



IT IS ORDERED as set forth below:

Date: August 5, 2014

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re)	Case No. 12-56011-MGD
)	
FOLASADE THERESA ADELUOLA,)	Chapter 13
)	
Debtor.)	Judge Mary Grace Diehl
)	
FOLASADE THERESA ADELUOLA,)	
)	
Plaintiffs,)	Adversary Proceeding
)	No. 14-05161
v.)	
)	
COMMUNITY & SOUTHERN BANK,)	
)	
Defendant.)	
)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Before the Court is Defendant Community & Southern Bank's motion to dismiss. (Docket No. 4). Defendant seeks to dismiss this action based upon the operation of Rule 41(a)(1)(B) of the

Federal Rules of Civil Procedure and made applicable to an adversarial proceeding under Federal Rules of Bankruptcy Procedure Rule 7041. Because the facts do not support a prior dismissal with prejudice under Rule 41(a)(1)(B), Defendant's motion to dismiss is **DENIED**.

This matter is a core proceeding under 28 U.S.C. § 157(b)(2); jurisdiction over this action is provided under 28 U.S.C. § 1334(b); and venue is proper.

Plaintiff was originally a tenant in a shopping center building, which Defendant held a security interest. The building was foreclosed upon and purchased by Defendant in April of 2011. Defendant initiated a dispossessory against Plaintiff, which was unanswered. Defendant obtained a writ and an eviction took place in April of 2012. About a month later, Plaintiff filed a wrongful eviction action against Defendant in the Northern District of Georgia, which was dismissed by court order ("First Dismissal"). The District Court's order of dismissal was based upon Plaintiff's failure to amend her complaint as ordered. Plaintiff later filed another lawsuit in the Superior Court of Cobb County, which sought damages based upon a claim of wrongful eviction. Plaintiff voluntarily dismissed the Cobb County action in March of 2013 ("Second Dismissal").

Defendant asserts in its motion to dismiss that the Second Dismissal resulted in a dismissal with prejudice by operation of Rule 41(a)(1)(B).¹ This is commonly referred to as the "two dismissal

¹Rule 41(a) Voluntary Dismissal reads:

(1) By the Plaintiff.

A. Without a Court Order, Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

i. a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

rule.” Since the two dismissal rule operates as an adjudication on the merits, it is strictly construed. *E.g., Manze v. State Farm Ins. Co.*, 817 F.2d 1062, 1066 (3d Cir.1987). The party seeking to invoke Rule 41(a)(1) bears the burden of proof. *E.g., In re Chi-Chi's, Inc.*, 338 B.R. 618, 622 (Bankr. D. Del. 2006).

Defendant has not adequately established that the two dismissal rule impacts this action. The Second Dismissal does not implicate Rule 41(a)(1)(B) because the First Dismissal was made by court order. In *ASX Inv. Corp. v. Newton*, 183 F.3d 1265 (11th Cir. 1999), the Eleventh Circuit Court of Appeals held that a dismissal by plaintiff's motion and court order does not implicate the two dismissal rule. Reversing the lower court, the Court of Appeals held that the appellant's dismissal of the second case was not an adjudication on the merits under Rule 41(a)(1) because the first case was dismissed by motion and order of the court and not by plaintiff. *Id.* at 1269. The Court distinguished between dismissal by a plaintiff and dismissal by court order stating:

The two dismissal rule . . . is implicated when ‘a plaintiff . . . has once dismissed’ a claim . . . Dismissal on plaintiff's motion and by order of court, on the other hand, is provided for in Rule 41(a)(2) . . . There is no two dismissal rule set out in Rule 41(a)(2) and we see no

ii. a stipulation of dismissal signed by all parties who have appeared.

B. Effect. Unless the notice or stipulation states otherwise, *the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.*

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

FED. R. CIV. P. 41(a)(1) (Emphasis added).

basis for reading the two dismissal rule to apply where the first dismissal is achieved by motion and order of the court.

Id. at 1267-8. Since the First Dismissal was effectuated by the District Court's Order, the voluntary dismissal in the Cobb County action does not equate to a dismissal with prejudice under Rule 41(a)(1)(B). Accordingly, it is

ORDERED that Defendant's Motion to Dismiss is **DENIED**.

The Clerk is directed to serve a copy of this Order on Plaintiff, Defendant, and Defendant's counsel.

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