

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

March 13, 2020

DEUTSCHE BANK NATIONAL TRUST )  
COMPANY, as indenture trustee for )  
American Home Mortgage Investment )  
Trust 2007-2, )  
 )  
Appellant, )  
 )  
v. )  
 )  
GREGORY A. BENNETT; MARY J. )  
BENNETT; UNKNOWN TENANT 1; )  
UNKNOWN TENANT 2; UNKNOWN )  
TENANT 3; UNKNOWN TENANT 4, )  
THE NAMES BEING FICTITIOUS TO )  
ACCOUNT FOR PARTIES IN )  
POSSESSION, )  
 )  
Appellees. )  
\_\_\_\_\_ )

Case No. 2D18-2020

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied. This court sua sponte grants rehearing to the extent that the opinion dated January 15, 2020, is withdrawn, and the attached opinion is substituted therefor.

I HEREBY CERTIFY THE FOREGOING IS A  
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL  
CLERK

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION, AND IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

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Case No. 2D18-2020

Opinion filed March 13, 2020.

Appeal from the Circuit Court for Pinellas  
County; Jack R. St. Arnold, Judge.

Kimberly S. Mello and Vitaliy Kats of  
Greenberg Traurig, P.A., Tampa, for  
Appellant.

Leslie M. Conklin, Clearwater, for Appellees  
Gregory A. Bennett and Mary J. Bennett.

No appearance for remaining Appellees.

KHOUZAM, Chief Judge.

Deutsche Bank National Trust Company filed a foreclosure action against Gregory Bennett, Mary Bennett, and other unknown parties. The trial court dismissed the action without prejudice as a sanction for untimely and incomplete production of documents. The Bank appeals, arguing that the trial court erred in failing to make findings of willful disregard of a trial court order. Accepting this argument, the Bennetts concede error. But because the court's dismissal was without prejudice, findings of willful disregard were not required. Accordingly, we decline to accept the concession of error, and we affirm the court's order.

"A lower court's decision to impose sanctions is reviewed under an abuse of discretion standard." Boca Burger, Inc. v. Forum, 912 So. 2d 561, 573 (Fla. 2005) (citing Harless v. Kuhn, 403 So. 2d 423, 425 (Fla. 1981)). This court and others have found such an abuse where a trial judge dismisses an action with prejudice "without making 'express written findings of fact supporting the conclusion that the failure to obey the court order demonstrated willful or deliberate disregard.'" <sup>1</sup> Hawthorne v. Wesley, 82 So. 3d 1183, 1185 (Fla. 2d DCA 2012) (quoting Ham v. Dunmire, 891 So. 2d 492, 495 (Fla. 2004)); see also Plantilla v. Plantilla, 777 So. 2d 978, 979-80 (Fla. 2d DCA 2000) (same); Nat'l City Bank v. White, 112 So. 3d 663, 667 (Fla. 4th DCA 2013) (same). This is because "dismissal is the ultimate sanction in the adversarial system,

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<sup>1</sup>Alternatively, the Bank alleges that its due process rights were violated because the court ruled on the merits of the case before the Bank finished presenting evidence. We do not address this argument because the record indicates that the dismissal was a sanction, not a ruling on the merits. Indeed, as a dismissal without prejudice, the ruling left the Bank free to relitigate the merits in a new foreclosure action.

[and] it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result." Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993); see also Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990) ("[I]t is for the very reason that the trial judge is granted so much discretion to impose this severe sanction that we have determined that the subject order should contain an explicit finding of willful noncompliance.").

While it is true that the trial court made neither oral nor written findings of willful disregard of a court order when imposing the sanction of dismissal, both parties overlook that the case was dismissed without prejudice. Therefore, failure to consider the factors laid out in Kozel, including "whether the attorney's disobedience was willful, deliberate, or contumacious," id., does not warrant reversal. See Fed. Nat'l Mortg. Ass'n v. Linner, 193 So. 3d 1010, 1013 (Fla. 2d DCA 2016) ("It is not reversible error for a trial court to fail to consider the Kozel factors before dismissing a case without prejudice."); SRMOF II 2012-1 Tr. v. Garcia, 209 So. 3d 681, 681 (Fla. 5th DCA 2017) (same). Far from suffering the ultimate sanction, the Bank was free to refile its case for about eight months, the time remaining under the statute of limitations for a December 2013 default after the March 2018 dismissal. See § 95.11(2)(c), Fla. Stat. (2013).

As we did in Linner, we certify conflict with the First District and the Third District on the application of Kozel to dismissals without prejudice. See HSBC Bank USA v. Cook, 178 So. 3d 548 (Fla. 1st DCA 2015); BAC Home Loans Servicing L.P. v. Parrish, 146 So. 3d 526 (Fla. 1st DCA 2014); BAC Home Loans Servicing, L.P. v. Ellison, 141 So. 3d 1290 (Fla. 1st DCA 2014); Fed. Nat'l Mortg. Ass'n v. Wild, 164 So. 3d 94 (Fla. 3d DCA 2015).

Affirmed; conflict certified.

VILLANTI and SLEET, JJ., Concur.