

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELLORA’S CAVE PUBLISHING, INC., et al)	CASE NO.: 5:14CV2331
)	
Plaintiffs,)	JUDGE JOHN R. ADAMS
)	
vs.)	
)	
DEAR AUTHOR MEDIA NETWORK, LLC et al.)	<u>REPLY TO DEFENDANTS’</u>
)	<u>OPPOSITION MOTION</u>
Defendants.)	<u>FOR REMAND</u>
)	

I. INTRODUCTION

Defendants’ opposition erroneously concludes that Plaintiffs base their Motion for Remand on Defendants’ “minimal and preliminary record activity.”¹ Defendants claim that the activity in this case, which includes participation in a court conference, filing a notice of appearance, seeking *pro hac vice* admission and utilizing the subpoena² powers of the State court is mere participation and not sufficient to demonstrate a clear and unequivocal intent to try this case in State court. However, Defendants’ clear and unequivocal *request and agreement* to conduct a state court hearing on the merits, along with the manner in which Defendants’ preliminary actions were conducted, demonstrate Defendants’ intent to litigate in the State court.

¹ Opposition Brief of Defendants, ECF Doc#14, page 3.

² In connection with this subpoena, Defendants make the scurrilous allegation that Plaintiffs harassed Defendant at her place of employment. Such false and gratuitous remarks, wholly unsupported by any evidence, are inappropriate in these procedural motions. And given the defamatory comments already posted by Defendants, Defendants should be more circumspect before making such allegations. Opposition Brief of Defendants, ECF Doc#14, page 3.

II. LAW AND ARGUMENT

a. Defendants' waiver was clear and unequivocal

Plaintiffs do not argue that mere reactive actions in state court, by their nature, are indicative of a clear intent to remain in state court. But unlike the cases cited by the Defendants, in the present case Defendants affirmatively sought to avail themselves of the State court proceedings by requesting and agreeing to an order for “a full airing of the issues” in the State court.³

The significance of the joint motion and agreed order go deeper. Because when the September 30, 2014 hearing was set to go forward, Defendants asked for additional time to prepare.⁴ In consideration for the Plaintiffs' agreement to continue the hearing, the parties jointly agreed that the matter would be heard before the State court on a different date. It was this inducement and explicit request by Defendants, that formed the basis for the issues to be heard before the State court on a different date. The Defendants' overt expression of a clear and unequivocal intent to litigate before the State court is what distinguishes this case from those with merely reactive participants.

Defendants' comparison of the facts of this case with *Rose v Giamatti*⁵ and other cases is misplaced because the parties seeking removal in those cases were passive participants. In those cases, the litigants seeking removal were found not to have made a “conscious choice” to submit the preliminary injunction to state court - their actions were merely reactionary and defensive. In other words, those defendants were brought into state court with little choice but to defend.

³ Journal Entry Order filed October 10, 2014 attached hereto as Exhibit 1.

⁴ Acknowledged by Defendants in the Opposition Brief of Defendants, ECF Doc#14, page 2.

⁵ *Rose v Giamatti*, 721 F.Supp.906 (S.D. Ohio 1989).

Such conduct is starkly different from expressly requesting and agreeing to a hearing considering merits of the case before the State court.

b. Defendants' request for attorney fees

Defendants allege that Plaintiffs' Motion to Remand is frivolous because it was filed "with[out] the intention of actually prevailing."⁶ As though not fully convinced of its own position, Defendants then state that they decline to pursue the request for fees at this time.⁷

The crux of Defendants' allegation is their belief that Plaintiff's filing was submitted for the improper purpose of undue delay.⁸ However, the delay in this case was caused by the Defendants' conduct - removing this case from State court - which unavoidably continued the previously set hearing by divesting the State court of jurisdiction to hear the matter on the appointed date. Defendants were well aware that Plaintiffs would have 30 days to file a motion to remand the action back to the State Court after the filing of the Notice of Removal.⁹ Thus, any hearing before the remand issue was decided was unlikely.¹⁰ In addition to the statutory time frame allotted for the remand motion, Plaintiffs' counsel expressly informed defense counsel that his client intended to file a motion to remand, along with a motion to continue the hearing.¹¹

⁶ Opposition Brief of Defendants, ECF Doc#14, page 5.

⁷ The irony of Defendants' argument in light of their own request - asking for a remedy with no intention to prevail on the request - is not lost on the Plaintiffs.

⁸ Opposition Brief of Defendants, ECF Doc#14, page 6; Plaintiffs never made a representation that they "wished to buy time." Plaintiffs indicated that because the facts on the ground had changed, the urgency associated with a temporary restraining order had become attenuated and that a consolidation of the hearing with the final hearing on the merits under Rule 65(a)(2) would avoid 2 hearings, 2 trips for defense counsel and his client, 2 briefings, and twice the use of the Court's time and resources.

⁹ 28 U.S.C.1447(c)

¹⁰ And, in the absence of a crystal ball, Defendants would have had no expectation as to when the date would have been reset by this Court.

¹¹ Counsel's email of October 22, 2014, attached hereto as Exhibit 2.

Lastly, Plaintiffs' do not seek to "unnecessarily multiply the proceeding" and "make this case more inefficient and expensive than necessary."¹² Rather it is the Defendants that that are unilaterally insisting on having a hearing – a hearing which if *not* held actually guarantees the Defendants the outcome they desire (namely, not having an injunction imposed). This begs the question: which party is unnecessarily seeking to multiply the proceedings and the expense of the case.

Plaintiffs clearly do not seek to complicate any proceedings by seeking to resolve the issue of remand before proceeding further with a hearing considering the merits of the case.

Therefore, Defendants' request for attorney fees should be denied.

III. CONCLUSION

Accordingly, for good cause shown, Plaintiffs respectfully request their motion for remand be granted. Plaintiffs further request their fees be awarded in connection with the order remanding the case back to the State court and to deny Defendants' request for attorney fees, the extent such a request was made.

Respectfully submitted,

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¹² Opposition Brief, ECF Doc#14, page 6.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 2014 a copy of the foregoing *Motion to Continue Hearing* 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