VERMONT SUPREME COURT
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Case No. 2020-244

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

OCTOBER TERM, 2021

The Bank of New York Mellon** v. Marjorie Johnston* & Kamberleigh Johnston*	} APPEALED FROM: } } Superior Court, Rutland Unit, Civil Division } CASE NO. 433-7-18 Rdcv Trial Judge: Robert A. Mello

In the above-entitled cause, the Clerk will enter:

In this case, the trial court dismissed with prejudice a foreclosure complaint that plaintiff bank filed against defendants. Defendants argue that the court erred in denying their motion for reconsideration. The bank cross-appeals, arguing that the court erred in dismissing its complaint with prejudice. We reverse and remand to the trial court to enter an order dismissing the case without prejudice.

The bank filed a foreclosure complaint against defendants in July 2018. Among other things, the complaint recited that upon information and belief, defendant Marjorie Johnston resided in Rutland, Vermont and that Kamberleigh Johnston had "an address located in Fairfax, Virginia." The complaint alleged that Marjorie Johnston executed the note and mortgage deed; Kamberleigh Johnston was noted to have a possible interest in the property based on various liens he filed against the property recorded in the land records. Kamberleigh Johnston had to be served by publication in the Rutland Herald and defendants did not file an answer until July 2019. In October 2019, the bank sought to amend its complaint, stating that it had inadvertently omitted additional items, such as a license to use and a "perpetual lease agreement," filed and recorded on the property by defendants.

In a January 2020 handwritten entry order, the court granted the bank's request to amend its complaint but rejected the amended complaint it had submitted. The court directed the bank to file a revised amended complaint within fourteen days that was "accurate as to Kamberleigh Johnston's residence in Vermont and specifies facts related to acceleration of the loan." The court indicated that the bank had caused the case to be delayed due to its error and it therefore could not recover interest or attorney's fees from the date the complaint was filed until the date of the court's January 2020 order. The precise nature of this error is not explained in the court's entry order. The bank filed a revised amended complaint within the time frame directed by the court. The amended complaint listed Kamberleigh Johnston as a resident of Rutland, Vermont, included language regarding the acceleration of the loan, and listed various potential claims or interests in the mortgaged property.

Defendants then moved to dismiss the complaint on a variety of grounds. In an April 2020 entry order, the court rejected most of these grounds. It agreed, however, that the complaint should be dismissed with prejudice under Vermont Rule of Civil Procedure 41(b)(2) because the bank failed to comply with the January 2020 order referenced above. The court found that while the bank filed a revised amended complaint within the required timeframe, the only allegation related to the acceleration of the loan was the following paragraph: "As a result of [defendants'] failure to make payments called for under the Note and Mortgage, the [bank] elected to call due the entire amount secured by the Mortgage, as of the filing of the original complaint on or about July 26, 2018." The court considered the mere allegation that the bank elected to accelerate the loan, without any specific facts related to the acceleration, clearly insufficient to satisfy the prior order. It found that the new language also failed to show that the bank complied with the terms of the mortgage note or deed, both of which required the bank to give defendant Marjorie Johnston written notice of default and an opportunity to cure before exercising any right to accelerate. The court noted that the bank had included language concerning these requirements in its initial complaint. It found the omission of such allegations in the revised amended complaint significant. The court found from the absence of this language that the bank could not allege the specific facts required by the prior order because the bank had failed to comply with the pre-acceleration notice requirements of the note and mortgage, which were a precondition to filing for foreclosure. Given its analysis, the court dismissed the bank's complaint with prejudice.

Defendants filed a motion for reconsideration, asking the court to permanently bar the bank from filing a future foreclosure action, which the court denied as incomprehensible.

The bank also moved for reconsideration, asking the court to reconsider the dismissal "with prejudice." It argued that dismissal with prejudice was not warranted because the court had improperly inferred that the bank had not sent a notice of default in compliance with the note and mortgage. The bank further argued that the additional pleading requirements were not clear from the court's January 2020 entry order. Finally, the bank asserted that the court exceeded its discretion given the preference in the law for adjudication on the merits. The bank simultaneously submitted a second motion to amend its complaint and a proposed second amended complaint. It proposed to add a paragraph detailing the dates in which it provided written notice of default to defendant Marjorie Johnston in compliance with the note and mortgage and stated that Marjorie Johnston failed to cure the default and it attached copies of two notices of default to its proposed second amended complaint.

