

64 A.D.3d 454, 883 N.Y.S.2d 473, 2009 N.Y. Slip Op. 05685
(Cite as: **64 A.D.3d 454, 883 N.Y.S.2d 473**)

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Supreme Court, Appellate Division, First Department,
New York.

ASTORIA FEDERAL SAVINGS & LOAN ASSO-
CIATION/FIDELITY NEW YORK FSB, Plaintiff,
v.

Marilyn LANE, Defendant–Appellant,
Frances Turner, et al., Interve-
nors–Defendants–Respondents.

July 7, 2009.

Background: Lender filed foreclosure actions against borrower with respect to two condominium units. The Supreme Court, New York County, [Alice Schlesinger, J.](#), [22 Misc.3d 1108\(A\), 2008 WL 5501016](#), denied borrower's motion to vacate foreclosure judgments, and she appealed.

Holding: The Supreme Court, Appellate Division, held that state court's foreclosure judgments entered after borrower had filed removal petition, but before remand to state court, were not void.

Affirmed.

West Headnotes

[1] Removal of Cases 334 95

[334](#) Removal of Cases

[334VI](#) Proceedings to Procure and Effect of Re-
moval

[334k95](#) k. Transfer of jurisdiction and effect of
removal in general. [Most Cited Cases](#)

Removal of action divests state court of its juris-
diction over dispute while removal petition is pending
in federal court.

[2] Removal of Cases 334 97

[334](#) Removal of Cases

[334VI](#) Proceedings to Procure and Effect of Re-
moval

[334k96](#) Proceedings in State Court After Re-
moval

[334k97](#) k. Validity and effect in general.
[Most Cited Cases](#)

State court's foreclosure judgments entered after defendant had filed removal petition, but before federal court had remanded case to state court, were not void for lack of subject matter jurisdiction, where removal petition was untimely, asserted frivolous grounds for removal, and was filed for purpose of delaying imminent foreclosures, and defendant did not challenge judgments until more than ten years later.

**474 Marilyn Lane, appellant pro se.

Butler, Fitzgerald, **Fiveson** & McCarthy, P.C., New York ([David K. Fiveson](#) of counsel), for Frances Turner, respondent.

Thomas P. Malone, New York, for Marchena re-
spondents.

[SAXE](#), J.P., [FRIEDMAN](#), [MOSKOWITZ](#),
[FREEDMAN](#), [RICHTER](#), JJ.

*454 Order, Supreme Court, New York County (Alice Schlesinger, J.), entered December 9, 2008, which denied defendant Lane's motions to vacate two foreclosure judgments, unanimously affirmed, without costs.

In December 1994, plaintiff commenced fore-
closure actions against Lane with respect to two
Manhattan condominium units. Lane answered the
complaints and asserted counterclaims for fraud and
abuse of process. The counterclaims were dismissed
on June 5, 1995 and Lane appealed that decision to
this Court. In February 1996, Supreme Court struck
Lane's answers and appointed a referee to compute the
amount due plaintiff and report on whether the prop-
erties could be sold. In July, the referee recommended
that both properties be sold. Supreme Court subse-
quently confirmed the referee's reports, but stayed the
foreclosure sales pending resolution of Lane's appeal.
On November 14, 1996, this Court unanimously af-
firmed the dismissal of the counterclaims and rejected

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Lane's remaining contentions ([Fidelity N.Y. FSB v. Lane](#), 233 A.D.2d 181, 649 N.Y.S.2d 788 [1996], *lv. dismissed* 89 N.Y.2d 1029, 658 N.Y.S.2d 244, 680 N.E.2d 618 [1997]).

Shortly thereafter, in January 1997, Lane filed for bankruptcy, resulting in yet another stay of the foreclosures. The bankruptcy stay was lifted on April 10, and 19 days later plaintiff submitted proposed judgments of foreclosure to the court for signature. On May 9, only a week after the judgments were submitted, Lane filed a petition to remove the now-consolidated actions to federal court. Although it appears that a copy of the removal petition was given to someone in the County Clerk's office, there is no evidence that Lane served a copy of the petition on the trial judge assigned to the foreclosure matters.

On June 30, 1997, Supreme Court, apparently unaware of the removal petition, signed two judgments of foreclosure and sale, which were entered on July 10. Despite the fact that Lane *455 received copies of the signed judgments 10 days later, she took no steps to challenge them. On July 25, the federal court issued an order summarily remanding the matter back to state court. In October 1997, the referee conducted the foreclosure sales, and title to both properties was transferred to bona fide purchasers. Since that time, each of the subject properties has changed hands.

Now, more than 10 years after the properties were sold and without giving any excuse for her extraordinary delay, Lane seeks to undo the foreclosures,oust the current owners from their homes, and vacate the judgments. Lane's motions, presumably brought pursuant to [CPLR 5015\(a\)\(4\)](#), allege that Supreme Court lacked jurisdiction during the limited time period in 1997 between the filing of the removal petition and the federal court remand. Notably, Lane does not claim, nor could she, that Supreme Court did not have jurisdiction over the matter at any other time during the long history of this case. Lane offers no reason why her removal attempt was proper, nor does she present any viable defense on the merits of the foreclosure actions. And it is undisputed that at the time the properties were **475 sold, the federal court had already remanded the matter to state court.

[1] As a general rule, removal of an action divests the state court of its jurisdiction over the dispute while the removal petition is pending in federal court (

[Matter of Artists' Representatives Assn. \[Haley\]](#), 26 A.D.2d 918, 274 N.Y.S.2d 442 [1966]). While no New York case has addressed the specific issue presented here, a number of other courts have carved out exceptions to the general rule focusing on situations where removal petitions were frivolous, duplicative or abusive. For example, in [Motton v. Lockheed Martin Corp.](#), 692 So.2d 6 [La.App. 1997], after the defendant filed an improper removal petition but before the federal court remanded, the plaintiff filed a notice of appeal. The court denied the defendant's motion to dismiss the appeal, finding that the defendant's removal attempt was made to delay the plaintiff's right to move forward in the case.

In [Hunnewell v. Palm Beach County Code Enforcement Bd.](#), 786 So.2d 4 [Fl.App. 2000], a removal petition was filed three days before oral argument on appeal, and the federal court did not remand the case until several days after the appellate decision was rendered. The court concluded that because the removal to federal court was improper, the appellate court's decision was not void. That same court subsequently denied a petition for rehearing, finding that if on the face of a removal petition no colorable claim is made, the state court need not *456 recognize the removal (*id.* [2001], *petition for review denied* 817 So.2d 847 [Fla. 2002]; *see also* [Cok v. Cok](#), 626 A.2d 193 [R.I. 1993] [where the removal petition was without the slightest color of right or merit, the state court at no time lost jurisdiction]). Other courts have ruled similarly (*see* [Attig v. Attig](#), 177 Vt. 544, 862 A.2d 243 [2004]; [Heilman v. Florida Dept. of Revenue](#), 727 So.2d 958 [Fl.App. 1998]; [Farm Credit Bank of St. Paul v. Ziebarth](#), 485 N.W.2d 788 [N.D. 1992], *cert. denied* 506 U.S. 988, 113 S.Ct. 501, 121 L.Ed.2d 437 [1992]; [Farm Credit Bank of St. Paul v. Rub](#), 481 N.W.2d 451 [N.D. 1992]; [Citizens State Bank v. Harden](#), 439 N.W.2d 677 [Iowa App. 1989]).

[2] We find that under the unique circumstances of this case, where the federal court found the removal petition to be frivolous on its face and where it was made in bad faith at the eleventh hour, following an unsuccessful appeal, the motion court was not required, more than a decade later, to vacate the judgments based on a claimed lack of jurisdiction. There is no question that Lane's removal petition was frivolous. In the order summarily remanding the matter to state court, the federal court concluded that the petition showed "no non-frivolous basis for jurisdiction"

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and that “it clearly appears on the face of the papers submitted that removal should not be permitted.”

Moreover, Lane's removal petition was undeniably untimely. A notice of removal of a civil action must be filed within 30 days after receipt of a copy of the initial pleading ([28 USC § 1446\(b\)](#)). Here, the foreclosure actions were commenced in December 1994 and Lane's answers were struck in February 1996, yet the removal petition was not filed until May 1997. Therefore, in addition to asserting frivolous grounds for removal, the petition was time-barred and could not have caused the state court to lose jurisdiction (*see Booth v. Stenshoel*, 96 Wash.App. 1019, 1999 WL 438888 [state court had jurisdiction to enter judgment after removal petition was filed on the day of trial and 16 months after the action was commenced]; *Miller Block Co. v. United States Natl. Bank*, 389 Pa.Super. 461, 567 A.2d 695 [1989], lv. **476 denied 525 Pa. 658, 582 A.2d 324 [1990] [state court not divested of jurisdiction upon filing of the removal petition where petition was undisputedly untimely]; *Ramsey v. A.I.U. Ins. Co.*, 1985 Ohio App. LEXIS 8157, 1985 WL 10329 [an untimely removal petition is a nullity and does not divest the state of jurisdiction]).

Lane's bad faith in filing her removal petition is apparent. After an unsuccessful appeal and the lifting of an appellate stay, Lane filed for bankruptcy and, as a result, obtained yet another *457 stay of the foreclosure action, which already had been pending for several years. After the bankruptcy stay was lifted, plaintiff submitted proposed judgments of foreclosure. A week later, instead of taking any action in state court, Lane filed her frivolous removal petition. The only fair reading of the record is that Lane's actions in attempting removal were made in bad faith for the purpose of delaying the imminent foreclosures. Lane's bad faith litigation conduct persists to this day, as evidenced by her inexcusable delay in waiting more than 10 years to challenge the judgments despite being aware of their existence within weeks of their entry.

We recognize that some courts have concluded no exceptions should be created to the general rule and thus have invalidated state court action taken after removal but before remand (*see e.g. South Carolina v. Moore*, 447 F.2d 1067 [4th Cir.1971]; *State ex rel. Morrison v. Price*, 285 Kan. 389, 172 P.3d 561 [2007]; *People v. Martin-Trigona*, 28 Ill.App.3d 605,

[328 N.E.2d 362 \[1975\]](#)). These cases are not binding on us, and in any event, we decline to follow them under the egregious circumstances presented here. With no good reason, Lane waited over a decade before deciding to come back to court to challenge the foreclosures. Her abuse of the legal process, both in filing a bad faith petition and in failing to move to vacate the judgments she unquestionably knew about, cannot be countenanced, particularly in light of the harm that could befall the innocent purchasers of the properties. To hold otherwise would reward Lane for her inexcusable delaying tactics and would be entirely “inconsistent with any notion of fairness and justice” (*Farm Credit Bank of St. Paul v. Rub*, *supra*, 481 N.W.2d at 457).

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