

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

MYRTLE ROGINA,

Plaintiff,

OPINION AND ORDER

v.

13-cv-188-wmc

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

Defendants.

Before the court is plaintiff Myrtle Rogina's motion to remand and motion for attorney's fees (dkt. #2), which was filed the same day as *pro se* defendants Dawn and Carl Green's notice of removal (dkt. #1). This is the second time the Greens have attempted to remove this state court action. *See Rogina v. Martinson*, No. 12-cv-498 (W.D. Wis. July 13, 2012). The Greens' initial attempt based on diversity jurisdiction, 28 U.S.C. § 1332, having proved fruitless, the Greens now seek removal under this court's federal question jurisdiction, 28 U.S.C. § 1331. Because this basis is frivolous on its face, the court will grant the motion to remand and award plaintiff attorney's fees pursuant to 28 U.S.C. § 1447(c).

BACKGROUND

As recounted in the court's original remand order, plaintiff Rogina seeks injunctive and declaratory relief against her neighbors, the Greens, so that she can construct and maintain a pipeline to the utility company's water main. Nov. 13, 2012 Order, *Rogina v.*

Martinson, No. 12-cv-498 (dkt. #32). Rogina filed her lawsuit in state court on June 12, 2012; service was affected on June 21; defendants removed the action the first time on July 13; and remand was ordered on November 13, 2012. Defendants filed the current notice of removal on March 15, 2013, about nine months after defendants were served the complaint and four months after remand. (Dkt. #1.)

In the notice of removal, the Greens now contend that federal question jurisdiction exists because of “discrimination and political affiliation by lawyers and lawyer-judges, under 42 USCA 1983 & 1985 and the 14th Amendment and Due Process and Equal Protection Clauses of the United States.” (Not. of Removal (dkt. #1) ¶ 1.)

The Greens further contend that:

There is state and Bankruptcy law manipulation and blocking within 30 days based on court orders entered by the courts in a conspiracy with lawyers to design a verdict suitable to the court through the use of lawyer rules, judicial rules, court rules or otherwise trumped-up legal technicalities and instructions which effectively handcuff the defendants to its 14th Amendment Rights to substantive due process of law and equal protection of property and property rights including under 42 U.S.C. 1983 and 1985.

(*Id.* at ¶ 4.)

OPINION

Article III, section 2 of the Constitution and 28 U.S.C. § 1331 provide federal district courts with jurisdiction over cases “arising under the Constitution, laws, or treaties of the United States.” A cause of action arises under federal law only when federal law is part of the plaintiff’s “well-pleaded complaint.” *Metro. Life Ins. Co. v. Taylor*,

481 U.S. 58, 63 (1987). This means that the court looks only at the complaint, not at asserted defenses, *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936), or at counterclaims, *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002). It also means that the court refers only to the portions of the complaint that are necessary for a plaintiff's cause of action, not at pleadings that merely anticipate a defense. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153 (1908).

Rogina's claim for injunctive and declaratory relief does not raise a federal question. Reading the Greens' renewed removal notice as generously as possible, they are attempting to assert defenses or perhaps counterclaims to Rogina's state law claims by alleging unconstitutional actions of the judges and lawyers involved in the state court proceeding, as well as in Dawn Green's bankruptcy action. To the extent these defenses or counterclaims were even raised in state court, this court may not consider them in determining whether jurisdiction is proper. See *Gully*, 299 U.S. at 113; *Holmes Group*, 535 U.S. at 831.

Plaintiff further asserts correctly that remand is warranted because defendants filed the notice of removal more than 30 days "after receipt by defendants, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3). Since any valid grounds for removal *based on plaintiff's pleadings* were known to defendants more than 30 days before the filing of the present notice of removal, the court not only lacks jurisdiction over this lawsuit on the face of the notice of removal, but the notice is untimely under § 1446(b)(3).

In addition to seeking remand, plaintiff also seeks an award of \$500 in attorney's fees and "that the Court order the attorney's fees be paid within five days under penalty of default judgment being entered against Defendants." (Pl.'s Mot. to Remand (dkt. #2) p.2.)¹ Section 1447(c) only allows an award of "just costs and any *actual* expenses, including attorney fees, *incurred*, as a result of the removal." 28 U.S.C. § 1447(c) (emphasis added); *see also Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 366-67 (7th Cir. 2000) ("Section 1447(c) is unusual among fee-shifting statutes. Unlike the numerous statutes that authorize the recovery of 'reasonable' attorney's fees, § 1447(c) expressly limits fee awards to actual outlays-specifically, to 'any *actual* expenses, including attorney fees, *incurred*' (emphasis added).") (internal citations omitted)). In light of the fact that this second attempt at removal is frivolous on its face, the court agrees that an award of attorney's fees is warranted. Plaintiff, however, will need to submit proof of her actual expenses in bringing the second motion to remand before the court can grant such relief.

ORDER

IT IS ORDERED that:

- 1) plaintiff Myrtle Rogina's motion to remand and for attorney's fees (dkt. #2) is GRANTED;
- 2) plaintiff's motion to expedite briefing schedule (dkt. #4) is DENIED AS MOOT;
- 3) plaintiff shall submit proof of actual expenses incurred as a result of removal by Friday, March 22, 2013;

¹ Plaintiff fails to cite any support for her request that the court enter default judgment if defendants fail to pay attorney's fees. Given the court's lack of jurisdiction over this removal action, the court declines to grant that relief.

- 4) the court retains jurisdiction only for the limited and sole purpose of entering an attorney's fee award; and
- 5) accordingly, the court directs that the clerk's office immediately remand this case back to Douglas County Circuit Court.

Entered this 18th day of March, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge