No. 22-6954

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF: WILLIAM PAUL BURCH,

DEBTOR

JUANITA BURCH,

APPELLANT

v.

RUSHMORE LOAN MANAGEMENT SERVICES, L.L.C

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE FIFTH CIRCUIT
20-10651

PETITION FOR WRIT OF CERTIORARI

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February 27, 2023

I. QUESTION(S) PRESENTED

Juanita Burch ("Burch") filed her appeal to the circuit court on March 19, 2022, to which no question raised by Appellant Juanita Burch (Burch) was addressed. The appeal was for an Order and Finale Judgment from the district court ruling of March 11, 2022, which did not address the issues. This was on the appeal from the bankruptcy court non-jurisdictional summary judgment ruling of March 8, 2021, against someone not in bankruptcy.

The questions presented are:

1. The defendant, Rushmore Loan Management Services, LLC (Rushmore) lost a hearing in the state court because they did not have a loan on the property and were trying to illegally take it from Burch. Burch's husband had been in bankruptcy, but the case was closed. The case could not be removed to the federal district court because there was no federal question and there was no diversity. **The bankruptcy court allowed the removal as a related to case correctly stating that Burch was part of the 2008 bankruptcy but erred in citing the 2012 bankruptcy because Burch was not part of that bankruptcy and in that bankruptcy the property was abandoned. If the 2008 bankruptcy extinguished the lien on the property and the lender refused to follow the court**

instructions to reinstate the loan does that mean that Rushmore should not remove the case to the federal court?

2. **Federal Rule of Bankruptcy Procedure 9027(a)(1) as well as FRBP 7012(b) and FRBP 7016** clearly states that the removal must contain a statement that upon removal of the claim or cause of action the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy court. **FRBP 7012(b) Based on the law as written and approved by the United States Congress and signed into law by the President of the United States can a bankruptcy judge just assume that Rushmore meant to include it in their removal and make their rulings in defiance of the written law and if not then If a ruling is made in defiance of FRBP 9027(a)(1), is it valid?**

3. **FRCP 12(b)(6)** does not apply to removed cases because federal courts only have jurisdiction over live cases in controversy not mute cases. If the court dismisses a removed case under **FRCP 12(b)(6)** must the Court remand the case to the state court from which it came?

II PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to these proceedings include Plaintiff William Paul Burch; and Defendant Select Portfolio Servicing, Inc. Pursuant to this Court's Rule 29.6, undersigned pro-se states that Rushmore Loan Management Services

LLC with a nerve center in Irving, Texas. From the Rushmore website, **"We were originally set to move from our Farmers Branch building last year, but COVID-19 foiled those plans. So now, we get to enjoy a double celebration – getting our team back together in person and the grand opening of our new official headquarters in Irving on April 11. We'll have a ribbon-cutting ceremony, tours of the new facility for our employees, and more. Stay tuned." for more details and invitations"** This appears to mean that this case does not qualify for removal based on diversity.

Appellees:	**Counsel for Appellees:**
Rushmore Loan Management Services LLC	Crystal Gee Gibson Barrett Daffin Frappier Turner & Engel 4004 Beltline Rd, Suite 100 Addison, TX 75001 crystalr@bdfgroup.com
Appellant:	**Appellant is Pro-Se**
	Juanita Burch-Pro-Se Grand Prairie, TX
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III STATEMENT OF RELATED PROCEEDINGS

Fifth Circuit case number 22-10025.

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VI. TABLE OF AUTHORITIES

VII. PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

VIII. OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit to review the case appears at **App. B** in the appendix to this petition and is unpublished.

The opinion of the United States District Court for the Northern District of Texas appears at **App. D** and is unpublished.

The opinion of the United States Bankruptcy Court for the Northern District of Texas appears at **App. E** and is unpublished.

IX. JURISDICTION.

A timely petition for rehearing was denied by the United States Court of Appeals on November 29, 2022, and a copy of the order denying rehearing appears at **Appendix A.** The jurisdiction of this Court is invoked under **28 U. S. C. § 1254(1).**

X. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. Five provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FRBP 7012 Appendix Q

FRBP 7016 provides:

> (a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary proceedings.
>
> (b) DETERMINING PROCEDURE. The bankruptcy court shall decide, on its own motion or a party's timely motion, whether:
>
> (1) to hear and determine the proceeding;
>
> (2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or
>
> (3) to take some other action.
>
> (As amended Apr. 28, 2016, eff. Dec 1, 2016.)
>
> COMMITTEE NOTES ON RULES—2016 AMENDMENT
>
> This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the parties' statements, as required under **rules 7008(a), 7012(b),** and **9027(a) and (e),** regarding consent to the entry of final orders and judgment. If the bankruptcy court chooses to issue proposed findings of fact and conclusions of law, **Rule 9033** applies.

FRBP 9011 Appendix R

FRBP 9027 Appendix S

FRCP Rule 12(b)(6). provides:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (6) failure to state a claim upon which relief can be granted; A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

TBCC 3.501 Appendix T

TBCC 26. Appendix U

11 U.S.C. §1141 Appendix V

28 U.S.C. § 157 Appendix W

28 U.S.C. § 1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1)By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2)By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1334 Appendix

28 U.S.C. § 1452 Provides:

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

XI. STATEMENT OF THE CASE

On March 8, 2021, the Bankruptcy Court for the Northern District of Texas, Fort Worth Division, granted Rushmore's motion for Summary Judgment (**Appendix E**) despite lacking jurisdiction to enter such an order. The effect of this order was to deprive Burch of her property without due process of law as guaranteed under the **Fifth Amendment of the United States Constitution**.

Following Rushmore's filing of a Notice of Acceleration on September 22, 2020, (**Appendix O**) Burch notified Rushmore that she intended to file for a TRO on November 2, 2020. Burch filed a "Plaintiff's Original Petition" on November 2, 2020. (**Appendix L**) Plaintiff's causes were Breach of Contract and Quiet Title. Burch also filed for a Temporary Restraining Order to be heard the same day. On November 2, 2020, Burch argued that Rushmore had no financial interest in the property thus no legal right to foreclose due to a lack of a loan on the property (**Appendix M**). Rushmore could not defend itself on the issue and the TRO was issued (**Appendix N**) It should be noted that at no time throughout the hearings and appeals has Rushmore ever shown that it had a financial interest in the property or that anyone else had a financial interest in the property other than Burch. Prior to removal Rushmore responded to Burch's Original pleading by asserting allegations which were entirely without merit. (**Appendix K**)

Although the case has many errors committed by the federal courts, Burch has chosen to focus on the Notice of Removal. (**Appendix J**) filed by Rushmore on November 6, 2020. Rushmore also filed another Notice of Acceleration and Notice of Substitute Trustee's Sale on November 6, 2020, even though the TRO was in effect and no Temporary Injunction Hearing had been held. (**Appendix P**) The dismissal was under **FRCP 12(b)(6)**, and the subsequent treatment of this document in the federal courts. The issues in question on the removal are:

1. The petition could not be removed to the district court based on diversity as it was under the threshold and the parties were both based in Texas. Rushmore added William Burch to the case as a petitioner and debtor in an effort to make the case acceptable to the bankruptcy under **28 U.S.C § 1334 (Appendix X) and 28 U.S.C § 1452** claiming that the case was related to the bankruptcy. In ***re Dow Corning Corp.*, 86 F. 3d 482 - Court of Appeals, 6th Circuit 1996** the court wrote:

> The definition of a "related" proceeding under **Section 1334(b)** was first articulated by the Third Circuit in ***Pacor.*** (***Pacor, Inc. v. Higgins*, 743 F. 2d 984 - Court of Appeals, 3rd Circuit 1984**) As stated in that case, the "usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." ***Pacor*, 743 F.2d at 994**. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." Id. A proceeding "need not necessarily be against the debtor or against the debtor's property" to satisfy the requirements for "related to" jurisdiction. Id. However, "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section **[1334(b)]**." Id. (stating also that "[j]udicial economy itself does not justify federal jurisdiction"). Instead, "there must be some nexus between the `related' civil proceeding and the title 11 case." Id.

Rushmore further claims that the claims are "core proceedings" under title 11 of the Bankruptcy Code.

The bankruptcy court responded to the Burch Motion for Remand (**Appendix I**) where the issue was addressed by incorrectly ruling (**Appendix H)** that the removal was correct under both the 2008 bankruptcy (**Appendix F**) and the 2012 bankruptcy. (**Appendix G**)

A. The error on the 2012 plan was that:
    1. The property had been abandoned by the bankruptcy court thus removing it from the bankruptcy case
    2. Juanita Burch was not a party to the 2012 bankruptcy.
    3. There were no uncollateralized creditors.
    4. The outcome would not affect the bankruptcy of Burch's husband which had been closed

B. The error with the bankruptcy court misreading of the 2008 plan (**08-45761-RFN-11**) was as Burch has stated in each Brief that the lien was extinguished pursuant to ***Elixir Indus., Inc. v. City Bank & Trust Co. (In re Ahern Enterprises, Inc.),*** **507 F.3d 817 (5th Cir. 2007).** The error was made because the judge in the 2012 bankruptcy misinterpreted the ruling of the separate judge in the 2008 bankruptcy case.

    In the 2008 bankruptcy there were two pertinent paragraphs. Without reading both it is easy to not understand what the

correct situation is. In the first bankruptcy plan on page 13, paragraph 5.8 it is written:

> "Based upon the Debtors' current value of the Hemlock property, the Debtors will enter into a New Hemlock Note in the original principal amount of $84,950 ("New Hemlock Note"). The New Hemlock Note shall bear interest at the rate of 5.25% per annum. The Debtors shall pay the New Hemlock Note in 360 equal monthly payments of $469.65 commencing on the Effective Date."

What this clearly means is that Burch was to enter into a new Hemlock Promissory Note. If confused, the court should go to the preceding paragraph (5.7) where the plan reads regarding the Burch homestead with the terms of the existing loan documents:

> "Aurora is also the lienholder on the Debtors present home at 5947 Waterford, Grand Prairie, Texas (the "Waterford Property"). The Debtors shall retain the Waterford Property as their homestead and continue to make monthly payments in accordance with the terms of the existing loan documents. The Debtor's shall pay any pre-petition arrearage on the property prior to the Effective Date. The payments to Aurora shall be principal and interest only on the Waterford property. The Debtors shall be responsible for maintaining and directly paying for adequate continuous insurance coverage on the Waterford property and directly paying all property taxes."

This meant a new loan was needed for the Hemlock property.

The Fifth Circuit defined the criteria needed to extinguish a loan in ***Elixir Indus., Inc. v. City Bank & Trust Co. (In re Ahern Enterprises, Inc.)*, 507 F.3d 817 (5th Cir. 2007),** the Fifth Circuit held that four conditions must be met for a lien to be voided under **11 U.S. Code § 1141(c): (i)** (**Appendix V**)the plan must be confirmed (done); (ii) the collateral must be dealt with by the plan (done); (iii) the lien holder must participate in the reorganization (done); and (iv) the lien must not be preserved under the plan (done);. Other courts have similarly required secured creditor participation in the case as a condition to lien extinguishment under **section 1141(c).** This case met all the criteria for the lien to be extinguished.

With the lien extinguished the Texas Business and Commerce Code 26 "Statute of Frauds" (**TBCC 26.02**) (**Appendix U**) comes into play, requiring:

"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.

Burch agreed to give the lenders six months to give her a new note. Freedom Mortgage did send a new note to Burch but never completed the transaction. It appears that Freedom collected the PMI from the Federal National Bank Association and left it to them to send a new note. Burch sent a Presentment Letter to Chase as required in **TBCC 3.501** (**Appendix T**) notice that if the new note was not given to Burch, then the lien was void and the lien must be removed.

Once again, the outcome does not affect the 2008 bankruptcy.

The second issue is the lack of compliance with **FRBP 9027(a)(1), FRBP 7012(b), ans FRBP 7016** "The notice shall be signed pursuant to **Rule 9011** and contain a short and plain statement of the facts which entitle the party filing the notice to remove, **contain a statement that upon removal of the claim or cause of action the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy court**, and be accompanied by a copy of all process and pleadings". This issue has never before been addressed by the Supreme Court or the Circuit Courts including the Fifth Circuit on this appeal. The bankruptcy court simply brushed it aside by ruling that the defendants must

have meant to put it in based on their actions. However, in the committee notes the legislature wrote:

Committee Notes on Rules—2016 Amendment

> Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, **28 U.S.C. § 157(b)(2),** may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. **The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.**
>
> The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under **subdivision (e)(3),** because a statement regarding consent **must be included** in a responsive pleading filed pursuant to **Rule 7012(b). Rule 7016** governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

Due to the wording of the bankruptcy court ruling it is assumed that the court based its ruling on an earlier case unrelated to this issue had ruled that a court may assume that a party meant to include something. However, in this rule as well as several other rules the legislature came back and installed provisions similar to the amendment above for the purpose of

eliminating the ability of a court to assume that a party meant to include something.

The third and final issue is the dismissal of the case pursuant to **FRCP 12(b)(6).** In **FRBP 7012(b)** it is written that:

> b) Applicability of **Rule 12(b)–(i) F. R.Civ.P. Rule 12(b)–(i) F.R.Civ.P**. applies in adversary proceedings. A responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court.

As stated above in **FRBP 9027(a)(1)** there was no statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court at the time of removal or any time afterwards.

Under **FRCP 12(b)(6),** a motion to dismiss may be granted only if, accepting the well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court concludes that those allegations "could not raise a claim of entitlement to relief." ***Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).** The appeals court must review de novo an order granting a **FRCP 12(b)(6)** motion. ***Mariotti v. Mariotti Bldg. Prods., Inc.*, 714 F.3d 761, 765 (3d Cir. 2013).** The Fifth Circuit failed to address any of the issues presented by Burch. The same applies to the District Court. The issues were not federal issues and there should have been a hearing if the court had jurisdiction, which it did not have. The issues were simple:

1. Quiet Title due to the fact that there was no loan on the property.
2. There was a breach of contract by the lien holder not releasing the lien as required by the court after the presentment letter was given and the extinguishing of the lien by the court. See ***Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1102 (2d Cir. 1993)** (finding a "breach-of-contract action by a debtor against a party to a pre-petition contract, who has filed no claim with the bankruptcy court, is non-core.");

XII. REASONS FOR GRANTING THE PETITION

The **Fifth Amendment of the United States Constitution** says, "No person shall....be deprived of life, liberty, or property, without the due process of law". These words have as their central promise an assurance that all levels of American government must operate within the law ("legality") and provide fair procedures.

The citizens of the United States depend on the courts to render judgment based on the rule of law and that the courts will base their rulings on the true meaning of the law as written by Congress and grant due process to all the citizens. Failure of the courts to adhere to the rule of law places our democracy in question.

The very idea of a government based on the rule of law was unique at the time of our founding. The very essence of the United States requires that the judges follow those laws and not make things up as they go along.

Although more than sixty percent of the cases brought forth in federal courts are in bankruptcy courts where a little more than one tenth of one percent are appealed. In the twelve months ending June 30, 2022, there were 380,634 bankruptcies. In fact, during this same period there were only 570 bankruptcy cases appealed to the court of appeals out of 40,403 appeals. The reasons vary but lack of money and ability to file pro-se are the main reasons. So those who have lost everything including their personal dignity are usually further harmed by the courts neglecting those rare cases where a pro-se brings forth a case like this one. Perhaps this is why the Circuit Courts and the Supreme Court never hear about egregious violations of **FRBP 9027(a)(1), FRBP 7012(b), and FRBP 7016**

The Supreme Court should rule on the violation of **FRAP 9027(a)(1), FRBP 7012(b), and FRBP 7016** so as to clarify for the lower courts the intent of Congress to follow this rule.

The Supreme Court should rule on the issue of related to jurisdiction. There is a conflict between Circuit courts on this issue which must be clarified.

The Supreme Court should rule on **FRCP 12(b)(6)** that a case that has been removed from state court should be remanded to state court in cases where the court concludes that those allegations "could not raise a claim of entitlement to relief."

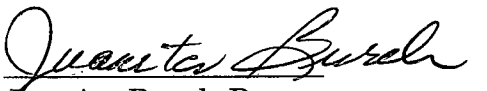
There are no federal issues to be considered here. Considering this and the wrongful conclusion that the case is related to a bankruptcy case, the failure to comply with **FRBP 9027(a)(1), FRBP 7012(b), and FRBP 7016** and the failure to properly handle the **FRCP 12(b)(6)** ruling, this Petition for Certiorari should be granted.

XIII. CONCLUSION

For the foregoing reasons, Burch respectfully requests that this Court issue a writ of certiorari to review the Order of the Court of Appeals for the Fifth Circuit.

DATED this 27th day of February 2023

Respectfully submitted,



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