

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2010

4 (Submitted: January 28, 2011 Decided: June 10, 2011)

5 Docket No. 10-66-cv

6 -----
7 VINCENT CALABRO,
8 Plaintiff-Appellee,

9 - v -

10 ANIQA HALAL LIVE POULTRY CORP.,
11 Defendant-Appellant.*

12 -----
13 Before: SACK and LIVINGSTON, Circuit Judges, and MURTHA,
14 Judge.**

15 Appeal from an order of remand to New York Supreme
16 Court, Queens County, and an award of attorney's fees and costs
17 pursuant to 28 U.S.C. § 1447(c) by the United States District
18 Court for the Eastern District of New York (John Gleeson, Judge).
19 Although we lack appellate jurisdiction to review the district
20 court's order remanding this case to state court, we write to
21 confirm that we do possess appellate jurisdiction to review the
22 district court's award of attorney's fees and costs. That review

* The Clerk of Court is directed to amend the official caption as set forth above.

** The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

1 is for abuse of discretion. Applying these principles, we
2 affirm.

3 Leo G. Bevolas, Law Office of Kenneth M.
4 Mollins, P.C., Melville, New York, for
5 Plaintiff-Appellee.

6 Janelle Laverne Niles, The Law Office of
7 Janelle Niles, Esq., Brooklyn, New York,
8 for Defendant-Appellant.

9 PER CURIAM:

10 Defendant Aniqā Halal Live Poultry Corp. ("Aniqā")
11 appeals from an order of remand and award of attorney's fees and
12 costs pursuant to 28 U.S.C. § 1447(c) by the United States
13 District Court for the Eastern District of New York (John
14 Gleeson, Judge). We rehearse the facts only insofar as we think
15 it necessary to explain our resolution of the relatively narrow
16 issue presented to us here.

17 **BACKGROUND**

18 Plaintiff Vincent Calabro initiated this lawsuit in New
19 York Supreme Court, Queens County, in October 2009. Calabro, a
20 federal safety inspector employed by the United States Department
21 of Agriculture ("USDA"), alleges that Aniqā used photographs of
22 him for advertising purposes without his consent in violation of
23 New York State Civil Rights Law §§ 50 and 51. Aniqā answered and
24 filed a third-party complaint naming Calabro and the USDA as
25 third-party defendants and asserting claims against them under
26 the False Claims Act, 31 U.S.C. § 3729 et seq., and the Poultry
27 Products Inspection Act, 21 U.S.C. § 451 et seq.

1 On November 9, 2009, Aniga filed a notice of removal
2 asserting federal subject-matter jurisdiction on the basis of its
3 third-party claims, thereby removing this action to the United
4 States District Court for the Eastern District of New York. On
5 November 10, 2009, Calabro moved to remand the case to state
6 court.

7 By memorandum and order of December 15, 2009, the
8 district court (John Gleeson, Judge) granted that motion. Noting
9 that Aniga's removal of the case was premised on federal-question
10 jurisdiction and that Calabro's complaint contained no federal
11 claim, the district court determined that it lacked subject-
12 matter jurisdiction over the case and therefore remanded the case
13 back to state court. See Calabro v. Aniga Halal Live Poultry
14 Corp., No. 09-cv-4859, 2009 WL 4893200, 2009 U.S. Dist. LEXIS
15 116660 (E.D.N.Y. Dec. 15, 2009). Because the district court
16 further determined that Aniga had "asserted no colorable bases
17 for federal jurisdiction," id. at *3, 2009 U.S. Dist. LEXIS
18 116660, at *8, the court also imposed an award of attorney's fees
19 and costs against Aniga as permitted by 28 U.S.C. § 1447(c).³ In
20 a subsequent order, the district court set the amount of the
21 award at \$3,575.

³ Section 1447(c) provides, in pertinent part, that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c).

1 Bryant v. Britt, 420 F.3d 161, 163 (2d Cir. 2005) (per curiam);
2 Morgan Guar. Trust Co. of N.Y. v. Republic of Palau, 971 F.2d
3 917, 923-25 (2d Cir. 1992). Following the lead of at least seven
4 of our sister circuits,⁴ we do so today.

5 Aniga contends that the district court abused its
6 discretion in awarding attorney's fees and costs to Calabro. We
7 agree with Aniga that our review of a district court's award of
8 attorney's fees and costs under section 1447(c) is for abuse of
9 discretion. See Bryant, 420 F.3d at 163 n.2; Morgan Guar. Trust
10 Co. of N.Y., 971 F.2d at 924. "A district court has abused its
11 discretion if it based its ruling on an erroneous view of the law
12 or on a clearly erroneous assessment of the evidence, or rendered
13 a decision that cannot be located within the range of permissible
14 decisions." In re Sims, 534 F.3d 117, 132 (2d Cir. 2008)
15 (brackets, citations, and internal quotation marks omitted).

16 In Martin v. Franklin Capital Corp., 546 U.S. 132
17 (2005), the Supreme Court instructed that "[a]bsent unusual
18 circumstances, courts may award attorney's fees under § 1447(c)
19 only where the removing party lacked an objectively reasonable
20 basis for seeking removal. Conversely, when an objectively
21 reasonable basis exists, fees should be denied." Id. at 141.

⁴ See Mints v. Educ. Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996); Hornbuckle v. State Farm Lloyds, 385 F.3d 538, 541 (5th Cir. 2004); Warthman v. Genoa Twp. Bd. of Trustees, 549 F.3d 1055, 1059 (6th Cir. 2008); Wisconsin v. Hotline Indus., Inc., 236 F.3d 363, 365 (7th Cir. 2000); Stuart v. UNUM Life Ins. Co. of Am., 217 F.3d 1145, 1148 (9th Cir. 2000); Topeka Hous. Auth. v. Johnson, 404 F.3d 1245, 1248 (10th Cir. 2005); Legg v. Wyeth, 428 F.3d 1317, 1319-20 (11th Cir. 2005).

1 Although district courts retain the discretion to depart from
2 those rules in unusual circumstances, a court's "reasons for
3 departing from the general rule should be faithful to the
4 purposes of awarding fees under § 1447(c)." Id. (internal
5 quotation marks omitted); see also id. at 140 (discussing the
6 purposes of section 1447(c)).

7 Applying those principles, we affirm the district
8 court's award in this case. Under the well-pleaded-complaint
9 rule, "federal question jurisdiction exists only if [a]
10 plaintiff's statement of his own cause of action shows that it is
11 based on federal law." Romano v. Kazacos, 609 F.3d 512, 518 (2d
12 Cir. 2010) (internal quotation marks omitted). Moreover, it is
13 well established that a defendant may not evade this rule by
14 raising a federal question in its responsive pleadings and then
15 attempting to remove on that basis. See Holmes Grp., Inc. v.
16 Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831-32 (2002).
17 The district court therefore did not abuse its discretion in
18 determining that Aniga's purported basis for removal -- i.e.,
19 that the presence of federal claims in its third-party complaint
20 rendered the entire action removable under 28 U.S.C. § 1441(c) --
21 was objectively unreasonable.

22 Finally, we have been given no grounds upon which to
23 conclude that the relatively modest size of the award of
24 attorney's fees and costs was an abuse of discretion.⁵

⁵ Although our review of the record indicates that the amount of the award was \$3,575, Aniga asserts that it was \$4,500.

1 We have considered the remainder of Aniq'a's arguments
2 on appeal and conclude that they are without merit or are not
3 properly before us. For the foregoing reasons, Aniq'a's appeal is
4 dismissed in part, and the district court's judgment awarding
5 attorney's fees and costs is affirmed.

See Appellant's Br. at 5; Appellant's Reply Br. at 12. Our conclusion would be the same if the amount of the award were indeed \$4,500.