

United States District Court  
For the Northern District of California

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**\*E-FILED 08-09-2010\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

AURORA LOAN SERVICES, LLC,

No. C10-03348 HRL

Plaintiff,

**ORDER REFERRING CASE TO JUDGE  
WARE FOR RELATED CASE  
DETERMINATION**

v.

DANIEL LOPEZ,

**REPORT AND RECOMMENDATION**

Defendant.

The instant action is hereby referred to Judge Ware for a determination whether it is related, within the meaning of Civil Local Rule 3-12, to *Aurora Loan Services, LLC v. Alvarado, et al.*, Case No. C10-00519 JW.

Earlier this year, Daniel Lopez attempted to remove this unlawful detainer action from Santa Clara County Superior Court, asserting diversity jurisdiction under 28 U.S.C. § 1332. That attempt failed because there was no showing that the action arose under federal law. Nor did the court find any basis for diversity jurisdiction. (*See* C10-00519 JW, Docket No. 10).

Now, for the second time, Lopez attempts to remove the very same unlawful detainer action. He also seeks leave to proceed *in forma pauperis* (IFP). Lopez's current attempt at removal fares no better. For the reasons stated below, the undersigned recommends that Lopez's IFP application be granted, but that this action nonetheless be summarily remanded to state court.

1 A court may authorize the commencement of a civil action IFP if the court is satisfied  
2 that the would-be litigant cannot pay the filing fees necessary to pursue the action. 28 U.S.C §  
3 1915(a)(1). In evaluating such an application, the court should “gran[t] or den[y] IFP status  
4 based on the [litigant’s] financial resources alone and then independently determin[e] whether  
5 to dismiss the complaint on the grounds that it is frivolous.” *Franklin v. Murphy*, 745 F.2d  
6 1221, 1226-27 n.5 (9th Cir. 1984). Lopez’s application indicates that his assets and income are  
7 insufficient to enable him to pay the filing fee. Accordingly, his application to proceed without  
8 the payment of the filing fee should be granted.

9 However, the court’s grant of the IFP application does not mean that Lopez may  
10 continue with this action here. A court may dismiss a case filed without the payment of the  
11 filing fee whenever it determines that the action “(i) is frivolous or malicious; (ii) fails to state a  
12 claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is  
13 immune from such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).

14 Plaintiff Aurora Loan Services LLC (“Aurora”) filed this unlawful detainer action on  
15 November 20, 2009<sup>1</sup> in Santa Clara County Superior Court. The record presented indicates that  
16 plaintiff acquired the subject property through a foreclosure sale in or about October 22, 2009.  
17 The complaint alleges that plaintiff served defendants with a notice to vacate, but defendants  
18 refused to deliver possession of the property. (Complaint, ¶¶ 6-8).

19 Removal to federal court is proper where the federal court would have original subject  
20 matter jurisdiction over the complaint. 28 U.S.C. § 1441. If, after a court’s prompt review of a  
21 notice of removal “it clearly appears on the face of the notice and any exhibits annexed thereto  
22 that removal should not be permitted, the court *shall* make an order for summary remand.” 28  
23 U.S.C. § 1446(c)(4) (emphasis added). These removal statutes are strictly construed against  
24 removal and place the burden on the petitioner to demonstrate that removal was proper. *Moore-*

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27 <sup>1</sup> It would appear that the removal is outside the thirty-day period for which  
28 removal is proper. 28 U.S.C. § 1446(b). However, as a procedural requirement, a federal  
court cannot remand sua sponte on this basis. *See Lively v. Wild Oats Markets, Inc.*, 456  
F.3d 933, 942 (9th Cir. 2006).

1 *Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009) (citing *Gaus v. Miles, Inc.*,  
2 980 F.2d 564, 566 (9th Cir. 1992)).

3 Here, Lopez asserts that removal is proper based on federal question. Federal courts  
4 have original jurisdiction over civil actions “arising under the Constitution, laws, or treaties of  
5 the United States.” 28 U.S.C. § 1331. A claim “arises under” federal law if, based on the  
6 “well-pleaded complaint rule,” the plaintiff alleges a federal cause of action. *Vaden v.*  
7 *Discovery Bank*, 129 S. Ct. 1262, 1272 (2009). Defenses and counterclaims asserting a federal  
8 question do not satisfy this requirement. *Id.* at 1273.

9 Lopez fails to support his assertion that this action arises under federal law. He asserts  
10 that Aurora has violated federal and state law in connection with the unlawful detainer  
11 proceedings. (Notice of Removal at 3-7). However, Lopez’s allegations in his removal notice  
12 or in a response to plaintiff’s complaint cannot provide this court with federal question  
13 jurisdiction. The plaintiff’s complaint states only a cause of action for unlawful detainer; it  
14 does not allege any federal claims whatsoever. Accordingly, Lopez has failed to show that  
15 removal is proper on account of any federal substantive law. Nor does the complaint on its face  
16 establish that this court might have subject-matter jurisdiction based on diversity.<sup>2</sup> *See* 28  
17 U.S.C. § 1332(a).

18 The undersigned therefore RECOMMENDS that the instant action be summarily  
19 remand the case to Santa Clara County Superior Court. Pursuant to Federal Rule of Civil  
20 Procedure 72(b), any party may serve and file objections to this Report and Recommendation  
21 within fourteen days after being served.

22 Dated: August 7, 2010

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24 \_\_\_\_\_  
25 HOWARD R. LOPEZ  
26 UNITED STATES MAGISTRATE JUDGE

27 \_\_\_\_\_  
28 <sup>2</sup> Lopez does not establish diversity of citizenship in his removal notice, and a  
review of the record shows that the unlawful detainer action was filed as a “Limited” civil  
action in which the amount demanded is \$25,000 or less. Plaintiff otherwise apparently  
seeks only judgment for possession of the property and the costs of suit. (Complaint at 3).

**United States District Court**  
For the Northern District of California

1 5:10-cv-03348-HRL Notice mailed to:  
2 David R Endres: dendres@dre-apc.com  
3 Daniel Lopez  
4 37 Union Street  
5 San Jose, CA 95110  
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