

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02949-RPM

JENNIFER LATHAM, individually and
as mother and natural guardian of
EDEN and JACKSON LATHAM, minors,

Plaintiff,

v.

TIME INSURANCE COMPANY,

Defendant.

ORDER FOR REMAND

This civil action was removed from the District Court, Boulder County, Colorado by Notice of Removal, filed December 17, 2009. The plaintiff filed an Emergency Motion for Removal today. This is the third attempt to remove this action which was initiated by a complaint filed on October 27, 2006. That complaint named Jennifer Smith as a defendant. The first Notice of removal alleged fraudulent joinder making the action a controversy between parties of diverse citizenship with jurisdiction under 21 U.S.C. § 1332. After voluntary dismissal of Ms. Smith the case proceeded in this court until October 10, 2007 when an order entered permitting the plaintiffs to again join Ms. Smith, thereby destroying complete diversity and accordingly, the action was remanded to the Boulder Court.

Another Notice of Removal was filed on May 22, 2008, based on an alleged relationship to a bankruptcy proceeding filed by Jennifer Smith. Another remand was ordered May 30, 2008.

The plaintiffs dismissed Jennifer Smith at a hearing on November 18, 2009.

This case is set for trial to begin in Boulder on January 19, 2010.

The defendant participated in a hearing before a Magistrate in Boulder on November 23, 2009 and in depositions on November 23, 2009 and on December 1, 2, 9, 10 and 16, 2009. The defendant filed 13 motions on December 15, 2009. A hearing was scheduled on December 17, 2009. The defendant submitted this Notice of Removal by electronic submission on the evening of December 16, 2009 but it was not accepted as a filing until the morning of December 17, 2009.

This removal is untimely under 28 U.S.C. § 1446 (b) because it was filed more than one year after commencement of the action.

The defendant argues that the 30 day time limit in the first paragraph should apply because the action was removable when first filed because Jennifer Smith was fraudulently joined. There has been no such determination. The plaintiffs essentially agreed to the first removal by voluntary dismissal of the Colorado defendant.

The defendant asks this Court to grant an equitable exception to the one year limitation, claiming manipulations by the plaintiff\`s. On the contrary, the equities favor the plaintiffs. The defendant could have filed the Notice of removal immediately after the dismissal of Ms. Smith on November 18, 2009. Waiting until the day of a hearing on its motions and after continuing its participation in preparation for the forthcoming trial, the defendant's motivation appears to be avoidance of unfavorable rulings and the trial date.

The plaintiffs's motion for remand asks for an award of costs and attorney fees. That request is denied without prejudice to any relief that may be granted by the state court for the improvident filing of this Notice of Removal.

For the forgoing reasons, it is

ORDERED that this civil action is remanded to the District Court, Boulder County,
Colorado.

DATED: December 18th, 2009

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge