

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE BANK OF NEW YORK MELLON
formerly known as the Bank of New York
on behalf of CIT Mortgage Loan Trust 2007-1,

Plaintiff,

OPINION AND ORDER

10-cv-765-slc¹

v.

JOHN A. GLAVIN, GABRIELLE GLAVIN,²
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. as nominee for Accredited
Home Lenders, Inc., UNIFUND CCR PARTNERS,
CITIBANK (SOUTH DAKOTA) N.A., UNITED
STATES OF AMERICA and WISCONSIN RIVER
CO-OP SERVICES,

Defendants.

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Defendant John A. Glavin has filed a notice of removal of a state foreclosure action filed in the Circuit Court for Juneau County, Wisconsin. In his notice of removal, defendant Glavin invokes the court's diversity jurisdiction. In a May 10, 2011 order, I noted two problems with the notice of removal: (1) it was unclear whether the court could exercise diversity jurisdiction over the case given that the United States of America is listed as a

¹ For the purposes of issuing this order, I am assuming jurisdiction over the case.

² For the sake of clarity, I will refer to defendant John Glavin as "defendant Glavin" throughout this opinion. I will refer to defendant Gabrielle Glavin by her full name.

defendant; and (2) even if the United States's presence in the lawsuit does not doom defendant Glavin's notice of removal, it was not clear whether there was complete diversity of the parties.

In order to resolve these issues, I asked the parties to submit briefs on the question whether the United States was an "indispensable" party, which would mandate remand of the action because federal courts cannot exercise diversity jurisdiction over cases involving the United States. Also, I asked defendant Glavin to submit a supplement to his notice of removal verifying the citizenship of every party in this case other than himself and defendant Gabrielle Glavin. Finally, because it appeared that the state court may have proceeded with the foreclosure action even after receiving defendant Glavin's notice of removal, leading to the possibility that the state court judgment was void, I asked the parties to provide further information on this issue and asked the state court for the record of proceedings.

Plaintiff Bank of New York Mellon and defendants Glavin and the United States have filed their responses. (The United States filed its brief a day after the May 24, 2011 deadline, along with a motion for leave to file past the deadline. The Assistant United States Attorney assigned to the case provides an affidavit explaining his large caseload and miscommunications with the Department of Justice that led to the late filing. I will grant the United States' motion for leave to file its brief past the deadline.) Also, plaintiff has filed a motion to remand the case to state court based on defects in the notice of removal. Plaintiff acknowledges that its motion was filed more than 30 days after defendant Glavin's notice of removal, but argues that its deadline to file the motion to remand should be

equitably tolled.

After considering the materials submitted by the parties, I conclude that the issue of diversity jurisdiction is irrelevant because the court has federal question jurisdiction over plaintiff's claim against the United States and may exercise supplemental jurisdiction over the remainder of plaintiff's claims. Further, I will have the parties brief the issue of equitable tolling before ruling on plaintiff's motion to remand.

OPINION

Defendant Glavin premises the removal of this case on this court's diversity jurisdiction over the foreclosure action. In the court's May 10, 2011 order, I questioned whether the court could exercise diversity jurisdiction over the case in part because the United States is a defendant. The parties have now briefed the issue whether the United States is an indispensable party and thus must stay in the case rather than be dropped under Fed. R. Civ. P. 21 to maintain diversity jurisdiction.

Although plaintiff, defendant Glavin and defendant United States all seem to agree that the United States is an indispensable party (even Glavin states that "the evidence clearly shows that [the United States] is [an indispensable party] for a variety of reasons"), further consideration of jurisdictional issues leads me to believe that this court has subject matter jurisdiction over the case even if the United States remains in the case. This is so because, to the extent plaintiff seeks judgment stating that the United States' interest in the property is subordinate to plaintiff's interest, plaintiff brings a federal claim against the United States.

Pacific Mutual Life Insurance Co. v. American National Bank & Trust Co., 642 F. Supp. 163, 164 (N.D. Ill. 1986) (a “suit to determine the validity and priority of [a] federal lien turns on and arises under federal tax laws . . .”); U.S. Bank N.A. v. Erakovich, 2010 WL 4877011, *1 (N.D. Ill., Nov. 24, 2010) (“jurisdiction . . . lie[s] under 28 U.S.C. § 1340, which provides that ‘[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue’”). In addition, independent of a diversity jurisdiction analysis, this court may exercise supplemental jurisdiction over plaintiff’s claims against the remainder of the defendants. Erakovich, 2010 WL 4877011 at *2 (“Section 1340 provides federal question jurisdiction over U.S. Bank’s claim against the United States, and U.S. Bank’s state law foreclosure claims against Erakovich indisputably are part of the “same case or controversy” as the federal claim.”); Fritz v. Coffey, 2008 WL 2444552, *3 (N.D. Ind. June 16, 2008) (asserting jurisdiction over state law claims closely related to claim that plaintiff’s lien has priority over federal tax liens).

However, the fact that this court has subject matter jurisdiction over the case does not end the analysis. Plaintiff has filed a motion to remand the case to state court, arguing that defendant Glavin has failed to comply with various requirements of the removal statutes.

Plaintiff sets out the following grounds:

1. The notice of removal was not filed within 30 days after defendant Glavin’s receipt of plaintiff’s original complaint, as required by 28 U.S.C. § 1446(b).
2. The notice of removal was defective because it did not contain a short and plain statement of the grounds for removal, as required by 28 U.S.C. § 1446(a).
3. Removal on diversity grounds is prohibited by a defendant who is a citizen

of the state in which the original action is brought, pursuant to 28 U.S.C. § 1441(b).

4. The notice of removal was filed more than one year after commencement of the action, making the diversity action non-removable pursuant to 28 U.S.C. § 1446(b).

5. Defendant Glavin failed to give plaintiff notice of the removal of this action, as required by 28 U.S.C. § 1446(d).

6. Defendant Glavin failed to provide a complete jurisdictional citizenship analysis to determine whether diversity jurisdiction exists.

I need not discuss every ground raised by plaintiff; for instance, grounds three, four and six are irrelevant given that the case is removable under federal question and supplemental jurisdiction. However, there is no question that defendant Glavin's notice of removal is defective because it was not filed until December 3, 2010, more than 30 days after his receipt of the complaint. According to the state court record, plaintiff's complaint was filed on September 4, 2009. Defendant Glavin filed his answer on September 28, 2009, eliminating any doubt that he received the complaint more than 30 days before he filed his notice of removal in December 2010. His notice of removal is defective.

This defect would usually force remand to the state court. However, objections to defects in the removal procedure are normally waived unless they are made within thirty days after the filing of the notice of removal. 28 U.S.C. § 1447(c); Western Securities Co. v. Derwinski, 937 F.2d 1276, 1279 (7th Cir. 1991). Defendant Glavin filed his notice of removal on December 3, 2010, and plaintiff filed its motion to remand on June 6, 2011.

Plaintiff explains the seven-month gap by stating that it did not become aware of the

notice of removal until May 13, 2011, when it received this court's May 10, 2011 order. (It is unclear why this is so given that the electronic state court record indicates that defendant Glavin filed notice of his removal in that court on December 6, 2010.) Plaintiff states that it "should not be prejudiced" by defendant Glavin's failure to provide notice. I understand plaintiff to be seeking equitable tolling of the 30-day deadline to file its motion to remand. Roe v. O'Donohue, 38 F.3d 298, 302 (7th Cir. 1994) (assuming that the "30-day period [of section 1447(c)] is subject to equitable tolling and estoppel"). Accordingly, I will direct the parties to brief the issue whether equitable tolling should apply to plaintiff's deadline. Because plaintiff raises a factual issue concerning when it received notice of defendant Glavin's removal, the parties should submit affidavits or other evidence establishing when this notice occurred. I will give plaintiff until October 26, 2011 to submit a brief and supporting evidence. Defendant Glavin will have until November 9, 2011 to file a response. The other defendants are not required to submit briefs on the issue. If they choose to do so, their deadline is October 26, 2011, so that defendant Glavin may respond.

ORDER

IT IS ORDERED that

1. Defendant United States of America's motion to file a late response to the court's May 10, 2011 order, dkt. #6, is GRANTED.
2. A decision on plaintiff Bank of New York Mellon's motion to remand the case to state court, dkt. #11 is STAYED pending briefing on the issue of equitable tolling. Plaintiff

may have until October 26, 2011 to submit a brief and supporting evidence. Defendant Glavin will have until November 9, 2011 to file a response. The other defendants are free to submit briefs on this issue by October 26, 2011, but they are not required to do so.

Entered this 13th day of October, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge