

Defendant USB filed a notice of removal on August 7, 2015 on the basis of diversity jurisdiction (Dkt. 1). On September 9, 2015, Plaintiffs filed an “Emergency Motion for Extension of Time to File Motion to Remand” (Dkt. 22), and on September 11, 2015, this Court granted Plaintiffs an additional 15 days to file a motion to remand.¹ See Dkt. 23. Plaintiffs subsequently filed the motion to remand (Dkt. 26) on September 28, 2015.

BACKGROUND

This suit involves Plaintiffs’ efforts to prevent a foreclosure sale on the property located at 105 Cloudcroft Drive, Wylie, Texas 75098 (the “Property”). Woods purchased the Property on March 2, 2009 and executed a Note and Deed of Trust with Leader One Financial Corporation. Dkt. 1-4 at ¶ 9 (“Original Petition”). The Note was subsequently assigned to USB on January 29, 2010. *Id.* at 15. According to Plaintiffs, the Property first went into foreclosure on October 4, 2011 when “USB wrongfully sold the home at a foreclosure sale to itself...but the sale was rescinded.” *Id.* at ¶ 18. Plaintiffs’ Original Petition goes on to recite a series of events from October 2012 to May 2015, during which time Woods was trying to work with USB to cure her default on the loan. *Id.* at ¶¶ 19-27. Ultimately, USB issued a Notice of Sale through its appointed Trustee, BDFTE. *Id.* at 23. The sale was scheduled for May 5, 2015 at 10:00 a.m. *Id.* Plaintiffs allege that “title passed to Southern on May 1, 2015” when Woods agreed to sell the property to Southern. *Id.* at ¶ 25. Plaintiffs further allege that on May 4, 2015, one day before the scheduled foreclosure sale, “USB simultaneously approved the packet from Southern and “sent a Stop Auction Sale request to the Trustee.” These efforts proved futile. The Property was sold at auction on May 5, 2015, and, according to Plaintiffs, American was the successful purchaser. *Id.* at ¶¶ 31-32.

¹ In granting the motion, however, the Court noted that “any opposing Defendants are not precluded from later challenging, through any applicable authorities, whether the 30-day period can be extended by Court order.”

STANDARD

Defendant USB removed this case on the basis of diversity jurisdiction. Suits are removed on the basis of diversity jurisdiction when: (1) the suit involves a controversy between citizens of different states and (2) the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. USB contends that Defendant BDFTE is a Texas citizen and was thus improperly joined in the litigation. Suits are removed on the basis of diversity jurisdiction “only if none of the parties in interest is *properly* joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b) (emphasis added).

“To establish that a non-diverse defendant has been improperly joined, the removing party must prove (1) actual fraud in the pleading of jurisdictional facts, or (2) the plaintiffs’ inability to establish a cause of action against the non-diverse party in state court.” *Rico v. Flores*, 481 F.3d 234, 238-39 (5th Cir. 2007); *Holder v. Abbott Labs., Inc.*, 444 F.3d 383, 387 (5th Cir. 2006). The second prong only is at issue here, and its test is “whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.” *Rico*, 481 F.3d at 239. This Court must decide whether “there is any reasonable basis for predicting that [Plaintiffs] might be able to establish [Defendants’] liability on the pleaded claims in state court.” *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999). Since the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder, not the merits of the plaintiff’s case. *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004). In making that determination, the court may conduct a Rule 12(b)(6)-type analysis, looking initially at the

allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant. *Id.* The court is also required to resolve any issues of material fact or ambiguity in the state law in the plaintiffs' favor. *Rico*, 481 F.3d at 239.

As explained by the Fifth Circuit:

To determine such possibility of state-court recovery, a court may analyze the sufficiency of a plaintiff's pleadings alone; or, in its discretion, pierce the pleadings and conduct a summary inquiry. The focus is on plaintiff's pleadings at the time of removal; post-removal filings may be considered only to the extent they amplify or clarify facts alleged in the state-court complaint, with new claims or theories of recovery disregarded.

Akerblom v. Ezra Holdings Ltd., 509 Fed. App'x 340, 344-45 (5th Cir. 2013) (internal citations and quotations omitted). The petition as filed in state court controls a court's inquiry. *See Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir.1995); *see also Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir.1999) (stating that the court must determine if there could possibly be liability "on the pleaded claims in state court.")² The party claiming fraudulent joinder bears a "heavy burden" of persuasion. *See Smallwood*, 385 F.3d 568 at 574.

ANALYSIS

I. Timeliness of Motion to Remand

In opposing Plaintiffs' motion to remand, Defendants BDFTE and American argue that the motion should be denied because it was filed fifty-two days after the case was removed, and, therefore, was not timely filed. *See* Dkt. 27 at 3-4; Dkt. 28 at 2-3. Generally, a court may remand a case on the basis of any valid defect identified in a motion to remand as long as it is made within 30 days of removal, and a court is required to strictly construe the removal statute in

² The Court notes that since filing the motion to remand, Plaintiffs have filed a motion for leave to amend the complaint and has sought other relief from the Court. The Court cannot address that request to amend until it addresses whether the case was properly removed and it has removal jurisdiction, and the petition as filed in state court controls the Court's inquiry. *See Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir.1995); *see also Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir.1999) (stating that the court must determine if there could possibly be liability "on the pleaded claims in state court.").

favor of remand and against removal. 28 U.S.C. §1447; *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007). If, however, remand is based on jurisdictional grounds, the plaintiff can move to remand at any time. *See* 28 U.S.C. § 1447(c); *see also Gonzales v. Rio Grande Plumbing Supply, Inc.*, No. CIV.A. M-04-409, 2005 WL 1653030, at *1 (S.D. Tex. July 11, 2005) (finding that 28 U.S.C. § 1447(c) clearly allows a plaintiff to challenge subject matter jurisdiction well beyond thirty days after a filing of a notice of removal); *Carroll v. Gold Medal, Inc.*, 869 F.Supp. 745 (E.D.Mo.1994) (stating that diversity jurisdiction in removal cases goes to subject matter jurisdiction and was not capable of being waived by tardiness). Since diversity jurisdiction in removal cases goes to subject matter jurisdiction and is “not a mere procedural irregularity capable of being waived,” the Court finds that Plaintiffs’ motion to remand was timely filed. *Carroll*, 869 F. Supp. 745, 747. Accordingly, the motion must be decided based on whether there is any possibility of recovery by the Plaintiffs against BDFTE. *Rico*, 481 F.3d at 239.

II. Improper Joinder

Diverse Defendant USB’s notice of removal claims that although Defendant BDFTE is “believed to be a Texas citizen,” it was improperly joined, and, therefore, its “citizenship should be disregarded for purposes of diversity.” Dkt. 1 at ¶ 17. USB contends that Plaintiffs have not asserted any viable causes of action against BDFTE. The Court thus reviews the state court petition (Dkt. 1-4) for the claims made against BDFTE.

The only claims against BDFTE in the “Causes of Action” portion of Plaintiffs’ petition are for violations of the Texas Deceptive Trade Practice Act (the “DTPA”). *Id.* at ¶ 41. Plaintiffs allege that USB and BDFTE violated the DTPA by “colluding to refuse to provide a payoff amount after accepting the Workout package and issuing the right to make a prepayment” in the amount of \$200,000 “for the sole purpose of precluding Southern from meeting the price

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