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**DISTRICT I/II**

May 22, 2013

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You are hereby notified that the Court has entered the following opinion and order:

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2012AP2283

JPMorgan Chase Bank, NA v. Margaret Bach (L.C. #2011CV8071)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Margaret Bach appeals an order granting the motion of JPMorgan Chase Bank, NA (Chase) to voluntarily dismiss its case without prejudice and without costs. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS.

STAT. RULE 809.21 (2011-12).<sup>1</sup> We affirm the denial as a proper exercise of the court's discretion.

Chase held a second mortgage on real property Bach owned and commenced a foreclosure action in May 2011. Bach simultaneously filed her answer and a motion to consolidate the action with two personal injury cases she had filed in another court. The motion was denied and Bach appealed. Bach then filed for a Chapter 7 bankruptcy, which stayed the foreclosure proceeding for several months. After receiving a discharge from the bankruptcy court, Bach objected to the circuit court hearing the foreclosure action because an issue in her appeal was the propriety of the denial of the motion to consolidate.

Soon after, Chase learned that the holder of the first mortgage had commenced a foreclosure action and named Chase in the action in order to foreclose Chase's second mortgage. As that would render Chase's action moot, Chase decided to appear in the new foreclosure action rather than maintain its own and moved to dismiss its action without prejudice and without costs to either party. Over Bach's objection, the court granted Chase's motion. Bach appeals.

An action may be dismissed at the request of the person filing it upon order of the court and upon such terms and conditions as the court deems proper. WIS. STAT. § 805.04(2). A motion for voluntary dismissal involves the exercise of judicial discretion. *Clark v. Mudge*, 229 Wis. 2d 44, 48-49, 599 N.W.2d 67 (Ct. App. 1999). Factors when considering a motion for voluntary dismissal include: (1) the plaintiff's diligence in bringing the motion; (2) "undue vexatiousness" on the plaintiff's part; (3) the extent to which the suit has progressed, including

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the defendant's trial preparation efforts and expense; (4) the duplicative expense of relitigation; and (5) the adequacy of the plaintiff's explanation for the need to dismiss. *Id.* at 49. On review, we will not reverse a discretionary determination "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." *Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

Bach first contends Chase did not act diligently because it failed to realize from the outset that it held a second mortgage. Not true. Chase's complaint alleges that it is the second mortgagee. The trigger for moving for dismissal was not a late discovery of its lien position but the first mortgage holder's foreclosure filing. The court found that Chase acted diligently, as it promptly moved for dismissal upon the filing of the first mortgage holder's foreclosure action.

On the second factor, Bach asserts that Chase's counsel's failure to return her phone call, to appear in person at a hearing due to miscalendaring it, and to obey court orders constitute undue vexatiousness. We disagree. Bach's telephone questions were answered by letter and counsel appeared telephonically at the hearing. Bach also is off the mark on the disobedience claim. She asserts that Chase's counsel failed to check her file as instructed and so was unaware of its lien position. Again, Chase's position always was clear. Bach's claim that Chase disobeyed an order to address a jurisdictional question also fails because the court told Chase to address it on summary judgment, and the case never reached that stage. The circuit court reasonably found no "undue vexatiousness" by Chase.

The next factor is the extent to which the suit had progressed, including Bach's trial preparation efforts and expense. The court found that, while Bach generated many filings, much of the information in them involved her other lawsuits and was not germane to the issues in the

foreclosure action. Further, delays were due to Bach's bankruptcy and her consolidation motion. Her trial preparation efforts were scant, at best, considering that she made no discovery requests, took no depositions, and filed only the one motion. The court correctly concluded that this factor did not weigh in Bach's favor.

As to the duplicative expense of relitigation, the court found it "extremely unlikely" that Chase would refile its foreclosure action. Bach argues that events in the first-mortgage foreclosure action that occurred after the court's decision render its decision "not rational." We review only what was before the circuit court and, with the facts before it at the time, the court's conclusion was reasonable. And on the last factor, the court found adequate Chase's explanation that dismissal was necessary, as its case would be rendered moot on foreclosure of the senior mortgagee. Bach's claim that Chase did not discover it was the junior mortgagee until late in the game is groundless.

Finally, Bach raises two nearly frivolous issues. First, she accuses Chase of failure to prosecute—again because of her baseless insistence that Chase was unaware of its mortgage's position. In reality, delays in the proceeding are directly attributable to Bach's actions. Second, she seeks attorney fees. Such fees may not be "taxed on behalf of any party unless the party appears by an attorney other than himself or herself." WIS. STAT. § 814.04(1)(c). Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*