UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELLORA'S CAVE PUBLISHING, INC.
and
JASMINE-JADE ENTERPRISES, LLC

Case No: 5:14-cv-02331

Plaintiffs,

v.

DEAR AUTHOR MEDIA NETWORK, LLC
and
JENNIFER GERRISH-LAMPE

Defendants.

OPPOSITION TO MOTION FOR REMAND

Plaintiffs request remand on the unsupportable position that Defendants waived their right to remove. This is a frivolous contention, which if accepted, would run counter to all precedent, and particularly against Sixth Circuit law.

On **26** September 2014, Plaintiffs filed their Complaint and Motion for Preliminary Injunction in the Court of Common Pleas, Summit County, Ohio. On **28** September, the defendants retained the undersigned. Late in the day on **29** September, the Summit County Court informed counsel for the Plaintiff that it

was scheduling a hearing on the motion for a temporary restraining order for the morning of **30** September.[1]

On 30 September the State Court held a hearing on the motion for a restraining order, and defense counsel had less than 48 hours in which to become familiar with the case and attend the hearing. Local counsel had even less than that. All parties agreed that the matter required needed additional time, and therefore the parties stipulated to a hearing to be held on 27 October. In the intervening period, counsel for the Defense was able to fully evaluate the case, and on 17 October it became 100% clear that removal was appropriate. The defense *could have* waited until after the hearing on the 27th, or even thereafter to remove. Instead, the defense acted expeditiously. (ECF 1) and on 20 October, removed this matter. The defendants engaged in neither delay nor gamesmanship in exercising their rights – even though doing so could have been to their benefit.

Removal is not a mere privilege. *Regis Associates v. Rank Hotels (Management), Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990). "The right of removal of a suit from state court to federal court is a statutory right. 28 U.S.C. §1441." *Id*. "If the requirements of the removal statute are met, the right to removal is absolute." *Id*. "Although the right to remove can be waived, the case law makes it clear that such waiver must be clear and unequivocal." *Id*. Not only is this the general rule nationwide, but the standard is even higher in this Circuit. *LaSalle Group, Inc. v. Tiger Masonry, Inc*., 2010 U.S. Dist. LEXIS 110071 (E.D. Mich.

[1] Fortunately, counsel for Plaintiffs was aware that the undersigned represented Defendants, despite no appearance yet being entered. Counsel for Plaintiffs then exhibited exemplary professionalism by tracking down counsel for Defendants and alerting him to the hearing. Despite this diligent courtesy, Defendants only had a matter of hours in which to prepare for the hearing, and to retain local counsel.

Oct. 15, 2010) ("[T]he Sixth Circuit has established a higher threshold for finding waiver of the right of removal than have other circuits").

Despite this, Plaintiffs come to this Court not only seeking remand but also requesting the punitive remedy of attorneys' fees. In seeking to deprive the Defendants of their rights, and in seeking sanctions, Plaintiffs rely on the rationale that minimal and preliminary record activity, consisting of attending a TRO hearing on a few hours' notice, seeking *pro hac vice* admission, and sending out a subpoena (to gather evidence that Plaintiffs had engaged in unlawful harassment of one of the defendants)[2] is enough to waive federal jurisdiction.

The Sixth Circuit consistently holds that participation in preliminary matters without *actively* seeking decisions by the State Court does not give rise to waiver. The very case that Plaintiffs rely upon in their motion upends their position:

> The court concluded that a fairly bright line existed between submitting a case for decision on its merits, and engaging in preliminary proceedings relating to temporary restraining orders or preliminary injunctive relief. Because the latter was not a conscious choice to submit the merits of a controversy to a state court for determination, the court concluded that even extensive participation in preliminary injunctive matters is not sufficiently indicative of a waiver to defeat the right to remove."

Rose v. Giamatti, 721 F. Supp. 906, 923 (S.D. Ohio 1989).

Rose v. Giamatti holds that "waiver of the right to remove occurs only where the parties have fully litigated the merits of the dispute." *Id*. citing *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir 1989). The "mere filing in the state

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[2] On 7 October, an email was sent to at least one of Ms. Lampe's supervisors. On 14 October that same email was forwarded to the entire department within which Ms. Lampe works. This is consistent with prior actions by directors of Ellora's Cave. Ellora's Cave has also engaged in acts to try and intimidate witnesses in this case. Therefore, sending this subpoena on short notice was of great importance. Since the Defense addressed this with Plaintiff's counsel, these actions have waned.

court of a pleading raising a defense which might be conclusive of the merits is insufficient for waiver. There must be further action on the part of the defendant resulting in a decision on the merits of the defense to waive the right to remove." *Bolivar Sand Co. v. Allied Equip., Inc.*, 631 F. Supp. 171, 173 (W.D. Tenn. 1986). The Defendants could have done *much more* in the state court case, and still not even approach waiving the right to be heard in this Court.[3] See *Regis Associates*, 894 F.2d at 195.

Even the filing of counterclaims does not support waiver. *Swartz v. DiCarlo*, 2013 U.S. Dist. LEXIS 40185 (N.D. Ohio Feb. 7, 2013) citing *Bolivar Sand Co. v. Allied Equip., Inc.* ("[B]ecause the case was properly removed just one day after Defendant filed its counterclaims and cross-claims, there can be no serious argument that Plaintiff 'clearly and unequivocally' intended to waive its right of removal, or that Defendant was attempting to forum shop."). "[T]the rule permitting waiver was intended to prevent defendants from fleeing to federal court after 'testing the waters in state court' and finding them too cold." *Id*. In this case, the parties did not even get to the lakeside, much less go for a swim.

Costs and Fees Should Not Be Granted to Plaintiffs

Plaintiffs' Motion to Remand requests attorneys' fees and costs, but this relief is inappropriate.[4] This Court may award attorneys' fees under 28 U.S.C. §1447(c) "only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 126 S. Ct.

[3] In fact, even though not likely strictly required, Defendants withdrew the single issued subpoena on October 21 so as to not erroneously misuse the power of the state court, when it no longer had jurisdiction. Attached hereto as Exhibit A is the Notice of Withdrawal of the Subpoena, dated 21 October.

[4] Rather than address this issue, Defendants attempted to secure a stipulation that fees and costs would not be sought. Exhibit B. Plaintiffs declined to authorize such a stipulation.

704, 711, 163 L. Ed. 2d 547 (2005); *Frischkorn v. Lake County Chrysler, Inc.*, 2006 U.S. Dist. LEXIS 74541(N.D. Ohio Oct. 13, 2006) (Attorneys' fees inappropriate where there is an objectively reasonable basis for removing the action.) Given the argument above, there can be no serious argument that the removal was appropriate.

Costs and Fees Are Appropriate Against Plaintiffs, But Are Not Yet Sought

It would be appropriate to award fees and costs to the Defendants. The motion for remand was frivolous, and the case law it cites in support makes it clear that no reasonable party could have considered the motion to have a likelihood of success. The reason for the motion was to create a means to prolong the case, and to have time in which to withdraw the motion for injunctive relief, only to re-file it at a later time.

This Court's Local Rules provide that filing a frivolous motion "may result in the imposition of appropriate sanctions including the assessment of costs and attorneys' fees against counsel and/or the party involved." Local Rule 7.1(i). Even in the absence of this Local Rule, it is appropriate to award costs and fees to Frivolous motions for remand under the court's inherent power and/or 28 U.S.C. §1927. *Dunleavy v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 9384 (E.D. Mich. Feb. 1, 2011) (awarding a defendant sanctions and fees in responding to a frivolous motion for remand).

However, the Defendants decline to request sanctions or fees *at this time*.[5] It was clear upon reviewing the motion that it could not have been filed with the intention of actually prevailing. Rather, it appears that it was filed for an improper purpose, and that is to delay the upcoming hearing.

[5] The Defendants do wish to preserve the issue for a later motion.

Despite initiating the action, and the motion Plaintiffs do not actually want a hearing against prepared Defendants. The greater underlying reason for this motion came to light during conferences to obviate the need for this opposition – when Plaintiffs noted that they wished to buy time in order to file an *amended motion for injunctive relief*. In other words, they came seeking extraordinary relief, relief they knew or should have known would have no likelihood of succeeding. Upon being confronted with a full opposition, and the specter of a hearing that would likely result in narrowing many of their claims, they now seek to unnecessarily multiply the proceedings even further. If they insist upon using the removal process to justify such actions, sanctions against the Plaintiffs will be necessary and proper.

This conduct is consistent with the overall goal of this case. At its core, this is a SLAPP suit[6] – a suit devoid of merit, filed for an improper purpose. Plaintiffs have made no secret of the fact that it is their intention to make this case more inefficient and expensive than necessary, in order to achieve the litigation's true purpose – to punish the defendants through the stress and expense of a lawsuit and to frighten anyone else who may dare to speak the unflattering truth about Ellora's Cave -- all of this despite the fact that there is nothing remotely actionable in the Article at issue in this case. This is a classic SLAPP suit, and this kind of motion practice is highly symptomatic of one.

The Motion for Injunctive Relief will, no matter its result, help advance this matter to an efficient and expeditious termination. But, the Defendants do not want an "efficient and expeditious" termination. In fact, Plaintiffs have threatened to simply withdraw the motion for injunctive relief, now that it has been fully briefed, preparations made, and travel arrangements purchased. This is not because they no longer want the relief, but because they are aware

[6] A SLAPP suit is a "Strategic Lawsuit Against Public Participation."

that an order narrowing the issues in the litigation will be detrimental to the goal of financial attrition through protracted and multiplied proceedings.

Therefore, the Defendants seek neither fees or sanctions at this time. However, if Plaintiffs withdraw the motion for injunctive relief, the Defendants intend to seek sanctions and fees for the full amount of the attorneys' fees expended in defending against *that* motion as well as the instant motion.

Dated this 26th day of October, 2014.

Respectfully Submitted,

/s/ Marc John Randazza
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 26, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served upon: Steven W. Mastrantonio, Esq., counsel for Plaintiffs, via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ T. Kaar
Employee of
Randazza Legal Group