APPENDICES

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 20-11240

IN THE MATTER OF: WILLIAM PAUL BURCH

Debtor,

WILLIAM PAUL BURCH,

Appellant,

versus

AMERICA'S SERVICING COMPANY,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CV-939

ON PETITION FOR REHEARING

Before ELROD, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 28, 2022
Lyle W. Cayce
Clerk

No. 20-11240
Summary Calendar

IN THE MATTER OF WILLIAM PAUL BURCH,

Debtor,

WILLIAM PAUL BURCH,

Appellant,

versus

AMERICA'S SERVICING COMPANY,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CV-939

Before ELROD, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:*

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

William Paul Burch filed a civil action in Texas state court, asserting claims against America's Servicing Co. (ASC). After ASC removed the action to the United States Bankruptcy Court for the Northern District of Texas, Burch moved to have the case remanded to state court. The bankruptcy court denied the motion to remand and denied Burch's motion for reconsideration. Burch then appealed to the district court, which affirmed the bankruptcy court's denial of the motion to remand and dismissed Burch's appeal.

Burch timely appealed to this court. The district court denied Burch's motion to proceed in forma pauperis (IFP) on appeal. Burch now moves to proceed IFP. ASC has moved to dismiss the appeal for lack of jurisdiction; Burch opposes the motion to dismiss.

With regard to appeals from bankruptcy matters, the limits of this court's jurisdiction "are described by the unique jurisdictional relationship between the bankruptcy court and the district court, and by 28 U.S.C. § 158(d), which provides that 'courts of appeal shall have jurisdiction of appeals from all *final* decisions, judgments, orders, and decrees' of district courts or bankruptcy appellate panels." *Matter of First Fin. Dev. Corp.*, 960 F.2d 23, 25 (5th Cir. 1992) (emphasis in opinion). This court has jurisdiction "only if the underlying bankruptcy court order was final." *Id.* (internal quotation and citation omitted). Thus, "interlocutory orders of the bankruptcy court cannot appropriately be reviewed by courts of appeals, notwithstanding the discretion afforded by the Rules of Bankruptcy Procedure to the district court to entertain review of non-final orders." *Id.*

Here, the bankruptcy court had not disposed of the claims raised in Burch's civil action against ASC. Therefore, the bankruptcy court's denial of the motion to remand was an interlocutory order that this court lacks jurisdiction to review. *See id.*; *Matter of Burch*, 835 F. App'x 741, 746-47 (5th

Cir.), *cert. denied sub nom. Burch v. Freedom Mortg. Corp.*, 142 S. Ct. 253 (2021).

Accordingly, ASC's motion to dismiss is GRANTED, and the appeal is DISMISSED for lack of jurisdiction. Burch's IFP motion is DENIED. His motion to file an out-of-time reply to ASC's motion to dismiss is DENIED. Burch's motion to remand to the district court so that he can pay the filing fee is DENIED; his motion to withdraw the motion to remand is also DENIED.

Burch has previously been sanctioned for filing and pursuing frivolous appeals. *See Matter of Burch*, No. 20-11171, 2022 WL 212836, *1 (5th Cir. Jan. 24, 2022) (unpublished) (noting that Burch had previously been sanctioned in the amount of $100 and imposing an additional monetary sanction of $250). He is hereby WARNED that his continued pursuit of frivolous or abusive filings in this court, the district court, or the bankruptcy court will result in the imposition of further sanctions, including monetary sanctions, and he is admonished to review his pending appeals and to withdraw any appeals that are frivolous.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

WILLIAM PAUL BURCH,	§	
	§	
Appellant,	§	
	§	
v.	§	**Civil Action No. 4:20-cv-00939-O**
	§	
AMERICA'S SERVICING COMPANY,	§	
	§	
Appellee.	§	

ORDER

Before the Court is Appellant Burch's Bankruptcy Appeal, filed August 19, 2020. ECF No. 1. Burch filed his Opening Brief on October 28, 2020,[1] and Appellee America's Servicing Company ("ASC") filed its Brief on November 24, 2020. *See* ECF Nos. 22, 24. Having considered the briefing and applicable law, the Court **AFFIRMS** the Bankruptcy Court's order and **DISMISSES with prejudice** Burch's Appeal.

I. JURISDICTION

This is an interlocutory appeal of a Bankruptcy Court Order, so this Court exercises jurisdiction pursuant to 28 U.S.C. § 158(a).

II. UNDERLYING FACTS

This appeal arises from the Bankruptcy Court's August 12, 2020 Order, denying Burch's Motion for Reconsideration of its denial of his Motion to Remand and holding that it had jurisdiction to issue the previous orders in the action. *See* Not. Appeal, ECF No. 1-1. In 2006, Burch, a pro se litigant, borrowed $86,250, executing a promissory note and deed of trust in

[1] Because Burch is a pro se litigant, the Court liberally construes his briefing.

connection with the loan. ROA 136–38, 171–86. ASC later came to own and service the loan. *Id.* at 118. In 2008, Burch filed for Chapter 11 bankruptcy protection. *Id.*

Burch filed this lawsuit against ASC in state court on November 8, 2019, seeking to void the loan and recover either the property or alleged damages. *Id.* at 116, 120–30. Burch contends that the bankruptcy court confirmed a plan requiring ASC to issue a new note within six months with a new principal amount of $89,620 and an interest rate of 4.5% per year and that ASC failed to issue the new note as allegedly required. *Id.* (alleging violations of Tex. Prop Code § 53.160, Tex. Civ. Prac. Rem. Code §§ 12.002–003, and Tex. Bus. Comm. Code § 27.01; breach of contract; trespass to try title; and gross negligence). ASC removed the case to bankruptcy court on May 21, 2020, *id.* at 101, but Burch filed a motion to remand, maintaining that the removal was untimely and relying on his service of process through the Texas Secretary of State's Office. *Id.* at 385. On May 28, 2020, the bankruptcy court denied his motion. *Id.* at 397–401. Burch requested reconsideration of the denial on June 10, 2020, and the Court denied the request following a hearing on August 12, 2020. *Id.* at 3, 402. Burch appealed the bankruptcy court's denial of his motion for reconsideration. *Id.* at 1.

III. ISSUE ON APPEAL[2]

(1) Did the bankruptcy court properly exercise removal jurisdiction based on the timing of ASC's service of process and filing of its notice removal?

IV. STANDARD OF REVIEW

[2] Burch framed the issues before the Court differently, but the Court liberally construes his rendition of issues to find its cognizable legal issues: (1) "If a case does not meet the jurisdiction qualifications for a court must it be immediately remanded to the state court?", (2) "If the bankruptcy court does not have jurisdiction to hear the case, then do the merits of this case matter? A ruling without jurisdiction is void?", (3) "Is it true that for a Texas Deed of Trust to be valid, when secured by real estate, the promissory note must be valid?". Opening Br. 1, ECF No. 22.

When a district court reviews a bankruptcy court's decision, it functions as an appellate court and utilizes the same standard of review generally applied by a federal court of appeals. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992). In reviewing conclusions of law on appeal, a *de novo* standard of review is applied. *In re Young*, 995 F.2d 547, 548 (5th Cir. 1993); *In re Allison*, 960 F.2d 481, 483 (5th Cir. 1992). A bankruptcy court's findings of fact are subject to the clearly erroneous standard of review. *Young*, 995 F.2d at 548; *Allison*, 960 F.2d at 483. These findings are reversed only if, based on the entire body of evidence, the court is left "with the definite and firm conviction that a mistake has been made." *Id.*

V. ANALYSIS

Burch maintains that the bankruptcy court should have remanded this case because of a jurisdictional defect related to the timeliness of the removal. *See* Opening Br. 6–8, 16, ECF No. 22 ("ASC was served on March 13, 2020 [sic] under Texas Rules of Civil Procedure (TRCP) 106(a)(2). ASC removed the case to Federal Bankruptcy Court sixty-nine days later, May 21, 2018."). ASC asks the Court to decline consideration of this interlocutory appeal or alternatively to affirm the bankruptcy court's denial of reconsideration of the denial of Burch's Motion to Remand. Resp. 6–11, ECF No. 24. Having weighed the relevant factors, the Court concludes that review of the interlocutory order is appropriate here—namely because resolution of this appeal will materially advance the ultimate termination of this litigation. *See In re Genter*, No. 3:19-cv-01951-E, 2020 WL 3129637, at *1 (N.D. Tex. June 12, 2020). Thus, the Court turns to whether the bankruptcy court properly denied Burch's Motion for Reconsideration of Burch's Motion to Remand.

In the case of an interlocutory order, "Federal Rule of Civil Procedure 54(b) governs whether the court reconsiders its ruling." *S.E.C. v. Cuban*, 2013 WL 1091233, at *2 (N.D. Tex.

Mar. 15, 2013) (Fitzwater, C.J.) (citing *Dos Santos v. Bell Helicopter Textron, Inc. District*, 651 F. Supp. 2d 550, 553 (N.D. Tex. 2009) (Means, J.)); *see also Cabral v. Brennan*, 853 F.3d 763, 766 (holding that "[b]ecause the order granting partial summary judgment was interlocutory, the court should have analyzed the motion for reconsideration under Rule 54(b) instead of Rule 59(e), which applies to final judgment."). Pursuant to Federal Rule of Civil 54(b): "[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." "Although the precise standard for evaluating a motion to reconsider under Rule 54(b) is unclear, whether to grant such a motion rests within the discretion of the court." *Dos Santos*, 651 F. Supp. 2d at 553 (citation omitted). The court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Cuban*, 2013 WL 1091233, at *2 (citations omitted). Having reviewed the record, the Court finds that the bankruptcy court exercised its sound discretion to deny reconsideration of its denial of Burch's Motion to Remand. Accordingly, the Court **AFFIRMS** the Bankruptcy Court's order and **DISMISSES with prejudice** Burch's Appeal.

VI. CONCLUSION

For the foregoing reasons, the Court **AFFIRMS** the Bankruptcy Court's order and **DISMISSES with prejudice** Burch's Appeal.

SO ORDERED on this **9th day** of **December, 2020.**

APPENDIX D

The following constitutes the ruling of the court and has the force and effect therein described.

Signed October 5, 2020

Mark X. Mullin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

In re:	§	
	§	
William Paul Burch,	§	Case No. 12-46959-mxm-7
	§	
Debtor.	§	Chapter 7
	§	

	§	
William Paul Burch,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adversary No. 20-4039
	§	
America's Servicing Company,	§	
	§	
Defendant.	§	
	§	
	§	
	§	

ORDER GRANTING MOTION TO DISMISS

[Relates to Adv. ECF No. 31]

Before the Court is the motion to dismiss (the "***Motion to Dismiss***") under Federal Civil Rule 12(b)(6), filed by defendant America's Servicing Company ("***ASC***").[1] ASC asks the Court to dismiss for failure to state a claim *Plaintiff's Original Petition* (the "***Complaint***"),[2] filed by plaintiff William Paul Burch (the "***Plaintiff***" or the "***Debtor***"). For the reasons described below, the Court agrees that the Complaint fails to state a claim upon which relief can be granted, so the Motion to Dismiss is granted.

I. JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. § 1409(a).

II. PROCEDURAL BACKGROUND[3]

A. The Debtor's bankruptcy filings and confirmed plans

On December 1, 2008, the Debtor and Juanita Burch filed for Chapter 11 bankruptcy (the "***2008 Bankruptcy Case***") to prevent foreclosure on multiple properties, including property located at 2809 Harvest Lake Drive, Irving, Texas (the "***Harvest Lake Property***").[4]

On April 7, 2009, ASC, as servicer for US Bank National Association, as Trustee, successor-in-interest to Bank of America, National Association, as Trustee, successor by merger

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[1] *Defendant's Motion to Dismiss and Brief in Support Thereof,* Adv. ECF No. 31.

[2] Adv. ECF No. 1-3 at 7/84.

[3] The documents cited in this section are either referred to in, or attached to, the Complaint, or are matters of which this Court can take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2008) (directing courts to "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.").

[4] *See* Case No. 08-45761-RFN-11.

to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2006-11, filed proof of claim number 52-1 in the 2008 Bankruptcy Case, asserting a claim for $92,568.67 secured by a mortgage on the Harvest Lake Property.[5] Various loan documents were attached to the proof of claim, including a note and deed of trust (together, the "***Harvest Lake Loan Documents***").

On December 9, 2009, the Court entered an *Order Confirming Debtor's Third Amended Plan of Reorganization* (the "***2008 Bankruptcy Case Confirmation Order***"),[6] which confirmed the Debtors' *Fourth Amended Plan of Reorganization* (the "***2008 Bankruptcy Case Chapter 11 Plan***")[7] that is attached as Exhibit A to the 2008 Bankruptcy Case Confirmation Order. Section 5[8] of the 2008 Bankruptcy Case Chapter 11 Plan provided for treatment of the claims of ASC, which the plan listed as the "mortgage holder" on several properties.[9] The specific treatment as to the Harvest Lake Property was as follows:

> Based upon the Debtors' current value of the Harvest Lake property, the Debtors will enter into a New Harvest Lake Note in the original principal amount of $89,620 ("New Harvest Lake Note"). The New Harvest Lake Note shall bear interest at the rate of 4.5% per annum. The Debtors shall pay the New Harvest Lake Note in 360 equal monthly payments of $454 commencing on the Effective Date.[10]

No party appealed the 2008 Bankruptcy Case Confirmation Order. The 2008 Bankruptcy Case was closed on September 11, 2012.

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[5] Claim 52-1, Case No. 08-45761-RFN-11.

[6] ECF No. 246, Case No. 08-45761-RFN-11.

[7] *Fourth Amended Plan of Reorganization of William & Juanita Burch Pursuant to Section 1125 of the Bankruptcy Code Dated October 16, 2009*, ECF No. 244, Case No. 08-45761-RFN-11.

[8] There appears to be a typographical error in the 2008 Bankruptcy Case Chapter 11 Plan. What appears to be intended as Paragraph 5.6 is stated as "5."

[9] 2008 Bankruptcy Case Chapter 11 Plan § 5[.6] (Section 5[.6] of the 2008 Bankruptcy Case Chapter 11 Plan describes the treatment of the Harvest Lake Property which was subject to the lien of ASC).

[10] *Id.*

On December 28, 2012, Burch filed for Chapter 13 bankruptcy (the "***2012 Bankruptcy Case***").[11] The 2012 Bankruptcy Case was converted to Chapter 11 on December 23, 2013.[12]

On April 30, 2013, ASC, as servicer for U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2006-11, filed proof of claim number 16-1 in the 2012 Bankruptcy Case, asserting a claim for $108,583.39 secured by a mortgage on the Harvest Lake Property.[13] The Harvest Lake Loan Documents were attached to the proof of claim.

On January 5, 2016, the Plaintiff filed an amended Chapter 11 plan of reorganization (the "***2012 Bankruptcy Case Chapter 11 Plan***"),[14] and on February 1, 2016, the Court entered an order confirming that plan (the "***2012 Bankruptcy Case Confirmation Order***").[15] The 2012 Bankruptcy Case Chapter 11 Plan provided the following treatment of ASC's secured claim:

Class	Claim No.	Collateral	Amount of claim
2	16	2809 Harvest Lake	$108,583.39

. . . .

> The Class 2 Allowed Secured Claim of Specialized Loan Servicing LLC (hereinafter "SLS"),[16] on the Effective Date, the property located at 2809 Harvest Lake Drive, Irving, Texas 75060 (the "Harvest Lake Property") shall be

[11] *Voluntary Petition*, ECF No. 1, Case No. 12-46959.

[12] *Order Converting Case from Chapter 13 to Chapter 11*, ECF No. 100, Case No. 12-46959.

[13] Claim 16-1, Case No. 12-46959-mxm-7.

[14] *William Paul Burch's Amended Plan of Reorganization*, ECF No. 186, Case No. 12-46959.

[15] *Order Confirming Debtor's Plan of Reorganization*, ECF No. 188, Case No. 12-46959.

[16] The same section of the plan describes the secured claim filed by ASC, but it appears that SLS at some point took over as servicer. *See, e.g., Response to Amended Motion to Sell Real Property Located at 2809 Harvest Lake Free and Clear of Liens, Claims and Encumbrances*, ECF No. 210, Case No. 12-46959 (objecting to Debtor's proposed sale of Harvest Lake Property, which sale the Debtor later abandoned).

> surrendered to the holder of the Class 2 Allowed Secured Claim and shall be deemed paid in full. Upon the Effective Date the automatic stay shall lift without further order of this Court to allow SLS, or its assigns or successors in interest, to take any and all steps necessary to exercise any and all rights it may have in the Harvest Lake Property.[17]

The 2012 Bankruptcy Case Confirmation Order contained the same language regarding the treatment of the claim.[18]

Nothing in the 2012 Bankruptcy Case Chapter 11 Plan or Confirmation Order provided, or even suggested, that the Debtor was retaining any causes of action related to ASC or the Harvest Lake Property, including any claims related to language in the 2008 Bankruptcy Case Chapter 11 Plan or related to events that took place after confirmation of the 2008 Bankruptcy Case Chapter 11 Plan.

The 2012 Bankruptcy Case was converted to Chapter 7 on January 30, 2018 based in part on the Plaintiff's material defaults under the 2012 Bankruptcy Case Chapter 11 Plan.[19]

ASC's proof of claim 16-1 was later disallowed by the Court[20] after the Chapter 7 trustee objected to the claim on the grounds that the Harvest Lake Property had been foreclosed on.[21]

B. The Plaintiff's claims against ASC related to the Harvest Lake Property and ASC's related motion to dismiss

On November 8, 2019, the Plaintiff filed his Complaint in the 48th Judicial District Court of Tarrant County, Texas under Cause No. 048-313194-19 (the "***State Court Lawsuit***"). In the

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[17] 2012 Bankruptcy Case Chapter 11 Plan, at 10.

[18] 2012 Bankruptcy Case Confirmation Order, at 10.

[19] *Order Granting Specialized Loan Servicing LLC's Motion to Dismiss with Prejudice or to Convert to Chapter 7*, ECF No. 354, Case No. 12-46959; *see also* ECF No. 390, Case No. 12-46959, Transcript of 1/25/18 hearing on conversion, at 46-51.

[20] *Order Granting Trustee's Objection to the Proof of Claim of America's Servicing Company*, Case No. 12-46959, ECF No. 670.

[21] *Trustee's Objection to the Proof of Claim of America's Servicing Company*, Case No. 12-46959, ECF No. 629.

Complaint, the Plaintiff asserted claims against ASC (i) under Texas Property Code § 53.160 for an allegedly invalid lien; (ii) under Texas Civil Practice and Remedies Code section 12.003 for an alleged fraudulent lien; (iii) under Texas Business and Commerce Code section 27.01 for alleged statutory fraud; (iv) Breach of Contract; (v) Trespass to Try Title; (vi) under Texas Civil Practice and Remedies Code section 41.008 for alleged gross negligence and punitive damages. All the Plaintiff's claims stem from the servicing of the mortgage encumbering the Harvest Lake Property. The Plaintiff also sought pre- and post-judgment interest, attorney's fees, and costs.

On May 21, 2020, ASC removed the lawsuit to this Court.[22]

On September 7, 2020, ASC filed its Motion to Dismiss asking the Court to dismiss the Complaint pursuant to Federal Civil Rule 12(b)(6). Pursuant to L.B.R. 7007-1(e), the time for Plaintiff to have filed a response to the Motion to Dismiss was September 28, 2020. The Plaintiff has not filed a response to the Motion to Dismiss.

The Court has reviewed the parties' filings, and the matter is now ripe for decision.

III. ANALYSIS

Under the applicable standard for Federal Civil Rule 12(b)(6) motions, the Court must review the Complaint by "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff."[23] Viewing the facts in the light most favorable to the Plaintiff, the Court must dismiss the Complaint if it fails "to state a claim to relief that is plausible

[22] *Notice of Removal*, ECF No. 1.

[23] *Stokes v. Gann*, 498 F. 3d 483, 484 (5th Cir. 2007).

on its face."[24] Applying this standard, the Court will review each count in the Complaint to determine whether any count states a plausible claim for relief.

A. Preliminary observations and conclusions: Plaintiff's erroneous bankruptcy-related arguments

Before reaching the specific counts, the Court first will address allegations in the Complaint that infect the entire document with the Plaintiff's erroneous notions of an invalid or void note and deed of trust on the Harvest Lake Property. Paragraph 9.A. of the Complaint first cites section 5[.6] of the 2008 Bankruptcy Case Chapter 11 Plan (providing for payment of the "New Harvest Lake Note" in 360 equal monthly payments) for the proposition that "[t]he Mortgage Note was voided, and ASC was ordered to make a new Mortgage Note and Deed of Trust."[25] Paragraph 9.B. of the Complaint then cites sections 13.4 of the 2008 Bankruptcy Case Chapter 11 Plan for the proposition that "ASC had six months to replace the Note or lose the opportunity to do so permanently. (EXHIBIT C)."[26]

The Plaintiff's interpretation of the 2008 Bankruptcy Case Chapter 11 Plan is mistaken, and equally important, his arguments are foreclosed by the 2012 Bankruptcy Case Chapter 11 Plan and Confirmation Order.

Plaintiff's erroneous interpretation of 2008 Bankruptcy Case Chapter 11 Plan. First, the plan provisions do not support the Plaintiff's allegation that there will be no claim or lien on the Harvest Lake Property if new loan documents are not signed within six months. It is true that section 5[.6] of the plan states that "the Debtors will enter into a New Harvest Lake Note," but the

[24] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[25] Complaint ¶ 9.A.

[26] Complaint ¶ 9.B.

plan does not require that separate loan documents be drawn up. Instead, the 2008 Bankruptcy Case Chapter 11 Plan provides that "all Claims and Debts will receive the treatment afforded in Articles of this Plan,"[27] and with respect to the "Allowed Secured Claims of America's Servicing Company" relating to the Harvest Lake Property, the plan specifies the interest rate on the debt (4.5%), the number of monthly payments (360), and the monthly payment amount ($454).[28] The plan also contains notice and cure provisions dealing with payment defaults by the Plaintiff under the plan.[29] Moreover, the letter the Plaintiff alleges he sent on January 15, 2010 (attached to the Complaint as Exhibit D) suggests that the Plaintiff likewise believed the payment terms were addressed in the 2008 Bankruptcy Case Chapter 11 Plan.

Notwithstanding the plan provisions that dealt with payment terms and defaults, the Plaintiff cites section 13.4 of the 2008 Bankruptcy Case Chapter 11 Plan as evidence that the claim and lien on the Harvest Lake Property are somehow voided if new loan documents are not drafted within six months. The Plaintiff completely misconstrues this plan provision, which provides for the forfeiture of distributions that are unclaimed for six months.[30] This is a common provision in Chapter 11 plans and deals with the situation where a debtor mails a distribution check to a creditor on account of an allowed claim, and the creditor does not negotiate the check for six months. In that scenario, the distribution is forfeited back to the debtor. Section 13.4 has nothing at all to do with voiding a creditor's entire secured claim and lien.

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[27] 2008 Bankruptcy Case Chapter 11 Plan § 2.1.

[28] *Id.* § 5[.6].

[29] *See id.* §§ 9.2, 9.3.

[30] 2008 Bankruptcy Case Chapter 11 Plan § 13.4 ("Any distribution pursuant to this Plan which remains unclaimed for a period of six (6) months from the due date of such distribution is forfeited.").

In short, there is nothing in the 2008 Bankruptcy Case Chapter 11 Plan that provides for the voiding or disallowance of the claim and lien related to the Harvest Lake Property.

The Plaintiff's arguments are foreclosed by the 2012 Bankruptcy Case Chapter 11 Plan and Confirmation Order. In the Complaint, the Plaintiff alleges various claims based on actions or inactions that occurred after confirmation of the 2008 Bankruptcy Case Chapter 11 Plan. Even if such claims had merit (and as explained above, they do not), no such claims were preserved in the 2012 Bankruptcy Case Chapter 11 Plan, so the Plaintiff cannot raise them now.[31]

With these observations and conclusions in mind, the Court now turns to the specific counts in the Complaint.

B. Count 1: Texas Property Code § 53.160 Invalid Lien

This count alleges statutory violations of section 53.160 of the Texas Property Code based on alleged actions concerning the "invalid" note and mortgage on the Harvest Lake Property.

First, as explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Harvest Lake Property, so the Plaintiff's arguments about violations of Texas Property Code section 53.160 stemming from the allegedly invalid note and mortgage have no merit.

Second, section 53.160 of the Texas Property Code establishes a procedure for a property owner to have the validity of a mechanic's, contractor's, or materialmen's lien adjudicated on an expedited basis by filing a verified motion. The summary-motion procedure can be used only

[31] 11 U.S.C. § 1123(b)(3)(B) (providing for the "retention and enforcement" of claims in a plan); *see also In re United Operating, LLC*, 540 F.3d 351, 355-56 (5th Cir. 2008) (debtor lacks standing to pursue claims that are not specifically and unequivocally preserved in confirmed Chapter 11 plan).

when asserting an objection based upon the seven grounds specified in section 53.160(b).[32] Six of the seven grounds apply exclusively to mechanic's, contractor's, or materialmen's liens.[33] The Plaintiff does not allege the lien he challenges is a mechanic's, contractor's, or materialmen's lien. The seventh ground for which the summary-motion procedure is available is where "the claimant executed a valid and enforceable waiver or release of the claim or lien claimed in the affidavit."[34] The Complaint is devoid of allegations that would show that ASC executed a valid and enforceable waiver or release of its claim or lien.

Count 1 of the Complaint fails to state a plausible claim for relief against ASC.

C. Count 2: Texas Civil Practice and Remedies Code section 12.003 – Fraudulent Lien

This count alleges that ASC violated section 12.003 of the Texas Civil Practice and Remedies Code based on alleged actions concerning the allegedly invalid note and mortgage on the Harvest Lake Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Harvest Lake Property, so the Plaintiff's arguments about the allegedly invalid note and mortgage have no merit. The Complaint is devoid of allegations that would show ASC violated section 12.003 of the Texas Civil Practice and Remedies Code.

Count 2 of the Complaint fails to state a plausible claim for relief against ASC.

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[32] TEX. PROP. CODE § 53.160(b) ("The grounds for objecting to the validity or enforceability of the claim or lien for purposes of the motion are limited to the following . . . .").

[33] TEX. PROP. CODE § 53.160(b)(1)-(6).

[34] TEX. PROP. CODE § 53.160(b)(7).

D. Count 3: Texas Business and Commerce Code section 27.01 Statutory Fraud

The Plaintiff's "Statutory Fraud" count alleges statutory violations of section 27.01 of the Texas Business and Commerce Code based on alleged actions concerning the allegedly invalid note and mortgage on the Harvest Lake Property.

First, as explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Harvest Lake Property, so the Plaintiff's arguments about violations of the section 27.01 of the Texas Business and Commerce Code stemming from the allegedly invalid note and mortgage have no merit.

Second, to state a claim under section 27.01(a), a plaintiff must plead facts showing a false representation or false promise. The Complaint is devoid of any meaningfully specific allegations that would show ASC made any such false representation or false promise.

Finally, although there is not a separate count for common-law fraud, paragraph 27 of the Complaint (found within the Count 3—Statutory fraud section) contains a reference to common-law fraud. To the extent the Plaintiff is asserting such a claim, it also fails. The elements of common-law fraud are (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant knew the representation was false or made the misrepresentation recklessly, without knowledge of the truth; (4) the defendant intended for the plaintiff to act on the misrepresentation; (5) the plaintiff acted on the misrepresentation; and (6) the plaintiff incurred damages. Any argument about fraud stemming from the allegedly invalid note and mortgage have no merit, as explained above. Moreover, the Complaint is devoid of allegations that would show ASC took any action, or failed to take any action, that would constitute common-law fraud.

Count 3 of the Complaint fails to state a plausible claim for relief against ASC.

E. Count 4: Breach of Contract

This Count alleges that ASC breached a contract through its actions in connection with the allegedly invalid note and mortgage on the Harvest Lake Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Harvest Lake Property, so the Plaintiff's arguments about the allegedly invalid note and mortgage have no merit. The Complaint is devoid of allegations that would show ASC breached any contract.

Count 4 of the Complaint fails to state a plausible claim for relief against ASC.

F. Count 5: Trespass to Try Title

This Count alleges that the Plaintiff is entitled to quiet title on the Harvest Lake Property due to ASC's actions and inactions with respect to the allegedly invalid note and mortgage on the Harvest Lake Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Harvest Lake Property, so the Plaintiff's arguments about the allegedly invalid note and mortgage have no merit. The Complaint is devoid of allegations that would show the Plaintiff is entitled to prevail on his quiet-title claim.

Count 5 of the Complaint fails to state a plausible claim for relief against ASC.

G. Count 6: Texas Civil Practice and Remedies Code section 41.008(a) – Gross Negligence and Punitive Damages

This Count alleges that the Plaintiff is entitled to punitive and exemplary damages against ASC due to ASC's allegedly fraudulent and malicious conduct in connection with the Harvest Lake Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Harvest Lake Property, so the Plaintiff's arguments about the allegedly invalid note and mortgage have no merit. The Complaint is devoid of allegations that would show the Plaintiff is entitled to any exemplary or punitive damages.

Count 6 of the Complaint fails to state a plausible claim for relief against ASC.

The balance of the Complaint fails to state a claim for relief

The balance of the Complaint (including its request for pre- and post-judgment interest and request for production of documents) is devoid of allegations that would show the Plaintiff is entitled to any relief whatsoever under any legal theory.

IV. CONCLUSION

For the reasons described above, and for the additional well-taken arguments made in the Motion to Dismiss, the Complaint fails to state a claim upon which relief can be granted. Therefore, the Court **ORDERS** as follows:

1. The Motion to Dismiss [Adv. ECF No. 31] is **GRANTED**.
2. The Court will enter a separate final judgment consistent with this Order.

 # # # End of Order # # #

APPENDIX E

The following constitutes the ruling of the court and has the force and effect therein described.

Signed May 28, 2020

Mark X. Mullin

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

In re:	§	
	§	
William Paul Burch,	§	Case No. 12-46959-mxm-7
	§	
Debtor.	§	Chapter 7
	§	

William Paul Burch	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adversary No. 20-4039
	§	
America's Servicing Company,	§	[Relates to Adv. No. 7]
	§	
Defendant.	§	

William Paul Burch,	§	
	§	
Plaintiff,	§	
	§	Adversary No. 20-4040
v.	§	
	§	[Relates to Adv. No. 7]
America's Servicing Company,	§	
	§	
Defendant.	§	

ORDER DENYING MOTIONS TO REMAND

Before the Court are the *Motion[s] to Remand* (the "***Motions***")[1] filed by plaintiff William Paul Burch (the "***Plaintiff***") in the above-captioned adversary proceedings. Through the Motions the Plaintiff asks the Court to remand the cases to the Texas state courts. For the reasons stated below, the Court finds that both Motions should be **DENIED**.

I. BACKGROUND

The above-captioned adversary proceedings are two of sixteen similar adversary proceedings[2] pending in this Court. Although each of the sixteen adversary proceedings involves lawsuits filed by the Plaintiff regarding different real properties and secured lender defendants, each lawsuit shares a similar litigation history that dates back more than a decade and involves two bankruptcy cases filed by the Plaintiff. The Plaintiff's first bankruptcy case was filed on December 1, 2008,[3] and his second bankruptcy case was filed on December 28, 2012,[4] which remains pending in this Court. In each of the sixteen adversary proceedings, the Plaintiff claims that the liens encumbering the applicable real property (typically rental property) were somehow invalidated by previous bankruptcy court orders entered in either the 2008 Bankruptcy Case or the 2012 Bankruptcy Case.[5]

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[1] *See* Adv. Proc. Nos. 20-4039, Adv. ECF No. 7; and 20-4040, Adv. ECF No. 7.

[2] *See* Adv. Nos. 18-4172; 18-4176; 19-4039; 19-4068; 19-4074; 19-4075; 19-4079; 19-4084; 19-4105; 19-4106; 19-4120; 20-4007; 20-4029; 20-4031; 20-4039; and 20-4040.

[3] *See* Case No. 08-45761-RFN-11 (the "***2008 Bankruptcy Case***").

[4] *See* Case No. 12-456959 (the "***2012 Bankruptcy Case***").

[5] The Plaintiff's original or amended petitions can be found at the following docket references for each Adversary Proceeding: Adv. No. 18-4172, ECF No. 1-3, at 183; Adv. No. 18-4176, ECF No. 1-3., at 3; Adv. No. 19-4039, ECF No. 1-17; Adv. Proc. No. 19-4068, ECF No. 3-6; Adv. Proc. No. 19-4074, ECF No. 1-3, at 49; Adv. No. 19-4075, ECF No. 1-3, at51; Adv. No. 19-4079, ECF No. 4-6; Adv. No. 19-4084, ECF No. 3-5; Adv. No. 19-4105, ECF No. 2, at10; Adv. No. 19-4106, ECF No. 2, at13; Adv. No. 19-4120, ECF No. 2, at13; Adv. No. 20-4007, ECF No. 1-2, at 6; Adv. No. 20-4029, ECF No. 1-6, at 2, Adv. No. 20-4031, ECF No. 1-3, at 2, Adv. No. 20-4039, ECF No. 1-3, at 7, and Adv. No. 20-4040, ECF No. 1-2, at 2.

II. ANALYSIS

Because the Plaintiff is a *pro se* litigant,[6] the Court must liberally construe his pleadings.[7] The Court has reviewed and considered the *Notice[s] of Removal*[8] filed by America's Servicing Company (the "***Defendant***"), *Plaintiff's Original Petition(s)*[9] (the "***Plaintiff's Complaints***"), and the Motions in these Adversary Proceedings. The Plaintiff contends through the Motions that remand is proper in each case based on his right to a jury trial, this Court's alleged lack of jurisdiction, and untimely removal.

First, the Plaintiff argues that these adversary proceedings must be remanded to the Texas state courts because he is entitled to a jury trial.[10] Indeed, the Seventh Amendment preserves the right to trial by jury,[11] even in bankruptcy matters deemed to be "core" proceedings.[12] But the existence of such a right does not divest the bankruptcy court of jurisdiction over the proceeding.[13] Further, the right to a jury trial does not arise until a jury issue is presented to the court.[14] Therefore, the Plaintiff's perceived right to a jury trial is not enough, by itself, to warrant remand

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[6] Plaintiff filed each of the sixteen underlying lawsuits that are now the sixteen pending adversary proceedings in this Court as a *pro se* plaintiff. Although the Plaintiff is a *pro se* plaintiff, prior to filing each of his *pro se* lawsuits, as a debtor in his 2012 Bankruptcy Case, he had been represented by at least four different law firms. Each of his previous attorneys and law firms, however, ultimately withdrew from representing him as a debtor in his 2012 Bankruptcy Case and he is now a *pro se* debtor in his 2012 Bankruptcy Case as well.

[7] *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993).

[8] Adv. Proc. Nos. 20-4039, Adv. ECF No. 1; and 20-4040, Adv. ECF No. 1.

[9] Adv. Proc. Nos. 20-4039, Adv. ECF No. 1-3; and 20-4040, Adv. ECF No. 1-2.

[10] The Court will presume without finding that the Plaintiff, Debtor in the underlying case, may be entitled to a trial by jury if he states a plausible claim for relief and if there are one or more triable facts. These issues are yet to be decided.

[11] U.S. CONST. AMEND. VII.

[12] *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

[13] *See Levine v. M&A Custom Home Builder & Developer, LLC*, 400 B.R. 200 (S.D. Tex. 2008) ("[W]ithdrawal should be deferred until [the bankruptcy] court has ruled on all dispositive motions, to further judicial economy and expedite the bankruptcy process.").

[14] *McFarland v. Leyh*, 52 F.3d 1330, 1339 (5th Cir. 1995).

to state court. This Court will adjudicate the matters before it in these adversary proceedings until a potential jury issue arises, at which time the Court will consider the appropriate avenue to proceed.

Second, the Plaintiff argues this Court lacks the appropriate jurisdiction to hear these adversary proceedings pursuant to 28 U.S. C. § 1334(c)(2). Contrary to the Plaintiff's arguments, however, the Defendant had a right to remove the underlying law suits to this Court,[15] and this Court has jurisdiction to hear and determine "any or all proceedings arising under title 11 or arising in or related to a case under title 11."[16] Further, this Court "may hear and determine all cases under title 11 and all core proceedings arising under title 11 . . . ."[17] Core proceedings, notably, includes "matters concerning the administration of the estate"[18] and "determinations of the validity, extent, or priority of liens."[19] The Court also has core jurisdiction to interpret and enforce its own orders. The Plaintiff's Complaints challenge the validity of Defendant's liens on properties—properties that were subject to the Plaintiff's Chapter 11 cases. Therefore, the Court finds and concludes that it has core matter jurisdiction over these adversary proceedings under 28 U.S.C. § 157 and that the bulk, if not all, of the Plaintiff's claims attempt to collaterally attack the Court's prior orders relating to either the 2008 Bankruptcy Case and/or the 2012 Bankruptcy Case.

Finally, the Plaintiff argues that pursuant to Bankruptcy Rule 9027, the Defendant's right to remove these matters expired before the filing of the *Notices of Removal*. Contrary to the Defendant's arguments, however, the state court docket sheets[20] do not reflect that the Defendant

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[15] 28 U.S.C. § 1452.

[16] 28 U.S.C. §§ 157(a) and (b).

[17] 28 U.S.C. § 157(b)(1).

[18] 28 U.S.C. § 157(b)(2)(A).

[19] 28 U.S.C. § 157(b)(2)(K).

[20] *See* Adv. Proc. Nos. 20-4039, Adv. ECF No. 1-2 - 1-4; and 20-4040, Adv. ECF No. 1-1.

was properly served with citation and a copy of the Plaintiff's Complaints, and the Defendant denies that the Plaintiff served the Defendant with citation and a copy of the Complaints.[21] Thus, removal is timely.

The Court further finds and concludes that the law and the equities substantially weigh in favor of maintaining these adversary proceedings in this Court rather than remanding the matters to the Texas state courts.

Finally, the Court finds and concludes that the Motions fail to identify any meritorious factual or legal basis challenging the removal of these proceedings or justifying remand of these adversary proceedings to the Texas state courts. Therefore, based on this Court's findings of fact and conclusions of law, it is hereby **ORDERED** that the Motions are **DENIED**.

End of Order # #

[21] *See* Adv. Proc. Nos. 20-4039, Adv. ECF No. 1-2 at 2, ¶¶ 1 and 5; and 20-4040, Adv. ECF No. 1 at 2, ¶¶ 1 and 5.

APPENDIX F

11 U.S. Code § 1141

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)

(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual—

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date;

(ii) modification of the plan under section 1127 is not practicable; and

(iii) subparagraph (C) permits the court to grant a discharge; and

(C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section

522(q)(1)(B);and if the requirements of subparagraph (A) or (B) are met.

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

APPENDIX G

28 U.S. Code § 1446 - Procedure for removal of civil actions

(a) Generally. —
A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
(b) Requirements; Generally. —
(1)
The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
(2)
(A)
When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.
(B)
Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.
(C)
If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.
(3)
Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.
(c) Requirements; Removal Based on Diversity of Citizenship. —
(1)
A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.
(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—
(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—
(i)
nonmonetary relief; or
(ii)
a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and
(B)

removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).
(3)
(A)
If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).
(B)
If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).
(d) Notice to Adverse Parties and State Court. —
Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.
(e) Counterclaim in 337 Proceeding. —
With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.
(g)
[1] Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

APPENDIX H

Texas Business and Commerce Code Title 3 Insolvency, Fraudulent Transfers, and Fraud, Chapter 26 Statute of frauds (TBCC)

Sec. 26.01. PROMISE OR AGREEMENT MUST BE IN WRITING.

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

(1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;

(2) a promise by one person to answer for the debt, default, or miscarriage of another person;

(3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;

(4) a contract for the sale of real estate;

(5) a lease of real estate for a term longer than one year;

(6) an agreement which is not to be performed within one year from the date of making the agreement;

(7) a promise or agreement to pay a commission for the sale or purchase of:

(A) an oil or gas mining lease;

(B) an oil or gas royalty;

(C) minerals; or

(D) a mineral interest; and

(8) an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care

provider as defined in Section 74.001, Civil Practice and Remedies Code. This section shall not apply to pharmacists.

TBCC Section 26.02 provides:

Sec. 26.02. LOAN AGREEMENT MUST BE IN WRITING.

(a) In this section:

(1) "Financial institution" means a state or federally chartered bank, savings bank, savings and loan association, or credit union, a holding company, subsidiary, or affiliate of such an institution, or a lender approved by the United States Secretary of Housing and Urban Development for participation in a mortgage insurance program under the National Housing Act (12 U.S.C. Section 1701 et seq.).

(2) "Loan agreement" means one or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, pursuant to which a financial institution loans or delays repayment of or agrees to loan or delay repayment of money, goods, or another thing of value or to otherwise extend credit or make a financial accommodation. The term does not include a promise, promissory note, agreement, undertaking, document, or commitment relating to:

(A) a credit card or charge card; or

(B) an open-end account, as that term is defined by Section 301.002, Finance Code, intended or used primarily for personal, family, or household use.

(b) A loan agreement in which the amount involved in the loan agreement exceeds $50,000 in value is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative.

(c) The rights and obligations of the parties to an agreement subject to Subsection (b) of this section shall be determined solely from the written loan agreement, and any prior oral agreements between the parties are superseded by and merged into the loan agreement.

(d) An agreement subject to Subsection (b) of this section may not be varied by any oral agreements or discussions that occur before or contemporaneously with the execution of the agreement.

(e) In a loan agreement subject to Subsection (b) of this section, the financial institution shall give notice to the debtor or obligor of the provisions of Subsections (b) and (c) of this section. The notice must be in a separate document signed by the debtor or obligor or incorporated into one or more of the documents constituting the loan agreement. The notice must be in type that is boldface, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous. The notice must state substantially the following:

"This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties.

"There are no unwritten oral agreements between the parties.

_____ _____

"Debtor or Obligor Financial Institution"

(f) If the notice required by Subsection (e) of this section is not given on or before execution of the loan agreement or is not conspicuous, this section does not apply to the loan agreement, but the validity and enforceability of the loan agreement and the rights and obligations of the parties are not impaired or affected.

(g) All financial institutions shall conspicuously post notices that inform borrowers of the provisions of this section. The notices shall be located in such a manner and in places in the institutions so as to fully inform borrowers of the provisions of this section. The Finance Commission of Texas shall prescribe the language of the notice.

APPENDIX I

TRCP Rule 145

(a) General Rule. A party who files a Statement of Inability to Afford Payment of Court Costs cannot be required to pay costs except by order of the court as provided by this rule. After the Statement is filed, the clerk must docket the case, issue citation, and provide any other service that is ordinarily provided to a party. The Statement must either be sworn to before a notary or made under penalty of perjury. In this rule, "declarant" means the party filing the Statement.

(b) Supreme Court Form; Clerk to Provide. The declarant must use the form Statement approved by the Supreme Court, or the Statement must include the information required by the Court-approved form. The clerk must make the form available to all persons without charge or request.

(c) Costs Defined. "Costs" mean any fee charged by the court or an officer of the court that could be taxed in a bill of costs, including, but not limited to, filing fees, fees for issuance and service of process, fees for a court-appointed professional, and fees charged by the clerk or court reporter for preparation of the appellate record.

(d) Defects. The clerk may refuse to file a Statement that is not sworn to before a notary or made under penalty of perjury. No other defect is a ground for refusing to file a Statement or requiring the party to pay costs. If a defect or omission in a Statement is material, the court - on its own motion or on motion of the clerk or any party - may direct the declarant to correct or clarify the Statement.

(e) Evidence of Inability to Afford Costs Required. The Statement must say that the declarant cannot afford to pay costs. The declarant must provide in the Statement, and, if available, in attachments to the Statement, evidence of the declarant's inability to afford costs, such as evidence that the declarant:

(1) receives benefits from a government entitlement program, eligibility for which is dependent on the recipient's means;

(2) is being represented in the case by an attorney who is providing free legal services to the declarant, without contingency, through:

(A) a provider funded by the Texas Access to Justice Foundation,

(B) a provider funded by the Legal Services Corporation; or

(C) a nonprofit that provides civil legal services to persons living at or below 200% of the federal poverty guidelines published annually by the United States Department of Health and Human Services;

(3) has applied for free legal services for the case through a provider listed in (e)(2) and was determined to be financially eligible but was declined representation; or

(4) does not have funds to afford payment of costs.

(f) Requirement to Pay Costs Notwithstanding Statement. The court may order the declarant to pay costs only as follows:

(1) On Motion by the Clerk or a Party. The clerk or any party may move to require the declarant to pay costs only if the motion contains sworn evidence, not merely on information or belief:

(A) that the Statement was materially false when it was made; or

(B) that because of changed circumstances, the Statement is no longer true in material respects.

(2) On Motion by the Attorney Ad Litem for a Parent in Certain Cases. An attorney ad litem appointed to represent a parent under Section 107.013, Family Code, may move to require the parent to pay costs only if the motion complies with (f)(1).

(3) On Motion by the Court Reporter. When the declarant requests the preparation of a reporter's record but cannot make arrangements to pay for it, the court reporter may move to require the declarant to prove the inability to afford costs.

(4) On the Court's Own Motion. Whenever evidence comes before the court that the declarant may be able to afford costs, or when an officer or professional must be appointed in the case, the court may require the declarant to prove the inability to afford costs.

(5) Notice and Hearing. The declarant may not be required to pay costs without an oral evidentiary hearing. The declarant must be given 10 days' notice of the hearing. Notice must either be in writing and served in accordance with Rule 21a or given in open court. At the hearing, the burden is on the declarant to prove the inability to afford costs.

(6) Findings Required. An order requiring the declarant to pay costs must be supported by detailed findings that the declarant can afford to pay costs.

(7) Partial and Delayed Payment. The court may order that the declarant pay the part of the costs the declarant can afford or that payment be made in installments. But the court must not delay the case if payment is made in installments.

(g) Review of Trial Court Order.

(1) Only Declarant May Challenge; Motion. Only the declarant may challenge an order issued by the trial court under this rule. The declarant may challenge the order by motion filed in the court of appeals with jurisdiction over an appeal from the judgment in the case. The declarant is not required to pay any filing fees related to the motion in the court of appeals.

(2) Time for Filing; Extension. The motion must be filed within 10 days after the trial court's order is signed. The court of appeals may extend the deadline by 15 days if the declarant demonstrates good cause for the extension in writing.

(3) Record. After a motion is filed, the court of appeals must promptly send notice to the trial court clerk and the court reporter requesting preparation of the record of all trial court proceedings on the declarant's claim of indigence. The court may set a deadline for filing the record. The record must be provided without charge.

(4) Court of Appeals to Rule Promptly. The court of appeals must rule on the motion at the earliest practicable time.

(h) Judgment. The judgment must not require the declarant to pay costs, and a provision in the judgment purporting to do so is void, unless the court has issued an order under (f), or the declarant has obtained a monetary recovery, and the court orders the recovery to be applied toward payment of costs.

Amended by order of Aug. 31, 2016, eff. Sept. 1, 2016.

Comment to 2016 Change: The rule has been rewritten. Access to the civil justice system cannot be denied because a person cannot afford to pay court costs. Whether a particular fee is a court cost is governed by this rule, Civil Practice and Remedies Code Section 31.007, and case law.

The issue is not merely whether a person can pay costs, but whether the person can afford to pay costs. A person may have sufficient cash on hand to pay filing fees, but the person cannot afford the fees if paying them would preclude the person from paying for basic essentials, like housing or food. Experience indicates that almost all filers described in (e)(1)-(3), and most filers described in (e)(4), cannot in fact afford to pay costs.

Because costs to access the system - filing fees, fees for issuance of process and notices, and fees for service and return - are kept relatively small, the expense involved in challenging a claim of inability to afford costs often exceeds the costs themselves. Thus, the rule does not allow the clerk or a party to challenge a litigant's claim of inability to afford costs without sworn evidence that the claim is false. The filing of a Statement of Inability to Afford Payment of Court Costs - which may either be sworn to before a notary or made under penalty of perjury, as permitted by Civil Practice and Remedies Code Section 132.001 - is all that is needed to require the clerk to provide ordinary services without payment of fees and costs. But evidence may come to light that the claim was false when made. And the declarant's circumstances may change, so that the claim is no longer true. Importantly, costs may increase with the appointment of officers or professionals in the case, or when a reporter's record must be prepared. The reporter is always allowed to challenge a claim of inability to afford costs before incurring the substantial expense of record preparation. The trial court always retains discretion to require evidence of an inability to afford costs.