

United States District Court
For the Northern District of California

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

ROBERT PACK,)	Case Nos. 12-cv-4512-SC
)	12-cv-4513-SC
Plaintiff,)	
)	ORDER TERMINATING AND
v.)	REMANDING CIVIL CASES;
)	GRANTING ATTORNEY FEE
HOGUE FENTON JONES & APPEL, INC.,)	REQUEST; ORDERING
et al.,)	SUPPLEMENTAL BRIEFING;
)	RETAINING JURISDICTION OVER
Defendants.)	<u>MOTIONS FOR SANCTIONS</u>
)	

For the reasons set forth below, the Court terminates Case No. 12-cv-4512-SC and remands Case No. 12-cv-4513-SC but retains jurisdiction over the pending motions for sanctions that have been filed in both cases. The Court also grants Defendants' request for attorney fees incurred as a result of removal, but defers ruling on the amount of the award and the question of who must pay. The Court orders supplemental briefing on those issues. No oral argument shall be held in these matters. Civ. L.R. 7-1(b).

I. BACKGROUND

Plaintiff Robert Pack has filed two civil cases against Hoge Fenton Jones & Appel, Inc., a law firm that formerly represented him, and attorneys affiliated with the firm (collectively, "Defendants"). Case Nos. 12-cv-4512-SC (the "'12 case"), 12-cv-

1 4513-SC (the "'13 case"). In the '12 case, Mr. Pack asserts claims
2 for fraud, breach of contract, breach of the implied covenant of
3 good faith and fair dealing, and violations of the civil RICO
4 statute, 18 U.S.C. § 1962. In the '13 case, Mr. Pack asserts
5 claims for legal malpractice and breach of fiduciary duty. The '13
6 case was originally filed in the California Superior Court for
7 Alameda County on January 14, 2011 and assigned case number
8 RG11556084.¹ However, Mr. Pack, notwithstanding his status as a
9 plaintiff, removed that case to this Court on the same day that he
10 filed the '12 case, i.e., August 28, 2012. On September 19, 2012,
11 the Court related the two cases.

12 On September 16, 2012, Defendants moved to remand the '13 case
13 to state court on the ground that Mr. Pack, as a plaintiff, had no
14 right to remove to federal court. That motion was set for hearing
15 on December 7, 2012.²

16 On October 24, 2012, Defendants filed a motion to dismiss in
17 the '12 case, which was set for hearing on December 7, 2012, and a
18 motion for sanctions in the '13 case, which also was set for
19 hearing on December 7, 2012.³ The thrust of this motion for
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21 ¹ Pursuant to Federal Rule of Evidence 201, the Court takes
22 judicial notice of the filing date, venue, and case number of Mr.
23 Pack's original state court complaint, as provided in Defendants'
unopposed request for judicial notice. Case. No. 12-cv-4513-SC,
Dkt. No. 13, Ex. A.

24 ² The motion to remand was fully briefed. See Case No. 12-cv-4513-
SC, Dkt. Nos. 12 ("MTR"), 19 ("MTR Opp'n"), 22 ("MTR Reply").

25 ³ The motion to dismiss was unopposed by Mr. Pack, who, in
26 contravention of this Court's Civil Local Rule 7-3(b), failed to
27 file either an opposition or statement of nonopposition. See Case.
No. 12-cv-4512-SC, Dkt. Nos. 28 ("MTD"), 34 ("MTD Reply"). The
28 motion for sanctions filed in the '13 case was fully briefed. See
Case. No. 12-cv-4513-SC, Dkt. Nos. 20 ("'13 MFS"), 27 ("'13 MFS
Opp'n"), 28 ("'13 MFS Reply").

1 sanctions is that Mr. Pack's removal to federal court was frivolous
2 in light of his status as a plaintiff. See '13 MFS at 3.

3 On November 16, 2012, Defendants filed a second motion for
4 sanctions, this time in the '12 case.⁴ The thrust of this motion
5 for sanctions is that the legal claims asserted in the '12 case are
6 frivolous and presented for an improper purpose. See '12 MFS at 3-
7 4. This motion, too, was set for hearing on December 7, 2012.

8 On December 4, 2012, Mr. Pack filed a notice of voluntary
9 dismissal in the '12 case. Case. No. 12-cv-4512-SC, Dkt. No. 40.
10 The same day, Mr. Pack also withdrew a motion to consolidate the
11 '12 and '13 cases which, as Mr. Pack noted, was moot in light of
12 his voluntary dismissal of the '12 case. Case. Nos. 12-cv-4512-SC,
13 Dkt. No. 40; 12-cv-4513-SC, Dkt. No. 31. Mr. Pack's notice stated
14 that "his filings were done and maintained in good faith and with
15 cause -- and that the conduct was never frivolous" Id.

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17 **II. DISCUSSION**

18 **A. The '12 Case**

19 Mr. Pack is entitled to voluntary dismissal of the '12 case
20 without leave of the Court because he filed his notice of voluntary
21 dismissal before service of an answer in that case or a motion for
22 summary judgment, neither of which Defendants have filed. See Fed.
23 R. Civ. P. 41(a)(1). The '12 case is dismissed and shall be
24 administratively terminated. The unopposed motion for involuntary
25 dismissal in the '12 case, Dkt. No. 28, is therefore moot.

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⁴ The motion for sanctions filed in the '12 case was fully briefed.
See Case. No. 12-cv-4512-SC, Dkt. Nos. 35 ("'12 MFS"), 38 ("'12 MFS
Opp'n"), 39 ("'12 MFS Reply").

1 However, Mr. Pack's voluntary dismissal of the '12 case does
2 not divest this Court of jurisdiction to hear the motion for
3 sanctions still pending in connection with it. See Williamson
4 Family Trust v. CIT Group/Consumer Fin., Inc., 205 F. App'x 616,
5 617 (9th Cir. 2006) (citing Cooter & Gell v. Hartmarx Corp., 496
6 U.S. 384, 395 (1990)); see also United States v. Real Prop. Located
7 at 475 Martin Lane, Beverly Hills, CA, 545 F.3d 1134, 1145 n.6 (9th
8 Cir. 2008) (affirming Cooter & Gell's holding that district courts
9 may consider collateral issues "such as attorney fees or sanctions"
10 following voluntary dismissal). The Court retains jurisdiction
11 over Mr. Pack and his counsel for purposes of the pending motion
12 for sanctions filed in the '12 case. Mr. Pack has had an
13 opportunity to be heard on that motion and in fact has filed an
14 opposition brief. See Williamson Family Trust, 205 F. App'x at 618
15 (due process requires opportunity to be heard but not an oral or
16 evidentiary hearing). The Court will issue a written order
17 disposing of the motion when it resolves the attorney fee award
18 issue detailed below in Section II.B.2.

19 **B. The '13 Case**

20 **1. Motion to Remand**

21 It is undisputed that the case Mr. Pack removed from
22 California state court is one in which he was the plaintiff.
23 However, the plain language of the general federal removal statute
24 authorizes only defendants to remove:

25 Except as otherwise expressly provided by Act
26 of Congress, any civil action brought in a
27 State court of which the district courts of the
28 United States have original jurisdiction, may
be removed by the defendant or the defendants,
to the district court of the United States for

1 the district and division embracing the place
2 where such action is pending.

3 28 U.S.C. § 1441(a) (emphasis added); see also id. § 1446 (setting
4 forth procedures for removal by defendants but omitting any mention
5 of removal by plaintiffs); Wright & Miller, 14C Fed. Prac. & Proc.
6 Juris. § 3730 (4th ed.) ("[P]laintiffs cannot remove[.]").

7 Mr. Pack's opposition brief is no model of clarity, but he
8 appears to argue that removal was warranted because of the
9 "underlying federal nature" of his claims. It is true that, in
10 some cases, the underlying federal nature of a plaintiff's claims
11 may give a defendant a right to remove to federal court. E.g.,
12 Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S.
13 308, 314 (2005) (setting forth test for removal on federal-question
14 grounds of state law claims that embed federal issues). Mr. Pack
15 cites no authority, however, for the novel proposition that such
16 claims could give a plaintiff a right to remove, nor is the Court
17 aware of any. In light of the plain language of § 1441(a), the
18 Court holds that Mr. Pack, as plaintiff, had no right to remove.⁵
19 Accordingly, Defendants' motion to remand the '13 case is GRANTED.

20 **2. Motion for Attorney Fees**

21 Defendants seek an award of the attorney fees they incurred in
22 connection with Mr. Pack's improper removal to federal court. MTR
23 at 7-8; MTR Reply at 3. An order remanding an improperly removed
24 case "may require payment of just costs and any actual expenses,
25 including attorney fees, incurred as a result of the removal." 28
26 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award
27 attorney's fees under § 1447(c) only where the removing party

28 ⁵ Even if Mr. Pack had such a right, which he did not, removal was
untimely and procedurally improper for the reasons set forth in
Defendants' motion to remand. MTR at 6-7.

1 lacked an objectively reasonable basis for seeking removal.
2 Conversely, when an objectively reasonable basis exists, fees
3 should be denied." Martin v. Franklin Capital Corp., 546 U.S. 132,
4 141 (2005). "In applying this rule, district courts retain
5 discretion to consider whether unusual circumstances warrant a
6 departure from the rule in a given case." Id. Removal, however,
7 "is not objectively unreasonable solely because the removing
8 party's arguments lack merit, or else attorney's fees would always
9 be awarded whenever remand is granted." Lussier v. Dollar Tree
10 Stores, Inc., 518 F.3d 1062, 1065 (9th Cir. 2008). Instead, the
11 objective reasonableness of removal depends on the clarity of the
12 applicable law and whether such law "clearly foreclosed" the
13 arguments in support of removal. Id. at 1066-67.

14 This case presents a paradigmatic example of objectively
15 unreasonable removal. As a preliminary matter, the Court notes
16 that Mr. Pack is represented by counsel and therefore not entitled
17 to the lenience afforded unrepresented litigants. Cf. Astoria Fed.
18 Sav. & Loan Ass'n v. Kunewa, C 12-1069 CW, 2012 WL 1222889, at *2
19 (N.D. Cal. Apr. 11, 2012) (explaining that, with respect to §
20 1447(c) attorney fee requests, courts give "significant weight" to
21 a removing party's pro se status; collecting cases). In this case,
22 the question of whether plaintiffs may remove their own cases to
23 federal court is neither complex nor novel. It turns on the plain
24 language of a federal statute whose basic contours have been
25 settled for 125 years. See Wright & Miller, 14B Fed. Prac. & Proc.
26 Juris. § 3721 (4th ed.) (§ 1441 "is closely patterned after" an
27 1887 law that "limited the right of removal to defendants").
28 Clearer authority would be hard to come by.

1 Further, this authority clearly foreclosed any argument that a
2 plaintiff such as Mr. Pack could make in support of removal. Even
3 a desultory consultation of the applicable statutes would have
4 revealed to Mr. Pack and his counsel that, as a plaintiff, he was
5 not permitted to remove. See 28 U.S.C. §§ 1441, 1446 (authorizing
6 removal by defendants but silent as to plaintiffs).

7 The Court would be acting within its discretion to deny
8 Defendants' request for the attorney fees incurred in connection
9 with remand, but doing so would fail to deter objectively
10 unreasonable removals like the one that occurred in this case. Mr.
11 Pack's removal has squandered valuable resources -- this Court's,
12 the state court's, and Defendants'.

13 Accordingly, the Court GRANTS Defendants' motion for attorney
14 fees incurred in connection with removal to this Court. The Court,
15 however, DEFERS ruling on the amount of the attorney fee award and
16 ORDERS supplemental briefing on that issue, as well as the issue of
17 who should pay -- Mr. Pack, his counsel, or both.⁶ The Court also
18 ORDERS Mr. Pack's counsel, Russell A. Robinson (SBN 163937), to
19 provide a true and complete copy of this Order to Mr. Pack and to
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21 ⁶ Defendants seek attorney fees in the amount of "at least
22 \$13,941.00" from Mr. Pack "and/or" his counsel. MTR Reply at 3.
23 The request is problematic for two reasons. First, "and/or" will
24 not do. Defendants must articulate a principled, reasonable basis
25 for why Mr. Pack, his lawyer, or both should be made to pay the
26 attorney fee award. Second, although Defendants have submitted
27 declarations concerning the number of hours their lawyers spent and
28 the fees incurred, that is not all that is required. For example,
"the party seeking an award of attorneys' fees bears the burden of
producing 'satisfactory evidence -- in addition to the attorney's
own affidavits -- that the requested rates are in line with those
prevailing in the community for similar services by lawyers of
reasonably comparable skill, experience and reputation." Andrews
v. Lawrence Livermore Nat. Sec., LLC, C 11-3930 CW, 2012 WL 160117,
at *1 (N.D. Cal. Jan. 18, 2012)(emphasis added) (quoting Camacho v.
Bridgeport Fin., Inc., 523 F.3d 973, 980 (9th Cir. 2008)).

1 electronically file with this Court a declaration confirming he has
2 done so within five (5) days of the signature date of this Order.

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4 **III. CONCLUSION**

5 For the foregoing reasons, the Court orders the Clerk to
6 TERMINATE Case No. 12-cv-4512-SC. The Clerk shall terminate the
7 now-moot motion to dismiss pending in that case, Dkt. No. 28, but
8 shall not terminate the pending motion for sanctions, Dkt. No. 35,
9 over which this Court retains jurisdiction.

10 The Court GRANTS Defendants' motion to remand Case No. 12-cv-
11 4513-SC. That case is hereby REMANDED to the California Superior
12 Court for Alameda County, where it bore case number RG11556084.
13 The Court, however, retains jurisdiction over the motion for
14 sanctions pending in that case, Dkt. No. 20, which shall not be
15 terminated.

16 The Court DEFERS ruling on both sanctions motions.

17 The Court GRANTS Defendants' motion for attorney fees incurred
18 as a result of Plaintiff Robert Pack's objectively unreasonable
19 removal to federal court. The Court DEFERS ruling on the issues of
20 (1) the size of the award and (2) whether Mr. Pack or his counsel,
21 Russell A. Robinson, or both, must pay the award. The Court ORDERS
22 supplemental briefing on those issues, as follows:

- 23
- 24 • Defendants shall electronically file a brief of no more
25 than eight (8) pages, exclusive of supporting evidentiary
26 materials. Defendants' brief is due twenty-one (21) days
27 from the signature date of this Order.
 - 28 • Mr. Pack may electronically file a responsive brief of no
more than six (6) pages, exclusive of supporting

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evidentiary materials. Mr. Pack's brief, if any, is due seven (7) days after Defendants electronically file their brief.

Mr. Robinson shall, within five (5) days of the signature date of this Order, provide a true and complete copy of this Order to Mr. Pack and electronically file with the Court a declaration that he has done so.

IT IS SO ORDERED.

Dated: December 7, 2012


UNITED STATES DISTRICT JUDGE