IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CAITLYNN HARRIS by her guardian ad litem THOMAS E. GREENWALD, SUSAN HARRIS and KIM HARRIS,

Plaintiffs,

v.

MEMORANDUM AND ORDER
05-C-164-S

HOME DEPOT U.S.A., Inc. a/k/a THE HOME DEPOT, INC., d/b/a HOME DEPOT, PHYSICIANS PLUS INSURANCE CORPORATION, WEST BEND MUTUAL INSURANCE COMPANY and CORESOURCE, INC.

Defendants.

Plaintiffs Caitlynn Harris, by her guardian ad litem Thomas E. Greenwald, Susan Harris and Kim Harris commenced this civil action in the Circuit Court for Dane County, Wisconsin against defendants Home Depot U.S.A., Inc. and Physicians Plus Insurance Corporation. Plaintiffs later amended their complaint to add claims against defendants West Bend Mutual Insurance Company and Coresource, Inc. Defendant Home Depot then removed pursuant to 28 U.S.C. § 1446 alleging diversity of citizenship, 28 U.S.C. § 1332, as the sole basis for removal. On May 13, 2005 the Court granted plaintiffs' timely motion to remand finding that there was no subject matter jurisdiction and awarding costs to plaintiffs pursuant to 28 U.S.C. § 1447(c). Presently before the Court is plaintiffs' request for attorney's fees and for approval of their submission for costs and other expenses incurred as a result of the removal.

MEMORANDUM

Plaintiffs request the sum of $15,220.00 in attorney's fees, costs and other expenses that they allegedly incurred in connection with their successful motion to remand. Defendant Home Depot opposes the request in its entirety and argues that the circumstances of removal do not warrant an award of fees. Defendant also objects to plaintiffs' inclusion in their request of an $800.00 expense attributed to expert witness fees. Finally, defendant urges denial of plaintiffs' fee request on the basis that it is excessive and unreasonable.

Like a party who succeeds in compelling withheld discovery, a party who succeeds in obtaining a remand on the basis that removal is improper is presumptively entitled to recover its fees. Garbie v. Daimler Chrysler Corp., 211 F.3d 407, 410-11 (7th Cir. 2000). The purpose of the rule is to make the victorious party whole. Id. The presumption could be overcome by a demonstration that the removal was substantially justified and not contrary to settled law. See id.; Rickels v. City of South Bend, 33 F.3d 785, 787 (7th Cir. 1994) (discussing the standard for Rule 37 fees awards). Here, however, defendant's removal was not substantially justified and was contrary to settled law. Accordingly, an award of fees under 28 U.S.C. § 1447(c) is appropriate.

Defendant West Bend Mutual Insurance Company, like plaintiffs, is a Wisconsin citizen. Consequently, its joinder in state court destroyed the "complete diversity" needed to establish diversity jurisdiction. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Its joinder would not have destroyed diversity had it been fraudulently joined. Home Depot's argument began, however, with the admission that West Bend had been properly joined.[1] Its argument should have ended with this admission. Instead, it proceeded to argue that West Bend's proper joinder nevertheless later became "fraudulent joinder" by the stipulation of the other defendants. This argument fails for many reasons.[2] To begin, Home Depot's argument that the same act of joinder can be both proper and fraudulent is incoherent; the two are mutually exclusive. If joinder was proper at the time of removal, then joinder was not fraudulent.

Moreover, defendant's attempt to manufacture diversity through its stipulation violates the well-settled rule that where an action is not originally removable, only the plaintiff's voluntary acts may

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[1]. Home Depot had to begin with this admission. Otherwise, the action became removable on May 25, 2004 and Home Depot's March 17, 2005 notice of removal was untimely. 28 U.S.C. § 1446(a).

[2]. In addition to the subject matter jurisdiction problem raised by plaintiffs, defendant's admission that West Bend was properly joined also rendered defendant's removal procedurally improper because defendant West Bend is a citizen of Wisconsin, the state in which this action was brought. 28 U.S.C. § 1441(b)(permitting removal of diversity actions only if no "parties in interest properly joined and served as defendants" are citizens of the state in which the action was brought); Hurley v. Motor Coach Indus., Inc., 222 F.3d 377, 380 (7th Cir. 2000).

create grounds for removal. Poulos v. Naas Foods, Inc., 959 F.2d 69 (7th Cir. 1992); Self v. General Motors Corp., 588 F.2d 655 (9th Cir. 1978) (collecting cases and reviewing the history of the doctrine). Where diversity is created by the act of a defendant without the plaintiff's consent or by ruling of the Court on the merits, removal is improper. Whitcomb v. Smithson, 175 U.S. 635 (1900). Although the voluntary-acts rule admits an exception for the dismissal of fraudulently joined defendants, this exception works against defendant's theory. If, as defendant suggests, a plaintiff's failure to voluntarily stipulate to the dismissal of a defendant renders that defendant's joinder "fraudulent," then there is no practical purpose for the long-standing voluntary-acts rule; defendant's exception swallows the rule.

When Home Depot removed, there were claims, counterclaims and cross-claims against West Bend Mutual. Home Depot concedes that these claims, counterclaims and cross-claims were proper when they were initially pleaded. "A party whose presence in the action would destroy diversity must be dropped formally as a matter of record to permit removal to federal court." 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3723, at 585 (3d ed. 1998). West Bend Mutual was properly joined to the state court action and never dismissed. Removal was plainly improper, and an award of fees is clearly warranted.

Defendant also objects to plaintiffs' inclusion in their request of an $800.00 item attributed to expert witness fees. Plaintiffs have submitted an affidavit of their attorney Thomas E. Greenwald to establish that they incurred additional expert witness fees of $800.00 because their experts had to supplement their reports so that they conformed to Rule 26 of the Federal Rules of Civil Procedure. The affidavit establishes that plaintiffs would not have incurred this expense had the matter remained in state court. Defendant protests that it has not received a copy of plaintiffs' supplemental expert reports. This objection, however, is inconsequential. Section 1447(c) permits the award of "any actual expenses" incurred as a result of the removal. The purpose of the rule is to make the victorious party whole. Plaintiffs have demonstrated that they incurred this expense as a result of removal. Accordingly, the Court will include this expense in plaintiffs' award.

The final issue is whether the fees requested are reasonable. Plaintiffs' recovery is limited to the market rate for their attorney's services. People Who Care v. Rockford Bd. of Educ., School Dist. No. 205, 90 F.3d 1307, 1310 (7th Cir. 1996). Plaintiffs' attorney has based his fee on a reasonable hourly rate of $200.00. Plaintiffs attorney has documented 72.1 hours that he spent on this matter as a result of the removal. Defendant argues that this amount of time is excessive in light of plaintiffs'

attorney's 35 years of experience in civil litigation. Defendant argues that its attorneys spent a mere 28.9 hours responding to plaintiffs' motion to remand and drafting its motion to dismiss West Bend. Missing from defendant's calculation, however, is the time defendant spent (or at least should have spent) researching its removal petition. Perhaps defendant should have spent more time assessing whether its removal was proper. Regardless, there is nothing extraordinary in plaintiffs' fee request. At $200 per hour, plaintiffs' lawyer spent 72.1 hours responding to defendant's flawed removal. The Court finds plaintiffs' request to be reasonable in light of those fees customarily charged for matters of this sort. Finally, the Court finds no support in the text of 28 U.S.C. § 1447(c) or the Seventh Circuit's interpretation thereof for defendant's argument that plaintiffs' contingency fee arrangement with their attorney should decrease or eliminate plaintiffs' recovery of fees incurred as a result of the removal.

ORDER

IT IS ORDERED that plaintiffs' request for attorney's fees is GRANTED and APPROVED in the amount of $14,420.00 and its request for costs and other expenses is APPROVED in the amount of $800.00 for a total of $15,220.00 for which judgment will be entered accordingly.

Entered this 6th day of July, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge