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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-902**

Geraldine Louise Swanson,
n/k/a Lang, petitioner/judgment creditor,
Appellant,

vs.

Thomas Mitchell Swanson,
Judgment Debtor,

and

Social Security Administration,
garnishee,
Respondent.

**Filed January 23, 2012
Reversed and remanded
Kalitowski, Judge**

Dakota County District Court
File No. 19-F7-04-015701

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Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant-creditor Geraldine Louise Swanson, n/k/a Lang challenges the district court's order denying her petition for attorney fees under the Equal Access to Justice Act (EAJA) as untimely. We reverse and remand.

FACTS

This case began when Lang obtained a judgment against respondent-debtor Thomas Mitchell Swanson in Dakota County district court on December 26, 2007, for child-support arrearages and medical support in the amount of \$9,436. The procedural history leading up to this appeal has been lengthy and tortuous.

On December 31, 2007, Lang properly served a garnishment summons on respondent-garnishee Social Security Administration (SSA) seeking to collect the judgment from disability benefits due to Swanson from SSA. SSA did not comply with the garnishment summons and failed to appear at the hearing. After obtaining permission from the district court, Lang filed and served a supplemental complaint on SSA on April 10, 2008, for \$9,456.88.¹ *See* Minn. Stat. § 571.75, subd. 4 (2006) (providing that when a garnishee denies liability, the creditor may move the court for an order making the garnishee a party to the civil action and granting the creditor leave to file a supplemental complaint against the garnishee and debtor). SSA did not respond to the supplemental complaint. On May 19, 2008, Lang filed a motion for summary judgment.

¹ The amount of the December 26, 2007 judgment plus interest and costs.

Again, SSA did not respond. On June 5, 2008, the district court granted the motion and judgment was entered against SSA in the amount of \$9,456.88.

Subsequently, on August 26, 2008, SSA filed a notice of removal in federal district court. On September 4, 2008, Lang moved for remand to state court, arguing that removal was untimely. SSA responded by filing a motion to dismiss, asserting that the judgment was barred by sovereign immunity. On February 5, 2009, the federal district court granted SSA's motion to dismiss and denied Lang's motion for remand, concluding that SSA's removal under 28 U.S.C. § 1446(b) (2006) was timely and that sovereign immunity barred Lang's complaint. *Lang v. Soc. Sec. Admin.*, No. 08-5029, 2009 WL 294230, at *2-4 (D. Minn. Feb. 5, 2009).

Lang appealed the federal district court order. On July 15, 2010, the Eighth Circuit held that SSA's removal was untimely and that the appeal was not mooted by a subsequent order issued in Dakota County authorizing SSA to garnish ten percent of Swanson's monthly disability benefits. *Lang v. Soc. Sec. Admin.*, 612 F.3d 960, 966-67 (8th Cir. 2010). The Eighth Circuit vacated the federal district court's order and judgment of dismissal. *Id.* at 967. On October 13, 2010, the federal district court remanded the case to state court in an order filed in Dakota County on October 25, 2010. Also on October 13, 2010, Lang filed a motion for attorney fees under EAJA in federal district court. On November 11, 2010, Lang withdrew the EAJA motion in federal district court and, four days later, re-filed the motion in Dakota County district court.

On October 29, 2010, SSA filed a motion in state court to vacate the June 5, 2008 judgment in Dakota County district court, asserting that the judgment was void because

the underlying action was barred by sovereign immunity and that EAJA does not authorize state courts to award attorney fees. On March 9, 2011, the Dakota County district court issued findings of fact and an order denying both SSA's motion to vacate and Lang's motion for attorney fees. The court rejected SSA's sovereign-immunity argument, concluding that 42 U.S.C. § 659 (2006) specifically authorized the action. The court also determined that Lang was the prevailing party with respect to the June 5, 2008 judgment, but denied her petition for attorney fees on the ground that the petition was untimely.

DECISION

A district court's decision whether to award attorney fees pursuant to EAJA is reviewed for an abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 562, 108 S. Ct. 2541, 2549 (1988). Statutory construction and other issues of law are reviewed de novo. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007).

The primary goal of statutory construction is “to give effect to the intent of Congress.” *Wegener v. Comm’r of Revenue*, 505 N.W.2d 612, 614 (Minn. 1993) (quoting *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 542, 60 S. Ct. 1059, 1063 (1940)). We “construe a statute as a whole” and read statutory text “to avoid absurd results and unjust consequences.” *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277, 278 (Minn. 2000).

Absent a waiver, sovereign immunity shields the federal government and its agencies from suit. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994). EAJA sets forth a limited waiver of sovereign immunity because it permits

prevailing private parties to recover attorney fees incurred in litigation with the federal government. *Scarborough v. Principi*, 541 U.S. 401, 420-22, 124 S. Ct. 1856, 1869-70 (2004).

EAJA provides, in pertinent part:

(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney . . . stating the actual time expended and the rate at which fees . . . were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1) (2006). EAJA defines “fees and other expenses” to include “reasonable attorney fees.” *Id.*, § 2412(d)(2)(A) (2006). “United States” is defined to include “any agency” thereof. *Id.*, § 2412(d)(2)(C) (2006). And “final judgment” is defined as “a judgment that is final and not appealable.” *Id.*, § 2412(d)(2)(G) (2006).

Accordingly, a prevailing party must file an EAJA application within 30 days after the time for taking an appeal from the district court’s judgment has expired. *Shalala v. Schaefer*, 509 U.S. 292, 302, 113 S. Ct. 2625, 2632 (1993). In Minnesota district courts, the 30-day period runs from the end of the 60-day period for appeal. *See* Minn. R. Civ.

App. P. 104.01, subd. 1 (“Unless a different time is provided by statute, an appeal may be taken from a judgment within 60 days after its entry, and from an appealable order within 60 days after service by any party of written notice of its filing.”).

The stated objective of EAJA is to “eliminate financial disincentives for those who would defend against unjustified governmental action and thereby . . . deter the unreasonable exercise of Government authority.” *Ardestani v. Immigration & Naturalization Serv.*, 502 U.S. 129, 138, 112 S. Ct. 515, 521 (1991). Congress intended that the statute would enable individuals to secure “vindication of their rights.” H.R. Rep. No. 99-120, pt. 1, at 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 133. Accordingly, the timeliness requirement of EAJA is to be construed functionally “with reference to the purpose of the EAJA and the realities of litigation against the Government.” *Sullivan v. Finkelstein*, 496 U.S. 617, 630, 110 S. Ct. 2658, 2666 (1990); *see Scarborough*, 541 U.S. at 414, 418-19, 124 S. Ct. at 1865, 1868 (holding that the 30-day deadline for EAJA applications is not jurisdictional and timely filed applications may be amended after the 30-day period pursuant to the relation-back doctrine); *Myers v. Sullivan*, 916 F.2d 659, 668 (11th Cir. 1990) (stating that the 30-day filing requirement “should be interpreted broadly and . . . overtechnical constructions of the requirement should be avoided”); *see also* H.R. Rep. No. 99-120, pt. 1, at 18 n.26, *reprinted in* 1985 U.S.C.C.A.N. 132, 146 n.26 (“This section should not be used as a trap for the unwary resulting in the unwarranted denial of fees.”).

Initially, we note that Lang’s attorney fees are the result of SSA’s inaction when served with the garnishment summons and supplemental complaint and subsequent

improper removal to federal court. *See Lang*, 612 F.3d at 962-66. Lang was obligated to litigate the validity of the \$9,456.88 judgment for more than three years, thereby incurring attorney fees that exceeded the value of the judgment. We conclude that this is the type of case to which EAJA was intended to apply. In addition, as explained below, we conclude that Lang's EAJA application was timely.

Tolling

We conclude that because of the unique procedural posture of this case, Lang's time deadline for filing an EAJA petition was tolled. The Dakota County judgment was entered on June 5, 2008. The district court concluded that the judgment was final and nonappealable after 60 days. Thus, Lang's EAJA application was due 90 days after June 5, 2008. But after the 60-day period to appeal had run, and before the additional 30-day EAJA period had expired, SSA filed a notice of removal in federal district court. Lang responded to SSA's August 26, 2008 notice of removal by filing a motion for remand in federal district court on September 4, 2008. And the federal district court did not remand the case until October 13, 2010.

In these circumstances, the SSA's notice of removal effectively tolled the EAJA clock during the time period in which the case was pending in federal court. *See Matsch v. Prairie Island Indian Cmty.*, 559 N.W.2d 128, 130 (Minn. App. 1997) (holding that removal of a case to federal court tolls the period for perfecting an appeal from a pre-removal state court order until the case is remanded to state court). Litigation could not proceed in Dakota County until the case was remanded. *See* 28 U.S.C. § 1446(d) (2006) (providing that after removal is effected, "the State court shall proceed no further unless

and until the case is remanded”); *Doerr v. Warner*, 247 Minn. 98, 105-06, 76 N.W.2d 505, 512 (1956) (explaining that removal of an action to federal court suspends state-court jurisdiction). And when the case was ultimately remanded, the Dakota County district court received the case in the posture it was in when remanded by the federal court. *See Doerr*, 247 Minn. at 105-06, 76 N.W.2d at 512; *Hunter, Keith Indus., Inc. v. Piper Capital Mgmt., Inc.*, 575 N.W.2d 850, 853 (Minn. App. 1998) (concluding that in remanding action to state court, federal court also remanded the party’s pending motion filed in federal court). Therefore, Lang’s October 13, 2010 EAJA application filed in federal district court is deemed to have been filed in Dakota County district court on remand.

At oral argument, SSA argued that Lang withdrew her October 13, 2010 EAJA application, and the application she re-filed in Dakota County was untimely. We disagree. Lang withdrew the October 13 petition by letter to the federal district court on November 11, 2010. But prior to that date, jurisdiction of the case was transferred to Dakota County district court and the federal court was divested of jurisdiction. *See* 28 U.S.C. § 1447(c) (2006) (“A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.”); *Seedman v. U.S. Dist. Court for Cent. Dist. of Cal.*, 837 F.2d 413, 414 (9th Cir. 1988) (“Once a district court certifies a remand order to state court it is divested of jurisdiction and can take no further action on the case.”). We conclude that Lang’s November 11 withdrawal was without effect.

Prevailing Party

In addition to the removal, we also conclude that tolling is appropriate because, after the notice of removal was filed, it was no longer clear whether Lang would ultimately be a prevailing party entitled to attorney fees. It is a statutory requirement that an EAJA petitioner demonstrate in her petition that she is a prevailing party. 28 U.S.C. § 2412(d)(1)(B). And a petitioner cannot seek EAJA fees prior to achieving prevailing-party status. *See Schaefer*, 509 U.S. at 300-02, 113 S. Ct. at 2631. After August 26, 2008, Lang would have been required to assert that she was a prevailing party in a petition for fees, notwithstanding SSA's removal of the case to federal court in an attempt to vacate the judgment. Although removal was not a timely appeal, the effect of removal was a review of the action on the merits. Moreover, the federal district court dismissed the action and eviscerated the judgment, thereby revoking Lang's prevailing-party status. *Lang*, 2009 WL 294230, at *5. We conclude that it would make no sense for Lang's deadline for filing an EAJA petition to have expired when it was not determined who was the prevailing party. *See Schaefer*, 509 U.S. at 304, 113 S. Ct. at 2633 (Stevens, J., concurring) (“[I]t makes little sense to start the 30-day EAJA clock running before a claimant even knows whether he or she will be a ‘prevailing party’ under EAJA . . .”).

Substantially Justified

Furthermore, it is a statutory requirement that an EAJA petitioner allege in her petition that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(A). Prior to removal, SSA had not yet appeared in the action or otherwise demonstrated its position. Relying only on a default judgment, Lang arguably could not

have asserted that the position of SSA was not substantially justified. *See McDonald v. Schweiker*, 726 F.2d 311, 316 (7th Cir. 1983) (stating that it is not the purpose of EAJA “to penalize the government for committing procedural defaults that help the private parties who are the Act’s intended beneficiaries”). Only after SSA’s removal was reversed could Lang assert that SSA’s position was not substantially justified. *See Lang*, 612 F.3d at 965 (describing the SSA’s claim that removal was appropriate as “remarkable and unprecedented” and noting that the government’s argument ran “directly contrary to the very purpose of [42 U.S.C. § 659], which is to have the government treated the same way a private person would be treated with respect to legal process served in a state court garnishment action brought to satisfy a child support obligation”). Because SSA removed this action to federal court, and Lang’s prevailing-party status was thus unknown, Lang’s entitlement to fees could not have arisen before SSA appeared in the action. Therefore, on these facts, we conclude that tolling of the time for filing an EAJA petition is appropriate.

Date of Final Judgment

Lang contends that the EAJA petition was timely filed because the relevant “final judgment” was the March 9, 2011 district court order denying SSA’s rule 60.02 motion. But because we determine that removal tolled the EAJA time period that began to run on June 5, 2008, we need not decide whether the March 9 order was a “final judgment” within the meaning of EAJA.

Sovereign Immunity

SSA contends that Lang cannot recover attorney fees under EAJA because the underlying judgment was barred by sovereign immunity. But the district court rejected this argument, concluding that 42 U.S.C. § 659 authorized the judgment against SSA. And SSA has not appealed this determination. Moreover, SSA fully satisfied the judgment and is therefore precluded from contesting its validity here. *See Bartel v. New Haven Twp.*, 323 N.W.2d 806, 810 (Minn. 1982) (holding that a party's payment of a judgment bars that party from challenging its liability on appeal).

State Court Authority

Finally, SSA argues that EAJA does not authorize a state court to award attorney fees. But as SSA concedes, the district court implicitly rejected this argument in its March 9, 2011 order. And because SSA failed to appeal the district court decision, this argument is not properly before us.

Conclusion

Because we have concluded that Lang's EAJA petition was timely filed, on remand the district court must make findings as to whether SSA's position was substantially justified and whether there are other circumstances that would make an award of attorney fees unjust. 28 U.S.C. § 2412(d)(1); *see Comm'r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 158, 110 S. Ct. 2316, 2319 (1990) (stating that an award of fees requires that the government's position was not substantially justified and that no special circumstances make an award unjust). The court also must

determine whether the requested fees are reasonable. 28 U.S.C. § 2412(d)2(A) (defining “fees and other expenses” to include “*reasonable* attorney fees” (emphasis added)).

In addition, on remand the district court should permit Lang to amend her EAJA petition to add attorney fees reasonably incurred during post-judgment litigation, including fees incurred litigating the issue of EAJA fees. *See Jean*, 496 U.S. at 166, 110 S. Ct. at 2323 (“The purpose and legislative history of the statute reinforce our conclusion that Congress intended the EAJA to cover the cost of all phases of successful civil litigation addressed by the statute.”); *see also, United States v. Eleven Vehicles*, 200 F.3d 203, 210 (3d Cir. 2000) (affirming the district court’s award of subsequently incurred fees and holding that EAJA does not dictate when a request for supplemental fees must be filed); *Hirschey v. Fed. Energy Regulatory Comm’n*, 777 F.2d 1, 3-4 (D.C. Cir. 1985) (awarding attorney fees incurred by the petitioner litigating her right to attorney fees).

Accordingly, we reverse the district court’s determination that Lang’s petition for an award of attorney fees under EAJA was untimely, and remand for proceedings consistent with this opinion.

Reversed and remanded.