

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

MICHAEL M. BRADY,

Plaintiff,

vs.

HALLMARK DEVELOPMENT
COMPANY, L.C.,

Defendant.

No. 4:04-cv-40079

**ORDER ON PLAINTIFF'S
MOTION TO REMAND**

Pending before the Court is Plaintiff's Motion to Dismiss Removal (Clerk's No. 6), which the Court treats and considers as a Motion to Remand. An oral hearing on the motion was held on Thursday, March 18, 2004.¹ Attorneys for the Plaintiff are Linda Hall and Thomas C. Verhulst, with Ms. Hall presenting argument in support of the motion; attorneys for the Defendant are James J. Beery and Michelle Engler, with Ms. Engler presenting argument in resistance.²

¹ Pursuant to an order issued by U. S. Magistrate Judge Celeste Bremer (Clerk's No. 12), filed March 3, 2004, the Court was also scheduled to hear oral argument on Plaintiff's pending Motion for Sanctions (Clerk's No. 5). However, counsel for the Defendant claimed no prior knowledge of the March 3, 2004, order, and the Court notes no resistance to the Motion for Sanctions had yet been filed. Accordingly, the Motion for Sanctions will be the subject of a future order, as more fully explained below. See In re Pozsga, 158 F.R.D. 435, 437 (D. Ariz. 1994) (retaining jurisdiction on Federal Rule of Civil Procedure 11 issues after remanding action to state court for lack of subject matter jurisdiction and provisionally finding the notice of removal violated Rule 11).

² Judge Bremer denied attorney James Beery's motion to withdraw as counsel in the March 3 order.

PROCEDURAL HISTORY AND BACKGROUND FACTS

Plaintiff, Michael M. Brady (“Brady”), commenced an action against Defendant, Hallmark Development Company, L.C. (“Hallmark”), on November 15, 1999, in the Iowa District Court in and for Polk County.³ The state action sought to recover money damages from Defendant in a breach of contract action. On January 24, 2002, the state court entered default judgment against Hallmark as a result of Defendant’s failure to secure counsel. The default judgment included the requirement that a series of actions be undertaken by Hallmark, apparently in an effort to determine a basis for entry of a default judgment.

Hallmark was unable to comply with the order of the state court. As a result, Hallmark was sanctioned on multiple occasions for failure to satisfy the January 24 order. In August 2003, Brady filed an Application and Affidavit for Order to Show Cause for Contempt. This application sought redress against Hallmark for failure to comply with the January 24 order. In October, the Iowa District Court ordered James Beery, Walter Schroeder, and David Brodsky to appear before the court with reference to Plaintiff’s Application for Contempt. Schroeder proceeded pro se through the hearing. He was

³ Walter Schroeder (“Schroeder”) had some undefined role with Hallmark that eventually caused him to be a specific focus of the state court’s attention for sanctions. He was variously described in the state court file as a member of the Hallmark limited liability company, and not, as a manager, and not, and as a partner. The ultimate contempt proceeding against Schroeder, within the confines of the state court’s efforts to gain compliance with its orders in the underlying action, is what Defendant contends creates the basis for removal and jurisdiction in this Court.

found guilty of contempt and sentenced to six months incarceration. Hallmark was not separately found in contempt.

Defendant Hallmark filed a notice of removal on February 5, 2004, the day before a hearing was scheduled to determine whether or not mittimus should issue for Schroeder. Defendant argues Schroeder's rights were violated throughout the proceedings in state court and that it is imperative this Court exercise jurisdiction over this matter.

ANALYSIS

The main contention in Plaintiff's motion is that the state case was improperly removed as removal occurred outside of the thirty-day period allowed under 28 U.S.C. § 1446(b). This section limits the time to file a notice of removal in a civil action to thirty days after the defendant has received the "initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter." 28 U.S.C. § 1446(b). Plaintiff also contends there is no basis for federal subject matter jurisdiction that would make this action removable.

The statute detailing the procedures following removal, 28 U.S.C. § 1447(c), provides for remand where it is apparent that the court lacks subject matter jurisdiction or where there is some procedural defect in the removal. See 28 U.S.C. § 1447(c). Plaintiff is correct in his assertion that failure to file within the prescribed time period is

proper grounds for remand. See, e.g., Webster v. Dow United Technologies Composite Prods., Inc., 925 F. Supp. 727, 729 (M.D. Ala. 1996) (finding timely objection to late petition for removal will result in remand); Barton v. Lloyd's of London, 883 F. Supp. 641, 642 (M.D. Ala. 1995) (finding failure to file notice of removal within thirty-day statutory window required district court to remand action); McCain v. Cahoj, 794 F. Supp. 1061, 1062 (D. Kan. 1992) (finding untimely notice of removal required remand of action even if federal courts would have had exclusive subject matter jurisdiction); Flood v. Celin Jewelry, Inc., 775 F. Supp. 700, 700 (S.D.N.Y. 1991) (finding notice of removal which was filed more than thirty days after defendant's receipt of initial pleading was untimely and ineffective, and case must be remanded as a result); Blow v. Liberty Travel, Inc., 550 F. Supp. 375, 375-76 (E.D. Pa. 1982) (finding failure to file petition for removal within thirty days as provided by statute is sufficient ground on which to remand).

In addition, because federal courts are courts of limited jurisdiction, see Bellevue State Bank v. Hueneke, 2004 WL 50863, at *1 (N.D. Iowa Jan. 8, 2004), the basis for removal must also be established. The burden of establishing jurisdiction falls upon the party removing the action. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). A state court action may be removed to federal court based on federal question jurisdiction only if that jurisdiction is evident on the face of a well-pleaded complaint or petition by the plaintiff. See Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). The removal statute is strictly construed, and the Court will resolve any doubt

as to the propriety of removal in favor of state court jurisdiction and remand. See Green v. Ameritrade, Inc., 279 F.3d 590, 596 (8th Cir. 2002); Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619, 625 (8th Cir. 1997).

According to the Defendant, the initial pleadings from which it seeks relief include the following: Plaintiff's Application and Affidavit for Order to Show Cause for Contempt, filed August 29, 2003, and served November 13, 2003; Order Re: Contempt of Court entered by the Iowa District Court in and for Polk County on November 20, 2003; and Application for Mittimus, filed December 24, 2003, and mailed to Defendant on December 23, 2003.

The original action is a contract action filed by Plaintiff in state court on November 15, 1999. There were no subsequent amended petitions filed or other changes made that affected the nature of the action. Notice of Removal was filed by Defendant on February 5, 2004, the day before the hearing on Plaintiff's Application for Mittimus was scheduled in state court.

Defendant argues that the rules for notice of removal for a *criminal* action are controlling. Contempt actions are considered quasi-criminal in nature due to the high stakes involved. Ervin v. Iowa Dist. Court for Webster County, 495 N.W.2d 742, 744-45 (Iowa 1993); Wilson v. Fenton, 312 N.W.2d 524, 528 (Iowa 1981). This is true even when the actions for contempt arise from civil cases. Wilson, 312 N.W.2d at 528 (citing Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980)).

The removal statute contains slightly different requirements for removal of criminal proceedings as compared to civil actions. 28 U.S.C. § 1446(c)(1) provides:

A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

28 U.S.C. § 1446(c)(1). The main difference is that the federal district court may extend the time period for filing notice of removal in a criminal proceeding where good cause is shown. Id.

Thus, whether filed within the statutorily prescribed time period or within an extended period granted for good cause, a court may find a petition for removal filed shortly before trial is timely. See, e.g., Brown v. City of Meridian, 356 F.2d 602, 606 (5th Cir. 1966) (finding petition filed two and one-half hours before case scheduled time for trial was timely filed). Conversely, a court will find removal untimely if no extension is sought or no good cause for granting an extension is shown. See, e.g., People v. Bell, 617 F. Supp. 47, 49 (E.D.N.Y. 1985) (finding removal petition untimely where petitioner did not request extension of time and no cause for granting extension appeared in the filings).

Defendant claims his delay in filing his Notice of Removal was due to the impossibility of obtaining Plaintiff's requested discovery as ordered by the Iowa District Court and securing an expert witness. Defendant had also previously appeared pro se

and has spent a considerable amount of time securing money to retain an attorney to represent him in this matter. In addition, Defendant sought removal the day before the state hearing on mittimus in order to keep from being incarcerated. Defendant states he has filed a timely Notice of Removal under 28 U.S.C. § 1446(c) by essentially claiming there was good cause for the delay in filing.

“As a general principle, the removal statutes are to be construed narrowly.” Webster, 925 F. Supp. at 729 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941)). In other words, the prescribed time limits are “mandatory and must be strictly applied.” Id.; McCain, 794 F. Supp. at 1062. This is because federal courts are courts of limited jurisdiction. Shamrock Oil & Gas Corp., 313 U.S. at 108-09. Furthermore, the burden is on the removing party to establish the right to remove the action and to show compliance with the requirements of the removal statute. Blow, 550 F. Supp. at 375. Thus, the removing part must prove the petition for removal was timely. Id. at 375-76.

The fact that a civil contempt proceeding is considered quasi-criminal is primarily for purposes of applying the higher reasonable doubt burden of proof to the proceedings. See Ervin, 495 N.W.2d at 744. This does not mean that courts are to apply the rules governing removal of criminal actions to the removal of civil contempt actions. Indeed, the contrary is true. See, e.g., Polanco v. 21 Arden Realty Corp., 121 B.R. 425, 426 (S.D.N.Y. 1990) (applying thirty-day time limit from 28 U.S.C. § 1446(b) (applicable to removal of *civil* actions) to attempt to remove civil contempt action to federal court and

finding removal was untimely because it was filed seven months after proceedings were commenced).

Moreover, where the contempt proceeding is not separate and independent from the underlying state action, the court cannot exercise jurisdiction over the ancillary contempt action when it does not have federal subject matter jurisdiction over the underlying state action. See Dale v. Family Guar. Life Ins. Co., 205 F. Supp. 2d 620, 622 (S.D. Miss. 2002) (finding that under Mississippi law, contempt proceedings are ancillary and court lacked federal subject matter jurisdiction over underlying state action, thus court also lacked subject matter jurisdiction over contempt proceeding); cf., Levin v. Tiber Holding Co., 1999 WL 649002, at *1-2 (S.D.N.Y. Aug. 25, 1999) (finding that under New York law, contempt proceeding constitutes a separate and independent civil action from the underlying litigation and thus subject matter jurisdiction could properly be asserted over the action for contempt on its own).

The Court finds the removal statute subsection applicable to civil actions is governing. The contempt proceeding at issue is a civil action and is not separate and independent from the underlying state action. This section, 28 U.S.C. § 1446(b), requires notice of removal be filed within thirty days of the events specified in the statute. Defendant's Notice of Removal was filed well beyond the statutorily prescribed thirty-day limitations period. The initial petition in the action was filed in November of 1999,

well over four years ago. Moreover, all of the filings in the contempt portion of the proceedings took place between two and five months prior to Defendant's Notice of Removal. As a result, the Notice of Removal is untimely under any interpretation of the applicable state court filings, and the action must be remanded.

Even if the Court applied the removal statute subsection applicable to criminal actions, notice of removal is untimely unless good cause can be shown. In this case, the only good cause asserted is Defendant's explanation for its delay in filing for removal, i.e., impossibility of obtaining requested discovery and an expert witness, and appearance pro se. In addition, removal was sought the day before the state hearing on mittimus in order to keep Schroeder from being incarcerated. Defendant did not, however, seek an extension of time for filing for removal nor has Defendant shown good cause for removal.

In either case, Defendant has fallen far short of its burden to establish its right to remove the action. Defendant has failed to show compliance with the requirements of the removal statute. The record is devoid of any indication that removal was within the thirty days as required. At the very most, Defendant makes a feeble argument that the Court should apply the criminal removal requirements and find good cause exists to extend that time period.

Furthermore, Defendant has failed to provide the Court with an explanation of the basis for federal subject matter jurisdiction that would make the case removable. The underlying state action is based in contract and is a dispute among Iowans, with no subsequent changes to the nature of the action. The initiation of contempt proceedings against Defendant does not automatically make the entire state action removable. To allow the case to proceed in federal court would usurp the power of the state court to effectively manage its cases.⁴ Therefore, consistent with the case law discussed and pursuant to 28 U.S.C. § 1447(c), the Court will remand the case.

⁴ In addition, it is also likely that the Rooker-Feldman doctrine would prevent this Court from maintaining jurisdiction over the present action. “[B]ecause the United States Supreme Court alone has jurisdiction to review state court decisions, the lower federal courts lack subject matter jurisdiction to consider federal claims that would vitiate an underlying state court judgment.” Johnson v. City of Shorewood, Minn., — F.3d —, 2004 WL 405692, at *5 (8th Cir. Dec. 18, 2004) (citing Lemons v. St. Louis County, 222 F.3d 488, 492 (8th Cir. 2000)); see also District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). “[T]his principle, known as the Rooker-Feldman doctrine, applies whenever a federal claim would succeed only ‘to the extent that the state court wrongly decided the issues before it.’” Id. (quoting Simes v. Huckabee, 354 F.3d 823, 827 (8th Cir. 2004) (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring))). In the present action, the state court has already found Schroeder guilty of contempt. The issue being fought by Defendant concerns the impending mittimus hearing and incarceration of Schroeder. This issue is at once outside the province of this Court under the Rooker-Feldman doctrine, and within the authority of the state court.

CONCLUSION

The Notice of Removal by Hallmark was not timely as it was filed well beyond the statutorily prescribed limit. Moreover, there is clearly no federal subject matter jurisdiction making the case removable. The Court finds remand is mandated, and the action is thus remanded to state court. For the foregoing reasons, the Court hereby **grants** Plaintiff's Motion to Remand (Clerk's No. 6), and this action is **remanded** to the Iowa District Court for Polk County.

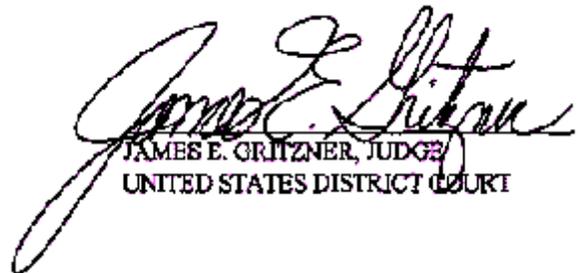
Despite the remand, the Court retains jurisdiction to resolve the pending Motion for Sanctions.⁵ At the close of the hearing on this matter the Court granted counsel for the Defendant an additional five days in which to provide any objections to the Affidavit of Attorney Fees and Expenses presented at the hearing by the Plaintiff. Given the

⁵ "It should be noted that a court retains the power to sanction parties, even if the case has been dismissed for lack of jurisdiction." In re Balboa Improvements, Inc., 99 B.R. 966, 970 (9th Cir. 1989) (citing Orange Prod. Credit v. Frontline Ventures Ltd., 792 F.2d 797 (9th Cir.1986)). "Although the District Court relinquished jurisdiction over this case when it either dismissed or remanded all the claims before it, it still had jurisdiction to order sanctions. Moreover, a district court has jurisdiction to impose Rule 11 sanctions on litigants and attorneys appearing before it even if the court is subsequently determined to have lacked subject matter jurisdiction over the claim in which the sanctionable conduct occurred." Lazorko v. Pennsylvania Hosp., 237 F.3d 242, 247 (3d Cir. 2000) (citing Willy v. Coastal Corp., 503 U.S. 131, 139 (1992)). See, e.g., Jones v. Sullivan, 779 F. Supp. 1033, 1038 (W.D. Mo. 1991) ("However, this Court retains jurisdiction over the issue of whether sanctions should be imposed against counsel for the Secretary.").

absence of any resistance to the Motion for Sanctions, and the statement of counsel for the Defendant that she was unaware the sanctions issue would be heard along with the Motion to Remand, the Court will modify that direction given at the hearing. **Defendant is granted one week from the date of this Order to file a resistance to the Motion for Sanctions and/or objections to the Affidavit of Attorney Fees and Expenses. At that point, the sanctions issue will be fully submitted and determined without additional hearing.**

IT IS SO ORDERED.

Dated this 19th day of March, 2004.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT