

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

US HOME OWNERSHIP LLC,

CASE NO.: 2015 CV 02823

Plaintiff,

JUDGE MARY E. MONTGOMERY

-vs-

COLLIN L YOUNG et al,

**FINAL AND APPEALABLE DECISION
AND ENTRY SUSTAINING PLAINTIFF'S
MOTION TO DISMISS COMPLAINT
UNDER RULE 41(A)(2)**

Defendants.

This matter is before the Court on the *Motion to Dismiss Plaintiff's Complaint Under Rule 41(A)(2)* ("Motion to Dismiss") filed by Plaintiff U.S. Home Ownership, LLC ("Plaintiff") on December 2, 2019. On December 12, 2019, Defendant Collin L. Young ("Mr. Young") filed his *Defendant's Memorandum in Opposition to Motion to Dismiss*. No reply in support was filed by Plaintiff. This matter is now properly before the Court. For the following reasons, the Court sustains Plaintiff's *Motion to Dismiss*.

I. FACTS AND PROCEDURAL HISTORY

Most of the facts and procedural history pertinent to the Court's decision as to the *Motion to Dismiss* have already been set forth in the Court's November 14, 2019 *Entry Declining to Issue an Opinion on Whether Defendant's Counterclaims Remain Pending* ("11/04/19 Entry"). See 11/04/19 Entry at 1-2. To recap, on November 16, 2016, the Court issued a *Decision and Entry* in which it granted Plaintiff summary judgment both as to Plaintiff's claims and as to Mr. Young's counterclaims. On December 14, 2016, Mr. Young filed his *Notice of Appeal* from this Court's November 16, 2016 *Decision and Entry*. Mr. Young's appeal was

docketed as Second District Court of Appeals Case No. 27382.¹ On March 23, 2018, the Second District issued an *Opinion* in Case No. 27382. The Second District reversed this Court's decision sustaining Plaintiff's motion for summary judgment and remanded the case to this Court for proceedings consistent with the Second District's *Opinion*. *U.S. Home Ownership, LLC v. Young*, 2018-Ohio-1059, 109 N.E.3d 681, ¶ 28 (2d Dist.).

Subsequently, Plaintiff sought an order of this Court as to whether Mr. Young's counterclaims remained pending following the Second District's remand of this matter for further proceedings. *See Order Setting Briefing Schedule on Issue of Whether Def.'s Countercls. Should be Dismissed, with Prejudice*, filed 09/17/19. In its November 14, 2019 *Entry*, this Court declined to issue an opinion on whether Mr. Young's counterclaims remain pending. The Court found that the issue was not yet ripe for decision. *See* 11/14/19 *Entry* at 3-4. The Court commented that "[i]f Plaintiff does in fact move for dismissal of its claims under Civ.R. 41(A)(2), the Court will, at that time, have to address the following: (1) whether Plaintiff is entitled to dismissal of its claims; and (2) the status of Mr. Young's counterclaims." *Id.* at 4-5.

Plaintiff has now moved for dismissal of its claims under Civ.R. 41(A)(2). *See Mot. to Dismiss*. In its *Motion*, Plaintiff states that it is moving for an order of dismissal to avoid the possible application of the double-dismissal rule. Plaintiff further argues that there are no counterclaims pending. In his *Memorandum in Opposition*, Mr. Young presents several arguments as to why this Court should deny Plaintiff's *Motion*. Mr. Young first argues that Plaintiff is again seeking an improper advisory opinion. Next, Mr. Young argues that Plaintiff has submitted no evidence as to whether Plaintiff's claims and Mr. Young's counterclaims are so intertwined that they cannot be independently adjudicated by this Court. Finally, Mr. Young argues that Plaintiff has submitted no evidence that Plaintiff's complaint was ever previously dismissed.

II. LAW AND ANALYSIS

Civ.R. 41(A)(2) provides as follows:

Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

¹ Mr. Young filed a second *Notice of Appeal* on December 15, 2016. His second appeal was docketed as Second District Court of Appeals Case No. 27383. On January 20, 2017, the Second District dismissed Case No. 27383 pursuant to a motion filed by Mr. Young.

“[A] dismissal pursuant to Civ. R. 41 is within the sound discretion of the trial court and will not be reversed unless upon a showing of an abuse of discretion.” *Sec. Natl. Bank & Trust Co. v. Reynolds*, 2d Dist. Greene No. 2007 CA 66, 2008-Ohio-4145, ¶ 31, citing *Douthitt v. Garrison*, 3 Ohio App.3d 254, 256, 444 N.E.2d 1068 (9th Dist.1981).

Ohio courts follow the federal courts’ construction of Fed.R.Civ.P 41(a)(2), under which voluntary dismissals are to be allowed unless the defendant will be prejudiced “‘*other than [by] the mere prospect of a second lawsuit.*’” (Emphasis in original.) *Douthitt* at 256, quoting *Holiday Queen Land Corp. v. Baker*, 489 F.2d 1031, 1032 (5th Cir.1974); *Capital One Bank v. Woten*, 169 Ohio App.3d 13, 2006-Ohio-4848, 861 N.E.2d 859, ¶ 16-19 (3d Dist.) (reversing trial court’s denial of plaintiff’s motion to dismiss pursuant to Civ.R. 41(A)(2) where there was no indication that the defendant would be prejudiced outside of being subjected to a second lawsuit by the plaintiff); *Copes v. Good Samaritan Hosp.*, 2d Dist. Montgomery No. 12726, 1991 Ohio App. LEXIS 5976, *5-6 (Dec. 10, 1991) (affirming trial court’s dismissal of complaint without prejudice pursuant to Civ.R. 41(A)(2) after trial had begun, where the plaintiffs had failed to specify in their demand for judgment any specific amount of damages and would have been barred from seeking any damages at trial).