In a July 2020 entry order, the court denied the bank's motion for reconsideration. The court found the January 2020 order clear and that the bank's failure to comply with it obvious. It stated that its order dismissing the complaint with prejudice "sanctioned the [bank] for previous delays that the [bank] had caused in this case," indicating that the bank's failure to comply with the January 2020 order "added another six months of delay in a case now two years old." The court stated that the bank had been sanctioned in the January 2020 order by being prevented from recovering attorney's fees or interest from the date it filed its complaint to the date of the court's January order because the bank had created delay in the case due to its error. Defendants appealed and the bank cross-appealed.

Defendants' opening brief appears to focus entirely on a response to the bank's cross-appeal rather than raising any challenge to the court's dismissal order. Defendants refer to prior cases apparently involving this bank or this property. The court made no reference to any such case in reaching its decision in this case and there is no indication any of this information was

part of the record below. We therefore do not address these arguments. See V.R.A.P. 28(a) (explaining that appellant's brief must contain "concise statement of case" and "specific claims of error, with appropriate reference to the record"); Johnson v. Johnson, 158 Vt. 160, 164 n.* (1992) (stating that Supreme Court will not address contentions so inadequately briefed as to fail to minimally meet standards of V.R.A.P. 28(a)). We reach a similar conclusion with respect to defendants' assertion that the court erred in denying their motion for reconsideration. This argument is inadequately briefed and we do not address it. Defendants also appear to refer to the merits of the bank's ability to prove default, apparently including notice requirements. Given our disposition of this case, it is unnecessary to consider the merits of the bank's foreclosure case.[*]

The bank argues on cross-appeal that the court should have dismissed its complaint without prejudice rather than with prejudice. It asserts that this Court's precedent clearly holds that a failure to comply with a mortgage's pre-foreclosure requirement of sending a notice of default should result in a dismissal without prejudice. It complains that the trial court retroactively labeled its decision a sanction to avoid this precedent. The bank argues that the dismissal order did not indicate that the case was being dismissed with prejudice as a sanction and it was not warned that sanctions could be imposed. It asserts that the January 2020 order did not clearly require it to specify in its amended complaint that it sent a notice of default and defendants failed to cure. It contends that defendants suffered no prejudice from the bank's misunderstanding of the January order.

Vermont Rule of Civil Procedure 41(b)(2) provides that an action or claim may be dismissed on a defendant's motion "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under [V.R.C.P.] 19, operates as an adjudication upon the merits." V.R.C.P. 41(b)(3).

The trial court had discretion in deciding to dismiss this case with prejudice and we thus review its decision for abuse of discretion. See Provident Funding Assocs., L.P. v. Campney, 2017 VT 120, ¶ 15, 206 Vt. 384 (explaining that Supreme Court reviews trial court's "exercise of its equitable authority," which includes the imposition of sanctions, "for abuse of discretion").

Other courts applying the analogous federal rule governing involuntary dismissals have recognized that "[d]ismissal with prejudice is an extreme sanction and should be used only in cases of willful disobedience of a court order or . . . persistent failure to prosecute a complaint." Rodgers v. Curators of Univ. of Mo., 135 F.3d 1216, 1219-20 (8th Cir. 1998) (quoting Givens v. A.H. Robins Co., 751 F.2d 261, 263 (8th Cir. 1984)). As the Givens court explained, while trial courts are entitled to "a large measure of discretion in deciding what sanctions are appropriate for misconduct" given their familiarity "with proceedings before them and with the conduct of counsel," "the punishment should fit the crime, and not every instance of failure to comply with an order of court, however inexcusable, justifies total extinction of a client's cause of action." Givens, 751 F.2d at 263.

[*] Following oral argument, defendants filed a motion asking the Court to take judicial notice of various matters in the record. We deny the motion to take "judicial notice" of these matters but note that the Court has reviewed the record and is aware of its contents.

We conclude that the court abused its discretion in dismissing the bank's case with prejudice here. The court's January 2020 entry order directed the bank to submit an amended complaint that "specifies facts related to acceleration of the loan." The bank did so. It responded to the order and addressed facts related to acceleration by adding the following paragraph to its complaint: "As a result of [defendants'] failure to make payments called for under the Note and Mortgage, the [bank] elected to call due the entire amount secured by the Mortgage, as of the filing of the original complaint on or about July 26, 2018." The court was not clear in its January 2020 order about what facts should be recited, and certainly not whether notice was an issue for the court and that it expected the bank to address this issue in its amended complaint or face dismissal as a sanction. Given the ambiguous order, the court erred in considering the bank's amended complaint unresponsive and worthy of a sanction of dismissal with prejudice. As referenced above, the punishment did not "fit the crime." Id. We thus reverse and remand for an entry of dismissal without prejudice.

Reversed and remanded for entry of dismissal without prejudice.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice