

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.

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 an October 13, 2011 order, I set further briefing on the issue whether plaintiff The Bank of New York Mellon's 30-day deadline to file its motion to remand, 28 U.S.C. § 1447(c), should be equitably tolled. After considering the materials submitted by the parties, I conclude that the deadline should be

¹ For the purpose 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.

tolled and that plaintiff's motion for remand is timely. Further, because plaintiff's motion for remand properly raises defects in the notice of removal, I will grant the motion and remand the case to state court.

OPINION

Defendant Glavin filed his notice of removal in this court on December 3, 2010. According to Wisconsin's electronic circuit court database, he filed the notice of removal with the Circuit Court for Juneau County on December 6, 2010. Wisconsin Consolidated Court Automation Programs, <http://wcca.wicourts.gov> (last visited May 13, 2012). Plaintiff did not file its motion to remand the case in this court until June 6, 2011. Ordinarily, objections to defects in the removal procedure are waived unless they are made within 30 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). Plaintiff seeks equitable tolling of the 30-day limit, asserting 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 in this case.

Equitable tolling is appropriate in "extraordinary circumstances," Savory v. Lyons, 469 F.3d 667, 673 (7th Cir. 2006), that are "far beyond a litigant's control." United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (cautioning that equitable tolling is applied "sparingly"). The Court of Appeals for the Seventh Circuit has suggested that equitable tolling could apply to the 30-day limit under § 1447. Roe v. O'Donohue, 38 F.3d 298, 302 (7th Cir. 1994) ("We may assume that the 30-day period [of section 1447(c)] is

subject to equitable tolling and estoppel, so that a defendant's misrepresentation may be challenged when the truth comes out.”) abrogated on other grounds by Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999). There seems to be no reason that this doctrine should not apply to this 30-day limit. If not, a cagey defendant could conceal defects in a notice of removal or even the fact that a case has been removed, with no consequence once the 30-day limit has passed.

This leaves the question whether the doctrine should apply to this case. Defendant Glavin has submitted an affidavit indicating that he sent the notice of removal to counsel for plaintiff via priority mail. Attached to the affidavit is a certificate of mailing dated December 3, 2010 and a receipt from the U.S. Postal Service postmarked December 3, 2010 and bearing a correct address for plaintiff's counsel. Usually, evidence of mailing creates a presumption that the item has been delivered. Vincent v. City Colleges of Chicago, 485 F.3d 919, 922 (7th Cir. 2007).

However, Gunar Blumberg, counsel for plaintiff, maintains that defendant Glavin never gave him notice of removal. He has submitted an affidavit stating that he was not aware of the removal until he received this court's May 10, 2011 order on May 13, 2011. Further, he states that neither he nor anyone in his office had reason to check the Wisconsin circuit court database, where he would have seen that defendant Glavin had filed his notice of removal in that court on December 6, 2010, because plaintiff's motion for summary judgment in state court was uncontested and the December 7, 2010 judgment of foreclosure entered by the court and sent to plaintiff via U.S. mail provided for a six-month redemption

period, meaning that no foreclosure sale could be held until six months after the judgment. (As I stated in the May 10, 2011 order in this case, it appears that the state court issued this judgment after receiving Glavin's notice of removal, but whether or not this judgment is void, plaintiff has shown why he would have had no reason to check the online docket for the state court case.)

The evidence submitted by the parties seems to conflict; defendant Glavin has evidence that he mailed the notice of removal, but plaintiff has evidence in the form of Blumberg's affidavit that it never received the document. The only way to reconcile these facts is to accept the possibility that both parties are telling the truth and that the notice of removal never arrived at its intended destination. Because plaintiff was never aware of the notice of removal for no fault of its own, I conclude that this is the type of extraordinary circumstance in which equitable tolling should be applied to the 30-day deadline to file a motion to remand under 28 U.S.C. § 1447(c). Because plaintiff filed its motion to remand within 30 days of becoming aware of the notice of removal on May 13, 2011, I conclude that the motion is timely.

Turning to the substance of plaintiff's motion for remand, I have already concluded in an order entered on Oct. 13, 2011 that plaintiff pointed out at least one defect in defendant Glavin's notice of removal:

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.

Oct. 13, 2011 Op. and Order, dkt. #14, at 5. Because defendant Glavin failed to file his notice of removal within the 30 days provided under 28 U.S.C. § 1446(b), his case must be remanded to state court.

ORDER

IT IS ORDERED that

1. Plaintiff The Bank of New York Mellon's motion to remand this action, dkt. #11, is GRANTED. This case is REMANDED to the Circuit Court for Juneau County, Wisconsin.

2. The clerk of court is directed to return the record to the state court.

Entered this 15th day of March, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge