

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

WELLS FARGO BANK, N.A.,	:	APPEAL NO. C-190466
	:	TRIAL NO. A-1804234
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
PATRICK C. SHEAR,	:	
and	:	
SANDRA A. SHEAR,	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

This appeal arises from plaintiff-appellee Wells Fargo Bank, N.A.'s, ("the bank") foreclosure on a mortgage on real property located at 539 Chaswil Drive, Cincinnati, Ohio.

The underlying complaint is the third complaint in foreclosure. The bank filed the first complaint in July 2014. The trial court subsequently dismissed the complaint pursuant to the bank's motion. The bank filed the second complaint in March 2016. The trial court again dismissed the complaint pursuant to the bank's motion.

The bank filed the third and underlying complaint in August 2018. This time the bank moved for summary judgment. In response, the Shears moved to dismiss

the complaint. The Shears did not contest the foreclosure claim, but instead asserted that the double-dismissal rule barred the action. Following a hearing, the magistrate granted the motion for summary judgment and denied the motion to dismiss.

On November 26, 2018, the Shears filed a “Motion to Appeal Magistrate’s Decision,” which the trial court construed as objections to the magistrate’s decision. The bank filed a response on July 8, 2019, more than seven months later. On July 11, 2019, the trial court overruled the Shears’ “Motion to Appeal Magistrate’s Decision” and adopted the magistrate’s decision in its entirety. The Shears timely filed this appeal.

The crux of this appeal centers on the proper application of the double-dismissal rule. In their third assignment of error, the Shears contend that the double-dismissal rule precludes the underlying complaint because the bank voluntarily dismissed the first two complaints. The bank argues that the double-dismissal rule is inapplicable because the first two complaints were dismissed by court order.

The double-dismissal rule provides that two notice dismissals under Civ.R. 41(A)(1)(a) function as an adjudication on the merits and require dismissal with prejudice. *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254, ¶ 10.

Civ.R. 41(A) sets forth three ways by which a plaintiff can dismiss an action: (a) by unilaterally filing a written notice of dismissal, (b) by filing a stipulation of dismissal agreed to by all parties, or (c) by order of the court. Although all of the dismissals are at the plaintiff’s instigation, only a notice dismissal can be unilaterally accomplished. *Id.* at ¶ 25. A dismissal by stipulation under Civ.R. 41(A)(1)(b) requires an agreement by all parties before the dismissal can occur. Likewise, a dismissal by court order under Civ.R. 41(A)(2) requires court approval before the dismissal can occur. “Because only a Civ.R.

41(A)(1)(a) dismissal is totally within a plaintiff's control, the double-dismissal rule targets only that type of dismissal; the other two types of Civ.R. 41(A) dismissals do not implicate the double-dismissal rule." *Id.*

This case involved two court-ordered dismissals under Civ.R. 41(A)(2). The bank brought the first action, in the case numbered A-1404071, in July 2014. It subsequently moved for an order dismissing the case under Civ.R. 41(A)(2). The trial court granted the motion and entered an order of dismissal on July 10, 2015. The bank brought the second action, in the case numbered A-1601864, in March 2016. It again moved for an order dismissing the case under Civ.R. 41(A)(2). And the trial court again granted the motion, entering an order of dismissal on May 31, 2018. Because the prior foreclosure actions were dismissed by court order (albeit at the bank's request), the double-dismissal rule was not implicated and did not bar the third foreclosure action. Therefore, the Shears' third assignment of error is overruled.

In their two remaining assignments of error, the Shears argue that the trial court erred in allowing the bank to file an untimely response to their objections. However, any procedural error was harmless in light of the foregoing analysis.

In their objections, the Shears argued that the underlying complaint violated the double-dismissal rule and should be dismissed with prejudice. As explained above, the double-dismissal rule was indisputably inapplicable to this case. Thus, the bank's untimely response (which also concerned application of the double-dismissal rule) was inconsequential to the trial court's decision to overrule the Shears' objections. The Shears' first and second assignments of error are overruled.

We accordingly affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

ZAYAS, P.J., MYERS and CROUSE, JJ.

To the clerk:

Enter upon the journal of the court on March 12, 2021,
per order of the court _____.
Administrative Judge