

OFFICE OF
APPELLATE COURTSSTATE OF MINNESOTA
IN SUPREME COURT

AUG 31 2010

FILED

Kevin E. Burns,

Barbara R. Burns,

Petitioners

DOCKET NO. A-09-466

TAX COURT DOCKET NO. 07929-R

v.

Commissioner of Revenue,

Respondents

PETITIONERS' JOINT AND SEPARATE OBJECTION
TO RESPONDENT'S MEMORANDUM IN OPPOSITION
TO PETITIONERS' PETITION FOR REHEARING

As provided and authorized by Rule 102 and as otherwise provided and authorized by the Minnesota Rules of Civil Appellate Procedure, Kevin E. Burns and Barbara R. Burns (collectively "Petitioners") hereby file this Joint and Separate Objection to the Respondent's Memorandum in Opposition to the Petitioners' Joint and Separate Petition for Rehearing. The Petitioners request the court to strike or otherwise disregard the Respondent's Memorandum in Opposition and to grant the relief sought by the Petitioners in their principal Brief and Petition for Writ of Mandamus and Prohibition and Petition for Rehearing on fundamental due process and public policy grounds that are evident from the Record and on the basis that the Petitioners have established entitlement to judgment as a matter of law.

DISCUSSION

As a preliminary matter, the Petitioners note that the Attorney General has misstated key facts and mischaracterized others and has also misstated and misapplied the law and the

relevant procedural history of this case. The Petitioners will address these misstatements in the order in which the oppositional memorandum raises them.

Preemption of State Court Jurisdiction

In what must be viewed as an obvious and transparent attempt to marginalize and discredit the Petitioners' legal claims under an order by a Minnesota federal court upholding federal jurisdiction of a removal of a state court action and approving transfer of venue from the District of Minnesota to the Southern District of New York, Assistant Attorney General Mark Levanger, the third in a succession of assistant attorneys general who have handled this case over an 18-month period¹, refers vaguely to an "alleged verbal statement by a federal court judge in Minnesota." In fact, the statement in question consisted of an explicit instruction and assurance by United States District Court Judge David S. Doty of the District of Minnesota and was memorialized by an official transcript of proceedings taken by Registered Court Reporter Kristine Mousseau that is publicly filed in federal courts in Minnesota and New York. A contemporaneous written order granting the Burns' motion for transfer of venue concerning a removed state court foreclosure action filed by Bank of America in the Dakota County District Court in 2001 and signed by United States District Court Judge David S. Doty of the District of Minnesota was issued and publicly filed on June 21, 2002. Both the June 21, 2002 Doty transcript and the June 21, 2002 Doty order were filed by the Petitioners in the Minnesota Tax Court and are part of the Record in this appeal of which this court is required to take judicial notice.

¹ The predecessor assistant attorneys general of record were Tax Division manager Tamar Gronvall and her direct-report Kevin Rodlund. Grovall unsuccessfully argued a motion to amend the case caption to eliminate Barbara Burns on May 21, 2008 and was succeeded by Rodlund. Rodlund represented the Commissioner and the State of Minnesota at trial in the Minnesota Tax Court and now has been succeeded by Assistant Attorney General Levanger.

The transcript of the proceedings upon which the Doty order was based memorialized a recorded stipulation by Bank of America and the Petitioners in which Bank of America expressly agreed to the transfer of venue ordered by Judge Doty on June 21, 2002. The transcript of proceedings and the Minnesota District Court Record in which the transcript was publicly filed further establish that (1) the Doty proceedings arose from a state court foreclosure action commenced by Bank of America in the Dakota County District Court on or about June 30, 2001; (2) the state court action was removed by the Burns to the Minnesota District Court on or about July 25, 2001, thereby divesting the state court and vesting jurisdiction in the federal court; (3) Bank of America did not file a timely motion for remand to the Dakota County District Court and (4) there is no order of remand that is of record.

As the Petitioners should not have to instruct the attorney general or this court, federal removal jurisdiction is preemptive, not concurrent. Once divested by a removal of a state court action to a federal court, the divested state court does not reacquire jurisdiction unless and until the federal court of jurisdiction enters an order of remand. Once federal removal jurisdiction is established, any attempt by a divested state court to frustrate or inhibit federal removal jurisdiction is unconstitutional.

Here, the Record is unequivocal that removal of a state court foreclosure action occurred on July 25, 2001 and that no order of remand is of record re-transferring jurisdiction of the Burns-Bank of America foreclosure action to the Dakota County District Court. Moreover and as noted and discussed at some length in the Petitioners' Petition for Rehearing, there is (1) a transcript of an in-court stipulation in which Bank of America,

on behalf of itself and its subsidiaries, affiliates, agents, attorneys, and purported assignees, expressly agreed on the record to continuing federal jurisdiction of this action and to venue of this action in a New York federal court; and (2) a filed lis pendens that was recorded by the Dakota County Registrar of Titles on August 8, 2003 pursuant to the Minnesota Lis Pendens Statute that warns the public of this pending litigation and expressly prohibits any Minnesota court from conveyance of the Property that is the basis for the lis pendens for a minimum period of two years following the filing of the lis pendens, which, in this case, occurred on August 8, 2003.

As the Petitioners noted and discussed in their Petition for Rehearing, recorded stipulations are legal in Minnesota and are presumed binding upon the court and the parties. Additionally, two legislative statutes, the federal removal statute and the Minnesota lis pendens statute, operate to preclude and preempt state court action concerning the Property that is the basis for this Petition.

Based upon the foregoing facts, which are evident from the record and other public records of which this court is required to take judicial notice, including, but not limited to, the June 21, 2002 Doty order and stipulation and the Certificate of Title upon which lis pendens was validly recorded on August 8, 2003, this court has no choice but to conclude that (1) the Minnesota state courts were divested of jurisdiction as to the issue of the validity of the purported Bank of America foreclosure action by the removal of the state court foreclosure action to a Minnesota federal court and the subsequent transfer of the case by that court to a federal court in New York; (2) no order of remand is of record; (3) federal removal jurisdiction is preemptive, not concurrent; (4) lis pendens was properly filed on August 3, 2003; (4) the Minnesota state courts never reacquired

jurisdiction after being divested by the Petitioners' removal of the state court action to a federal court on July 25, 2001; (5) any and all state court actions concerning the removed foreclosure action were preempted and barred by operation of the federal removal statute and the Minnesota lis pendens statute, both of which trump any exercise of discretion by any Minnesota state court, including this court. This compels the conclusion that the Dakota County District Court was divested of subject-matter jurisdiction to adjudicate issues raised by the Burns-Bank of America foreclosure action, including, but not limited to, adverse claims to the Property raised by Bank of America's purported assignees, and (6) as a consequence "the issue of ownership of the property in question during the relevant party" was not and could not have been "fully and finally adjudicated" by the Dakota County District Court on December 23, 2003 or at any other relevant time.

Federalism and Federal Abstention

The Minnesota Supreme Court may and is requested to take judicial notice that federal courts sitting in diversity may and, in some cases, must defer to state courts. Under the so-called *Burford* and *Thibidaux* abstention doctrines, federal courts sitting in diversity jurisdiction will abstain in cases where state courts are likely to have greater expertise and/or cases where a state court evidences that it will not relinquish jurisdiction or that pose issues of state law that risk infringement upon state sovereignty. The Petitioners additionally note that, unlike federal question cases, there is a strong presumption that federal courts sitting in diversity should not apply *Burford* or *Thibidaux* abstention.

Here, the federal court of jurisdiction denied de novo review of the validity and legality of the Bank of America removed state court foreclosure action and effectively abstained from exercising federal jurisdiction because the Minnesota state court proceeded as

though no removal and venue transfer had occurred and otherwise evidenced that it would not defer to the federal court. At the same time, the Minnesota state court, Dakota County, is on record as stating that it is pre-disposed to rule against the Petitioners, that it views the Petitioners as second-class citizens with no legal or constitutional rights that the Minnesota state courts are required to respect, and that it will not hear and adjudicate any claim or defense asserted by the Petitioners in any serious way, thereby violating standards of fundamental justice, fairness, and due process that the Minnesota appellate courts have articulated and applied specifically to Petitioner Barbara Burns. See, *In RE: The Matter of Burns*, Docket No. CX-95-141, 538 N.W. 2d 162.² Put another way, the Minnesota state courts will not accord fundamental constitutional due process to the Petitioners in any Minnesota state court and also will not permit the Petitioners to obtain it in a federal court sitting in diversity.

The Petitioners assert that they are United States citizens and property owners threatened with a taking of their private property and that, as such, they have the constitutional right to be heard in a meaningful proceeding somewhere. The Petitioners additionally again note that they invoked a legal process, removal of a state court action to a federal court to which the opposing party did not timely object, obtained a recorded stipulation and a judicial order that a Minnesota federal judge signed, that expressly

² The decision of the intermediate appellate court in I.M.O. Burns was appealed by the Respondent, Kevin S. Burke, to the Minnesota Supreme Court, then headed by Burke's mentor, then-Chief Justice Alexander M. Keith. The Minnesota Supreme Court granted review and issued a decision on January 19, 2006, some fourteen days after the trial court order from which appeal was taken became void of its own terms. The Petitioners again note that, in all cases in which the petitioner is not the protégée of the chief justice of the Minnesota Supreme Court, this would moot the appeal and operate to deprive the Minnesota Supreme Court of jurisdiction to hear the petition. The Petitioners additionally note that January 19, 2006 opinion expressly distinguishes between an administrative sanction involving mode of communication with the courts and a justiciable controversy, such as *Burns v. Bank of America*, and that the opinion expressly cites the opinion of this court in *IN RE: Clerk of Lyon*, 308 Minn. 172, 241 N.W. 781 (1976), stating that a full adversarial hearing of the type frustrated by the Dakota County District Court in the *Burns-Bank of America* case is "a necessity." The Petitioners will discuss this point in more detail in Point II of this brief.

authorized the Petitioners to litigate and obtain de novo review of the validity and legal of the Bank of America state court foreclosure action in a New York federal court and that, unlike Bank of America and its purported assignees and certain employees and agents of the state of Minnesota and its inferior political subdivisions, the Petitioners at all relevant times acted in accordance with the law and in conformity with the express instructions of a Minnesota federal judge and the advice of competent Minnesota attorneys.

Based upon these facts, this court should and must apply the law to reward the Petitioners' diligence and adherence to the rule of law. Conversely, justice requires the court to utilize equitable doctrines of waiver and estoppel and unclean hands to deny relief to the Respondent and other parties adverse to the Petitioners.

The Petitioners believe that the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit are refusing to adjudicate the validity and legality of the Bank of America foreclosure action that was validly removed to and transferred by the Minnesota District Court only because the Minnesota state courts will not relinquish jurisdiction. The Petitioners assert that the New York federal court would hear and adjudicate this case on the basis of the facts, the law, and the merits and accord to the Petitioners the full due process that Judge Doty promised that they would have if this court would clearly and unequivocally surrender jurisdiction and yield to the jurisdiction of the federal courts.

State Abstention Doctrines

No overreaching national rule exists that requires state courts to abstain from hearing cases brought in federal courts or in courts of other states. At the same time, every state has developed, either through its courts or through legislation, some doctrine under which

a state court can stay their actions to avoid duplication of efforts with another court hearing the same action.

Here, the Minnesota legislature has enacted the Minnesota Lis Pendens Statute, which permits lis pendens to be filed and prohibits conveyance of a property encumbered by lis pendens for a period of two years pending adjudication of competing property claims by the court named in the lis pendens. It is not in dispute that the Petitioners filed lis pendens that was recorded by the Dakota County Registrar of Titles on August 8, 2003, more than four months prior to the December 24, 2003 Dakota County proceeding that the Respondent claims “fully and finally” adjudicated claims to the Property that were properly placed before the federal court. Thus, the state court proceeding was barred by operation of a Minnesota legislative statute.

Additionally, the Minnesota Supreme Court has previously determined that it is permissible and appropriate for Minnesota state courts to abstain from hearing cases that are properly before other tribunals. See, e.g., *Gayle v. Little Six, Inc.*, 555 N.W. 2d 284 (Minn. 1996)(upholding abstention by state court on the basis that intervention by state court would undermine the authority of a sovereign tribunal). Applying the rule of *Gayle v. Little Six, Inc.* to this case, the actions of the Dakota County District Court, which acted in male fides and in clear violation of the federal removal statute and the Minnesota lis pendens statute and the written order of a Minnesota federal court, clearly undermines and infringes upon the right of the Petitioners to remove a state court action to a federal court and to obtain an adjudication on the merits of the their claims in accordance with the express representations and assurances of a Minnesota federal judge. Accordingly, the court should summarily vacate the “judgment” of the divested state court and formally

yield jurisdiction to the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit in accordance with the requirements of the federal removal statute and the Minnesota Lis Pendens Statute and the transfer order of the United States District Court for the District of Minnesota.

Collateral Estoppel and Due Process

The jurisprudence of this court dictates that application of collateral estoppel and other preclusion doctrines is generally disfavored in cases where a party attacks the validity of a judgment on jurisdictional grounds and that a strong public policy interest in the validity of a court's judgments trumps even the most compelling finality argument. It is well settled that this court has consistently adopted the majority view that collateral estoppel and other claim and issue preclusion doctrines cannot apply in cases where (1) the parties are not the same; (2) the issues are not the same; (3) the issue in question has not been litigated on the merits by a court of competent jurisdiction; and (4) an interested or vested party has not been accorded a full and fair opportunity to be heard.

Here, the Record is unequivocal that none of these conditions has been satisfied in this case. The Respondent—and this court—effectively beg the question by demonstrating a conclusion, that the parties and issues were identical and fully litigated by a court of competent jurisdiction and that all vested parties had a full and fair opportunity to be heard, by means of premises that assume that conclusion, i.e., “the Minnesota state court issued a “full and final adjudication” as to the issue of the Petitioners’ Property and we know this to be true because the Minnesota state court that issued the “full and final adjudication” under review in this case said so.”

This is a classic logical fallacy often accurately referred to as non-constructive circular argument. The Petitioners should not have to point out that, even if there was a legal basis to conclude that there is a possibility that this statement is true—which, given operative federal removal jurisdiction and the requirements of a Minnesota legislative statute, is demonstratively not the case—the statement in and of itself is insufficient proof of its validity.

The Petitioners also again note the decision of this court in *IN RE: Clerk of Lyon*, supra, 308 Minn. 172, 241 N.W. 2d 781 (1976), which was cited by an esteemed, if not revered, member of this court in *IN RE: Burns*, a case that involved Barbara Burns, a necessary and indispensable party to this case. In *Burns*, citing *Lyon*, the late Justice Mary Jeanne Coyne, writing for the court, distinguished the administrative issues upon which *Burns* was litigated, and upheld “the necessity” of a “full adversarial hearing in the context of an adversarial proceeding, which *Burns v. Bank of America* clearly was and is, “before a disinterested and unbiased court.” *IN RE: Burns*, 538 N.W. 2d 162 (Minn. App. 1995). The Petitioners—one of whom was prevented from appearing in court and asserting legal rights held by this court to be “a necessity” in all justiciable proceedings by issuance of a bogus arrest warrant that was promptly quashed once the state of Minnesota effectively seized and conveyed the Petitioners’ private property—clearly did not obtain the “full adversarial hearing before a disinterested and unbiased court” that this court determined in *Lyon* and upheld in *Burns* as a fundamental element of due process.

The Petitioners do not wish to burden this court or any other. At the same time, the Petitioners feel justified in invoking fundamental due process rights to which both the Minnesota District Court and this court has ruled the Petitioners are entitled.

Accordingly, the Petitioners move the Minnesota Supreme Court for an order striking or otherwise rejecting the Respondent's oppositional memorandum in its entirety and granting the relief sought by the Petitioners in their principal brief and petition for mandamus and prohibition.

CONCLUSION

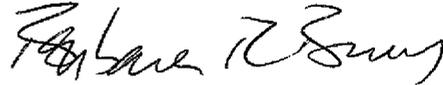
For the reasons stated, the Minnesota Supreme Court should strike or otherwise reject the Respondent's oppositional memorandum in its entirety and grant the relief sought by the Petitioners in their principal Brief and petition for a writ of mandamus and prohibition.

DATED: August 26, 2010

BY:



Kevin E. Burns



Barbara R. Burns