

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

U.S. BANK NATIONAL ASSOCIATION
AS TRUSTEE,

Plaintiff,

No. CIV S-10-1623 LKK GGH PS

vs.

JAMIE GARCIA, et al.,

FINDINGS &

Defendants.

RECOMMENDATIONS

_____/

Defendant Jamie Garcia,¹ proceeding pro se, was adjudged in criminal contempt by the district court on October 27, 2010 for his failure to appear as ordered. A warrant for his arrest is currently outstanding. Remaining in this action is plaintiff U.S. Bank’s application for remand to state court, filed July 28, 2010.²³

\\\\\\

\\\\\\

¹ Defendant Garcia’s co-defendants are Rafael Sierra and Rosalie Lopez, but they did not participate in the notice of removal.

² Garcia’s outstanding request to proceed in forma pauperis will not be addressed as the court recommends that this case be remanded to state court.

³ The case has been referred to this court by Local Rule 72-302(21), pursuant to 28 U.S.C. § 636(b)(1).

1 BACKGROUND⁴

2 Defendant Garcia was sued in state court in an unlawful detainer action for his
3 refusal to make monetary payments on the subject foreclosed real property since November 3,
4 2008. In response, defendant Garcia has filed the instant petition for removal, alleging
5 discrimination through plaintiff's failure to provide him with 90 days notice to quit. Garcia
6 asserts federal question jurisdiction, and seeks removal based on the aforementioned ground.

7 U.S. Bank filed the instant motion for remand and for sanctions, alleging that this
8 defendant previously removed the state court action to the federal court in the Northern District,⁵
9 which remanded it back to state court on May 28, 2010. Plaintiff asserts that defendant's second
10 attempt to remove the case warrants Rule 11 sanctions in the amount of \$975.00.

11 On August 13, 2010, this court issued an order to defendant Garcia to show cause
12 why he should not be sanctioned as requested by plaintiff, and enjoined from further removing
13 the state court action to any federal court, based on his prior removal of the same state court
14 action to the Northern District.⁶ Garcia was ordered to file a response to the order by August 26,
15 2010, and to personally appear at the September 2, 2010 hearing. U.S. Bank's counsel, Kajal
16 Islam, appeared telephonically. Garcia did not file a response and made no appearance.

17 In a previous opinion, the undersigned found that defendant previously removed
18 the same state court action to the Northern District of California. See U.S. Bank National

19 \\\

20 \\\

21
22 ⁴ Some of the background is repeated from this court's previous findings and
23 recommendations, filed September 3, 2010, recommending that defendant be adjudged in
24 contempt of court.

25 ⁵ Although U.S. Bank's papers repeatedly refer to a prior removal to "this" court, the
26 court's own research indicates that Garcia previously removed the state court action to the
Northern District. See U.S. Bank v. Garchia, Civ.10-785 SI.

⁶ The proposed sanction of an injunction was on the court's own motion based on
Garcia's apparent bad faith effort to delay the state court unlawful detainer case.

1 Association as Trustee v. Garcia, Civ.3:10-0785 SI.⁷ On May 28, 2010, the Northern District
2 remanded the case to the Superior Court for the County of Sacramento for lack of subject matter
3 jurisdiction. The instant action is the second time that Garcia has attempted to remove the same
4 state court action to a federal court. Garcia did not respond in writing or personally appear at the
5 September 2, 2010 hearing, as required by the order to show cause, filed August 13, 2010. That
6 order warned Garcia that his failure to personally appear at the sanctions hearing would be
7 considered contempt of court and would be cause for further sanctions, including the possibility
8 of incarceration. At the September 2, 2010 hearing, the undersigned noted on the record that it
9 intended to certify facts and recommend contempt to the district judge. The undersigned also
10 stated his intent to grant U.S. Bank's request for monetary sanctions, and to recommend an
11 injunction to prevent Garcia from further removal of the state court action.

12 On September 3, 2010, the undersigned referred the case to the district judge,
13 recommending that Garcia be adjudged in contempt. The matter was set for hearing on October
14 25, 2010, before the district court, and Garcia was served with the order and findings and
15 recommendations which warned him that a consequence of not appearing at the hearing might
16 result in a warrant for his arrest. Garcia did not appear at the hearing, and on October 27, 2010,
17 Judge Karlton issued an order adjudging Garcia in criminal contempt and sentencing him to five
18 days in prison. The sentence was stayed until November 8, 2010 when Garcia was again ordered
19 to appear. Garcia was advised one more time that failure to appear would result in a warrant for
20 his arrest. When Garcia did not appear at the November 8, 2010 hearing, the court issued an
21 arrest warrant. That warrant is outstanding.

