

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

MYRTLE ROGINA,

Plaintiff,

OPINION AND ORDER

v.

13-cv-188-wmc

DAWN R. MARTINSON a/k/a DAWN
R. GREEN a/k/a DAWN R. MARTINSON-
GREEN, CARL GREEN, BANK OF AMERICA,
and JOHN DOE,

Defendants.

After the court remanded this case for a second time because of the lack of subject matter jurisdiction, defendants Dawn and Carl Green filed a notice of appeal. Before the court is plaintiff Myrtle Rogina's motion for bond for costs on appeal pursuant to Federal Rule of Appellate Procedure 7. (Dkt. #21.) Plaintiff argues that a bond is appropriate here because of "Defendants' appeal lacks merits, Defendants' history of bad faith and vexatious conduct permeates this case (and others, filed by Defendants Carl Green and Dawn Martinson) and there is a high risk that Defendants' would not pay costs if their appeal fails." (*Id.* at p.2.) Plaintiff seeks a bond in the amount of \$15,300, which reflects \$15,000 in anticipated actual attorney's fees and \$300 in costs for copies, binding, and postage.¹

¹ Defendants filed an opposition to plaintiff's motion (dkt. #28), which the court has reviewed, but largely disregarded since it did not address the specific motion, but rather regurgitated arguments previously made and rejected by the court, or arguments entirely unrelated to the present appeal of this court's decision to remand plaintiff's claim to state court.

Federal Rule of Appellate Procedure 7 provides in pertinent part: “In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.” Plaintiff’s motion raises two issues: (1) whether a bond is appropriate given the circumstances surrounding this case and appeal; and (2) what costs may be covered by the bond.

“[T]he need for a bond for costs and its amount [is] in the discretion of the court.” Fed. R. App. P. 7, Advisory Committee Notes, 1979 Amendment; *see also Skolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (“The determination of the nature and amount of the bond is a matter left to the sound discretion of the district court.”) (citing *Westinghouse Credit Corp. v. Bader & Dufty*, 627 F.3d 221, 224 (10th Cir. 1980)). Here, the court finds such a bond is appropriate for at least three reasons. First, defendants’ appeal is patently frivolous in light of the lack of jurisdictional basis for such an appeal. (4/1/13 Op. & Order (dkt. #15) 1 (citing 28 U.S.C. § 1447(d).)

Second, the Greens’ litigation tactics in this case and in their foreclosure action, which was also before this court (*Bank of American v. Martinson*, No. 10-cv-10 (W.D. Wis.)), were suspect if not frivolous, and served no discernable purpose except to delay unreasonably plaintiffs’ meritorious claims. As the court understands plaintiff’s claim here, it is time-sensitive and the state court has already entered judgment in her favor. (Declaration of Parrish Jones, Ex. A (dkt. #23-1), *Rogina v. Martinson*, No. 12-cv-214 (Wis. Circuit Ct., Douglas Cnty. Apr. 5, 2013). Again, the Greens’ multiple attempts at removal and appeal of this court’s order for remand are nothing but vexatious attempts to deny plaintiff the relief granted by the state court.

Third, plaintiff's counsel represents that Carl Green is refusing to pay the judgment awarded by this court to cover plaintiff's attorney's fees in obtaining a second remand pursuant to 28 U.S.C. § 1447(c). (Pl.'s Br. (dkt. #22) 2.) This, too, weighs in favor of granting a bond.

Accordingly, the court finds requiring defendant Carl Green to post a bond appropriate, with the only remaining question as to the amount of that bond. Plaintiff acknowledges that the bond is commonly limited to the costs of the appeal as that term is defined in Federal Rule of Appellate Procedure 39, which does not include attorney's fees. (Pl.'s Br. (dkt. #22) 3; *see also Littlefield v. Mack*, 134 F.R.D. 234, 235 (N.D. Ill. 1991) (rejecting inclusion of attorney's fees in bond because attorney's fees not included in cost of appeal under Fed. R. App. P. 39).) Still, plaintiff argues that including anticipated attorney's fees in the amount of the bond is warranted here because "it is reasonable to conclude that attorney's fees in one fashion or another will be awarded by the 7th Circuit Court of Appeals, or upon a remand to the District Court for a determination of the same." (*Id.*) There is no special, underlying fee-shifting statute which allows an award of attorney's fees, and plaintiff's counsel has not directed the court to one. *See Adsani v. Miller*, 139 F.3d 67, 71 (2d Cir. 1998) (holding that Rule 7 bond may include security for anticipate appellate attorney's fees if those fees would be treated as recoverable costs under applicable fee-shifting statute).

Perhaps 28 U.S.C. § 1447(c) extends to costs, including attorney's fees, for an appeal of a motion to remand. But plaintiff's counsel has not directed the court to any such case -- albeit, such a case would be hard to find since, as this court has previously

explained, there is no jurisdictional basis for an appeal. While the Seventh Circuit may rely on § 1447(c) or its inherent authority to sanction a party for a frivolous appeal, this court will not presume the outcome. *See Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295, 299 (5th Cir. 2007) (per curiam) (“There is no provision in the rules of procedure for a district court to predict that an appellate court will find an appeal frivolous and to set a bond for costs on appeal based on an estimate of what ‘just damages’ and costs the appellate court might award.”). As such, the court will deny plaintiff’s request to include future attorney’s fees in the amount of the bond.

The court will, however, grant plaintiff’s request for a \$300 bond covering the costs for copies, binding, and postage appropriate, plus \$1,062.00 for the amount already due and owing. The court will enter the order for bond solely against defendant Carl Green, since, to the best of the court’s knowledge, defendant Dawn Green is still in bankruptcy.

ORDER

IT IS ORDERED that:

- 1) plaintiff Myrtle Rogina’s motion for bond for costs on appeal pursuant to Federal Rule of Appellate Procedure 7 (dkt. #21) is GRANTED IN PART AND DENIED IN PART. The motion is granted as to cover anticipated costs for copies, binding, and postage and attorney’s fees due and owing, but denied as to cover future attorney’s fees; and
- 2) defendant Carl Green is required to post a bond with this court in the amount of \$1,362.00.

Entered this 10th day of May, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge