

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

JELD-WEN, INC.,

Plaintiff,

v.

CDK DISTRIBUTION, INC., CURT HESSEN
and KEVIN M. OTTERSON,

Defendants.

MEMORANDUM AND ORDER
07-C-342-S

Plaintiff Jeld-Wen, Inc., ("Jeld-Wen") commenced this action against defendants CDK Distribution, Inc. ("CDK"), Curt Hessen ("Hessen") and Kevin M. Otterson ("Otterson") in the Circuit Court for Rusk County, Wisconsin alleging defendants received an excess discount to which they were not entitled. Defendants removed this action pursuant to 28 U.S.C. § 1441 citing 28 U.S.C. § 1332 as grounds for removal. The Court then granted plaintiff's motion to remand and awarded costs and attorney's fees incurred pursuant to 28 U.S.C. § 1447(c). The matter is presently before the Court on defendants' motion to reconsider the Court's order to remand and to award costs and attorney's fees to plaintiff.

MEMORANDUM

I. Motion to Reconsider

Concerning the Court's order that this case be remanded to the Circuit Court for Rusk County, Wisconsin defendants merely restate

the arguments this Court previously rejected when deciding that the case should be remanded. As the Seventh Circuit has reasoned, “[a] motion that merely republishes the reasons that had failed to convince the tribunal in the first place gives the tribunal no reason to change its mind.” Ahmed v. Ashcroft, 388 F.3d 247, 249 (7th Cir. 2004). Accordingly, defendants have failed to present any reason for rescinding the Court’s order that the case be remanded.

Concerning the Court’s order to award plaintiff its attorney’s fees and costs, defendants argue that despite their failure to address the issue the Court was mistaken in awarding fees and costs because the presumption upon which the Court based its decision, i.e., that plaintiff’s success in obtaining a remand entitled it to recover fees and costs, no longer applies. Defendants further argue that instead of the presumption in favor of granting attorney’s fees and costs the Court may only grant such fees and costs if defendants “lacked an objectively reasonable basis for seeking removal.” Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005). Plaintiff does not dispute that Martin presents the standard for awarding attorney’s fees and costs in a remand but argues that defendants lacked an objectively reasonable basis for seeking removal.

Under 28 U.S.C § 1447(c) “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” In Martin the

Supreme Court reasoned that there was nothing persuasive to support “that fees under § 1447(c) should either usually be granted or usually be denied.” 546 U.S. at 139. The Supreme Court further reasoned that “[a]bsent unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal.” Id. at 141.

The Seventh Circuit has noted that the Supreme Court had not defined “objectively reasonable” when the Court set forth the standard in Martin. Lott v. Pfizer, Inc., 492 F.3d 789, 792 (7th Cir. 2007). However, the Seventh Circuit has given guidance as to how a court should determine whether there was an objectively reasonable basis for removal. Id. at 793. The Seventh Circuit has stated:

As a general rule if, at the time the defendant filed his notice in federal court, clearly established law demonstrated that he had no basis for removal, then a district court should award a plaintiff his attorney’s fees. By contrast, if clearly established law did not foreclose a defendant’s basis for removal, then a district court should not award attorney’s fees.

Id. Accordingly, the Court must look at the clearly established law relevant to defendants’ reasons for removal in determining whether there was an objectively reasonable basis for removal.

In this case, defendants based removal on diversity jurisdiction claiming complete diversity and an amount in controversy exceeding \$75,000. However, their reasoning in support of there being more than \$75,000 in controversy was controverted by

clearly established law. Accordingly, at the time defendants filed their notice in federal court clearly established law demonstrated that they had no basis for removal. They lacked an objectively reasonable basis for removal.

Here, plaintiff had pleaded a specific number of monetary damages in its state court complaint. It is clearly established law that “[w]hen the complaint includes a number, it controls unless recovering that amount would be legally impossible.” Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813, 815 (7th Cir. 2006). Furthermore, it is clearly established law that the amount in controversy is determined by the amount the defendant could pay to satisfy the plaintiff’s demands in full on the day of removal. Oshana v. Coca-Cola Co., 472 F.3d 506, 510-11 (7th Cir. 2006) cert. denied, 127 S. Ct. 2952, 168 L. Ed. 2d 264 (U.S. Jun. 11, 2007) (No. 06-1443) (citation omitted). Despite the specific number in the complaint, defendants never argued that it was legally impossible for plaintiff to recover only that specific amount nor that it would have taken more than the pleaded amount to satisfy plaintiff’s demands in full.

Instead the gravamen of defendants’ argument¹ was that based on a possible breach of an Exclusive Supply Agreement (“ESA”)

¹Defendants other specific arguments were each against clearly established law as discussed in this Court’s previous order and it is not necessary for the Court to repeat itself on each argument. See Jeld-Wen, Inc. v. CDK Distrib., Inc., No. 07-C-342-S, 2007 WL 2436763, at *3 (W.D. Wis. Aug, 16, 2007).

entered into by the parties plaintiff would be entitled to more money than requested and this would raise the amount in controversy over \$75,000. However, it is clearly established law that a plaintiff, as master of its complaint, is free to sue for less than the jurisdictional amount, even when the plaintiff would be justly entitled to more than the jurisdictional amount. See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294, 58 S. Ct. 586, 82 L. Ed. 845 (1938). As stated in the Court's previous order, "examination of the complaint leaves no doubt that plaintiff has chosen not to bring, and is not required to bring, a claim for breach of the ESA." Jeld-Wen, Inc. v. CDK Distrib., Inc., No. 07-C-342-S, 2007 WL 2436763, at *3 (W.D. Wis. Aug, 16, 2007). Without the breach of the ESA claim, which plaintiff was not legally required to pursue, the amount in controversy fell short of the required \$75,000 by over \$25,000.

Based on the relevant established case law, it was not objectively reasonable for defendants to attempt to remove the case when (1) the complaint on its face pleaded a damages number that was below the required \$75,000 amount in controversy; (2) plaintiff was suing for an excess discount it believed defendants mistakenly received and not for breach of the ESA; and (3) it was not legally impossible for plaintiff to obtain only the amount pleaded regardless of what other amounts to which plaintiff may or may not have been entitled. Accordingly, under the standard set forth in

Martin and further reasoned by the Seventh Circuit in Lott, the clearly established law when defendants filed their notice for removal supports that they lacked an objectively reasonable basis for seeking removal and plaintiff's attorney's fees and costs shall be awarded.

II. Approval of plaintiff's bill of costs

Plaintiff submitted a bill of costs requesting \$17,506.00 in attorney's fees and \$496.10 in costs as the result of the improper removal of this action. Defendants dispute some of the costs as excessive and unreasonable. Plaintiff claims to have "spent 87.15 hours (i) seeking remand, (ii) responding to Defendants' Motion to Dismiss, (iii) complying with the requirements of this Court's orders and the Federal Rules of Civil Procedure, and (iv) preparing to respond [sic] to the Defendant's Motion for Summary Judgment." (Pl.'s Resp. to Objections to Bill of Costs, at 4.) Furthermore, the breakdown of plaintiff's attorney's hourly rates were: "[Robert] Pasch, lawyer of 35 years and a shareholder at Murphy Desmond, whose billing rate is \$270.00 per hour; [Matthew] Moeser, an associate with eight years of experience, whose billing rate is \$175.00 per hour, and Paralegal Kelly J. Bostedt[], a paralegal whose billing rate is \$120.00 per hour." (Id. at 3.) Overall, the amount of time spent and rates suggested by plaintiff appear reasonable in accordance with the matters presented in the case and

the market rate for legal services. See Harris v. Home Depot U.S.A., Inc., No. 05-C-164-S, 2005 WL 1587593, at *2 (W.D. Wis. July 6, 2005).

Defendants do not dispute plaintiff's attorney's rates, but they do object to several specific line items. First, defendants argue that any contact plaintiff's attorneys in this case had with plaintiff's lawyers in the Oklahoma action should not be included in awarding attorney's fees. Defendants suggest that plaintiff cannot assert that this case is unrelated to the Oklahoma action and still charge for time spent in communication with attorneys in the Oklahoma action. However, defendants, not plaintiff, introduced many issues concerning the Oklahoma action into this case through their removal, motion to dismiss, and motion for summary judgment. Accordingly, it was not unreasonable for plaintiff's attorneys in this case to communicate with plaintiff's attorneys in the Oklahoma action to address issues involving the Oklahoma action that defendants raised in this case.

Second, defendants argue that the time plaintiff's attorney spent in preparing to respond to defendants' summary judgment motion was unreasonable because the motion became moot five days prior to the deadline for plaintiff to file its response. However, spending approximately nine hours in reviewing defendants' summary judgment motion and materials, along with discussing a plan for plaintiff's response is not unreasonable. Especially considering

that once the movant has established there are no genuine issues of fact the non-movant in a summary judgment motion has the burden of setting forth "specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Deciding what "specific facts" are necessary and how to obtain them, i.e., deposition, affidavit, etc., takes time. Accordingly, it was not unreasonable for plaintiff's attorneys to spend approximately nine hours in preparation for plaintiff's summary judgment response.

Third, defendants argue that spending \$1,780.00 for research and conferencing concerning removal and remand of this case is excessive. However, defendants do not explain why it is excessive. Defendants complicated the removal and remand process by using several figures that under established law should not have been included when calculating the amount in controversy in this case.² It was plaintiff's attorneys' duty to address all the amounts and explain why they should not be included in the amount in controversy. Accordingly, spending \$1,780.00, which divided by the average rate of \$200 is approximately nine hours is not excessive.

Finally, defendants argue that they should not have to pay for Attorney Pasch to review Attorney Moeser's work, which would amount to \$1,201.50. However, Attorney Pasch signed the documents submitted to the Court, and the Court expects that Attorney Pasch

²See footnote 1 supra.

would have reviewed both the research and the actual documents he was filing before he signed them. Accordingly, it was not unreasonable for Attorney Pasch to review that which Attorney Moeser was researching and writing.

Accordingly, the bill of costs submitted to the Court by plaintiff is reasonable, not excessive and will be awarded in full.

ORDER

IT IS ORDERED that defendants' motion to reconsider is DENIED.

IT IS FURTHER ORDERED that plaintiff's request for attorney's fees is GRANTED in the amount of \$17,506.00 together with costs and other expenses in the amount of \$496.10 for a total of \$18,002.10 for which judgment will be entered accordingly.

Entered this 2nd day of October, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge