

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PARKER COMMUNITY CREDIT UNION,

Plaintiff,

v.

DEAN C. HENNING AND MARIE E. HENNING,
UNITED STATES OF AMERICA DEPARTMENT
OF TREASURY INTERNAL REVENUE SERVICE,
TIMOTHY J. O'LEARY, MICHAEL BLASER,
SCOTT D. PETERSON, CITY OF JANESVILLE,
STATE OF WISCONSIN BY ITS DEPARTMENT
OF WORKFORCE DEVELOPMENT,

Defendants.

OPINION AND ORDER

11-cv-693-slc¹

After defendants Dean C. Henning and Marie E. Henning filed a notice of removal of this case, combining a state foreclosure action and a state replevin action originally filed separately in the Circuit Court for Rock County, Wisconsin, plaintiff Parker Community Credit Union moved to remand the cases. In defendants' notice of removal, they state that original jurisdiction is proper under the court's diversity jurisdiction. (The only defendants involved this removal are Dean and Marie Henning; all references to defendants are to them only.) Plaintiff argues that removal is improper for two reasons: (1) defendants failed to comply with the procedure for removal set forth in 28 U.S.C. § 1446 and (2) this court does

¹For the purposes of issuing this order, I am assuming jurisdiction over the case.

not have original jurisdiction over this case. After considering the parties' submissions, I conclude that plaintiff's motion to remand must be granted because defendants' notice of removal fails to provide a short and plain statement showing that the court can exercise jurisdiction over the case.

OPINION

Under 28 U.S.C. § 1446(c)(4), a district court must examine a notice of removal to determine whether it appears from its face and any attached exhibits that an order for summary remand must be issued. The case can be remanded if there are defects in the removal procedure. 28 U.S.C. §§ 1446, 1447. A motion to remand for any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). 28 U.S.C. § 1447. Plaintiff filed a motion to remand within 30 days following defendants' notice of removal, stating that the court must remand this case because defendants failed to comply with the procedure for removal as set forth in 28 U.S.C. § 1446. Specifically, plaintiff states that the notice of removal must include a "short and plain statement of the grounds for removal," 28 U.S.C. § 1446, and defendants failed to provide an "explanation or indication of how or whether the [court] has original jurisdiction over civil actions." Plt.'s Br., dkt. # 3, at 1.

A. Consolidation

As an initial matter, I note that defendants are attempting to remove two separate

state court cases with one notice of removal. According to the materials submitted by the parties and the State of Wisconsin's electronic circuit court access system, plaintiff filed two separate complaints against defendants, case no. 11-cv-1564 (a foreclosure case) and case no. 11-sc-2519 (a replevin case), in the Circuit Court for Rock County, Wisconsin. On their own accord, defendants combined the two separate cases in their notice of removal and attempted to remove both cases.

However, the court cannot consider both cases under one notice of removal. There is no indication that the two cases were ever consolidated in state court under Wis. Stat. § 805.05(1)(b). Even if I were to construe defendants' submissions as including a motion to consolidate the two state court cases, I could not grant the motion. This court may consolidate two cases only if they are individually pending before the court and if the court determines that the two cases involve a common question of law or fact. Fed. R. Civ. P. 42(a). Even then, consolidation "does not merge the suits into a single cause." Johnson v. Manhattan R. Co., 289 U.S. 479, 496-97 (1933). Although a consolidation order may result in a single unit of litigation, such an order does not create a single case for jurisdiction purposes. Cella v. Togum Constructeur Ensembleier en Industrie Alimentaire, 173 F.3d 909, 912 (3d Cir. 1999). Had the foreclosure action and replevin action been removed separately, I could not have consolidated them at this stage because each would need an independent justification for removal.

B. Short and Plain Statement

Even assuming that defendants could have removed both state cases together in the present action, I conclude that defendants' notice of removal fails to provide a "short and plain statement of the grounds for removal" for either state court action as required by 28 U.S.C. § 1446. This language mirrors the pleading standard set forth in Fed. R. Civ. P. 8(a), so courts apply the same liberal notice pleading standard to notices of removal. Zhang v. United Healthcare Insurance Co., 2011 WL 1533008 (E.D. Wis. Apr. 22, 2011); see also 14C Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure, § 3733 (4th ed. 2012). ("[T]he better rule is that detailed grounds for removal need not be set forth in the notice. Rather, it should be sufficient if the court is provided the facts from which its jurisdiction can be determined.") Additionally, pro se pleadings are to be construed liberally. Erickson v. Pardus, 551 U.S. 89 (2007). On the other hand, the party seeking removal has the burden of establishing federal jurisdiction, Tylka v. Gerber Products Co., 211 F.3d 445, 448 (7th Cir. 2000), and federal courts should interpret the removal statute narrowly, resolving any doubt in favor of the plaintiff's choice of forum in state court. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993).

