

Trust Company v. Burke, 655 Fed. Appx. 251 (5th Cir. 2016); (2) *Deutsche Bank National Trust Company v. Burke*, 902 F.3d 548 (5th Cir. 2018); (3) *Burke v. Ocwen Loan Servicing, L.L.C.*, 855 Fed. Appx. 180 (5th Cir. 2021); and (4) *Burke v. Ocwen Loan Servicing, L.L.C.*, No. 22-20504, 2023 WL 6374190 (5th Cir. Apr. 25, 2023).

2. Within the *latest* Complaint, Plaintiff requested affirmative and injunctive relief, damages, and court fees based upon the alleged violation of her due process rights by PHH in moving forward with the judicially authorized foreclosure (by the U.S. District Court for the Southern District of Texas) of Plaintiff's deed of trust. Plaintiff has also brought claims against what she describes as the "judicial machinery itself," namely those attorneys, law firms and judges who Plaintiff claims have either ruled against her (the judges and their staff) or taken legal action against her (all the mortgagee's attorneys) in connection with the foreclosure of Plaintiff's deed of trust.

3. As set out in PHH's Notice of Removal [Doc. 1], the state court action was properly removed by PHH based upon: (a) bankruptcy jurisdiction pursuant to 28 U.S.C. §1334, (b) federal question jurisdiction pursuant to 28 U.S.C. §1331, and (c) diversity jurisdiction pursuant to 28 U.S.C. §1332. The following goes into further specificity regarding each basis for removal:

- a. Bankruptcy Jurisdiction. Plaintiff had² an active bankruptcy case pending at the time of removal (filed on the eve of foreclosure). Plaintiff's claims in the instant lawsuit, seeking to stop foreclosure, are considered "core proceedings" under Title

² The Bankruptcy Court dismissed Plaintiff's most recent bankruptcy on April 1, 2024, due to Plaintiff's failure to comply with a deficiency order regarding her incomplete filing. *In Re Burke*, Case No. 24-30885; in the United States Bankruptcy Court for the Southern District of Texas. The Order of Dismissal included a bar that prevents Plaintiff from filing a new bankruptcy case until the filing fee for the second bankruptcy is paid. *Id.* This was Plaintiff's second attempt at filing for bankruptcy to stall the scheduled foreclosure sale of the Property.

11 of the Bankruptcy Code. District Courts such as the Court have original and exclusive jurisdiction of all cases under Title 11. *See*, 28 U.S.C. §1334.

b. Federal Question. In addition to the foregoing, federal question jurisdiction exists as Plaintiff alleges her due process rights were violated by the scheduling of a foreclosure sale during the pendency of a federal appeal (without bond) initiated by Plaintiff, with Plaintiff alleging that federal law and/or procedure exists to restrain such a sale. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. *See*, 28 U.S.C. §1331.

c. Diversity. PHH, Deutsche Bank as Trustee³ and Plaintiff are diverse and all other defendants (the attorneys, substitute trustee, and members of the judiciary) are all nominal parties whose citizenship should be disregarded. The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. *See*, 28 U.S.C. §1332.

4. Plaintiff advances a single reason in her “Emergency Motion to Remand” as to why PHH’s removal is allegedly improper. [Doc. 5] Plaintiff asserts only that the automatic bankruptcy stay (allegedly effective upon Plaintiff’s latest bankruptcy filing) works to prohibit PHH’s removal of the Plaintiff’s state court action to this Court. [Doc. 5]. Plaintiff is incorrect. As explained below, the automatic bankruptcy stay only works to stop suits “against bankrupt debtors, not suits filed by bankrupt debtors.” *See, McMillian v. MBank Fort Worth, N.A.*, 4 F.3d 362, 366 (5th Cir. 1993).

³ Deutsche Bank National Trust Company as Trustee for Residential Asset Securitization Trust 2007-A8 Mortgage Pass-Through Certificates Series 2007-H (“Deutsche Bank as Trustee”), improperly named herein as Deutsche Bank National Trust Company.

II. ARGUMENT AND AUTHORITIES

A. Standard of Review.

5. A case may be removed to federal court if the action is one over which the federal court possesses subject matter jurisdiction. 28 U.S.C. §1441(a). In an action that has been removed to federal court, a district court is required to remand the case to state court if, at any time before final judgment, it determines that it lacks subject matter jurisdiction. 28 U.S.C. §1447(c); see also *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 571 (2004); *In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 392 (5th Cir. 2009). When considering a motion to remand, “[t]he removing party bears the burden of showing that federal jurisdiction exists and that removal was proper.” *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002); accord *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).⁴

B. Automatic Stay Provision of 11 U.S.C. §362(a)(1) Does Not Prohibit Removal.

6. The only argument expressed within Plaintiff’s Motion to Remand, challenging PHH’s removal of the case, is Plaintiff’s ill-conceived thought that the automatic bankruptcy stay⁵ works to prohibit removal of Plaintiff’s state court action. See Plaintiff’s Motion to Remand at P.3 [Doc. 5]. Plaintiff is incorrect. The automatic stay only stays actions “against a debtor” and not suits filed by bankrupt debtors. 11 U.S.C. § 362(a)(1).

7. The automatic stay provision of 11 U.S.C. § 362(a)(1) forbids “the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that

⁴ Plaintiff does not challenge removal for any reason asserted in PHH’s Notice of Removal [Doc. 1]. As such, PHH does not address bankruptcy jurisdiction, federal question jurisdiction and/or diversity jurisdiction within this Response as Plaintiff has not attacked those bases for removal. Instead, Plaintiff alleges that an independent reason exists, the existence of her bankruptcy stay, that works to prohibit removal. For sake of judicial economy, PHH’s Response is limited to the singular issue raised by Plaintiff’s Motion to Remand. PHH will certainly provide supplemental briefing upon the Court’s request should the Court desire more information than set out within the Notice of Removal regarding the existence of federal question jurisdiction and diversity jurisdiction.

⁵ See 11 U.S.C. §362(a)(1).

was or could have been commenced before the commencement of the [bankruptcy case], or to recover a claim *against the debtor* that arose before the [bankruptcy case].” 11 U.S.C. § 362(a)(1)(emp. added). As explained by the United States District Court for the Northern District of Texas in *Stafford v. Wilmington Trust*, “‘Against the debtor’ means that Congress intended only to stay suits filed against bankrupt debtors, not suits filed by bankrupt debtors.” *Stafford v. Wilmington Trust*, 2023 U.S. Dist. LEXIS 16588, 2023 WL 1421564 (N.D. Tex. 2023); *relying on, McMillan*, 4 F.3d at 366; *see also In re Merrick*, 175 B.R. 333, 336 (B.A.P. 9th Cir. 1994) (“[T]he stay is inapplicable to postpetition defensive action in a prepetition suit brought by the debtor.”).

8. *Stafford* adhered to the Fifth Circuit’s holding in *McMillan*. *McMillan*, 4 F.3d at 366. Therein, the Fifth Circuit explained bluntly,

As the statute clearly indicates, § 362(a) only stays those “proceedings against the debtor,” *see Freeman v. Commissioner of Internal Revenue*, 799 F.2d 1091, 1092-93 (5th Cir. 1986), thereby “protecting the debtor’s assets, providing temporary relief from creditors, and furthering equity of distribution among the creditors by forestalling a race to the courthouse.” *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir.1985).

Id. (emp. added).

9. In seeking to determine whether a continuing proceeding, such as the removal of an action, is deemed to be an action against a debtor, the Fifth Circuit explained in *McMillian* that courts are to examine the posture of the case at the initial proceeding. *Id.* Expressly rejecting Plaintiff’s argument herein, the Fifth Circuit has held, “**where an action is brought by the debtors at the initial proceeding, the appeal of that action is not a continuing proceeding against the debtors.**” *McMillian*, 4 F.3d at 366; *relying on, Freeman v. Commissioner of Internal Revenue*, 799 F.2d 1091, 1092-93 (5th Cir. 1986). In accordance with 11 U.S.C. § 362(a)(1) and court’s analysis thereof, while Joanna Burke’s second bankruptcy may have acted as a bar to the

pending foreclosure, or to PHH seeking any affirmative relief in this lawsuit, there is no bar to PHH's defense of this case. There is no dispute that the present action was commenced *by Joanna Burke* and not against Joanna Burke. PHH is permitted to defend itself against claims of Joanna Burke, regardless of whether she has filed a bankruptcy triggering the automatic stay. Joanna Burke initiated this proceeding and the automatic stay did not bar removal of this case.

III. Conclusion

10. Binding precedent on the Court dictates the denial of Plaintiff's motion to remand. The automatic stay provided to bankrupt debtors in 11 U.S.C. §362(a)(1) does not prohibit the removal of actions brought by debtors; the stay only prohibits actions against a debtor.

For each of the reasons set out above, PHH prays that the Court deny Plaintiff's Motion to Remand. [Doc. 5]. PHH Mortgage Corporation further requests the Court grant such other relief, in law or in equity, to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Civil Procedure, I certify that a true and correct copy of the foregoing has been sent on this the 5th day of April 2024 to all parties of record the method indicated below.

VIA E-SERVICE

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PRO SE PLAINTIFF

/s/ Mark D. Hopkins _____

Mark D. Hopkins