

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ellora's Cave Publishing, Inc., et al.)	Case No.: 5:14CV2331
)	
Plaintiffs,)	JUDGE JOHN ADAMS
vs.)	
)	
Dear Author Media Network, LLC, et al.)	PLAINTIFFS' MOTION
)	FOR REMAND TO STATE COURT
Defendants.)	
)	

Plaintiffs, Ellora's Cave Publishing, Inc. and Jasmine Jade Enterprises, LLC, respectfully request this Court for an order remanding this case back to the State court from which it was removed. Plaintiffs also request the order require Defendants' payment of just costs and actual expenses incurred by Plaintiffs as a result of the removal. 28 U.S.C. §1447.

Defendants waived their right to removal based upon diversity jurisdiction because of their clear and unequivocal intent to proceed with this case in the State court. Because these actions were clearly inconsistent with the Defendants' right of removal, remand to the State court is appropriate.

The grounds for this motion are more fully set forth in the attached Memorandum in Support and accompanying exhibits.

Respectfully submitted,

NIEKAMP, WEISENSELL, MUTERSBAUGH, &
MASTRANTONIO, LLP

/s/ Steven W. Mastrantonio

Steven W. Mastrantonio (0062575)

The Nantucket Building, Suite 301

23 South Main Street

Akron, OH 44308

330-434-1000 Tele

330-434-1001 Fax

mastrantonio@nwm-law.com

Counsel for Plaintiffs

MEMORANDUM IN SUPPORT

I. The State court Claims and Proceedings

Plaintiffs filed a complaint (alleging state law defamation claims) and motion for temporary restraining order with the Summit County, Ohio, Court of Common Pleas Court on September 26, 2014.

On September 30, 2014, an initial conference before the State court was held wherein a discussion of a preliminary injunction hearing and restraint of party conduct occurred.¹ In furtherance of the items discussed at the conference, the parties negotiated and submitted a joint motion to the State court, which provides in part:²

2. In lieu of a hearing on the issues on September 30, 2014, **the parties agreed to a full airing of the issues at a preliminary injunction hearing** to be held starting at 9 a.m. on Monday October 27, 2014....³

Additionally, the Defendants expressly agreed to be bound by the State court concerning further conduct:

3. In the interim, all parties agree that neither they, nor anyone under their direct control, shall post on the Internet any comments specifically and directly related to the factual allegations that form the basis of Ellora Cave's defamation complaint; further, they agree not to comment online, directly or indirectly, on the allegations that form the basis of the defamation complaint. Nothing herein shall prohibit Plaintiffs from responding to defamatory posts or re-posts made by third parties related to the issues raised in this litigation.

4. Except as provided for herein, nothing in this agreement prevents either party from blogging or otherwise commenting – on the Internet or otherwise – about any other matter. Defendants reserve the right to solicit witnesses – online and otherwise – who may aid in their defense of the underlying action.

¹ Affidavit of Attorney Steven Mastrantonio attached hereto as Exhibit 1.

² Joint Motion for Continuance of Temporary Restraining Order Hearing filed October 2, 2014 attached hereto as Exhibit 2.

³ *Id.* See also, Journal Entry Order filed October 10, 2014 attached hereto as Exhibit 3, which was submitted as an agreed order and mirrors the parties' joint motion at Exhibit 2.

On October 10, 2014, the State court adopted the agreed order submitted with the party's joint motion rescheduling the State court hearing date.⁴

Defense counsel also submitted a motion for admission *pro hac vice* seeking:

...permission to appear as co-counsel for Dear Author in this matter *pro hac vice* and to engage in discovery, trial, and other matters before the Court pertaining to this case. (emphasis added).⁵

Defendants subsequently sought and offered deposition discovery of the opposing parties and their clients.⁶ Defendants engaged in other discovery by issuing a state-court subpoena to Google.⁷ Moreover, Defendants obtained declarations from third parties and captioned the statements with the State court proceedings.⁸

II. Defendants Waived Their Right to Removal In This Case

Based upon diversity jurisdiction, a defendant normally has the right to remove this action to federal court. 28 U.S.C. §1446(b). That right may be waived by acts that indicate a submission to the jurisdiction of the State court. *Bedell v. H.R.C. Ltd.*, 522 F. Supp. 732, 737 (E.D. Ky 1981). The right of removal is a statutory right that can only be waived when the waiver is "clear and unequivocal." *City of Cleveland. v. Ameriquest Mortgage Securities, Inc.* 615 F.3d 496, 501 (6th Cir. 2010), citing *Cadle Co. v. Reiner, Reiner & Bendett, P.C.*, 307 Fed.Appx. 884, 886 (6th Cir. 2009); *Regis Associates v. Rank Hotels*, 894 F.2d 193, 195 (6th Cir. 1990);

Where a clear of intent to submit the case in the State court is found, remanding the case back to the State court from which it was removed is proper. *Atlanta, K & N Ry. Co. v. Southern*

⁴ Exhibit 3.

⁵ Motion for Admission *Pro Hac Vice* of Marc J. Randazza filed in State court on October 8, 2014 attached hereto as Exhibit 4; Order Admitting Attorney Randazza *Pro Hac Vice* attached hereto as Exhibit 5.

⁶ Correspondence between defense counsel to plaintiff's counsel dated October 12, 14, and 15, 2014 attached hereto as Exhibits 6, 7, and 8.

⁷ Subpoena Duces Tecum, Notice of Subpoena, and Praeceptum for Instructions for Service of Subpoena Upon Third Party filed by Defendants in State court on October 17, 2014 attached as Exhibits 9, 10, and 11.

⁸ Defendants' Opposition to Plaintiffs Motion for Temporary Restraining Order at Exhibits 1 to 6, ECF Doc#7.

Ry. Co., 131 F. 657, 661 (6th Cir. 1904). The critical factor in determining whether a particular defensive action in the State court should operate as a waiver of the right to remove is the defendant's intent in making the motion.

Here, Defendants' intent to litigate in the State court can be established through express and implicit conduct. First, and perhaps most telling of Defendants' intent to waive the right to removal is Defendants' express agreement in a *signed writing* and subsequent agreed order to submit to a full hearing of the issues in the State court. Within those writings, Defendants also expressly agreed to be bound by the State court's order limiting the Defendants' conduct before the hearing date. Second, Defense counsel requested *pro hac vice* admission specifically to "engage in discovery, trial and other matters before the Court"—not to defend the case until Defendants filed for removal. Third, as further evidence of its intent, Defendants availed themselves of the State court subpoena power and process related thereto. Fourth, Defendants requested deposition discovery and offered to make their clients available for depositions in the State court proceedings. Fifth, Defendants procured declarations from third-party witnesses that contain the caption of the State court proceedings. These actions show the Defendants' clear intent to litigate in, and submit to the jurisdiction of, the State court.

Waiver becomes clear when a defendant makes affirmative use of a State court. *Rose v. Giamatti*, 721 F. Supp. 906, 921 (S.D. Ohio 1989); *Southwest Truck Body Co. v. Collins*, 291 F.Supp. 658 (1968, WD Mo); *Zbranek v. Hofheinz*, 727 F. Supp. 324, (E.D. Tex 1989).

In *Southwest Truck Body Co.*, *supra*, the defendants sought to dissolve a preliminary injunction and other preliminary actions in State court. The defendants thereafter removed the case to federal court. The court held that the defendants voluntarily submitted to the jurisdiction

of the State court and thus could not thereafter be allowed to remove the case to federal court under 28 U.S.C.A. §1441. 291 F.Supp. at 662.

In *Zbranek, supra*, the defendant was held to have manifested the intent to have the case adjudicated in State court and abandon the right to a federal forum by seeking an injunction. 727 F. Supp. at 325.

In *Rose, supra*, the court held that there was not a clear waiver in the case and that a court should be reluctant to grant a waiver. *Id.* at 908-09. Like in this case, the defendants in *Rose* appeared to contest a temporary restraining order and participated in discovery related thereto. *Id.* at 923. In *Rose*, the defendants simply defended the scheduled proceedings in State court before filing for removal.

Unlike *Rose*, here the Defendants expressly, and unequivocally, requested in a motion and agreed order a “full airing of the issues at a preliminary injunction” before the State court. This was no simple request for a continuance; Defendants explicitly requested to take full advantage of the State court proceedings for an adjudication on the merits before seeking removal to this Court.

Accordingly, Defendants have waived their right of removal and this action should be remanded to the State court from which it was removed.

III. Conclusion

Accordingly, Plaintiffs respectfully request this Court to remand the proceedings to the State court and for costs and attorney fees associated with this Motion.

Respectfully submitted,

NIEKAMP, WEISENSELL, MUTERSBAUGH, &
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2014 a copy of the foregoing *Motion to Remand to State Court* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Steven W. Mastrantonio

Steven W. Mastrantonio

Attorney for Plaintiff