulations require the mortgage lender to conduct a face-to-face meeting with the homeowner.[14] Let us also assume no such face-to-face meeting has taken place. Defense counsel raises the lack of a face-to-face meeting as an affirmative defense to the lawsuit, and the mortgage lender answers by saying it made a reasonable effort to arrange such a meeting, which proved fruitless due to the homeowner's lack of cooperation. After 18 months of litigation and initial written discovery, it turns out the loan servicer never did make a reasonable effort to arrange such a face-to-face meeting; as a result, the lawsuit may well be subject to being dismissed.

Scenario 1. Plaintiff's counsel, realizing it will not likely be able to survive a defense motion for summary judgment, moves for a voluntary dismissal pursuant to section 2-1009(a) of the Illinois Code of Civil Procedure.[15]

In this scenario, the plaintiff's motion for voluntary dismissal probably will be granted upon a payment of costs, likely limited to the defendant's appearance fee. After the dismissal, the plaintiff will make sure it has a face-to-face meeting with the homeowner in compliance with FHA regulations, curing the defect of its initial lawsuit. Then, relying on *Dubrovay,* the plaintiff will argue it is entitled to demand payment of the $6,500 arrearage plus an additional $27,000, comprising 18 months of alleged "missed monthly payments" during litigation. Add to that any escrow disbursements of real estate taxes and insurance premiums and any other corporate advance made for property inspections, appraisals, attorney fees, and litigation costs and you have a new "claimed arrearage" far in excess of $33,500. By reneging on its previous election to accelerate the note and mortgage, and under *Dubrovay* decelerating the

note and mortgage, the mortgage lender is now able to send out a new "notice of default and intent to accelerate," demanding the homeowner pay in excess of $33,500 within 30 days or else face acceleration and a second lawsuit, free of the defenses previously asserted.

In opposing the plaintiff's motion for voluntary dismissal, defense counsel should cite *Sigler,* point out that there are no "missed monthly payments" during litigation because the plaintiff transformed what was once an installment contract into a single, indivisible obligation by electing to accelerate the note and mortgage, and confirmed its election of remedies by filing suit.

Defense counsel also should cite the First District in *Sigler,* "... the contract became indivisible, and the obligations to pay each installment merged into one obligation to pay the entire balance on the note."[16] Defense counsel should argue that a condition of granting the plaintiff's motion for voluntary dismissal should be that the plaintiff is deemed to have waived the alleged "missed monthly payments" during litigation—because there were none under the *Sigler* analysis. Defense counsel should also argue, the plaintiff, by moving for a voluntary dismissal, has similarly waived any escrow disbursements of real estate taxes and insurance premiums, together with any other corporate advances made for property inspections, appraisals, attorney fees, and litigation costs incurred during litigation.

Defense counsel, citing the Illinois Supreme Court's seminal cases of *Weisguth* and *Gibellina,* should argue plaintiff "*should not be restored to the position and the rights which he voluntarily abandoned. Having taken a non-suit, his only recourse is to begin his action anew*."[17] Accordingly, the court should dismiss with prejudice the plaintiff's claim for damages advanced in the litigation as having been waived, in accordance with section 2-1009(a) of the Illinois Code of Civil Procedure.[18]

Under this scenario, defense counsel should argue the homeowner should be allowed to resume making their monthly mortgage payments after the plaintiff is awarded its voluntary dismissal.

Plaintiff's counsel, in response, should once again argue pursuant to *Dubrovay,* that the plaintiff would be entitled to take a voluntary dismissal, decelerate the mortgage obligation, and in the future demand payment of all "missed monthly mortgage payments," together with all corporate advances made during litigation.

Scenario 2. Defense counsel, realizing the homeowner can prevail on his affirmative defense, files a motion for summary judgment.

Plaintiff's counsel files a motion for voluntary dismissal in the face of that motion for summary judgment pursuant to section 2-1009(a) of the Illinois Code of Civil Procedure.

Defense counsel should argue the court should first hear the homeowner's dispositive motion, in accordance with section 2-1009(b) of the Illinois Code of Civil Procedure, since the

plaintiff's motion for voluntary dismissal was filed after the defendant's motion for summary judgment.[19]

Scenario 2a. Homeowner is awarded summary judgment.

Defense counsel should petition the circuit court for an award of reasonable attorney fees and costs pursuant to section 15-1510(a) of the IMFL[20] and demand a release of the mortgage.

Plaintiff's counsel should argue the lender should not be precluded from trying to enforce the mortgage obligation by filing a subsequent lawsuit. In the alternative, plaintiff's counsel should argue the mortgage remains a lien against the property, which will eventually be paid when the homeowner eventually sells his home.

Scenario 2b. Homeowner is denied summary judgment.

Defense counsel should cite *Sigler,* as in Scenario 1 above, and argue a condition of granting the plaintiff's motion for voluntary dismissal should be that the plaintiff is deemed to have waived the right to demand payment in the future of what plaintiff's counsel will allege to have been "missed monthly payments" during litigation because there was none.

As in Scenario 1 above, defense counsel should once again cite the Illinois Supreme Court's seminal cases of *Weisguth* and *Gibellina,* and argue plaintiff "*should not be restored to the position and the rights which he voluntarily abandoned. Having taken a non-suit, his only recourse is to begin his action anew*."[21] Accordingly, defense counsel should argue the court should dismiss with prejudice plaintiff's claim for damages advanced in the litigation as having been waived. Defense counsel should also argue the plaintiff has similarly waived the right to demand in the future any escrow disbursement of real estate taxes and insurance premiums, together with any corporate advance made for property inspections, appraisals, attorney fees, and litigation costs incurred during litigation, in accordance with section 2-1009(c).[22]

Plaintiff's counsel, in response, should once again argue, pursuant to *Dubrovay,* the plaintiff would be entitled to take a voluntary dismissal, decelerate the mortgage obligation, and in the future demand payment of all "missed monthly mortgage payments" together with all corporate advances made during litigation.

Finally, it is important to note the homeowner in *Dubrovay* never argued Deutsche Bank waived its right to later demand payment of those alleged "missed monthly installment payments" in the prior litigation. That the issue of waiver was never addressed by the Second District majority in *Dubrovay* makes the argument that much stronger when raised by defense counsel, going forward.

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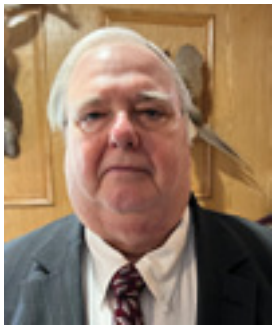

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ISBA RESOURCES >>

• Thomas J. Cassady, *The 'New Default Rule' Saves Lenders From the Harsh Results of the Single Re-Filing Rule*, Commercial Banking, Collections, and Bankruptcy (Oct. 2020).

• Hon. Cecilia A. Horan, *Mortgage Foreclosure Relief*, 108 Ill. B.J. 38 (Feb. 2020).

• Julie A. Repple & Stephen G. Daday, *The Effect of* First Midwest Bank v. Cobo *on Lenders and Servicers in Their Collection Pursuits*, Real Property (June 2019).

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1. *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 543 (1916) (emphasis added); see also *Gibellina v. Handley*, *127 Ill. 2d 122*, 136 (1989) ("this court is not unaware of, nor can it any longer turn its back on, the myriad abusive uses of the voluntary dismissal statute. As we pointed out earlier in this opinion, these three cases are indeed indicative of the scope of utilization of the voluntary dismissal procedure following a defendant's motion for summary judgment.").