In their notice of removal, defendants state that "[d]iversity of citizenship' is complete" because they are "sovereign . . . citizen[s] of the Wisconsin Republic . . . American National[s]" and not . . . citizen[s] of the De facto Federal State of Wisconsin." Original jurisdiction is appropriate when parties are citizens of different states. 28 U.S.C. § 1332. However, "sovereign citizen" claims like these have been rejected repeatedly by the courts.

E.g., United States v. Hilgeford, 7 F.3d 1340, 1342 (7th Cir. 1993) (argument that individual is sovereign citizen of state who is not subject to jurisdiction of United States and not subject to federal taxing authority is "shopworn" and frivolous). Given defendants' statements that they are citizens of the "Wisconsin Republic," I will assume that they are citizens of Wisconsin. The parties appear to agree that plaintiff is a Wisconsin citizen as well. Because both plaintiff and defendants are citizens of Wisconsin, complete diversity does not exist and this court does not have original jurisdiction based on diversity.

In their brief opposing plaintiff's motion to remand, defendants state that the case raises federal questions because the "matter involves numerous violations of the Constitutional Law." However, defendants may not raise new grounds for removal unless they included them in their notice of removal and defendants' notice of removal says nothing about whether the cases may be removed under the court's federal question jurisdiction. "In most circumstances . . . defendants may not add completely new grounds for removal or furnish missing allegations, even if the court rejects the first-proffered basis of removal, and the court will not, on its own motion, retain jurisdiction on the basis of a ground that is present but that defendants have not relied upon." 14C Wright, Miller & Cooper, Federal Practice and Procedure § 3733; see also Bova v. U.S. Bank, N.A., 446 F.Supp.2d 926, 936 (S.D. Ill. 2006) ("A notice of removal may be amended more than thirty days after the time to remove has expired . . . only to set out more specifically the grounds for removal that already have been stated, albeit imperfectly, in the original notice Completely new grounds for removal jurisdiction may not be added and missing allegations may not be

furnished, however.”); Gray v. Remley, 2004 WL 951485, *5 (M.D.N.C. Apr. 30, 2004); Briarpatch Ltd. v. Pate, 81 F.Supp. 2d 509, 517 (S.D.N.Y. 2000).

In any case, even had defendants raised this argument in their notice of removal or a timely amendment to the notice, it would not have supported federal question jurisdiction. The foreclosure and replevin claims raised by plaintiffs are not constitutional in nature. They do not change even if defendants intended to raise constitutional arguments opposing them because jurisdiction may not be “predicated on an actual or anticipated defense.” Vaden v. Discover Bank, 556 U.S. 49, 60 (2009).

C. Costs

Because this case will be remanded, plaintiff requests that defendants bear the costs of litigating the removal and remand as authorized by 28 U.S.C. § 1447(c), which provides that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal.” Generally, an award for costs in removal cases is justified when “the removing party lacked an objectively reasonable basis for seeking removal.” Wisconsin v. Amgen, 516 F.3d 530, 534 (7th Cir. 2008) (citing Martin v. Franklin Capital Corp., 546 U.S. 132 (2005)). In Lott v. Pfizer, Inc., 492 F.3d 789, 793 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit held that a defendant had an objectively reasonable basis for removal “if clearly established law did not foreclose a defendant’s basis for removal”

As discussed above, clearly established law indicates that defendants could not have

removed these cases under a “sovereign citizen” theory of diversity jurisdiction. Accordingly, I conclude that defendants must reimburse plaintiff for its costs and attorney fees incurred as a result of the removal. Defendants will be given a chance to object to the amount that claims as itemized expenses, but not to raise any new objections to the decision that they are liable for the expenses.

ORDER

1. Plaintiff Parker Community Credit Union’s motion to remand this case, dkt. #2, is GRANTED. Both plaintiff’s foreclosure action and replevin action are REMANDED to the Circuit Court for Rock County, Wisconsin.

2. The clerk of court is directed to return the record to the Circuit Court for Rock County, Wisconsin.

3. Plaintiff’s motion for costs and attorney fees, dkt. #2, is GRANTED.

4. Plaintiff may have until June 21, 2012, in which to submit an itemization of the actual expenses, including costs and attorney fees, it incurred in responding to defendants’ notice of removal.

5. Defendants may have until July 2, 2012, to file an objection to any itemized costs and fees.

Entered this 31st day of May, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge