

E-FILED 09-15-2010

NOT FOR CITATION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

BIG SUR, INC.,

No. C10-04002 HRL

Plaintiff,

**ORDER THAT CASE BE REASSIGNED
TO A DISTRICT COURT JUDGE**

v.

REPORT AND RECOMMENDATION

VIRGILIO L. ORCILLA, TEODORA R.
ORCILLA, DOES I through V, inclusive,

Defendants.

On September 7, 2010, pro se defendants Virgilio L. Orcilla and Teodora R. Orcilla removed this case from Santa Clara County Superior Court. They also seek leave to proceed *in forma pauperis* (IFP). For the reasons stated below, the undersigned recommends that this action be summarily remanded to state court.

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

1 However, the court’s grant of the IFP applications does not mean that defendants may
2 continue with this action here. A court may dismiss a case filed without the payment of the
3 filing fee whenever it determines that the action “(i) is frivolous or malicious; (ii) fails to state a
4 claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is
5 immune from such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). Additionally, if the court
6 determines at any time that it lacks subject matter jurisdiction, it must dismiss the action. FED.
7 R. Civ. P. 12(h)(3).

8 The record presented indicates that plaintiff Big Sur, Inc. filed this unlawful detainer
9 action on August 12, 2010 in Santa Clara County Superior Court. According to the complaint,
10 plaintiff acquired the subject property through a foreclosure trustee’s sale in or about May 24,
11 2010. (Complaint, ¶ 4). The complaint further alleges that on May 24, 2010 plaintiff served
12 defendants with a notice to vacate, but defendants refused to deliver possession of the property.
13 (*Id.* ¶¶ 5-6).

14 Removal to federal court is proper where the federal court would have original subject
15 matter jurisdiction over the complaint. 28 U.S.C. § 1441. If, after a court’s prompt review of a
16 notice of removal “it clearly appears on the face of the notice and any exhibits annexed thereto
17 that removal should not be permitted, the court *shall* make an order for summary remand.” 28
18 U.S.C. § 1446(c)(4) (emphasis added). These removal statutes are strictly construed against
19 removal and place the burden on the petitioner to demonstrate that removal is proper. *Moore-*
20 *Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009) (citing *Gaus v. Miles, Inc.*,
21 980 F.2d 564, 566 (9th Cir. 1992)).

22 Federal courts have original jurisdiction over civil actions “arising under the
23 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. A claim “arises under”
24 federal law if, based on the “well-pleaded complaint rule,” the plaintiff alleges a federal cause
25 of action. *Vaden v. Discovery Bank*, 129 S. Ct. 1262, 1272 (2009). Defenses and counterclaims
26 asserting a federal question do not satisfy this requirement. *Id.* at 1273.

27 Defendants fail to support their assertion that this action arises under federal law. Here,
28 they assert that the underlying trustee’s sale was illegal. (Notice of Removal, ¶ 2). They further

1 suggest that the unlawful detainer action is related to their federal complaint filed in *Orcilla v.*
2 *Bank of America, et al.*, C10-03931 HRL. (*Id.* ¶ 5). However, defendants' allegations in their
3 removal notice or in a response to plaintiff's complaint cannot provide this court with federal
4 question jurisdiction. The plaintiff's complaint states only a cause of action for unlawful
5 detainer; it does not allege any federal claims whatsoever. Accordingly, defendants have failed
6 to show that removal is proper on account of any federal substantive law. Nor does the
7 complaint on its face establish that this court might have subject-matter jurisdiction based on
8 diversity.¹ See 28 U.S.C. § 1332(a).

9 Because defendants have yet to consent to the undersigned's jurisdiction, this court
10 ORDERS the Clerk of the Court to reassign this case to a district court judge. The undersigned
11 further RECOMMENDS that the newly assigned judge summarily remand the case to Santa
12 Clara County Superior Court. Pursuant to Federal Rule of Civil Procedure 72(b), any party may
13 serve and file objections to this Report and Recommendation within fourteen days after being
14 served.

15 Dated: September 15, 2010

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17 HOWARD B. LLOYD
18 UNITED STATES MAGISTRATE JUDGE
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25 ¹ Defendants do not establish diversity of citizenship in their removal notice,
26 and a review of the complaint shows that it specifies that the amount of claimed damages is
27 "under \$10,000.00." (Complaint at 1). Plaintiff otherwise seeks judgment only for
28 possession of the property and the costs of suit. (*Id.* at 3.) In addition, as local defendants, it
would appear that defendants would not have the right to remove this action to federal court
under diversity jurisdiction. 28 U.S.C. § 1441(b) (stating that an action is removable for
diversity "only if none of the parties in interest properly joined and served as defendants is a
citizen of the State in which such action is brought").

United States District Court

For the Northern District of California

1 5:10-cv-04002-HRL Notice mailed to:

2 Todd Rothbard
4261 Norwalk Drive #107
3 San Jose, CA 95129

4 Virgilio Orcilla
2975 Winwood Way
5 San Jose, CA 95148

6 Teodora Orcilla
2975 Winwood Way
7 San Jose, CA 95148

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