

STATE OF MICHIGAN
COURT OF APPEALS

KATHERINE DOWNING and JERRY J.
DOWNING,

Plaintiffs-Appellants,

v

BANKERS TRUST COMPANY OF
CALIFORNIA, as trustee,

Defendant-Appellee.

UNPUBLISHED
September 24, 2002

No. 230443
Oakland Circuit Court
LC No. 98-009955-CH

Before: O’Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, plaintiffs Katherine Downing and Jerry J. Downing appeal as of right the trial court’s order dismissing, for no cause of action, their complaint against defendant Bankers Trust Company of California. We affirm.

The Downings brought suit to have the mortgage foreclosure sale on the Downings’ house set aside. On appeal, the Downings argue that dismissal was inappropriate because the court forced the Downings to proceed to trial without counsel after their counsel was allowed to withdraw two days before trial.¹ The Downings contend that the serious irregularities and unusual circumstances occurring in the foreclosure proceedings could have been successfully argued had they been represented by counsel, instead of being forced to proceed in propria persona. We disagree.

¹ Const 1963, art 1, § 13 states:

A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.

Our review is de novo concerning the over-arching issue whether the Downings’ constitutional right to counsel has been violated. *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002).

The Downings filed their complaint within the six-month statutory redemption period, alleging that Bankers Trust had failed to credit a received payment and had subsequently refused to accept payments tendered by the Downings to bring their account up-to-date. The trial court granted the Downings a temporary restraining order tolling the redemption period and allowing the Downings to remain in the house until the case could be heard on the merits. Subsequently, the Downings' original attorney filed a motion to withdraw, which was granted, along with a motion for an adjournment of trial. In his motion to withdraw, the attorney claimed in part that the Downings had not paid him as agreed and that there was a breakdown in communications so that he could no longer represent the Downings. The Downings found another attorney, who filed a motion to adjourn the upcoming trial and reopen discovery, which was denied.

On the day of trial, Bankers Trust was prepared to proceed, having flown in a witness from North Carolina to testify. The Downings appeared, but their attorney did not. The court ordered sanctions against the attorney and adjourned trial again. Two days before trial, the Downings' attorney served a motion on the Downings to withdraw from representing them, and the Downings answered. In his motion, the attorney claimed that the Downings wished to terminate his services, did not trust him, refused to meet with him, made reasonable communication impossible, and that the Downings had generally caused a breakdown in the attorney-client relationship. The Downings responded that it was the attorney's decision to withdraw because he was always breaking appointments with them and that he had demanded more money before he would come to trial. On the date of the adjourned trial, Bankers Trust was ready to proceed once more, and the Downings appeared without counsel. The parties were told that another judge had granted the motion to withdraw.

The court decided to proceed with trial, and instructed Bankers Trust to present its position, after which Katherine Downing made an opening statement. Katherine cross-examined Bankers Trust's witness, and both parties introduced exhibits and made short statements after the examination concluded. The court then granted Bankers Trust's motion to dismiss because the evidence showed that the Downings had defaulted on their mortgage payments, Bankers Trust had properly foreclosed, and there was no indication of fraud, irregularity, or exigency to warrant stopping the foreclosure process.

The Downings argue on appeal that the trial court abused its discretion in granting the attorney's motion to withdraw two days before trial and in requiring the Downings to proceed to trial in propria persona. We disagree with each of these contentions. This Court reviews a trial court's decision regarding a motion to withdraw and a motion for a continuance for an abuse of discretion. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999); *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). In equity cases, the trial court's determinations are presumed to be correct, and this Court will not find an abuse of discretion unless it is convinced that it would have reached a different result. *Wilkins v Wilkins*, 149 Mich App 779, 792; 386 NW2d 677 (1986).

With regard to the withdrawal issue, an attorney who has entered an appearance for a party may withdraw only with the party's consent or by leave of the court. MCR 2.117(C)(2); *In re Withdrawal of Attorney*, *supra* at 431. *In re Withdrawal of Attorney*, *supra*, discussed the issue of granting attorneys' motions to withdraw under a Michigan Rules of Professional Conduct analysis. Under MRPC 1.16, withdrawal is permitted if it "can be accomplished without material adverse effect on the interests of the client." Contrary to the Downings' claim

on appeal, the MRPC does not require that a hearing be held when a motion to withdraw is decided, especially if the clients do not object to the motion. In this case, the Downings filed a response to the attorney's motion, but they did not object to his withdrawal. They merely clarified that the decision to withdraw was the attorney's, not theirs, and they verified that they no longer trusted him. It does not appear that granting the motion to withdraw materially adversely affected the Downings, since the attorney-client relationship was strained and it appears that the attorney would not have been prepared to proceed anyway. See *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Thus, the court did not abuse its discretion by granting the attorney's motion to withdraw two days before the Downings' trial date. See *In re Withdrawal of Attorney*, *supra* at 431.

With regard to the adjournment issue, a court has discretion to grant or deny an adjournment or continuance for good cause. MCR 2.503; *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991).

In making such a determination [whether the lower court should have granted an adjournment], we consider whether (1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion. [*Lansing*, *supra* at 351 (quotation and citation omitted).]

The parties agree that the Downings had a constitutionally protected right to be represented by counsel. However, as Bankers Trust notes, the Downings have had several attorneys over the course of this matter. Trial had already been adjourned twice due to the alleged lack of communication between the Downings and their attorneys. Bankers Trust also had the right to have the claim against it resolved in a timely manner. In this case, the trial court decided to proceed only after properly balancing Bankers Trust's right to have the matter settled against the Downings' right to a proper foreclosure procedure.

In *Bye v Ferguson*, 138 Mich App 196; 360 NW2d 175 (1984), this Court held that the trial court abused its discretion in proceeding immediately with trial after the civil defendant's counsel withdrew without notice. As in the present case, the attorney in *Bye* alleged that the defendant failed to pay his legal fees as agreed and failed to communicate with the attorney. *Id.* at 200, 206-207. Despite reversing the trial court, this Court also recognized that "[w]ithdrawal of counsel does not give a litigant an absolute right to a continuance; the decision to grant a continuance rests in the sound discretion of the trial court." *Id.* at 207. Likewise, in *Pascoe v Sova*, 209 Mich App 297; 530 NW2d 781 (1995), the fact that the civil defendant did not receive notice that his attorney had "abandoned" the representation necessitated reversal of the judgment against the defendant. *Id.* at 300-301.

In this case, the trial court sanctioned the Downings' attorney when he failed to appear at trial, and adjourned trial for two weeks. The Downings were served notice of the attorney's motion to withdraw approximately eight days later, five days before the rescheduled trial date. The Downings were able to respond to the motion three days after that, which was two days before the trial date, agreeing with the attorney that they were dissatisfied with his representation.

In *Bauman v Grand Trunk W R Co*, 363 Mich 604; 110 NW2d 628 (1961), our Supreme Court recognized that the review of a trial court's discretionary determination whether to adjourn a case depends on the facts of each individual matter. *Id.* at 609. In deciding *Bauman, supra*, the Court referred to *McLay v McLay*, 354 Mich 19; 91 NW2d 824 (1958), where the *McLay* Court did not find an abuse of discretion in the denial of a motion for continuance:

where the appellant's attorney was unable to be present; where there had been 1 previous adjournment; where there were out-of-town witnesses present; where the adjournment request was based on the unavailability of counsel, whose presence could not be promised for a considerable period of time [*Bauman, supra* at 609, citing *McLay, supra*; see also *Lansing, supra* at 351.]

The Court in *Bauman, supra*, looked at these types of factors and decided that the trial court had abused its discretion in denying a continuance in a complex trial where the defense counsel had become seriously ill and could no longer represent the defendant. *Bauman, supra* at 610.

Here, the trial court did not abuse its discretion by refusing to grant the Downings yet another adjournment based on yet another attorney withdrawing as their counsel. The case had already been adjourned at least twice based on the Downings attorneys' actions. The Downings had a history of "communication breakdown" with their attorneys. Bankers Trust already had twice flown in a witness from North Carolina for trial. The case was nearly two years old, the Downings were living in the house without paying rent, and Bankers Trust's legal rights were on hold because of the preliminary injunction barring Bankers Trust from claiming the property. Furthermore, the Downings ably handled their case. The issues presented in this case were not complex, nor did they require expert testimony, and the Downings had drawn up adequate responses to motions in propria persona. Once the trial began, Katherine was granted much leeway in her opening statement and closing argument, the cross-examination of Bankers Trust's witness, and in introducing exhibits into evidence. In the end, the evidence introduced at the hearing did not present "a strong case of fraud, irregularity or peculiar exigency," as required to set aside a foreclosure sale. *Detroit v Agozzino*, 280 Mich 402; 273 NW 747 (1937). Even if the Downings had been represented by counsel, the facts of their case would not have changed. Thus, the Downings have failed to establish prejudice in this matter. See *Lansing, supra* at 351.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra