

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

CHARLES E. HEATH,

Plaintiff,

v.

FRANKLIN CREDIT MANAGEMENT CORP.,
TIM McNURLEN, PARK BANK, and
ADVANTAGE AMERICA TITLE &
CLOSING SERVICES, INC.,

Defendants.

OPINION AND ORDER

11-cv-409-bbc

In April 2011, Charles E. Heath brought a state court action against two entities, WMC Mortgage Corp. and Franklin Credit Management Corp., alleging that they were holders of mortgages granted to his estranged wife that she obtained through forgery. Defendant WMC Mortgage removed the case from the Circuit Court for Dane County, Wisconsin, to this court, with the consent of defendant Franklin Credit. Defendant WMC Mortgage alleged that diversity jurisdiction existed under 28 U.S.C. § 1332 because plaintiff was a citizen of Wisconsin and neither defendant was incorporated here or had its principal place of business here. After the case was removed, plaintiff moved to amend the complaint

to add as defendants Tim McNurlen, Park Bank and Advantage America Title & Closing Services, Inc. The latter two defendants answered the amended complaint. Defendant McNurlen moved to dismiss the complaint against him, arguing that it did not state a cause of action against him. On September 29, 2011, plaintiff dismissed defendant WMC Mortgage Corp. by stipulation. On October 12, 2011, plaintiff moved for leave to file a second amended complaint, adding GMAC Mortgage Corp. as a defendant. The motion was opposed by defendants McNurlen and Advantage America.

Before I could address defendants' motion to dismiss or plaintiff's motion to amend, it was necessary to determine that the court had jurisdiction to hear the case. In an order entered on November 3, 2011, I gave plaintiff an opportunity to prove that this court had jurisdiction over his complaint against defendants Franklin Credit Management Corp., Tim McNurlen, Park Bank and Advantage America Title & Closing Services, Inc. or to show that the court should permit joinder under 28 U.S.C. § 1447, in which case the entire suit would be remanded to state court. Subsection (e) of § 1447 gives a court two options when a plaintiff in a removed case seeks to add additional defendants whose joinder would destroy subject matter jurisdiction. One is to deny joinder of the additional non-diverse defendants and keep the case in federal court; the other is to permit joinder and remand the case.

Plaintiff responded to the order on November 17, 2011. He did not make it any clearer whether he is a citizen of Wisconsin or merely a resident. He provided the court

information about proposed defendant GMAC Mortgage, LLC, but it is inadequate to show the citizenship of this defendant. Plaintiff did not say who the members of the LLC are or what their citizenship might be and no defendant has supplied the necessary information. For purposes of this motion, I will assume that its citizenship is not diverse and that the only defendant with citizenship diverse from plaintiff's is Franklin Credit.

On the question of joinder, plaintiff said that GMAC Mortgage was a necessary party to the case because it is the present assignee of one of the two mortgages at issue and appears to be the successor to the rights and liabilities of WMC Mortgage. He said also that his interests would be adversely affected if he had to proceed separately against this defendant because GMAC "is the apparent party in interest as to the holder of the note and mortgage and recipient of Plaintiff's payments." Dkt. #34 at 2.

Also in his response, plaintiff said that "[d]efendant McNurlen should be dismissed as a party to this proceeding." Id. I read this as equivalent to a stipulated dismissal of McNurlen. Under Fed. R. Civ. P. 41(a), a plaintiff may dismiss an action against one defendant without a court order if he does so before the defendant has filed an answer. Although the rule refers to "an action," the language has been held to apply to less than the entire case. 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2362 (3d ed. 2008).

Although plaintiff's showing on joinder is sparse, I am persuaded that the equities tip

in his favor. He is challenging the validity of two different mortgages, one of which is held by GMAC Mortgage and one by defendant Franklin Credit; both were allegedly obtained under the same circumstances: by his estranged wife, using a forged power of attorney. His motive for seeking joinder is a valid one; he would be prejudiced if joinder were disallowed; and his requests for amendment of his complaint were timely in relation to the removal of the case. (Defendant Advantage America argues that plaintiff's entire suit is untimely under Wisconsin's statute of limitations, Wis. Stat. § 893.43, because he waited to sue until more than six years after the allegedly invalid mortgages took effect, but that issue is one I cannot reach without jurisdiction.) I conclude that joinder should be permitted and the case remanded to state court. No good purpose would be served by requiring plaintiff to try the claims against GMAC Mortgage, Advantage America and Park Bank separately from the claim against defendant Franklin Credit. Central to all of them is plaintiff's claim of perjury and false swearing by his estranged wife; that issue should be decided by one court.

ORDER

IT IS ORDERED that

1. Defendant Tim McNurlen is dismissed from the case by stipulation; his motion to dismiss the complaint against him, dkt. ##23, and his motion for entry of an order dismissing the complaint against him, dkt. #29, are DENIED as moot;

2. Plaintiff Charles E. Heath's motion to file a second amended complaint, dkt. #30, adding GMAC Mortgage, LLC as a defendant is GRANTED;

3. Joinder is permitted of defendants Franklin Credit Management Services; Park Bank, Advantage America Title & Closing Services, Inc. and GMAC Mortgage LLC; and

4. The case is REMANDED to the Circuit Court for Dane County, Wisconsin.

Entered this 29th day of November, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge