IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MARTIN LeVAKE and
MADELINE LeVAKE, et al.,

Plaintiffs,

v. OPINION AND ORDER

WILLIAM ZAWISTOWSKI, a/k/a
WILLIAM ZAWISTOWSKI, JR., 02-C-0657-C

Defendant,

and

RURAL MUTUAL
INSURANCE COMPANY,

Intervening Defendant.

This was a nuisance action brought by a group of lakefront property owners against their neighbor, cranberry farmer and Wisconsin resident William Zawistowski. Plaintiffs, all of whom are non-Wisconsin residents, sought to invoke this court's diversity jurisdiction. On December 15, 2003, I dismissed the case for lack of subject matter jurisdiction, finding that no plaintiff had shown to a reasonable certainty that he or she could recover $75,000 for defendant Zawistowski's alleged pollution of the bay on which plaintiffs owned property.

Now before the court is defendant's motion for attorney fees and costs under Wisconsin's right-to-farm statute, Wis. Stat. § 823.08. Alternatively, defendant seeks an award of costs under 28 U.S.C. § 1919. Defendant seeks an award of $206,202.76 in attorney fees and $11,828.07 in costs.

Because this court lacks jurisdiction to award attorney fees or costs under state law, I am denying defendant's motion for attorney fees and costs under Wisconsin's right-to-farm statute. However, because I find that plaintiffs' lawsuit was unjustified under settled law, I will award costs under 28 U.S.C. § 1919.

BACKGROUND

Plaintiffs all own recreational property on Musky Bay, a bay of Lac Courte Oreilles in northern Wisconsin. In their complaint, all plaintiffs contended that defendant William Zawistowski's practice of using phosphorous-containing fertilizer on his cranberry bogs created a public and private nuisance by causing weeds and algae to proliferate on Musky Bay. In addition, plaintiffs Martin LeVake, Madeleine LeVake, Charles LeVake and Anne Uhde brought a separate private nuisance claim under Wisconsin law against defendant for his alleged negligent and reckless use of an insecticide spray.

Plaintiffs sought four categories of damages arising from defendant's alleged pollution of Musky Bay: lost property value; loss of use and enjoyment of Musky Bay; the cost to

clean up Musky Bay; and punitive and exemplary damages under Wis. Stat. § 895.85. In addition, they sought "abatement of the discharge by [defendant] of phosphorus pollution and other chemical pollutants into Musky Bay" and attorney fees. In addition to these claims, the LeVake plaintiffs and plaintiff Uhde sought damages for their loss of use and enjoyment of the LeVake cabin as a result of the overspraying incident.

In an October 10, 2003, opinion and order, I questioned whether the court had jurisdiction to entertain the claims of any plaintiff. After reviewing each of the categories of relief sought by plaintiff, I concluded that there was insufficient evidence in the record to show that at the time the complaint was filed each plaintiff had a good faith basis for claiming that the amount in controversy was $75,000. Among other defects, I noted that during discovery, nearly all plaintiffs had conceded that their property had not lost value as a result of the eutrophication of Musky Bay. I found that the only form of relief discussed by the parties that would exceed the jurisdictional threshold was dredging; however, it was unclear whether plaintiffs were seeking an injunction requiring defendant to perform the dredging or whether they were seeking to recover damages in the amount it would cost for this undertaking. Accordingly, I ordered plaintiffs to submit evidence showing proof to a reasonable probability that jurisdiction existed under 28 U.S.C. § 1332 and to clarify the relief they were seeking.

In their response, plaintiffs did not present any evidence to show to a reasonable certainty that they could recover $75,000 individually. Further, they conceded that they were seeking to recover damages in the amount it would cost to dredge the bay as opposed to an injunction ordering defendant to perform the dredging, although they indicated that they would be satisfied by the latter. Accordingly, in a December 15, 2003, opinion and order, I dismissed the case for lack of subject matter jurisdiction. I reaffirmed my earlier conclusion that plaintiffs could not recover under a "restoration costs" theory of damages. Also, I concluded that I would not allow plaintiffs to amend their complaint to include a request for an injunction ordering defendant to dredge Musky Bay.

OPINION

I. WIS. STAT. § 823.08(4)

Defendant seeks attorney fees and costs under Wis. Stat. § 823.08(4), which provides that the court "shall award litigation expenses to the defendant in any action in which an agricultural use or agricultural practice is alleged to be a nuisance if the agricultural use or agricultural practice is not found to be a nuisance." Defendant maintains that because this court dismissed the case for lack of jurisdiction, it did not find defendant's agricultural practice to be a nuisance, and therefore attorney fees must be awarded.

