

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

INTERCON CONSTRUCTION, INC.,

Plaintiff,

v.

SOUTHEAST DIRECTIONAL
DRILLING, L.L.C.,

Defendant.

ORDER

04-C-0225-C

This civil action is before the court on plaintiff InterCon Construction, Inc.'s motion for an award of attorney fees pursuant to 28 U.S.C. § 1447 and defendant Southeast Directional Drilling, L.L.C.'s motion for an award of attorney fees pursuant to Fed. R. Civ. P. 11. Plaintiff contends that it is entitled to an award because defendant removed this case improperly to federal court and plaintiff incurred costs as a result of the removal. The posture of this case is somewhat unusual. Plaintiff filed its complaint initially in the Circuit Court for Dane County, Wisconsin. Defendant removed the case to this court but sought a transfer to the federal court in the District of Minnesota. Plaintiff opposed the transfer but did not seek a remand to state court. That came about when the court raised a question

about the citizenship of the members of the defendant LLC. When defendant advised the court that one of the members is a citizen of Wisconsin, as is plaintiff, the court ordered the case remanded to state court on June 23, 2004. Almost five months later, on November 18, 2004, plaintiff filed this motion for attorney fees. At the same time, it filed a motion for an award of fees under Fed. R. Civ. P. 11. On December 15, 2004, defendant filed its own motion for sanction under Rule 11, arguing that both of plaintiff's motions seeking attorney fees were untimely and that plaintiff had failed to comply with Rule 11's safe harbor rule, which prohibits a party from filing such a motion unless it has given the opposing party 21 days in which to withdraw the challenged pleading. Plaintiff has now withdrawn its Rule 11 motion; defendant's remains pending.

Defendant opposes the motion for an award of attorney fees on two grounds. The first is its untimeliness; the second is what it characterizes as plaintiff's share of the blame for the case remaining in federal court after it was removed. In addition, defendant objects to awarding plaintiff the amount of the fees it incurred when plaintiff has not advised the court or defendant's counsel what work it did and at what hourly rate.

28 U.S.C. § 1447(c) 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." An award 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.”)

The first question is whether plaintiff has forfeited its entitlement to an award by waiting almost five months to ask for one. Defendant says “yes,” and points to Fed. R. Civ. P. 54(d), which requires motions for attorney fees to be filed within 14 days after entry of judgment, unless otherwise provided by statute or order of the court. As plaintiff responds, however, an order of remand on procedural grounds is not a “judgment” within the meaning of Rule 54; the lack of a judgment means that no filing deadline was ever triggered.

I agree with plaintiff that no statutory time limit was triggered by the entry of the order remanding this case to state court. The remand order said nothing about a deadline for filing a motion for attorney fees; this court has no local rule governing the filing of such motions; and I am not aware of any statute that would impose a deadline. However, I agree with defendant that plaintiff’s motion comes too late to be considered. In the absence of a prescribed deadline, reasonableness must be the guide. It is not reasonable to wait almost five months to file a motion for an award of attorney fees, at least in the absence of any showing of excusable neglect. As time passes, memories dim and paperwork becomes harder to locate. Therefore, I will deny plaintiff’s motion for an award of attorney fees for the improper removal.

On the other hand, if it was unreasonable for plaintiff to wait for almost five months

to ask for attorney fees, it was breathtakingly unreasonable for defendant to file a Rule 11 motion for sanctions for plaintiff's filing of the motion for fees. Defendant says that it went ahead with the filing because plaintiff did not withdraw its motions within the time provided under the safe harbor provision of Rule 11, but it fails to mention that plaintiff informed defendant's counsel before the 21-day period had run that plaintiff was formally withdrawing its Rule 11 motion.

Moreover, defendant's filing of a Rule 11 motion was flagrantly improper. Rule 11 motions are not intended as an automatic response to the filing of any motion that a party thinks can be defeated on legal grounds. Plaintiff's motion was not frivolous just because I have decided it was wrong in arguing that five months was not too late for the filing of a motion for fees under § 1447. Defendant's reflexive filing of a Rule 11 motion conjures up the prospect of an infinite regression that the drafters of Rule 11 hoped would not come into being. When they warned of their concern that Rule 11 not turn into satellite litigation that overshadowed the original lawsuit, they might have had this case in mind.

Enough is enough. Defendant is not entitled to Rule 11 sanctions against plaintiff; plaintiff is not entitled to file a renewed motion for Rule 11 sanctions, as it suggested it might do, because it has let too much time pass.

I will add one more comment, although it is extraneous at this point. Plaintiff does not share the blame for not recognizing that this case did not belong in federal court, as

defendant has the temerity to argue in its brief in opposition to plaintiff's motion for attorney fees. Plaintiff was assured by defendant that all the members of the L.L.C. were citizens of states other than Wisconsin; even if it had not been, the burden of proving jurisdiction is always on the party seeking to be in federal court, not on its opponent.

ORDER

IT IS ORDERED that plaintiff InterCon Construction, Inc.'s motion for an award of attorney fees pursuant to 28 U.S.C. § 1447 for defendant Southeast Directional Drilling, L.L.C.'s improper removal of this case to federal court is DENIED on the ground that plaintiff waited too long to file the motion. FURTHER, IT IS ORDERED that defendant's motion for Rule 11 sanctions is DENIED because plaintiff withdrew its motion for Rule 11 sanctions before the 21-day period had run and because plaintiff's motion for attorney fees under § 1447 was not sanctionable.

Entered this 7th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge