

ENTERED

August 17, 2023

Nathan Ochsner, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

STEVEN DEMPSEY,
“Plaintiff,”

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY, et al.,
“Defendants.”

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Civil Action No. 1:23-cv-00056

ORDER

Before the Court is Defendant Deutsche Bank National Trust Company’s (“Defendant Deutsche Bank”) “Notice of Removal” (Dkt. No. 1).

I. PROCEDURAL BACKGROUND

Plaintiff filed this wrongful foreclosure lawsuit in state court, and Defendant Deutsche Bank removed it to this Court based on diversity jurisdiction.¹ Dkt. No. 1. All parties are Texas residents except for Defendant Deutsche Bank, a citizen of California. Dkt. Nos. 1 & 1-3. Defendant Deutsche Bank argued diversity jurisdiction existed because Defendants Febenz Investments, LLC, JACAP, LLC, Marcia Chapa, and Auction.com were fraudulently joined. Dkt. No. 1. Plaintiff did not challenge removal.

II. DISCUSSION

Courts have an affirmative duty to raise issues on subject matter jurisdiction sua sponte. *Burciaga v. Deutsche Bank Nat’l Tr. Co.*, 871 F.3d 380, 384 (5th Cir. 2017).

To remove a case based on diversity, a defendant must show that all the prerequisites of diversity jurisdiction in 28 U.S.C. § 1332 are satisfied. *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 572 (5th Cir. 2004). The district court cannot exercise jurisdiction over a suit in which any party has been improperly or collusively joined to manufacture federal diversity jurisdiction. *Id.* (citing 28 U.S.C. § 1359). A defendant has been fraudulently joined if “there is no possibility of recovery by the plaintiff against an in-state defendant.” *Smallwood*, 385 F.3d at 573.

¹ None of the other Defendants joined in the Notice of Removal (Dkt. No. 1) as required by 28 U.S.C. §§ 1446(a) and 1446(b). *See Palermo v. Letourneau Techs., Inc.*, 542 F. Supp. 2d 499, 504 (S.D. Miss. 2008) (discussing the Fifth Circuit’s imposition of the “rule of unanimity”). Still, failure “to join in the removal within the statutory thirty-day period is a non-jurisdictional defect that can be waived” if the plaintiff does not raise the issue. *Id.*

In analyzing whether a plaintiff has shown a reasonable possibility of recovery, the Court reviews the allegations of the complaint to determine whether it states a claim under state law against the in-state defendant. *Menendez v. Wal-Mart Stores, Inc.*, 364 Fed. Appx. 62, 69 (5th Cir. 2010) (per curiam) (quoting *Smallwood*, 385 F.3d at 573).

A wrongful foreclosure claim may be brought only against a mortgagee or trustee. *Miller v. Homecomings Fin., LLC*, 881 F. Supp. 2d 825, 829-30 (S.D. Tex. 2012); *Ricardo v. Bank of N.Y. Mellon*, No. H-16-3238, 2017 WL 3424975, at *10 (S.D. Tex. Aug. 9, 2017). It is clear from the pleadings that neither Defendants Febenz Investments, LLC nor JACAP, LLC are trustees or mortgagors. Dkt. No. 1-39 at 2. There is thus no reasonable possibility Plaintiff can establish a cause of action against these parties, and the Court cannot exercise subject matter jurisdiction over them.

III. CONCLUSION

For these reasons, Plaintiff's claims against Defendants Febenz Investments, LLC and JACAP, LLC are **DISMISSED**. The Clerk of the Court is **ORDERED** to close this case.

Signed on this 17 day of August, 2023



Rolando Olvera
United States District Judge