

STATE OF MICHIGAN  
COURT OF APPEALS

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WALTER STACK and MICHELLE STACK,

Plaintiffs-Appellants,

v

GMAC MORTGAGE CORPORATION,

Defendant-Appellee.

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UNPUBLISHED

December 27, 2007

No. 271186

Bay Circuit Court

LC No. 04-003814-CH

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur with the result reached by the majority, but write separately to set forth my reasons for doing so.

Defendant initiated foreclosure proceedings. Plaintiffs sued for an accounting, alleging that the faulty practices of several mortgage service companies caused delays in their mortgage payments. The trial court issued a preliminary injunction, halting further foreclosure efforts. On February 23, 2006, the trial court ordered that plaintiffs forward the mortgage arrearage and future monthly mortgage payments to defense counsel, for deposit in an IOLTA escrow account. By May 16, 2006, plaintiffs had forwarded approximately half the amount due. On that date, the trial court dismissed plaintiffs' case pursuant to MCR 2.504(B)(1), which provides that if the plaintiff fails to comply with a court order, "a defendant may move for dismissal of an action or a claim against that defendant."

Plaintiffs contend on appeal that reversal is required because the trial court failed to consider the seven factors discussed in *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995).<sup>1</sup> The majority opinion does not mention the *Vicencio* factors,

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<sup>1</sup> The *Vicencio* factors are: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Id.* at 507.

and instead premises its analysis on *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The Supreme Court's decision in *Maldonado* provides a framework for this Court's review of a trial court decision. In my view, *Maldonado* did not overrule *Vicencio*. Recitation of the *Maldonado* standard of review, without more, does not resolve the issue presented in this appeal: whether the trial court should have applied the *Vicencio* factors.

"Dismissal is a drastic step that should be taken cautiously." *Vicencio*, *supra* at 506. I believe that a trial court should consider and apply the *Vicencio* factors when confronted with a motion for dismissal brought under MCR 2.504(B)(1). *Vicencio* counsels a trial court to carefully evaluate options other than dismissal, as well as a plaintiff's previous conduct, before concluding that dismissal is appropriate. *Id.*

The trial court did not specifically refer to the *Vicencio* factors when it dismissed the instant case. It did, however, articulate an analysis that closely tracked *Vicencio*. The trial court found that plaintiffs deliberately failed to proffer their monthly mortgage payments or the arrearage, and that plaintiffs had a history of failing to make their payments, or of making delayed, partial payments. Additionally, the trial court noted that its previous order provided plaintiffs with several months in which to cure any defects in their mortgage payment process, but they failed to do so. The trial court expressed its belief that plaintiffs were engaged in a "cat and mouse game" with their ever-accruing mortgage debt, and would never catch up with their obligations.

Because the trial court's decision was fully informed and entirely consistent with *Vicencio*, I agree with my colleagues that it did not abuse its discretion when it dismissed plaintiffs' case pursuant to MCR 2.504(B)(1).

/s/ Elizabeth L. Gleicher