22 DISCUSSION

23 I. Jurisdiction

24 Although there are criminal contempt proceedings ongoing before the district

25
26 ⁷ A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman,
803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 court, the undersigned may dispose of the outstanding matters pending in this case without
2 affecting those proceedings. In fact, dismissal or remand of this action will not affect the
3 contempt proceedings as they are considered collateral and may be dealt with after an action is no
4 longer pending. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S.Ct. 2447, 2456
5 (1990). A criminal contempt proceeding is “a separate and independent proceeding at law,” not
6 part of the original action because it is not dependent on a certain outcome on the merits of that
7 action. Bray v. United States, 423 U.S. 73, 75-76, 96 S.Ct. 307, 309 (1975). Such contempt
8 proceedings survive even where the order has been set aside on appeal or the original action has
9 become moot. Id. at 76, 310, *citing* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 319
10 S.Ct. 492 (1911). Even where orders expire or are set aside, “convictions for criminal contempt
11 intervening before that time may stand.” United States v. United Mine Workers of America, 330
12 U.S. 258, 294, 67 S.Ct. 677, 696 (1947). See also Cooter & Gell v. Hartmarx Corp., 496 U.S.
13 384, 396, 110 S.Ct. 2447, 2456 (1990) (holding that “[a] court may make an adjudication of
14 contempt and impose a contempt sanction even after the action in which the contempt arose has
15 been terminated”). The reasoning is that contempt is similar to costs, attorney’s fees, and Rule
16 11 sanctions in that a decision on these matters does not amount to a judgment on the merits of
17 the action. Instead, contempt concerns the collateral issue of whether there has been abuse of the
18 judicial process. Id.

19 Based on this authority, pending matters in this case may be determined at the
20 present time, including the possibility of dismissal or remand, without affecting the criminal
21 contempt proceedings.

22 II. Remand

23 Garcia filed the notice of removal on the ground that the complaint does not
24 address his claim of discrimination by U.S. Bank in failing to provide him with a 90 day notice to
25 quit. Garcia cites various sections of the “Helping Families Save Their Homes Act of 2009,” in
26 the petition, but he has not filed a response to U.S. Bank’s petition for remand.

1 A district court has an independent duty to examine its own jurisdiction and
2 remand a removed action “since removal is permissible only where original jurisdiction exists at
3 the time of removal or at the time of the entry of final judgment” Sparta Surgical Corp. v.
4 National Ass’n. of Securities Dealers, Inc., 159 F.3d 1209, 1211 (9th Cir. 1998), quoting
5 Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 43, 118 S. Ct. 956, 966
6 (1998); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229, 110 S. Ct. 596, 606-07 (1990); Harris
7 v. Provident Life and Acc. Ins. Co., 26 F.3d 930, 932 (9th Cir. 1994).

8 Removal jurisdiction statutes are strictly construed against removal. See Libhart
9 v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979). “Federal jurisdiction must be
10 rejected if there is any doubt as to the right of removal in the first instance.” Gaus v. Miles, 980
11 F.2d 564, 566 (9th Cir. 1992). “The burden of establishing federal jurisdiction falls on the party
12 invoking removal.” Harris v. Provident Life and Accident Ins. Co., 26 F.3d 930 (9th Cir.1994)
13 (quoting Gould v. Mut. Life Ins. Co. of New York, 790 F.2d 769, 771 (9th Cir.1986)).

14 Garcia invokes the court’s jurisdiction under 28 U.S.C. § 1331. A plaintiff may
15 bring suit in federal court if his claim “arises under” federal law. 28 U.S.C. § 1331. In that
16 situation, the court has original jurisdiction. A defendant cannot invoke the federal court’s
17 original jurisdiction. But he may in some instances invoke the court’s removal jurisdiction. The
18 requirements to invoke removal jurisdiction are often identical to those for invoking its original
19 jurisdiction. The requirements for both relate to the same end, that is, federal jurisdiction.

