NOT RECOMMENDED FOR PUBLICATION

No. 21-1346

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIMONETTA VESPUCCI SUTTON, Plaintiff-Appellant, v. MOUNTAIN HIGH INVESTMENTS, LLC; INHERITANCE FUNDING GROUP I, LLC; PREMIUM HOMES REALTY, LLC; REALTY SHARES REO, LLC; BOWMAN K. MITCHELL, Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: COLE, GIBBONS, and ROGERS, Circuit Judges.

Simonetta Vespucci Sutton, a Michigan resident proceeding pro se, appeals the district court's order dismissing her complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2020, Sutton filed a state-court action seeking to quiet title and challenge the foreclosure of her home, and defendant Realty Shares REO, LLC removed the action to the district court. The relevant facts, as set forth in the pleadings and attached exhibits, are as follows. In 2009, Sutton and her husband purchased the property in Detroit, Michigan. In 2016, Sutton and her husband transferred the property to Sutton alone. On January 20, 2017, Sutton purportedly transferred the property to Mountain High Investments, LLC. On January 23, 2017, Mountain High Investments granted a mortgage on the property to Premium Homes Realty, LLC, which in turn assigned a 50% interest in the mortgage to Bowman K. Mitchell. On

May 19, 2017, Mountain High Investments sold the property to Inheritance Funding Group 1, LLC,[1] who obtained a mortgage loan from RS Lending, Inc. On October 27, 2017, RS Lending assigned its mortgage to Realty Shares. On August 16, 2018, after Inheritance Funding Group 1 defaulted on the mortgage loan, the Wayne County Sheriff's Office auctioned off the property, and a Sheriff's deed was executed in favor of Realty Shares.

On May 11, 2018, Sutton filed for Chapter 7 bankruptcy relief. In the Chapter 7 case, the trustee for Sutton's bankruptcy estate sued Mitchell, Mountain High Investments, Inheritance Funding Group 1, Premium Homes Realty, and Realty Shares to quiet title to the property. The bankruptcy court subsequently entered a default judgment against all of the defendants except Realty Shares, extinguishing any interest they had in the property. On July 2, 2019, the bankruptcy estate and Realty Shares settled the remaining claims, and the bankruptcy court ordered that Realty Shares had title to the property "free and clear" of any interest of Sutton, the bankruptcy estate, or the other defendants.

Sutton filed this complaint in state court on March 3, 2020, against those same defendants, generally alleging that the defendants refused to communicate with her and did not allow her to make monthly mortgage payments or to redeem the property before the redemption period expired. On June 23, 2020, Realty Shares removed the complaint to the district court based on diversity jurisdiction, asserting that none of the other defendants were properly joined. On the same day, Realty Shares moved to dismiss the complaint for failure to state a claim, arguing that Sutton had no legal interest in the property and that her claims were barred by res judicata. Sutton moved to remand to state court, arguing that the removal was untimely and that diversity jurisdiction did not exist because several defendants were located in Michigan.

The district court denied Sutton's motion to remand and granted Realty Shares's motion to dismiss. The district court held that the removal was timely because Realty Shares—the only proper defendant—had not been properly served. Relatedly, the district court set aside a state-court entry of default against Realty Shares. Finally, the district court dismissed the complaint

[1] According to the warranty deed, Sutton was the authorized signor for Mountain High Investments.

for failure to state a claim, concluding that the 2018 foreclosure extinguished any interest Sutton had in the property and that Sutton failed to allege any fraud or irregularities in the foreclosure proceeding.

On appeal, Sutton argues that Realty Shares failed to meet the statutory requirements for removal, that she was entitled to a default judgment, that the district court erred by dismissing her complaint, and that the district court improperly amended its judgment to dismiss without prejudice her claims against Mountain High Investments, Inheritance Funding Group 1, Premium Homes Realty, and Mitchell.

We review the denial of a remand motion de novo. *Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352, 357 (6th Cir. 2015). "[I]n reviewing the denial of a motion to remand, a court looks to 'whether the action was properly removed in the first place.'" *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871-72 (6th Cir. 2000) (quoting *Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996)). Likewise, we review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6). *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015). In determining whether a complaint states a claim, a court must construe the complaint in the light most favorable to the plaintiff, accept the factual allegations as true, and draw all reasonable inferences in the plaintiff's favor. *Id.* To survive a motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Exhibits attached to the complaint or the motion to dismiss may be considered "so long as they are referred to in the complaint and are central to the claims contained therein." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016). As a pro se litigant, Sutton is entitled to a liberal construction of her pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam).

Sutton's Motion to Remand

Sutton contends that the district court improperly denied her motion to remand because the notice of removal was untimely and diversity jurisdiction did not exist. A defendant is entitled to remove "any action brought in a State court" over which the federal district court would have "original jurisdiction." 28 U.S.C. § 1441(a). The notice of removal "shall be filed

within 30 days." *Id.* § 1446(b). The thirty-day period does not begin to run until the defendant is formally served; "mere receipt" is not sufficient. *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 348 (1999); *see Dernis v. Amos Fin.*, 701 F. App'x 449, 453 (6th Cir. 2017) (noting that the thirty-day removal period begins when the defendant "receives formal service of process" as provided by state rules).

Sutton contends that Realty Shares was served on March 27, 2020, and had thirty days from that date to effect removal. The district court correctly concluded, however, that Sutton failed to properly serve Realty Shares and that, as a result, the thirty-day period did not begin to run on that date. Michigan Court Rule 2.105(D), which governs service on corporations, requires personal service of the summons and complaint "on an officer, registered agent, director, trustee, or person in charge of an office or business establishment." *Bullington v. Corbell*, 809 N.W.2d 657, 662 (Mich. Ct. App. 2011) (citing Mich. Ct. R. 2.105(D)(1), (2)). Sutton argues that her service by certified mail was sufficient because it gave actual notice of the complaint, citing Michigan Court Rule 2.105(J)(3). But that provision, by its terms, pertains only to motions to dismiss based on improper service. Mich. Ct. R. 2.105(J)(3) (2020). And here, Realty Shares is not seeking dismissal based on improper service, so Rule 2.105(J)(3) does not apply. Rather, the issue is whether Realty Shares was properly served with the complaint so as to trigger the 30-day removal period. *See Murphy Bros.*, 526 U.S. at 348 (holding that the "mere receipt of the complaint unattended by any formal service" does not trigger the defendant's time to remove). And because Sutton did not serve personally serve Realty Shares as required by Rule 2.105(D), *see Bullington*, 809 N.W.2d at 662, the thirty-day period to remove the case did not commence. Accordingly, Realty Shares's removal of the complaint was timely. *See Dernis*, 701 F. App'x at 453.

Sutton next argues that diversity jurisdiction does not exist because several of the defendants—Mountain High Investments, Inheritance Funding Group 1, and Premium Homes Realty—are Michigan entities. The district court concluded, however, that none of these defendants were proper parties to the case because they have no interest in the property at issue and therefore that, under the doctrine of fraudulent joinder, their inclusion did not defeat

diversity jurisdiction. On appeal, Sutton simply asserts, without further argument, that the non-diverse defendants were properly joined. She has thus forfeited any challenge to the district court's determination that these defendants were fraudulently joined. *See Scott v. First S. Nat'l Bank*, 936 F.3d 509, 522 (6th Cir. 2019); *Geboy v. Brigano*, 489 F.3d 752, 766-67 (6th Cir. 2007).

In any event, the district court properly concluded that the non-diverse defendants were not proper parties and were thus fraudulently joined. *See Cline v. Dart Transit Co.*, 804 F. App'x 307, 310 (6th Cir. 2020) ("[F]raudulent joinder of non-diverse defendants will not defeat removal on diversity grounds." (quoting *Saginaw Hous. Comm'n v. Bannum, Inc.*, 576 F.3d 620, 624 (6th Cir. 2009))). "Fraudulent joinder occurs when the non-removing party joins a party against whom there is no colorable cause of action." *Id.* (quoting *Bannum*, 576 F.3d at 624). "The removing party bears the burden of demonstrating fraudulent joinder." *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 432 (6th Cir. 2012) (quoting *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994)).

As explained by the district court, the record shows that none of the Michigan defendants—Mountain High Investments, Inheritance Funding Group 1, and Premium Homes Realty—retain an interest in the property at issue. The bankruptcy court orders provided by Realty Shares reflect that, in 2018, the bankruptcy court issued a default judgment against all of the defendants except Realty Shares, providing that, as to those defendants, the property was deemed property of Sutton's bankruptcy estate. And in a subsequent order, the bankruptcy court ordered that that any interest in the property held by Sutton's bankruptcy estate be deemed abandoned. As a result, Realty Shares was the sole defendant with an interest in the property. Thus, the district court properly concluded that the other defendants were improperly joined and dismissed Sutton's claims against them without prejudice.

Sutton next argues that the district court erred by denying her request for default judgment and setting aside the state court entry of default against Realty Shares. Because Sutton does not meaningfully challenge the district court's reasoning, in particular its application of Federal Rule of Civil Procedure 55, she has forfeited this issue as well. *See Scott*, 936 F.3d

at 522. In any event, the district court did not abuse its discretion in setting aside the entry of default under Rule 55(c). *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("Under the *Erie*[2] doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."); *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 352 (6th Cir. 2003). Rule 55(c) allows a district court to set aside an entry of default for "good cause," a standard that gives a district court "considerable latitude." *Waifersong, Ltd v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992). In determining whether to set aside an entry of default, courts consider three factors: "(1) [w]hether culpable conduct of the defendant led to the default, (2) [w]hether the defendant has a meritorious defense, and (3) [w]hether the plaintiff will be prejudiced." *United States v. $22,050 U.S. Currency*, 595 F.3d 318, 324 (6th Cir. 2010) (quoting *Waifersong*, 976 F.2d at 292).

First, the district court properly set aside the default because there was no proper service. *See O.J. Distributing*, 340 F.3d at 355. Moreover, the three factors all weigh in favor of setting aside the default. The record does not suggest that Realty Shares's conduct led to the default, and it put forth a meritorious defense, i.e., that Sutton did not have an interest in the property. *See Davey v. St. John Health*, 297 F. App'x 466, 472 (6th Cir. 2008). Lastly, Sutton does not argue that she will be prejudiced by the district court's decision to set aside the default. Accordingly, the district court did not abuse its discretion when it set aside the state-court entry of default.

Realty Shares's Motion to Dismiss

In her complaint, Sutton asserted that she should be granted legal title to the property, that the foreclosure proceeding was wrongful, and that she had been denied the ability to make mortgage payments or redeem the property. The district court concluded, however, that Sutton could not challenge the 2018 foreclosure proceeding because that proceeding extinguished any interest Sutton had in the property and the six-month redemption period had expired. The district court further noted that, five months after the redemption period expired, the bankruptcy court

[2] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

held that Sutton had no interest in the property and ordered that Realty Share had title to the property "free and clear of any interest" of Sutton or any other party. According to Sutton, the district court erred in dismissing her complaint because she still retains an interest in the property at issue and the Sheriff's deed to the property is "void or voidable."

In a diversity case, we "appl[y] the substantive law of the forum state—in this case, Michigan." *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 358 (6th Cir. 2013) (citing *Savedoff v. Access Grp., Inc.*, 524 F.3d 754, 762 (6th Cir. 2008)); *see Erie,* 304 U.S. at 78. Michigan's foreclosure statutes "provide a mortgagor six months after the sheriff's sale in which to redeem the property." *Conlin*, 714 F.3d at 359 (citing Mich. Comp. Laws § 600.3240(8)). After the redemption period lapses, "the mortgagor's 'right, title, and interest in and to the property' are extinguished." *Id.* (quoting *Piotrowski v. State Land Office Bd.*, 4 N.W.2d 514, 517 (Mich. 1942)); *see* Mich. Comp. Laws § 600.3236. "Michigan courts have held that once the statutory redemption period lapses, they can only entertain the setting aside of a foreclosure sale where the mortgagor has made 'a clear showing of fraud, or irregularity.'" *Conlin*, 714 F.3d at 359 (quoting *Schulthies v. Barron*, 167 N.W.2d 784, 785 (Mich. Ct. App. 1969)); *see Sweet Air Inv., Inc. v. Kenney,* 739 N.W.2d 656, 659 (Mich. Ct. App. 2007) (per curiam). Furthermore, the alleged misconduct "must relate to the foreclosure procedure itself." *Conlin*, 714 F.3d at 360 (quoting *El-Seblani v. IndyMac Mortg. Servs.*, 510 F. App'x 425, 429-30 (6th Cir. 2013)). Plaintiffs must also show prejudice, i.e. that "they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Id.* at 361 (quoting *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d. 329, 336 (Mich. 2012)).

Sutton does not plausibly allege fraud or irregularity in the foreclosure proceeding itself. She generally asserts that the defendants refused to communicate with her when she tried to make mortgage payments and refused to let her redeem the property within the statutory timeframe. However, Sutton neither identifies a specific provision of Michigan's foreclosure statutes that Realty Shares purportedly violated nor alleges a defect in the actual foreclosure proceeding. Moreover, to the extent that Sutton alleges that she tried to continue making payments after the conclusion of her most recent bankruptcy proceeding, that proceeding

concluded after the redemption period expired. Because the statutory redemption period has lapsed and Sutton does not plausibly allege any fraud or irregularity in the foreclosure proceeding, the district court properly concluded that Sutton no longer has any interest in the property and cannot challenge the foreclosure sale. *See id.* at 359.

Moreover, Sutton does not adequately allege prejudice. Although Sutton contends that she attempted to make monthly payments to Realty Shares, she does not allege that she would have been able to pay the sum of the bid for the property, the mortgage interest from the date of the sale, and the sheriff's fee paid by Realty Shares. *See* Mich. Comp. Laws § 600.3240(2). Despite her assertion that she was prejudiced, Sutton failed to allege that she would have been in a better position to preserve her interest in the property absent any fraud or irregularity. *See Kim*, 825 N.W.2d at 337; *see also Elsheick v. Select Portfolio Servicing, Inc*, 566 F. App'x 492, 497 (6th Cir. 2014) (noting that a plaintiff must allege a plausible claim of prejudice when seeking to set aside a foreclosure under Michigan law). Because all of Sutton's claims depend on her interest in the property, which was eliminated by the foreclosure proceeding, the district court properly dismissed her complaint.

For the foregoing reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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Filed: March 01, 2022

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Re: Case No. 21-1346, Simonetta Sutton v. Mountain High Investments, LLC, et al
Originating Case No. 2:20-cv-11656

Dear Counsel and Ms. Sutton,

The Court issued the enclosed Order today in this case.

Sincerely,

s/Maria Welker
Case Manager
Direct Dial No. 513-564-7025

cc: Ms. Kinikia D. Essix

Enclosure

Mandate to issue