Here, Plaintiff seeks an order dismissing this matter under Civ.R. 41(A)(2) to avoid the potential application of the double-dismissal rule. Plaintiff’s argument is as follows:

The risk of inadvertently dismissing an action twice by notice is significant in the foreclosure context. It is not unusual for a foreclosure action to be dismissed and later filed again, sometimes by a different law firm, because of a loss mitigation agreement, bankruptcy filing, or some other reason relevant to a foreclosure action, such as a transfer of a loan or the servicing rights to the loan. As a result, Plaintiff respectfully requests an order of dismissal under Rule 41(A)(2).

Motion to Dismiss at 1 (unpaginated). There is no evidence on the record that Mr. Young would suffer any prejudice upon the dismissal of this matter pursuant to Civ.R. 41(A)(2), other than the prospect of a second lawsuit. As such, the Court finds that dismissal of this matter is warranted under Civ.R. 41(A)(2).

However, before the Court may dismiss this matter pursuant to Civ.R. 41(A)(2), it must first address whether Mr. Young’s counterclaims remain pending. As an initial matter, the Court rejects Mr. Young’s argument that Plaintiff is again seeking an advisory opinion as to whether Mr. Young’s counterclaims remain pending. Civ.R. 41(A)(2) explicitly limits a court’s discretion to dismiss a plaintiff’s claim when the defendant has pleaded a counterclaim prior to service of the plaintiff’s motion to dismiss, and the defendant objects to

dismissal. Plaintiff moved to dismiss its claims after Mr. Young filed his *Answer to Amended Complaint and Counterclaim*, and Mr. Young objects to Plaintiff's request for dismissal. As such, the Court finds that the issue of whether Mr. Young's counterclaims remain pending is now ripe for decision.

The Court has reviewed the parties' appellate briefs and the Second District's *Opinion* in Case No. 27382. See *Bingamon v. Curren*, 83 Ohio App.3d 711, 714, 615 N.E.2d 706 (2d Dist.1992) (in determining the scope of issues remanded for consideration by the trial court, the trial court may review the parties' appellate briefs and the appellate court's opinion from the prior appeal). On appeal, Mr. Young argued only that the Court erred in granting Plaintiff summary judgment as to Plaintiff's claims in its *Amended Complaint in Foreclosure*. Because Mr. Young did not argue on appeal that this Court erred in granting Plaintiff summary judgment as to Mr. Young's counterclaims, the Court finds that the doctrine of the law of the case precludes Mr. Young from maintaining his counterclaims before this Court. See *City Of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 659 N.E.2d 781 (1996) ("[T]he doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred."); *First Nat. Bank of Fairbanks v. Kennedy*, 6th Dist. Lucas No. L-82-025, 1982 Ohio App. LEXIS 11748, *5-6 (May 14, 1982) (where appellant failed to raise the issue of dismissal of his counterclaims in his appeal from a prior trial court decision, appellant was barred by the doctrine of law of the case from raising the issue in a subsequent appeal); *Waddell v. Frasure*, 4th Dist. Scioto No. 08CA3215, 2008-Ohio-5183, ¶ 14 (where party to foreclosure case failed to raise an argument in a prior appeal, and party could have raised that argument in the prior appeal, that argument was precluded by the doctrine of the law of the case); 5 American Jurisprudence 2d, Appellate Review, Section 803, at 538 (2007) ("A reversal of a trial court decision * * * affects only the lower court issues that were appealed from, so long as, on appeal, these points were severable from the nonappealed issues, and it is an adjudication of only the matters expressly discussed and decided."), citing *Triton Coal Co. v. Husman, Inc.*, 846 P.2d 664 (Wyo.1993) and *Hansen & Rowland, Inc. v. C. F. Lytle Co.*, 167 F.2d 998 (9th Cir.1948).

Because Mr. Young is precluded from maintaining his counterclaims, the Court need not consider, under Civ.R. 41(A)(2), whether Mr. Young's counterclaims can remain pending for independent adjudication by the Court. And because dismissal of Plaintiff's *Amended Complaint in Foreclosure* is warranted under Civ.R. 41(A)(2), the Court sustains Plaintiff's *Motion to Dismiss*.

III. CONCLUSION

For the foregoing reasons, the Court sustains Plaintiff's *Motion to Dismiss*. The Court hereby dismisses Plaintiff's *Amended Complaint in Foreclosure*, without prejudice. Costs to Plaintiff.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST REASON FOR DELAY FOR PURPOSES OF CIV.R. 54. IN ACCORDANCE WITH APP.R. 4, ANY PARTY INTENDING TO APPEAL THIS DECISION SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

To the Clerk of Courts:

Pursuant to Civ.R. 58(B), please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

SO ORDERED:

JUDGE MARY E. MONTGOMERY

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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Number:
2015 CV 02823

Case Title:
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Type:

Order:

So Ordered,

Mary E. Montgomery