I do not reach the question whether defendant's interpretation of the statute is correct because Wisconsin law does not govern. A court lacking diversity jurisdiction over the complaint also lacks jurisdiction to award attorney fees or costs under state law. Signorile v. Quaker Oats Co., 499 F. 2d 142, 144 (7th Cir. 1974). As the court explained in Signorile: "Since diversity was lacking, jurisdiction never attached in the federal court. Factually, of course, there was an action, but one not stemming from diversity." Each of the cases cited by defendant in support of its jurisdiction argument involved a federal fee-shifting statute and is therefore inapposite. See Citizens for a Better Environment v. Steel Co., 230 F.3d 923 (7th Cir. 2000) (42 U.S.C. § 11046(f)); Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988) (42 U.S.C. § 1988); Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) (Fed. R. Civ. P. 11); Sanders v. CIR, 813 F.2d 859 (7th Cir. 1987) (federal tax laws); Moten v. Bricklayers International Union, 543 F.2d 224 (D.C. Cir. 1976) (42 U.S.C. § 2000e-5(k)). Although defendant cites language from the Szabo opinion in which the court mentioned lack of diversity in the context of its discussion concerning attorney fees, that comment was made for illustrative purposes and does not set forth anything that could be construed as a holding or even persuasive dicta. See Szabo, 823 F.2d at 1077-78. Nothing in Szabo can be read to assert that a federal court may award attorney fees to a party under the substantive law of the forum state after the court has concluded that it has

no power to exercise its diversity jurisdiction. Accordingly, defendant's motion for attorney fees and costs under Wis. Stat. § 823.08(4) must be denied.

Defendant makes some policy arguments that attorney fees need to be awarded because they exact a harsh toll on defendant and that plaintiffs need to be punished for filing a claim in federal court without a good faith belief that the jurisdictional amount was satisfied. The court does recognize the serious financial burden placed on defendant by his attorney fees. However, those fees might have been reduced substantially if defendant would have decided to challenge jurisdiction earlier in the proceedings.

II. COSTS

In the alternative, defendant seeks costs under 28 U.S.C. § 1919. Under that statute, district courts have authority to order the payment of "just costs" when an action or suit is dismissed "for want of jurisdiction." "Just costs" do not include attorney fees. Signorile, 499 F. 2d at 145.

Congress enacted § 1919 to overturn the common law rule prohibiting an award of costs when a court lacked jurisdiction. Citizens for a Better Environment v. Steel Co., 230 F.3d 923, 926-27 (7th Cir. 2000). According to the Court of Appeals for the Seventh Circuit, both § 1919 and 28 U.S.C. § 1447(c) emerged from the same law and both statutes permit courts to award "just costs" in particular circumstances (although § 1447(c) permits

a court to award attorney fees). Id. at 927 (noting that Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379, 386-87 (1884), applied a new statute and held that costs may be awarded even when court to which action is removed lacks jurisdiction to decide merits and that statute is now split into 28 U.S.C. § 1919 and 28 U.S.C. § 1447(c)). Under § 1447(c), an award of fees and costs is proper when "[r]emoval [is] unjustified under settled law." Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000) (" § 1447 is *not* a sanctions rule; it is a fee-shifting statute, entitling the district court to make whole the victorious party").

In a recent case, I concluded that "because § 1447(c) and § 1919 originated in the same law and use the same 'just costs' term, it is reasonable to assume that the standard for awarding costs under either statute should be the same." Bollig v. Christian Community Homes and Services, 2003 WL 23211142, *3 (W.D. Wis. 2003). I concluded that an award of costs under § 1919 is appropriate when there is no justification for plaintiffs' pursuit of their case. Id. This standard requires an inquiry into the merits of the case, if only briefly, but does not necessarily raise a presumption of an award of costs under § 1919. Id.

Plaintiffs' lawsuit was unjustified under settled law, at least insofar as it was filed in federal court. Plaintiffs' contention that the amount in controversy requirement was met was founded primarily on their theory that they could recover damages in the amount it would cost to restore Musky Bay. In the October and December opinions, I explained why

plaintiffs could not recover damages under this theory under Wisconsin law. With a little forethought and research, plaintiffs could have discovered these flaws on their own. Plaintiffs' lackluster response to this court's request for evidence to support diversity jurisdiction suggests that they did not give much thought to the jurisdiction question before they filed their suit. For these reasons, in addition to the reasons cited in previous opinions for finding that jurisdiction was lacking, I find that plaintiffs' lawsuit was unjustified under settled law.

Defendant has filed a bill of costs totaling $11,828.07. Plaintiffs have not filed specific objections to any items of costs submitted by defendant or argued that the amount sought is unreasonable. Accordingly, I will order plaintiffs to submit payment to defendant for costs in the amount of $11,828.07.

ORDER

IT IS ORDERED:

1. Defendant's William Zawistowski's motion for attorney fees and costs under Wis. Stat. § 823.08(4) is DENIED; and

2. His motion for costs under 28 U.S.C. § 1919 is GRANTED. Plaintiffs shall make payment to defendant in the amount of $11,828.07.

Dated this 12th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge