

APPENDIX

PET APP 1 Order to Remand November 4, 2022; Motion to Reconsider November 14, 2022; Magistrate Judge TEXT order denied November 15, 2022. No final document entered or sent to the non ECF pro-se filer defendant

PET APP 2 January 23, 2023 District Court issues final order of the text order November 15, 2022

PET APP 3 TEXT order sua sponte, District Court Judge Michael M. Mihm denied Motion to Reconsider and mailed Petitioner a copy of the text order. February 9, 2023

PET APP 4 Seventh Circuit dismissed case 23-1139 for lack of jurisdiction and totally ignoring Rule 58

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
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ORDER

February 16, 2023

Before

DIANE P. WOOD, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

| | |
|--|---|
| No. 23-1139 | BANK OF AMERICA, N.A., Plaintiff - Appellee v. JODY KIMBRELL, Defendant - Appellant |
| Originating Case Information: | |
| District Court No: 1:22-cv-01348-MMM-JEH Central District of Illinois District Judge Michael M. Mihm | |

The following are before the court:

- 1. APPELLANT'S EXPEDITED MOTION TO STAY US DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS REMAND ORDER ENTERED ON 1/23/2023; IN COMBINATION WITH ORDER TO FILE BRIEF 1/24/2023 MOTION TO EXTEND EMAILED 1/23/2023**, filed on February 13, 2023, by the pro se appellant.
- 2. APPELLANT'S MOTION TO FILE BY ECF**, filed on February 13, 2023, by the pro se appellant.

No. 23-1139

Page 2

IT IS ORDERED that this appeal is **DISMISSED** for lack of jurisdiction.

Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. In this case, judgment was entered on November 8, 2022, and the order denying defendant-appellant's motion to reconsider was entered on November 15, 2022, starting the time to appeal. The notice of appeal was filed on January 20, 2023, therefore, is over one month late. The district court has not granted an extension of the appeal period, see Rule 4(a), and this court is not empowered to do so, see Fed. R. App. P. 26(b).

Accordingly, **IT IS FURTHER ORDERED** that all pending motions are **DENIED**.

form name: c7_Order_3J (form ID: 177)

**IN THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION**

BANK OF AMERICA, N.A.)
Plaintiff,)
v.)
JODY D. KIMBRELL and) Case No. 1:22-cv-1348
MICHAEL D. KIMBRELL)
Defendants.)

ORDER

Pending before the Court is Plaintiff Bank of America, N.A.'s Motion to Remand. (ECF No. 14). Defendant Jody Kimbrell has responded, and the motion is ripe for ruling. Plaintiff's Motion to Remand is granted for the reasons stated below.

BACKGROUND

Plaintiff initially filed this Complaint to Foreclosure Mortgage against Defendant Jody Kimbrell and several other defendants in Illinois State Court in 2018. ECF No. 5-1. The case was litigated in state court for several years. On August 31, 2021, the state court granted Plaintiff's motion for summary judgment and motion for reformation of the mortgage. ECF No. 1 at 28. On September 2, 2021 the state court entered a judgment for foreclosure and sale in favor of Plaintiff. *Id.* The parties agree that the foreclosure sale was scheduled for October 26, 2022.

More than one year after the state court entered summary judgment in favor of Defendant, Defendant filed a Notice of Removal to Federal Court. ECF No. 1. Plaintiff moved to remand the case arguing that the removal was untimely, procedurally improper, and that this Court otherwise lacks subject matter jurisdiction over this foreclosure action.

LEGAL STANDARD

“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). If a plaintiff files a case in state court even though the federal courts also have jurisdiction, the defendant may remove the case to federal court. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005). Section 1441(a) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441 (a). Generally, the party invoking jurisdiction bears the burden of establishing all elements of federal subject matter at the time of removal. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993). Courts are to presume that “a cause lies outside [its] limited jurisdiction.” *Kokkonen*, 511 U.S. at 377.

DISCUSSION

As Plaintiff notes, Defendant Jodie Kimbrell removed this case more than a year after the state court entered the judgement for foreclosure. This case was also initially filed in 2018, meaning that Defendant delayed removing the case for years and the state court has already entered summary judgment in favor of Plaintiff. Accordingly, Plaintiff argues that removal was untimely. Plaintiff also argues that Defendant does not otherwise have a meritorious basis for removal in that she claims federal question jurisdiction when the complaint is a mortgage foreclosure and reformation act under Illinois law. ECF No. 14 at 5. Finally, Plaintiff points out that Defendant failed to join all the defendants named in the state court matter and the Notice of Removal bears

only Defendant Jodie Kimbrell's signature. *Id.* at 4. The Court agrees that there are multiple reasons it is appropriate to remand this case to state court, as explained below.

A. This Court Lack Subject Matter Jurisdiction.

Defendant attempts to argue that a federal question has arisen because the mortgage at issue is insured by the Federal Housing Administration ("FHA") and that Plaintiff did not follow the FHA regulations. Under 28 U.S.C. § 1331, district courts have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. However, the presence or absence of federal question jurisdiction is governed by the well-pleaded complaint rule which requires that a federal question be presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also Doe*, 985 at 911.

Plaintiff's Complaint asserts only a mortgage foreclosure and reformation under Illinois law. ECF No. 5-1. Plaintiff asserts no federal claims against Defendant. The Seventh Circuit and district courts in this Circuit have long held that a state-court mortgage foreclosure proceeding itself does not raise a federal question. *See, e.g., Hilgefond v. Peoples Bank*, 776 F.2d 176, 178 (7th Cir. 1985) (an action involving "only [a] mortgage foreclosure" was "proper for state court determination, not federal court", and "[l]and title and possessory actions are generally not the business of federal courts."); *GMAC Assocs., Inc. v. Devon Bank*, No. 92-3347, 1993 WL 86802, at *2 (N.D. Ill. Mar. 23, 1993) (foreclosure "does not turn on an interpretation of [] federal law" and "foreclosure complaint remains an action between private parties to determine the contractual rights to private property"); *Green Tree Servicing, LLC v. Williams*, No. 14 C 888, 2014 WL 2865905, at *12 (N.D. Ill. Jun. 24, 2014) (state-court complaint that alleged "nothing more than a mortgage foreclosure action under Illinois law" was not a basis for federal question jurisdiction).

Defendant's argument about having a federal defense does not serve as not an adequate basis for federal question jurisdiction. *Caterpillar Inc.*, 482 U.S. at 393. The Supreme Court has clearly explained "a case may not be removed to federal court on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.*; *see also Chi. Tribune Co. v. Bd. of Trustees of the Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir. 2012) ("a potential federal defense is not enough to create federal jurisdiction"). Here, there is clearly no federal question on the face of the complaint. Plaintiff only cites a potential federal defense which is not enough to give rise to federal jurisdiction.

Accordingly, to the extent Defendant may raise a federal defense founded on FHA regulations, such a defense does not serve as a proper basis for removal.

B. Defendant's removal was otherwise procedurally improper.

Defendant's removal was also otherwise procedurally improper as she waited to remove the case for years after the window for removal had closed and did not obtain the necessary signatures of the co-defendants.

Defendants cannot remove cases to federal court at any time. Instead, "[t]he rules of procedure provide two different removal windows." *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 820 (7th Cir. 2013). First, "[t]he 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." 28 U.S.C. § 1446(b)(1). Second, "[e]xcept as provided [elsewhere], if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 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.” 28 U.S.C. § 1446(b)(3). As explained above, the removal was otherwise not appropriate. However, upon receiving the Complaint, Plaintiff should have been aware of the potential federal defense she now cites. Even assuming Plaintiff was not aware of this potential defense at first, in July 2019 she filed an Amended Answer raising a defense to the foreclosure action related to FHA requirements. ECF No. 5-5 at 43. Accordingly, her deadline for removal had certainly passed by August 2019. Defendant waited nearly four years after the initiation of the lawsuit and three years after raising a defense related to FHA requirements to remove the case. Defendant’s extraordinary delay would also place this court in the position of reviewing a state court decision which implicates various federalism concerns. As there are other compelling reasons to remand this case, the Court need not fully explore this issue except to note the importance of the deadlines for removal.

Defendant asserts that the state court’s October 6, 2022 order started the clock on the 30-day removal time clock. However, she does not respond to Plaintiff’s observation that she first cited a potential federal defense in 2019 or explain why that order would have triggered the 30-day clock for removal. Accordingly, the Court is unpersuaded by this assertion.

Finally, Defendant Jodie Kimbrell also failed to join the other named Defendants. The removal notice only bears the signature of Defendant Jodie Kimbrell despite there being several other Defendants. ECF No. 1 at 42. 28 U.S.C. § 1446 reads, “[w]hen 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.” Defendant Jodie Kimbrell’s failure to join the appropriate Defendants provides another reason for remand.

CONCLUSION

For the reasons stated above, Plaintiff's Motion to Remand [14] is GRANTED and the case is remanded to the Circuit Court of the Tenth Judicial Circuit, Peoria County.

ENTERED this 4th day of November, 2022.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

| Date Filed | # | Docket Text |
|------------|-----------|--|
| 02/07/2023 | | TEXT ONLY ORDER DENYING <u>32</u> . Defendant Jody Kimbrell has filed a Motion to Reconsider, requesting that the Court reconsider its Order denying Kimbrell's Motion for Leave to Appeal in forma pauperis. In part, the Court observed that Defendant had missed the deadline to appeal. The Court otherwise explained that it lacked jurisdiction and Defendant's attempts to appeal were frivolous. Defendant now argues that she did not receive notice of the Court's decision and thus, her time to appeal should be extended. The Court disagrees with Kimbrell's assertion that she did not receive a copy of the order, but the Court would not have granted her motion even if it were timely filed because Kimbrell's appeal was otherwise frivolous as explained in the Court's initial order (ECF No. 30). Accordingly, Kimbrell's Motion for Reconsideration <u>32</u> is DENIED. Entered by Judge Michael M. Mihm on 2/7/2023. (VH) (Entered: 02/07/2023) |
| 02/06/2023 | <u>33</u> | TRANSCRIPT INFORMATION SHEET by Jody D Kimbrell. (VH) (Entered: 02/06/2023) |
| 01/25/2023 | <u>32</u> | MOTION for Leave to File Motion to Reconsider January 24, 2023 Order Pursuant Rule 59(e) by Defendant Jody D Kimbrell. Responses due by 2/8/2023 (Attachments: # <u>1</u> Memorandum in Support)(VH) (Entered: 01/25/2023) |
| 01/24/2023 | <u>31</u> | CIRCUIT RULE 3(b) FEE NOTICE re <u>23</u> Notice of Appeal. (VH) (Entered: 01/24/2023) |
| 01/23/2023 | <u>30</u> | ORDER Entered by Judge Michael M. Mihm on 1/23/2023. Denying <u>25</u> Motion for Leave to Appeal in forma pauperis; denying <u>26</u> Motion ; denying <u>27</u> . (SEE FULL ORDER). (AEM) (Entered: 01/23/2023) |
| 01/23/2023 | <u>29</u> | NOTICE of Docketing Record on Appeal from USCA re <u>23</u> Notice of Appeal filed by Jody D Kimbrell. USCA Case Number 23-1139. (JS) (Entered: 01/23/2023) |
| 01/20/2023 | <u>28</u> | Short Record of Appeal Sent to US Court of Appeals re <u>23</u> Notice of Appeal. (VH) (Entered: 01/20/2023) |
| 01/20/2023 | <u>27</u> | MOTION for Leave for Order to File Through ECF by Defendant Jody D Kimbrell. Responses due by 2/3/2023 (VH) (Entered: 01/20/2023) |
| 01/20/2023 | <u>26</u> | MOTION for Leave for Order to Stay Pending Appeal by Defendant Jody D Kimbrell. Responses due by 2/3/2023 (VH) (Entered: 01/20/2023) |
| 01/20/2023 | <u>25</u> | MOTION for Leave to Appeal in forma pauperis by Defendant Jody D Kimbrell. Responses due by 2/3/2023 (VH) (Entered: 01/20/2023) |
| 01/20/2023 | <u>24</u> | DOCKETING STATEMENT by Jody D Kimbrell re <u>23</u> Notice of Appeal. (VH) (Entered: 01/20/2023) |
| 01/20/2023 | <u>23</u> | NOTICE OF APPEAL as to <u>20</u> Order on Motion to Remand by Jody D Kimbrell. (VH) (Entered: 01/20/2023) |
| 11/15/2022 | | TEXT ONLY ORDER DENYING <u>22</u> . Defendant seeks to have the Court reconsider its order to remand the case to state court. Plaintiff does not adequately explain why a motion to reconsider would be appropriate here. Plaintiff primarily raises new arguments that she could have initially raised or rehashes arguments the Court already rejected. As the Court initially explained, it did not have subject jurisdiction over the removed case and Plaintiff also made numerous errors in removing the case that otherwise required remand. Notably, she waited for years until the case was nearly resolved in state court before removing. Accordingly, the Court will not reconsider its order when the case so clearly belongs in state court and Defendants Motion for Leave to File Motion to Reconsider <u>22</u> is denied. Entered by Judge Michael M. Mihm on 11/15/2022. (VH) (Entered: 11/15/2022) |

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| 11/14/2022 | <u>22</u> | MOTION for Leave to File Motion to Reconsider Court Order 11/8/2022 by Defendant Jody D Kimbrell. Responses due by 11/28/2022 (Attachments: # <u>1</u> Proof of Service)(VH) (Entered: 11/14/2022) |
| 11/08/2022 | <u>21</u> | JUDGMENT entered. (VH) (Entered: 11/08/2022) |
| 11/04/2022 | <u>20</u> | ORDER entered by Judge Michael M. Mihm on 11/4/2022. For the reasons stated, Plaintiff's Motion to Remand <u>14</u> is GRANTED and the case is remanded to the Circuit Court of the Tenth Judicial Circuit, Peoria County. Civil Case Terminated. See full written Order. (VH) (Entered: 11/04/2022) |
| 10/28/2022 | <u>19</u> | MOTION to Leave to Request Emailed Pleadings and Amend Response to Plaintiff's Motion to Remand Rule 15 by Defendant Jody D Kimbrell. Responses due by 11/14/2022 (Attachments: # <u>1</u> Proof of Service)(VH) (Entered: 10/28/2022) |
| 10/24/2022 | <u>18</u> | Defendant's Reply to Plaintiff's <u>15</u> Response to Defendant Request for Injunction Against Plaintiff. filed by Defendant Jody D Kimbrell. (Attachments: # <u>1</u> proof)(AEM) (Entered: 10/24/2022) |
| 10/21/2022 | <u>17</u> | RESPONSE to Motion re <u>14</u> MOTION to Remand <i>With Incorporated Memorandum of Law in Support</i> filed by Defendant Jody D Kimbrell. (Attachments: # <u>1</u> Attachment)(VH) (Entered: 10/21/2022) |
| 10/21/2022 | <u>16</u> | ORDER entered by Judge Michael M. Mihm on 10/21/2022. Accordingly, it is ORDERED this matter is STAYED until after the Court has ruled on the pending Motion to Remand. See full written Order. (VH) (Entered: 10/21/2022) |
| 10/20/2022 | <u>15</u> | RESPONSE to Motion re <u>4</u> MOTION for Preliminary Injunction filed by Plaintiff Bank of America, N.A.. (Burris, Natalie) (Entered: 10/20/2022) |
| 10/20/2022 | <u>14</u> | MOTION to Remand <i>With Incorporated Memorandum of Law in Support</i> by Plaintiff Bank of America, N.A.. Responses due by 11/3/2022 (Burris, Natalie) (Entered: 10/20/2022) |
| 10/19/2022 | <u>13</u> | PROOF OF SERVICE by Jody D Kimbrell (VH) (Entered: 10/19/2022) |
| 10/19/2022 | <u>12</u> | MOTION for Leave to Request the Court Grant Defendant to File through the Court's ECF System by Defendant Jody D Kimbrell. Responses due by 11/2/2022 (VH) (Entered: 10/19/2022) |
| 10/19/2022 | <u>11</u> | NOTICE filed by Jody D Kimbrell. (VH) (Entered: 10/19/2022) |
| 10/19/2022 | <u>10</u> | MOTION to Demand Jury Trial by the Seventh Amendment of the Constitution by Defendant Jody D Kimbrell. Responses due by 11/2/2022 (VH) (Entered: 10/19/2022) |
| 10/19/2022 | <u>9</u> | MOTION for Leave to Amend Heading Doc #8 and Correct Address by Defendant Jody D Kimbrell. Responses due by 11/2/2022 (VH) (Entered: 10/19/2022) |
| 10/18/2022 | <u>8</u> | Defendant's Now (Plaintiff's) Motion to Remit State Court Records to the Case by Defendants Jody D Kimbrell, Michael D Kimbrell. Responses due by 11/1/2022 (Attachments: # <u>1</u> Defendant's Response, # <u>2</u> K L Court docs, # <u>3</u> Documents 1, # <u>4</u> Documents 2, # <u>5</u> Documents 3, # <u>6</u> Proof of Email Service of Bank of America)(TK) (Entered: 10/18/2022) |
| 10/18/2022 | <u>7</u> | CERTIFICATE OF INTEREST pursuant to Local Rule 11.3 by Bank of America, N.A.. (Burris, Natalie) (Entered: 10/18/2022) |
| 10/18/2022 | <u>6</u> | NOTICE of Appearance of Attorney by Natalie T Burris on behalf of Bank of America, N.A. (Burris, Natalie) (Entered: 10/18/2022) |

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| 10/17/2022 | <u>5</u> | MOTION to Remit State Court Records to the Case by Defendant Jody D Kimbrell. Responses due by 10/31/2022 (Attachments: # <u>1</u> Attachment1, # <u>2</u> Attachment2, # <u>3</u> Attachment3, # <u>4</u> Attachment4, # <u>5</u> Attachment5, # <u>6</u> Attachment6, # <u>7</u> Attachment7, # <u>8</u> Attachment8, # <u>9</u> Attachment9, # <u>10</u> Attachment10, # <u>11</u> Attachment11, # <u>12</u> Attachment12, # <u>13</u> Attachment13, # <u>14</u> Attachment14)(VH) (Entered: 10/17/2022) |
| 10/13/2022 | <u>4</u> | MOTION for Injunction by Defendant Jody D Kimbrell. Responses due by 10/27/2022 (VH) (Entered: 10/13/2022) |
| 10/11/2022 | <u>3</u> | PROOF OF SERVICE by Jody D Kimbrell re <u>1</u> Notice of Removal. (VH) (Entered: 10/11/2022) |
| 10/08/2022 | <u>2</u> | NOTICE of Appearance for Pro Se Litigant by Plaintiff Jody Kimbrell. (TK) (Entered: 10/11/2022) |
| 10/08/2022 | <u>1</u> | NOTICE OF REMOVAL from Peoria County, case number 18-CH-420 (Filing fee \$ 402, receipt No. PIA100000948), filed by Jody D Kimbrell, Michael D Kimbrell. (Attachments: # <u>1</u> Notice of Amendments to Notice of Removal, # <u>2</u> Civil Cover Sheet)(VH) Modified on 10/11/2022 to correct filing date(TK). (Main Document 1 replaced on 10/11/2022) (TK). (Attachment 1 replaced on 10/11/2022) (TK). (Entered: 10/11/2022) |

| PACER Service Center | | | |
|----------------------|---------------|------------------|-----------------------|
| Transaction Receipt | | | |
| 02/09/2023 15:50:54 | | | |
| PACER Login: | jodydKimbrell | Client Code: | |
| Description: | Docket Report | Search Criteria: | 1:22-cv-01348-MMM-JEH |
| Billable Pages: | 4 | Cost: | 0.40 |

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 24, 2023

By the Court:

BANK OF AMERICA, N.A.,
Plaintiff-Appellee,
No. 23-1139 v.] Appeal from the United
JODY KIMBRELL,] States District Court for
Defendant-Appellant.] the Central District of
] Illinois.
]
] No. 1:22-cv-01348-MMM-JEH
]
] Michael M. Mihm,
] Judge.

ORDER

Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. In this case judgment was entered on November 8, 2022 and the order denying defendant-appellant's motion to reconsider was entered on November 15, 2022, starting the time to appeal. The notice of appeal was filed on January 20, 2023, therefore, is over one month late. The district court has not granted an extension of the appeal period, *see* Rule 4(a), and this court is not empowered to do so, *see* Fed. R. App. P. 26(b).

Further, the order appealed from may not be a final appealable judgment within the meaning of 28 U.S.C. § 1291.

This court has consistently reminded litigants that an order remanding a case to state court based on a lack of subject matter jurisdiction or a defect in the removal procedure is not reviewable on appeal, whether or not the decision is correct. *See, e.g., The Northern League, Inc. V. Gidney*, 558 F.3d 614 (7th Cir. 2009) (*per curiam*) *Rubel v. Pfizer, Inc.*, 361 F.3d 1016 (7th Cir. 2004); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 354-55 (7th Cir. 2000); *In re Continental Casualty Co.*, 29 F.3d 292, 293 (7th Cir. 1994).

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No. 23-1139

-Page 2-

In the present case, the district court remanded this case to state court both for lack of jurisdiction and for a defect of the removal procedure. As such, the untimeliness of this appeal is not defendant-appellant's only jurisdictional problem. Accordingly,

IT IS ORDERED that appellant, on or before February 6, 2023, file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be suspended pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.

Orders on Motions

1:22-cv-01348-MMM-JEH Bank of America, N.A. v.
Kimbrell et al **CASE CLOSED on 11/04/2022**

12,15,APPEAL,CLOSED,REFER,REMOVAL,STAYED

U.S. District Court**CENTRAL DISTRICT OF ILLINOIS****Notice of Electronic Filing**

The following transaction was entered on 2/7/2023 at 4:15 PM CST and filed on 2/7/2023

Case Name: Bank of America, N.A. v. Kimbrell et al

Case Number: 1:22-cv-01348-MMM-JEH

Filer:

WARNING: CASE CLOSED on 11/04/2022

Document Number: No document attached

Docket Text:

TEXT ONLY ORDER DENYING [32]. Defendant Jody Kimbrell has filed a Motion to Reconsider, requesting that the Court reconsider its Order denying Kimbrell's Motion for Leave to Appeal in forma pauperis. In part, the Court observed that Defendant had missed the deadline to appeal. The Court otherwise explained that it lacked jurisdiction and Defendant's attempts to appeal were frivolous. Defendant now argues that she did not receive notice of the Court's decision and thus, her time to appeal should be extended. The Court disagrees with Kimbrell's assertion that she did not receive a copy of the order, but the Court would not have granted her motion even if it were timely filed because Kimbrell's appeal was otherwise frivolous as explained in the Court's initial order (ECF No. 30). Accordingly, Kimbrell's Motion for Reconsideration [32] is DENIED. Entered by Judge Michael M. Mihm on 2/7/2023. (VH)

1:22-cv-01348-MMM-JEH Notice has been electronically mailed to:

John Matthew Kienzle john.kienzle@yahoo.com

Natalie T Burris nburris@winston.com, natalie-burris-7196@ecf.pacerpro.com

1:22-cv-01348-MMM-JEH Notice has been delivered by other means to:

Jody D Kimbrell
6608 N. University St
Peoria, IL 61614

Michael D Kimbrell
6608 N. University St.
Peoria, IL 61614

**IN THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION**

BANK OF AMERICA, N.A.)
Plaintiff,)
v.) Case No. 1:22-cv-1348
JODY D. KIMBRELL and)
MICHAEL D. KIMBRELL)
Defendants.)

ORDER

Pending before the Court is Defendant Jody D. Kimbrell's Motion for Leave to Appeal in forma pauperis (ECF No. 25) and Motion for Stay Pending Appeal (ECF No. 26). These Motions are DENIED for the reasons stated below.

On November 4, 2022 this Court entered an opinion granting Plaintiff Bank of America's Motion to remand and remanding the case to state court. In the opinion, the Court explained that the case had been litigated in state court for several years and it was not until nearly a year after the state court entered a judgement of foreclosure that Plaintiff attempted to remove the case. Thus, removal was untimely. Moreover, Defendant did not follow the appropriate procedural rules and this Court otherwise lacked subject matter jurisdiction over the case. As explained in the opinion, the only alleged basis for federal jurisdiction was a purported federal defense and an anticipated federal defense is not enough to give rise to federal jurisdiction when the state complaint was a mortgage foreclosure action under Illinois law. *See* ECF No. 20 at 4. The Court entered Judgment on November 8, 2022 and denied Defendant's Motion to Reconsider on November 15, 2022. *See* ECF No. 21 and d/e dated 11-15-2022.

Now, over two months later, Defendant seeks to appeal that decision and moves for this Court to grant her leave to file in forma pauperis and to stay the case. Under 28 U.S.C. § 1915(a) a court may authorize an appeal by persons unable to pay the fees, but an “appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). Here, the Court determined it does not have subject matter jurisdiction and that Defendant otherwise missed the deadline to remove by years and also failed to follow the proper procedural rules. ECF No. 20. Also, under Rule 4(a) of the Federal Rules of Appellate Procedure, Defendant had only 30 days to file an appeal. Accordingly, any notice of appeal was due, at the latest, by December 15, 2022. Defendant missed that deadline by over thirty days. Finally, decisions to remand based on lack of subject matter jurisdiction are generally not appealable. *See* 28 U.S.C. § 1447. Accordingly, the Court finds that this appeal was not taken in good faith and declines to grant Defendant’s motion to proceed in forma pauperis.

Defendant also moves this Court to stay remanding the case back to state court pending appeal. This Court has already determined it does not have subject matter jurisdiction and remanded the case over two months ago. Defendant blew her deadline to appeal and otherwise has no basis to appeal. The Court has no jurisdiction and certainly does not have the power to interfere in the state proceeding. Defendant does not attempt to support this request by citing any laws, and thus, there is little else for the Court to say on this matter. Defendant’s motion to stay is therefore denied.

CONCLUSION

For the reasons stated above, it is ORDERED as follows:

- (1) Defendant’s Motion for Leave to Appeal in forma pauperis [25] is DENIED;
- (2) Defendant’s Motion for a Stay Pending Appeal [26] is DENIED;

(3) Defendant's Motion for Leave for Order to File Through ECF [27] is DENIED because this case is closed, and Defendant has no further need to file documents in this case.

ENTERED this 23rd day of January, 2023.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge