

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

RCB BANK,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-16-1305-M
)	
FEDERAL NATIONAL MORTGAGE)	
ASSOCIATION (“FANNIE MAE”),)	
a corporation organized and existing)	
under the laws of the United States)	
of America, and MORTGAGE)	
ELECTRONIC REGISTRATION)	
SYSTEMS, INC.,)	
)	
Defendants.)	

ORDER

Before the Court is the Motion of RCB Bank for Voluntary Dismissal under FED.R.CIV.P 41(a)(2) Combined with Brief in Support, filed July 18, 2017. On July 19, 2017, defendants filed their joint response, and on July 24, 2017, plaintiff replied. Based on the parties’ submissions, the Court makes its determination.

On June 3, 2015, plaintiff RCB Bank (“RCB”) filed a foreclosure proceeding in state court (case no. CJ-2015-3128) against Roger W. Ely and Kathleen A. Ely (collectively the “Elys”), and on June 4, 2015, RCB filed a Notice of Pendency of Action with the County Clerk of Oklahoma County. On August 4, 2015, RCB amended its petition, joined defendant Mortgage Electronic Registration Systems, Inc. (“MERS”), and alleged that MERS was a party in interest in the Elys’ real property RCB sought to foreclose, as MERS also held a mortgage on the Elys’ real property. On January 4, 2016, the state court granted RCB’s foreclosure action against the Elys; however, it also found that MERS’s interest in the Elys’ real property was superior to that of RCB’s interest, but did not determine the amount secured by MERS’s mortgage. On October 13, 2016, RCB filed

this declaratory action in the District Court of Oklahoma County, State of Oklahoma seeking the court to declare the amount of MERS's mortgage on the Elys' real property, if any.¹

On November 15, 2016, defendant Federal National Mortgage Association, with consent from MERS, removed this action to this Court. RCB now moves this Court for a voluntary dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(2). Specifically, RCB seeks to dismiss this action as it has finalized a settlement with the Elys and is no longer seeking to sell the Elys' real property in a sheriff sale.² As a result, RCB is no longer seeking a declaration of the amount of the MERS's mortgage from this Court. Defendants object to a voluntary dismissal and urge the Court to rule on their pending joint motion for summary judgment in order to resolve the claims in this matter and to prevent RCB from relitigating this issue.³

Since defendants have filed their motion for summary judgment, Rule 41 only permits voluntary dismissal by a court order. *See* Fed. R. Civ. P. 41(a)(2) ("an action may be dismissed at the plaintiff's request only by court order . . . [and] [u]nless the order states otherwise, a dismissal under this paragraph [] is without prejudice."). "Absent 'legal prejudice' to the defendant, the district court normally should grant such a dismissal." *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (citing *Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986)). "The

¹ In its Petition, RCB challenges the validity of the assignment of the MERS's mortgage and alleges that it was void as to RCB. *See* Petition ¶ 13, attached as Exhibit 3 to Defendants' Notice of Removal [docket no. 1].

² Pursuant to the settlement agreement between RCB and the Elys, the Elys have agreed to pay the balance of the mortgage owed to RCB over seven years, and RCB agrees not to sell the Elys' real property in a sheriff sale as long as the Elys do not default on paying the debt.

³ In the alternative, defendants request that if the Court finds dismissal is appropriate, the Court use its discretion, pursuant to Rules 41(a)(2) and 54(d)(1)&(2), and award defendants attorney fees and cost as the prevailing party. However, for the reasons set forth in this Order, the Court declines to award defendants attorney fees and costs.

parameters of what constitutes ‘legal prejudice’ are not entirely clear, but relevant factors the district court should consider include: the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of litigation.” *Id.* (citing *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir.1996)). “Each factor need not be resolved in favor of the moving party for dismissal to be appropriate, nor need each factor be resolved in favor of the opposing party for denial of the motion to be proper”. *Id.*


Having carefully reviewed the parties’ submissions, the Court finds that defendants will not suffer any legal prejudice from this matter being voluntarily dismissed. Defendants contend that due to the expenses incurred to date, RCB’s insufficient reason for dismissal, the present state of the litigation, and the potential for additional claims, dismissal of this matter will legally prejudice them. The Court disagrees. RCB has advised the Court and defendants that due to a settlement reached with the Elys, it is no longer pursuing its claim against defendants and defendants have not filed any counter-claims in this action, therefore, the Court finds that at this time, there are no claims for the Court to resolve in this matter. Further, discovery in this matter consisted exchanging 200 pages of written documents, and although defendants have filed a motion for summary judgment, the Court finds that the discovery and pending pleadings in this matter can be preserved in case a legal dispute arises in this matter in the future.⁴ Further, RCB did not delay in filing its motion to dismiss once the settlement with the Elys had occurred, and

⁴ Defendants advise that they may potentially be filing a foreclosure proceeding against the Elys, unless the Elys resolve the default of the MERS’s mortgage and contend that RCB will be a party to the foreclosure action and will raise the same claims as this suit as defenses if this matter is dismissed without prejudice.

since the Court has yet to rule on defendants' motion for summary judgment⁵ and the pre-trial submissions' deadline has been extended to August 2, 2017, dismissal at this time will not be disruptive to the judicial process. Therefore, the Court finds that this matter should be dismissed.

Accordingly, for the reasons set forth above, the Court GRANTS the Motion of RCB Bank for Voluntary Dismissal under FED.R.CIV.P 41(a)(2) Combined with Brief in Support [docket no. 35] and DISMISSES this action.

IT IS SO ORDERED this 26th day of July, 2017.


VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

⁵ Defendants filed their reply to RCB's response to defendants' motion for summary judgment the same day this Order was entered.