20 Removal of a state court action is proper only if it originally could have been filed
21 in federal court. 28 U.S.C. § 1441. “[F]ederal courts have jurisdiction to hear, originally or by
22 removal, only those cases in which a well-pleaded complaint establishes either that federal law
23 creates the cause of action, or that the plaintiff’s right to relief necessarily depends on resolution
24 of a substantial question of federal law.” Franchise Tax Board v. Construction Laborers
25 Vacation Trust, 463 U.S. 1, 27-28, 103 S. Ct. 2841, 2855-56 (1983). Mere reference to federal
26 law is insufficient to permit removal. See Smith v. Industrial Valley Title Ins. Co., 957 F.2d 90,

1 93 (3d Cir. 1992). A defense to an action, based on constitutional rules of general applicability,
2 is not a sufficient basis to remove an action to federal court. See id.; Berg v. Leason, 32 F.3d
3 422, 426 (9th Cir. 1994) (“[N]either an affirmative defense based on federal law . . . nor one
4 based on federal preemption . . . renders an action brought in state court removable.”).
5 Defendant has not shown that he is unable to raise his federal constitutional rights in state court.

6 This court has no jurisdiction over unlawful detainer actions which are strictly
7 within the province of state court. Garcia’s apparent attempt at creating federal subject matter
8 jurisdiction by simply adding claims and defenses to a petition for removal will not succeed,
9 especially in light of his prior removal history. See McAtee v. Capital One, F.S.B., 479 F.3d
10 1143, 1145 (9th Cir. 2007) (even previously asserted counterclaims raising federal issue will not
11 permit removal).

12 Accordingly, the court finds that remand is appropriate because the case is not one
13 which arises under federal law. Pursuant to 28 U.S.C. § 1447(c), where it appears the court lacks
14 subject matter jurisdiction, the court shall make an order for remand. The petition for removal
15 and the state court record filed in this case demonstrate that the underlying proceedings are not
16 removable to this court.

17 III. Sanctions

18 Rule 11 provides that a pleading filed with the court “certifies that to the best of
19 the person’s knowledge, information, and belief, formed after an inquiry reasonable under the
20 circumstances,” it is not presented for an improper purpose, the claims are warranted by existing
21 law or an argument to modify the law that is non-frivolous, and the factual allegations will have
22 evidentiary support. Fed. R. Civ. P. 11(b). The court may, on its own initiative, order a party to
23 show cause why specified conduct does not violate Rule 11. Id., (c)(3).

24 As set forth above, Garcia previously removed the same state court action to the
25 Northern District of California. The Northern District’s remand of the case to the Superior Court
26 for the County of Sacramento put Garcia on notice that removal was improper. Nonetheless,

1 Garcia removed the action again, but removed it to this court instead. Garcia had the opportunity
2 to respond to the Bank's motion for remand and for sanctions, but declined to do so. Garcia did
3 not appear at the hearing on the matter, did not appear at the contempt hearing before the district
4 judge, and did not appear at the second hearing before the district court. Garcia has filed no
5 response to any orders issued in this case. Without other explanation, the undersigned can only
6 assume that defendant filed the second removal in order to delay the inevitable eviction from the
7 dwelling where he may be residing unlawfully. Therefore, plaintiff will be compensated for the
8 time spent in having to seek remand of this action. The declaration of attorney Kajal Islam
9 indicates that he spent over 6.5 hours in reviewing the removal and preparing the remand and
10 request for sanctions, at a rate of \$150 per hour. This request is reasonable under the
11 circumstances.

12 IV. Injunction

13 Garcia's bad faith effort to delay the state court unlawful detainer case by
14 repeatedly removing it to various federal courts requires an injunction. Therefore, it is
15 recommended that Garcia be prevented from further removing the state court action to any
16 federal court.

17 CONCLUSION

18 IT IS HEREBY RECOMMENDED that:

- 19 1. The state action be summarily remanded to the Superior Court for the County
20 of Sacramento;
- 21 2. The Clerk serve a certified copy of this order to the clerk of the Sacramento
22 County Superior Court, and reference the state case number (09UD10568) in the proof of
23 service;
- 24 3. Defendant Garcia be enjoined from removing state court case number
25 09UD10568, filed in Sacramento County Superior Court, to any federal court;
- 26 4. Defendant Garcia be ordered to pay sanctions to U.S. Bank in the amount of

1 \$975.00; and

2 5. The Clerk be directed to close this case.

3 These findings and recommendations are submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
5 fourteen (14) days after being served with these findings and recommendations, any party may
6 file written objections with the court and serve a copy on all parties. Such a document should be
7 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the
8 objections shall be served and filed within fourteen (14) days after service of the objections. The
9 parties are advised that failure to file objections within the specified time may waive the right to
10 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 DATED: 12/07/2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

12
13 GGH:076/U.S.Bank1623.rem.wpd
14
15
16
17
18
19
20
21
22
23
24
25
26