

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID E. HAYS,

Plaintiff,

v.

WELLS FARGO BANK, N.A., ET AL.,

Defendants.

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1:13-CV-102

ORDER

This matter is before the Court on Plaintiff's Motion for Remand. (Doc. 12.) Plaintiff David E. Hays, a citizen of North Carolina, filed this lawsuit in the Superior Court of Guilford County pursuant to N.C. General Statute § 45-21.34, which authorizes suit for equitable relief on appropriate grounds to stop foreclosures. (Doc. 6.) He named Wells Fargo Bank, N.A., the holder of the mortgage, and The Ford Firm, PLLC, the substitute trustee responsible under the deed of trust, as defendants. (*Id.*) Wells Fargo, a citizen of South Dakota, removed the case to this court, contending that there is diversity of citizenship. (Doc. 1 at ¶ 3.) Mr. Hays has filed a motion to remand, asserting that there is incomplete diversity because The Ford Firm is a citizen of North Carolina. (Doc. 13 at 7.) Wells Fargo agrees that The Ford Firm is a citizen of North Carolina, but contends that The Ford Firm is a nominal defendant whose citizenship does not defeat diversity.

Most courts which have addressed this issue have agreed with Wells Fargo. *See, e.g., Prasad v. Wells Fargo Bank, N.A.*, No. C11-894-RSM, 2011 WL 4074300, at *2-3 (W.D. Wash. Sept. 13, 2011); *Andersen v. Homecomings Fin., LLC*, No. 2:11-CV-332-TS, 2011 WL 2470509, at *4-5 (D. Utah June 20, 2011); *Sherman v. Wells Fargo Bank, N.A.*, No. CIV S-11-0054 KJM

EFB, 2011 WL 1833090, at *2-3 (E.D. Cal. May 12, 2011); *Jeanes-Kemp, LLC v. Johnson Controls, Inc.*, No. 1:09CV723 LG-RHW, 2010 WL 502698, at *1-2 (S.D. Miss. Feb. 5, 2010); *Sones v. Simmons*, No. 1:05cv424-KS-MTP, 2006 WL 2805325, at *1-2 (S.D. Miss. Sept. 25, 2006); *Dempsey v. Transouth Mortg. Corp.*, 88 F. Supp. 2d 482, 484-85 (W.D.N.C. 1999).

The North Carolina Supreme Court also agrees, and has held in a very similar circumstance that the trustee is “purely . . . a nominal defendant” in actions concerning foreclosures. In *Allred v. Trexler Lumber Co.*, 194 N.C. 547, 140 S.E. 157, 158 (1927), the Supreme Court wrote:

Victor S. Bryant, a resident of Durham, N. C., was named as trustee in the deed of trust, the foreclosure of which is sought to be enjoined, and his executrix, upon whom “all the title, rights, powers, and duties of such trustee” were cast (C. S. § 2578) at his death, is joined purely as a nominal defendant, and no separate cause of action is alleged or relief demanded as against her. Her interest, therefore, is not sufficient to defeat a removal of the cause of action to the federal court for trial. *Morganton v. Hutton & Bourbonnais Co.*, 187 N. C. 736, 122 S. E. 842 [(1924)].

Where it appears that the real controversy is between citizens of different states, the presence of mere formal parties, such as executors of a deceased trustee, even though citizens of the same state with the plaintiff, will not defeat or oust the jurisdiction of the federal court. *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963 [(1879)]; Black’s Dillon on Removal of Causes, c. 8, § 85.

*Id.*¹

As the United States Supreme Court has made clear, federal judicial power to hear a removed case “is a question of the construction of the federal statute on removal, and not the

¹ It appears that before 1948, removal questions like this could be decided by state courts, under a previous version of the removal statute. See 28 U.S.C. § 72 (1946) (providing that a party “entitled to remove [suits mentioned in 28 U.S.C. § 71] may make and file a petition, duly verified, in such suit in such State court”), *amended and replaced by* 28 U.S.C. § 1446 (1948). In 1948, Congress enacted 28 U.S.C. § 1446(a), which displaced the statutory provisions allowing filing of a removal petition in state court and directs defendants “desiring to remove any civil action from a State court” to file a notice of removal in federal court. See Historical and Revision Notes — 1948 Act, 28 U.S.C. § 1446 (2006).

state statute. The [state statute's] procedural provisions cannot control the privilege or removal granted by the federal statute.” *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). Nonetheless, the North Carolina Supreme Court’s view is instructive on whether the trustee’s role under state law is nominal or real, and courts evaluating the question of removal in foreclosure cases routinely refer to state law on the trustee’s role. *E.g.*, *Prasad*, 2011 WL 4074300, at *3. In view of the *Allred* decision, the Court agrees that in cases where the plaintiff does not seek any independent remedy from the trustee, which is the case here, the trustee is a nominal defendant whose citizenship does not defeat diversity jurisdiction.

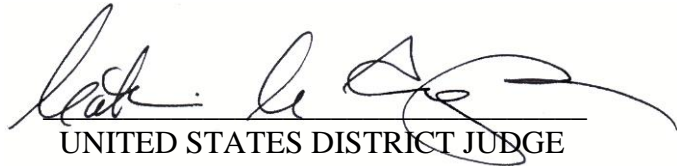
The plaintiff also contends that the *Rooker-Feldman* doctrine requires remand. The *Rooker-Feldman* doctrine “is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). This case does not fall into that category. First, the plaintiff does not want to be in federal court, as is obvious from the motion to remand. Second, the plaintiff is not a “state-court loser.” While the plaintiff did lose in state court on the four questions at issue in a foreclosure proceeding initiated pursuant to N.C. General Statute § 45-21.16, the claims in this lawsuit arise under N.C. General Statute § 45-21.34. The issues in an action pursuant to § 45-21.34 are not the same as those that were before the Superior Court pursuant to § 45-21.16, and a decision by the Superior Court on the questions decided in a § 45-21.16 hearing do not preclude or affect the substance of the issues that can be raised in a § 45-21.34 case. *E.g.*, *Meehan v. Cable*, 127 N.C. App. 336, 338, 489 S.E.2d 440, 442 (1997). Indeed, in the § 45-21.16 procedure, the plaintiff was precluded from raising the equitable defenses proper in a § 45-21.34 action. Nor does the state court’s decision on the TRO have any

preclusive effect. For all of these reasons, this Court will not be put in the position of reviewing the § 45-21.16 foreclosure decision of the Superior Court. *Cf. Smalley v. Shapiro & Burson, LLP*, No. 12-1266, 2013 WL 1613219, at *4-7 (4th Cir. Apr. 16, 2013). The *Rooker-Feldman* doctrine does not apply.

Nor does it appear that the Anti-Injunction Act would prohibit this Court from granting the relief the plaintiff seeks, should the plaintiff prove he is entitled to it. *See Diggs v. Wells Fargo Bank, NA*, No. 3:12CV490, 2012 WL 3308214 (W.D.N.C. Aug. 13, 2012) (considering injunctive request in § 45-21.34 case on the merits). If necessary, the Court can revisit the matter.

It is **ORDERED** that the Plaintiff's Motion for Remand, (Doc. 12), is **DENIED**.

Entered in open court on April 30, 2013, and signed the 6th day of May, 2013.



UNITED STATES DISTRICT JUDGE