

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIEL J. ALEXY : CIVIL ACTION
:
v. :
:
O'NEIL NISSAN, INC. and :
NISSAN MOTOR ACCEPTANCE CORP. : NO. 99-327

MEMORANDUM ORDER

This case involves a dispute about \$250, deposited by plaintiff when he executed an automobile lease. Presently before the court is plaintiff's Motion for Reconsideration and Rescission of the court's order granting his motion to remand this case to state court.

Plaintiff filed his complaint on December 17, 1998 in the Court of Common Pleas of Bucks County. He alleged that defendants wrongfully retained what was supposed to be a refundable \$250 security deposit with an automobile lease by improperly treating it as payment of an end-of-lease "disposition fee" to which he had not agreed. Plaintiff asserted claims for breach of contract, unjust enrichment, violation of the Pennsylvania Unfair Trade Practices Act (UTPA) and violation of the federal Truth In Lending Act (TILA).

Defendant Nissan Motor Acceptance Corporation (Nissan Motor) was served on December 22, 1998 and removed the case to this court on January 21, 1999, predicated on federal question jurisdiction in view of plaintiff's TILA claim. Nissan Motor filed an answer to the complaint in this court the next day. On

January 27, 1999, plaintiff moved to remand the case on the ground that the co-defendant had not joined in or consented to the removal within the time permitted by 28 U.S.C. § 1446(b). Plaintiff's motion also contained a one-sentence request that "any and all pleadings in the United States District Court be stricken with prejudice." Plaintiff also requested attorney's fees and costs.

Nissan Motor filed an amended answer in this court on February 4, 1999 and on February 9, 1999 responded to the motion to remand. Nissan Motor consented to a remand and opposed the request for fees, costs and to strike its pleadings. Plaintiff filed a reply brief and a motion for Rule 11 sanctions against Nissan Motor, its attorney and her law firm on February 17, 1999. He did not seek permission to file a further brief consistent with L. R. Civ. P. 7.1(c) and did not comply with the requirements of Fed. R. Civ. P. 11(c)(1)(A). In any event, the court had not seen the reply brief and motion for sanctions when by order of February 18, 1999 it granted plaintiff's motion to remand.

On February 23, 1999, plaintiff filed a motion in this court to enjoin all proceedings in the Common Pleas Court while his motion for remand was pending. As the case had in fact been remanded five days earlier, the court denied plaintiff's motion. Also, of course, state court proceedings are stayed by law

following notice of removal. See 28 U.S.C. § 1446(d).

On March 3, 1999, plaintiff filed the instant motion for reconsideration. He asks the court to rescind the remand order, resume jurisdiction, award him costs and fees, strike defendant's answer and then again remand the case to the state court. Plaintiff suggests that the court's prompt action on the remand motion deprived it of "the benefit" of his reply brief and brief in support of his motion to enjoin proceedings in the Common Pleas Court. Suffice it to say there is nothing in these submissions which supports or warrants the result plaintiff now seeks.

The apparent reason for plaintiff's persistent effort to strike Nissan Motor's pleadings is his belief that this would help him to protect a default judgment he obtained on January 14, 1999 in the state court against Nissan Motor when it failed to file an answer within twenty days of service. Following remand, the Common Pleas Court issued a Rule to Show Cause why the default judgment should not be opened. Plaintiff apparently hopes to argue that the default judgment should not be opened because Nissan Motor not only failed timely to answer in that court but has never filed an answer of record, as the answer filed after removal would have been stricken by this court.

Plaintiff asserts that Nissan Motor's pleadings should be stricken and sanctions should be imposed because the notice of

removal was "baseless, patently frivolous, constituted an abuse of process, was submitted solely to harass, cause unnecessary delay, and needlessly increase the cost of litigation."

The court had federal question jurisdiction over the TILA claim and supplemental jurisdiction over plaintiff's related claims pursuant to 28 U.S.C. § 1367. This was a case which defendant was entitled to attempt to remove.

The requirement that all defendants join in the removal petition is a procedural and not a jurisdictional one. See Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995); Michaels v. State of N.J., 955 F. Supp. 315, 321 (D.N.J. 1996). Procedural defects are "modal or formal, and can be waived." Id. Had plaintiff not timely moved to remand, the defect would have been waived. Once alerted to the procedural defect and plaintiff's timely objection, Nissan Motor agreed to stipulate to a remand.

Defendant's reliance on Samuel v. Langham, 780 F. Supp. 424 (N.D. Tex. 1991) to argue for costs and sanctions is misplaced. The Court in Samuel remanded a case which had been removed despite the absence of any federal subject matter jurisdiction. Unlike a jurisdictional defect, procedural defects may be waived by failure timely to seek remand. See, e.g., Barnes v. Westinghouse Electric Co., 962 F.2d 513, 516 (5th Cir.), reh'g denied, 968 F.2d 18 (5th Cir.), cert. denied, 506

U.S. 999 (1992). To the extent that Wallis v. Southern Silo Corp., 369 F. Supp. 92 (N.D. Miss. 1973), cited by plaintiff, suggests otherwise, it is inconsistent with and has been implicitly overruled by Barnes. The actual decision of the Court in Wallis was that a removing defendant could amend the removal petition to assert a legally cognizable reason for the nonjoinder of a co-defendant. Id. at 94-95.

What effect the Common Pleas Court should give pleadings filed in a federal court following a procedurally defective removal is a matter of state law for resolution by the state courts. See Wenrick v. Schloemann-Siegmag Aktiengesellschaft, 522 A.2d 52, 54 (Pa. Super. 1987) (effect of removal on state court proceedings is matter to be determined by state court on remand), aff'd, 564 A.2d 1244 (Pa. 1989). Crown Construction Co. v. Newfoundland American Ins. Co., 239 A.2d 452 (Pa. 1968), cited by plaintiff, is not to the contrary. The Court in that case held that a default judgment in a removed case was properly entered as a matter of state law where the federal court held that removal had been jurisdictionally defective. Id. at 454.

Quite frankly, it is plaintiff who appears to be unnecessarily compounding and increasing costs in this litigation, out of all proportion to the stakes. Plaintiff seeks actual damages of \$250. The maximum TILA award is \$1,000. See

15 U.S.C. § 1640(a)(2)(A)(ii). The maximum UTPA award is \$750. See 73 P.S. § 201-9.2. As plaintiff's name appears on virtually every submission as "associate counsel" in this case, the extent of his entitlement to legal fees, as least under TILA, may reasonably be questioned. See Kay v. Ehrler, 499 U.S. 432, 437-38 (1991) (pro se attorneys not entitled to fees under 42 U.S.C. § 1988); Burka v. United States Dept. of Health & Human Svcs., 142 F.3d 1286, 1289 (D.C. Cir. 1998) (denying fees to pro se attorney under Freedom of Information Act and noting Supreme Court intended ruling in Kay to apply to "other similar fee-shifting statutes").

In any event, plaintiff was and is not entitled to fees, costs, sanctions or an order striking defendant's answer. He has not remotely demonstrated the propriety of the extraordinary recall and re-remand he now seeks.

ACCORDINGLY, this day of March, 1999, upon consideration of plaintiff's Motion for Reconsideration and Rescission of Court Order (Doc. #15) and defendant Nissan Motor's response, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.