

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

VERNON VAN AUKEN, et al.,	)	
	)	8:06cv730
Plaintiffs,	)	
	)	ORDER to SHOW CAUSE
vs.	)	
	)	
TIME INS. CO./FORTIS/ASSURANT	)	
HEALTH,	)	
	)	
Defendant.	)	

This matter is before the court sua sponte. The defendant, Time Ins. Co./Fortis/ Assurant Health ("Assurant"), has attempted to remove to this court a judgment which is on appeal from the Small Claims Court of Sarpy County, Nebraska, to the Sarpy County District Court. Because this court questions whether a state-court judgment on appeal to a higher court may be removed pursuant to 28 U.S.C. § 1441 *et seq.* and whether, even if an appellate proceeding may be removed, the removal in this case is timely, the defendant shall demonstrate that good cause exists for the course it seeks to take in this matter.

The plaintiffs, Vernon and Victoria Van Auken, obtained a default judgment in the principal amount of \$2,700.00, with \$63.96 in costs, against Assurant in the Small Claims Court of Sarpy County, Nebraska, on a claim under a policy of health insurance. The "Plaintiff's Claim and Notice to Defendant - Small Claims Court" (filing no. 1-5) indicates that on September 29, 2006, the Small Claims Court issued a Notice to Defendant of a hearing scheduled for November 6, 2006.

However, the defendant did not appear for the hearing, and the small claims court entered a default judgment for the plaintiffs on November 6, 2006 (filing no. 1-5). The

defendant then appealed to the Sarpy County District Court, and in its Notice of Appeal (Case No. SC-06-128), the defendant stated that it had been served with process on October 30, 2006 and did not become aware of the hearing set for November 6, 2006 until November 7, 2006.

Nebraska statutes provide for two kinds of appeals in civil cases from the lower courts to the district courts. See Neb. Rev. Stat. §§ 25-2733 and 25-2734.

Standard of Review:

On appeal from a county court pursuant to § 25-2733, the district courts review "for error appearing on the record made in the county court." The district court may affirm, modify or reverse the county court's order or judgment. On the other hand, the standard of review in appeals from the small claims court to district court pursuant to § 25-2734 is "de novo without a jury."

Effect of the Appellate Judgment:

In both kinds of appeals, "[t]he judgment of the district court shall vacate the judgment in the county court." Neb. Rev. Stat. § 25-2733(3), 25-2734. In other words, the Notice of Appeal does not vacate the lower court's judgment. That judgment remains in effect until replaced by whatever decision the district court renders on appeal.

In addition, a defendant removing a case from state to federal court pursuant to 28 U.S.C. § 1446 is required to file the notice of removal "within thirty days after the receipt by the defendant, through service **or otherwise**, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based ...." 28 U.S.C. 1446(b) (emphasis added). The defendant has informed the court of the date (October 30,

2006) when it was served with process. However, the Notice of Removal does not state precisely when the defendant first learned of the action in small claims court.

Therefore, by no later than December 28, 2006, the defendant shall file the following items in support of its Notice of Removal. First, the defendant shall provide the court with precedent and authority for the proposition that, by use of the removal statutes, this court can be substituted as the appellate court on appeal from a judgment by a state small claims court. Second, the defendant shall provide an affidavit in which an officer of the defendant testifies under oath as to the earliest date any agent or employee of the defendant first learned of the plaintiffs' proceedings in the small claims court.

SO ORDERED.

DATED this 4<sup>th</sup> day of December, 2006.

BY THE COURT:

s/Laurie Smith Camp  
United States District Judge