2. *Bank of NY Mellon v. Dubrovay*, 2021 IL App (2d) 190540.
3. *Deutsche Bank Trust Co. Americas v. Sigler,* 2020 IL App (1st) 191006.
4. *First Midwest Bank v. Cobo,* 2018 IL 123038.
5. See Senate Bill 3035 (proposing the following: "Section 15-1406. Refiling of Foreclosure Proceedings. A default for failing to make a scheduled payment each month as required under any applicable note and mortgage shall constitute a basis for a new, separate and distinct cause of action. The new, separate and distinct cause of action shall exist notwithstanding (i) any prior acceleration of the same debt due to one or more previous defaults that resulted in a foreclosure proceeding that was voluntarily dismissed, or (ii) anything to the contrary in Section 13-217. Any voluntary dismissal of a foreclosure shall act as a deacceleration of the note and mortgage.").
6. 735 ILCS 5/15-1101 *et seq.*
7. *ABN AMRO v. McGahan*, *237 Ill. 2d 526* (2010).
8. *Id.* at 536 (emphasis added) (internal citation omitted).
9. *Cathay Bank v. Accetturo,* 2016 IL App (1st) 152783, ¶ 33 (citing *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ ١٦ ("If CitiMortgage had not sent an acceleration notice, it would not be entitled to foreclose," therefore not satisfying "a condition precedent to its right to bring suit.")).
10. *Deutsche Bank Trust Co. Americas v. Sigler,* 2020 IL App (1st) 191006, ¶ 53.
11. See *First Midwest Bank v. Cobo,* 2018 IL 123038.
12. 735 ILCS 5/13-217.
13. It should be noted that, under section 15-1602 of the IMFL, the homeowner has the statutory right to reinstate his or her mortgage within 90 days of being served with process or otherwise submitting to the jurisdiction of the court. 735 ILCS 2/15-1602 ("Reinstatement is effected by 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 by paying all costs and expenses required by the mortgage to be paid in the event of such defaults, 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.").
14. 24 CFR § 203.604.
15. 735 ILCS 5/2-1009(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.").

16. *Deutsche Bank Trust Co. Americas v. Sigler,* 2020 IL App (1st) 191006, ¶ 53.
17. *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 543 (1916) (emphasis added).
18. 735 ILCS 5/2-1009(a).
19. See *id.* ("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 case.").
20. 735 ILCS 5/15-1510(a).
21. *Weisguth*, 272 Ill. at 543 (emphasis added).
22. 735 ILCS 2-1009(c) ("After trial or hearing begins, the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof.").

Member Comments (1)

From Stephen T. Saporta, Esq on December 2, 2022

Upon further reflection, and in the interest of clarifying my position, I would state the following:

After the first case is voluntarily dismissed, either my office or my client will receive a new mortgage statement that undoubtedly will decelerate the note and mortgage obligation.

Defense counsel should immediately send out a "Notice of Error" under Regulation X (hereinafter "NOE") spelling out the fact that the bank, by taking its voluntary dismissal, has waived all of the so-called "missed monthly payments" and other corporate advances made during the course of the first litigation, citing Sigler out of the First District, and the Illinois Supreme Court case of Weisguth v. Supreme Tribe of Ben Hur, which cautioned against the abuse of the voluntary dismissal statute, with the following language:

If a plaintiff by his deliberate and voluntary act secures the dismissal of his suit he must be held to have anticipated the effect and necessary results of his action and should not be restored to the position and the rights which he voluntarily abandoned. Having taken a non-suit, his only recourse is to begin his action anew.

Chris Jepson and I would make the argument that the servicer / bank "waived" or "voluntarily abandoned" the so-called "missed monthly payments" and corporate advances made during the course of the litigation it just voluntarily dismissed (hereinafter let's just call these items "MMPCA").

What I am further suggesting is defense counsel should argue at that point -- in an NOE sent in response to the very next mortgage statement, and in response to each one that follows -- that the servicer / bank is equitably estopped from trying to go after the MMPCA they abandoned in the prior litigation. Ditto, the eventual "Notice of Default and Acceleration," should it ever come.

I would not advise the client to stop making his mortgage payments, but rather would build a case for an eventual lawsuit against the loan servicer and owner of the note and mortgage for violating RESPA. In other words, I would object to the servicer / bank decelerating the note and mortgage back to the original date of default, while at the same time instruct my client to resume making his mortgage payments beginning with the first month following the voluntary dismissal of the initial cause of action, and sending NOE's with each successive mortgage statement that follows. Depending on the client's financial situation and willingness to do so, I may well advise the client to stop paying once we reached what I would consider to be his last payment (end of the note term minus the time period measured from the date of the initial default to the date the court entered the order voluntarily dismissing the first cause of action).