IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LINDA J. CROSS, Plaintiff, vs. CITY OF LISCOMB, ROBERT TERRY, DARWIN BRACY, and GARNET SMALL, Defendants.	)	NO. 4:03-cv-30172 RULINGS ON DEFENDANT BRACY'S MOTION TO ENJOIN STATE COURT ACTION, PLAINTIFF'S MOTION TO STAY FEDERAL PROCEEDINGS, AND PLAINTIFF'S MOTION TO EXTEND EXPERT WITNESS DEADLINE

The above motions (## 20, 27 and 28) are before the Court. They are submitted following hearing.

Motion to Enjoin State Court Action.

Relying on 28 U.S.C. § 1446(d), defendant Bracy moves to enjoin a subsequent state court action filed by plaintiff Cross dealing with the same subject matter. The other defendants join.

On March 5, 2003 plaintiff Cross filed a Petition in the Iowa District Court for Marshall County in seven counts. The thrust of her lawsuit was that she was defamed and driven out of her employment as the City Clerk and Treasurer of the City of Liscomb by the individual defendants, members of the City Council, when she refused to discriminate against Hispanics in the use of the City's community center. Count I stated a claim for retaliation for opposing discrimination in violation of the Iowa Civil Rights Act (ICRA). Ch. 216, Iowa Code. Counts II and III stated causes of action based on violations of separate provisions of the Iowa Constitution dealing with life, liberty and the pursuit of

happiness and the Iowa counterpart to the Equal Protection Clause. Count IV alleged defamation. Count V was denominated "prima facie tort." Counts VI and VII alleged federal causes of action brought under, respectively, 42 U.S.C. § 1983 for retaliation and discrimination because Cross had opposed unlawful discrimination, and 42 U.S.C. § 1985 for conspiracy to violate her civil rights. Defendants removed the case to this Court on March 27, 2003 on the basis of the Court's original jurisdiction over the federal claims, citing 28 U.S.C. § 1441(b). The pendent state law claims over which this Court has supplemental jurisdiction were also removed. 28 U.S.C. § 1367(a). The Court was required to exercise its supplemental jurisdiction over the state law claims unless one of the circumstances described in subsection 1367(c) applied to permit the Court in its discretion to decline to exercise jurisdiction (which has not been suggested). McLaurin v. Prater, 30 F.3d 982, 985 (8th Cir. 1994).

Plaintiff subsequently filed motions to dismiss without prejudice all of her state law counts except the ICRA claim, Counts II, III, IV and V. She did not indicate the reason for her motion. The motions were granted without resistance.

On July 28, 2003 Cross filed a second Petition in the Iowa District Court for Marshall County which, according to defendants, pleads the same state constitutional and defamation

claims originally removed to this Court, and adds a claim based on "concert of action" grounded on the same factual allegations.

Plaintiff does not dispute defendants' characterization of her pleadings. In fact, in her motion to stay this action she has alleged that the "two lawsuits aris[e] out of the same set of operative facts." A review of the state Petition removed to this Court indicates the conduct on which she bases her state tort and constitutional law claims is part of the retaliation, discrimination, and conspiracy that is the basis for the federal claims.

Defendants contend that plaintiff's dismissal and refiling in state court of most of the state claims removed to this Court is a subversion of this Court's removal jurisdiction which should be enjoined under the authority of 42 U.S.C. § 1446(d). Cross responds first, that the state action should not be enjoined absent evidence of fraud and second, that nothing precludes her from filing actions based on the same facts in both state and federal courts when neither action has been tried and decided in the other forum. She contends she has a right to have her state claims decided in state court.[1]

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[1] At hearing counsel for plaintiff made a constitutional argument which the Court took as arising under the Tenth Amendment. The Tenth Amendment "states . . . a truism." United States v. Darby Lumber Co., 312 U.S. 100, 124 (1940). There is nothing in its history to suggest "it was more than declaratory of the relationship between the national and state governments" or that (continued...)

The Anti-Injunction Act prohibits federal courts from enjoining state court proceedings except in three circumstances. 28 U.S.C. § 2283. One of these is where "expressly authorized by Act of Congress . . . ." Id. The removal statute at 28 U.S.C. § 1446(d) states that after notice of removal is filed in state court and served on all adverse parties the state court "shall proceed no further unless and until the case is remanded." This language has long been taken as "express authorization to stay state court proceedings." See Kansas Pub. Employees Retirement Sys. (KPERS) v. Reimer & Koger Assoc., Inc., 77 F.3d 1063, 1069 (8th Cir. 1996), cert. denied, 519 U.S. 948 (1996). Though the removal statute only refers to a stay of state court proceedings "it has been interpreted to authorize courts to enjoin later filed state cases that were filed for the purpose of subverting federal removal jurisdiction." Id.

Here, Cross' federal and state claims were properly removed to this Court. Cross voluntarily dismissed her state claims, but one, and refiled them in state court, thus splitting her causes of action based on the same facts between the two

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[1](...continued)
its purpose "was other than to allay fears that the new national government might seek to exercise powers not granted." Id. A Tenth Amendment challenge to an injunction issued by a federal court against related state court litigation involving only state court claims was rejected by the Fifth Circuit in In re Corrugated Container Antitrust Litigation, 659 F.2d 1332, 1336-37 (5th Cir. 1981), cert. denied, 456 U.S. 936 (1982).

courts. The absence of fraud argued by Cross is not the relevant inquiry. As the KPERS court noted, fraud is relevant in cases based on diversity jurisdiction, not when, as here, based on federal question jurisdiction. 77 F.3d at 1069.

Cross' second argument that she may file claims in federal and state court based on the same facts requires more attention. The mere filing of factually similar claims in state and federal court does not involve the removal statute. The landscape changes when federal and state claims arising from the same case or controversy are filed in state court and then removed to this Court under its removal jurisdiction. Upon removal this Court acquired "full and exclusive subject matter jurisdiction over the litigation." 14C C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Civil § 3738 at 390 ("Wright & Miller"); see Ward v. Resolution Trust Corp., 972 F.2d 196, 198 (8th Cir. 1992), cert. denied, 507 U.S. 971 (1993). Cross could not thereafter "file essentially the same case in a second state action to subvert federal jurisdiction." KPERS, 77 F.3d at 1069. "It would be of little value to enjoin continuance of a state case after removal and then permit the refiling of the same suit in state court." Id. (quoting Lou v. Belzberg, 834 F.2d 730, 741 (9th Cir. 1987), cert. denied, 485 U.S. 993 (1998)).

The determinative question is whether Cross' dismissal of the state claims without prejudice effected a relinquishment of

this Court's exclusive removal jurisdiction of the state law claims. The Court treated the motion to dismiss as seeking voluntary dismissal under Fed. R. Civ. P. 41(a). In practice individual claims are frequently voluntarily "dismissed" under the rule. The technical distinction ordinarily is inconsequential, but Rule 41(a) is concerned only with dismissal of "action[s]," not with some of the claims in an action. See Berthold Types, Ltd. v. Adobe Systems, Inc., 242 F.3d 772, 777 (7th Cir. 2001); Gobbo Farms & Orchards v. Poole Chemical Co., Inc., 81 F.3d 122, 123 (10th Cir. 1996); Wilson v. Crouse-Hinds Co., 556 F.2d 870, 873 (8th Cir.), cert. denied, 434 U.S. 968 (1977); Moore's Federal Practice 3d § 41.21[1] at 41-30, 31 (2003)("Moore's"). Conceptually, the dismissals are more properly viewed as an amendment to the complaint under Fed. R. Civ. P. 15(a) to delete the state claims. See Paglin v. Saztec Int'l, Inc., 834 F. Supp. 1184, 1189-90 (W.D. Mo. 1993); Moore's § 41.21[2]. It is well established that "a party may not employ Rule 15(a) to interpose an amendment that would deprive the district court of jurisdiction over a removed action." Wright & Miller, § 1477 at 562; see Moore's, § 15.16[5] at 15-64. Here Cross did not attempt to eliminate the federal claim or, had this been a diversity case, reduce claimed damages below the diversity amount, the usual means used to manipulate the pleadings to avoid federal jurisdiction. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988); St. Paul Mercury Indem. Co. v. Red Cab

Co., 303 U.S. 283, 292-93 (1938). But what she has done amounts to the same thing, an amendment to the complaint in an effort to short circuit removal jurisdiction with respect to the state claims in question.

Once the action was removed the state court could not proceed any further "unless and until the case is remanded." 28 U.S.C. § 1446(d), in other words until a decision is made by the federal court to send the case back to state court. This action has not been remanded and the entire cause therefore remains subject to the exclusive jurisdiction of this Court. It would be plainly inconsistent with the rules of civil procedure, as well as the removal and supplemental jurisdiction statutes, to view a party's voluntary elimination of state claims from a removed action (regardless of the procedural device employed) as a relinquishment of removal jurisdiction over such claims absent an express decision by the court to remand or decline supplemental jurisdiction.

At the outset the plaintiff is the master of the complaint. She can avoid federal court by foregoing federal claims in state court. However, when Cross decided to join in her state court action federal and state claims based on the same operative facts she gave the ultimate opportunity to select a forum where the claims, both state and federal, would be litigated to the defendants. Defendants had the right, which they exercised, to take the entire case to this Court.

The present motion puts the Court in a difficult position. On the one hand the Court is loathe to enter an injunction which interferes with the progress of an action in state court, particularly an action which now involves only state law claims. On the other hand, plaintiff's post-removal splitting of her action and refiling of state claims in state court raises an issue that cannot be ignored. The Eighth Circuit's discussion in KPERS makes clear that that issue is whether Cross acted "for the purpose of subverting federal removal jurisdiction," a fact question. 77 F.3d at 1069-70; see Quackenbush v. Allstate Ins. Co., 121 F.3d 1372, 1378 (9th Cir. 1997). When Cross' motion to stay this lawsuit in favor of the state lawsuit is considered Cross' purpose to subvert removal jurisdiction is unmistakable. Her plan is to split her causes of action between state and federal courts, proceed to judgment first on the state claims while putting the federal action on the back burner in the hope the result will trump the federal action, reserving the federal option if in her interest to proceed later. Defendants' right to remove the first state case would thus be eviscerated. The Court finds the subsequent state action is substantially identical to this action and that it was filed to subvert removal to this Court of the state claims in the earlier state case.

Plaintiff Cross will be enjoined from proceeding with the state court action.

Motion to Stay Federal Proceedings.

It follows from the ruling on the preceding motion that plaintiff's motion to stay federal proceedings should be denied. In any event, as this was the first action filed it ought to proceed regardless of the state action. The Court notes that Judge Pratt has viewed similar motions as essentially a request that the federal court abstain from adjudicating the claims before it and absent extraordinary circumstances there is no basis for such a request under the federal abstention doctrine. See October 6, 2003 ruling in Robison v. Coventry Health Care of Iowa, Inc., 4:03-cv-90309 and Davis v. American Health Care Management Servs., 4:03-cv-90344. I agree.

Motion to Extend Expert Witness Deadline.

For good cause shown, plaintiff's motion to extend the expert witness deadline will be granted. The parties shall confer and present a new proposed scheduling order concerning experts and such other deadlines as may be appropriate.

In view of the foregoing, the following orders are entered:

1. Defendants' motion to enjoin state court action **granted** to the extent that plaintiff is enjoined from in any manner proceeding with the state court action except to dismiss the same (#20);

2. Plaintiff's motion to stay federal proceedings **denied** (#27); and

3. Plaintiff's motion to extend expert witness deadline **granted** (#28). Deadlines are extended as indicated above.

IT IS SO ORDERED.

Dated this 2d day of March, 2004.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE