

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

JP Morgan Chase Bank, National Association,

Plaintiff,

v.

Jacek Windak and Unknown Owners and Non-record Claimants,

Defendants.

No. 11 CH 7952

**MEMORANDUM OPINION AND ORDER**

The favorable pleading and inferential presumptions a plaintiff enjoys in opposition to a motion to dismiss do not excuse inadequate fact pleading in the complaint. Here, JP Morgan Chase's complaint does not allege that Windak had breached his promissory note before June 1, 2010. While that fact may be true, Windak's motion to dismiss is granted without prejudice so that JP Morgan Chase may plead additional facts to support its foreclosure action.

**FACTS**

On December 13, 2007, Windak executed a \$258,000 promissory note with JP Morgan Chase secured by a mortgage on the property at 1915 North 72nd Court, Elmwood Park, Illinois. On March 2, 2011, JP Morgan Chase filed a complaint to foreclose on the note and mortgage, alleging that Windak had not paid "the monthly installments of principal, taxes, interest and insurance for 06/01/2010, through the present. . . ." Cmplt. at ¶ 3(J). Windak filed a motion to dismiss the complaint and attached exhibits showing a payment history from May 2010 into early 2011. JP Morgan Chase responded to the motion, and Windak replied.

**ANALYSIS**

Windak brings his motion to dismiss under Code of Civil Procedure section 2-619(a)(9) and attaches the required affidavit. 735 ILCS 5/2-619(a)(9). Such a motion admits a plaintiff's claims are legally sufficient but asserts defects or defenses that defeat the claim. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). A court is to construe the pleadings and supporting documents in a light most favorable to the nonmoving party, *Czarowski v. Lata*, 227 Ill. 2d 364, 369 (2008), and to accept as true in the plaintiff's favor all well-pleaded facts and all reasonable inferences. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008).

Windak's argument is a simple one: the payment history attached as exhibits to his motion and averred to in his affidavit defeat JP Morgan Chase's claim that he had defaulted on the note beginning June 1, 2010. Windak's documents support his argument. They indicate a continuous payment history from May to November 2010. After that point, JP Morgan Chase

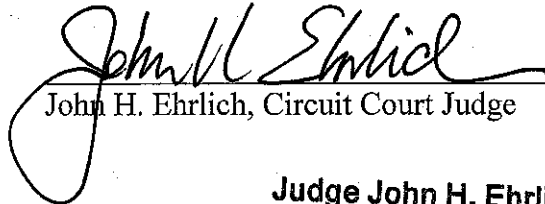
returned Windak's checks, indicating in letters that he had insufficient funds to cure his default, but without providing any additional information about when the alleged default occurred.

In response to this paper trail, JP Morgan Chase argues that Windak "completely fails to provide any further documentation which predates the alleged date of default that would indicate he was current on his payments." Resp. Br. at 4. That argument is faulty because it improperly seeks to employ the favorable presumption a plaintiff enjoys on a motion to dismiss as an excuse for insufficient fact pleading. The law requires that a court give deference only to well-pleaded facts and reasonable inferences. While it may be true that Windak had failed to make monthly payments before June 1, 2010 and was, therefore, in default as of that date, the complaint fails to allege any facts in that regard or from which such a default may be inferred. Those missing facts are certainly within JP Morgan Chase's possession and should be easy to introduce in an amended pleading.

For that reason, it is ordered that:

1. Windak's motion to dismiss the complaint is granted without prejudice;
2. JP Morgan Chase is given leave until May 28, 2013 to file an amended complaint;
3. Windak is given until June 18, 2013 to file a responsive pleading; and
4. the May 29, 2013 status date is stricken.

Dated: 7 May 2013



John H. Ehrlich, Circuit Court Judge

**Judge John H. Ehrlich**

**MAY 07 2013**

**Circuit Court 2075**