

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: Angel Fire Resort Operations, LLC., v. Lewis Pierce, et al.
Case Number: 03-01192
Nature of Suit:
Judge Code: S
Reference Number: 03-01192 - S

Document Information			
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

THE ANGEL FIRE CORPORATION,
Tax ID 85-0226843; and ANGEL FIRE
SKI CORPORATION, Tax ID 86-0290933,

Debtors.

Jointly Administered
No. 11-93-12176 Bohanon (3)(A)
(Formerly No. 93-12176 Brumbaugh (5)(A))

ANGEL FIRE RESORT OPERATIONS, LLC
A New Mexico Limited Liability Company,

Plaintiff,

v.

Adv. No. 03-1192

LEWIS PIERCE and BETTY PIERCE,

Defendants.

**ORDER GRANTING FEES AND COSTS TO LEWIS & BETTY PIERCE AND
SETTING PRELIMINARY HEARING**

Plaintiff initiated this adversary proceeding by removing counterclaims from a pending state court case. Defendants moved to remand, which motion the Honorable Richard Bohanon, the preceding judge on this case, granted on the ground of lack of subject matter jurisdiction. Order Dismissing Counterclaims for Lack of Subject Matter Jurisdiction and Remanding Counterclaims to State Court (doc 12) ("Remand Order"). Now Defendants have filed an application for an award of costs and attorney fees, doc 13, supported by an affidavit detailing those fees, doc 14. Plaintiff has

responded in opposition, doc 15, and Defendants have replied, doc 16.

Although the bankruptcy removal statute is 28 U.S.C. § 1452, which itself has no provision for the award of costs or attorney fees upon remand, the Tenth Circuit has ruled that 28 U.S.C. § 1447(c) applies to actions removed to and remanded from the bankruptcy court. Daleske v. Fairfield Communities, Inc., 17 F.3d 321, 324 (10th Cir. 1994). Section 1447(c) provides in relevant part as follows:

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

That is, the Court may award attorney fees and costs but is not required to.

While a showing of bad faith in the removal of the action which is remanded is not necessary for the award of fees and costs, Excell, Inc. v. Sterling Boiler & Mechanical, inc., 106 F.3d 318, 322 (10th Cir. 1997), "the propriety of the defendant's removal continues to be central in determining whether to impose fees." Daleske v. Fairfield Communities, Inc., 17 F.3d at 324. The Court cannot award fees without "a showing that removal was improper ab initio." Suder v. Blue Circle, Inc., 116 F.3d 1351, 1352 (10th Cir. 1997). The Tenth

Circuit explained:

What is required to award fees, however, is a showing that the removal was improper ab initio. Thus, it was error for the district court to assess fees against Blue Circle only if its removal to federal court was proper in the first place.

* * *

We reject Blue Circle's argument that fees should not be awarded under § 1447(c) if there is a "colorable" basis for the removal. The standard is not whether the basis for the removal was merely "colorable;" the central inquiry is the "propriety" of the removal, a standard much different than "colorable." A removal is proper only if it is legitimate. . . . Once the district court correctly made that determination, it was then within the court's discretion to assess just costs and fees.

Id. at 1352-53 (emphasis in original).

In the instant case, Judge Bohanon ruled sua sponte and rather emphatically that this Court did not have subject matter jurisdiction of the removed counterclaims, reciting in part that

[t]he plan was confirmed over eight years ago, and the final decree was entered over two years ago. The Debtor no longer operates, and there is no bankruptcy estate in existence to administer. This is simply a dispute of state law claims involving two non-debtors. The outcome certainly will not affect distribution to creditors. Thus, there is no conceivable effect that this civil proceeding would have on the bankruptcy estate.

Remand Order at 6.

Neither party argued directly that the Court lacked

subject matter jurisdiction. Remand Order, at 3 n. 2. Thus, if it was obvious from the outset that there was no jurisdiction, neither party pointed that out to the Court. Defendants had argued for remand on equitable and timeliness grounds and for mandatory and discretionary abstention. The Court made its own independent determination that it lacked subject matter jurisdiction. This sequence of events suggests that, at the time Plaintiff removed the counterclaims, the jurisdictional question was not so obvious to the parties, particularly Plaintiff, such that Plaintiff was obviously engaged in an impropriety. Additionally, a court should be careful about using hindsight to determine that a party should clearly have known better when it made a decision that, at the time of the making of the decision, was much less clear.

Nevertheless, the issue here is the propriety of the removal, not whether the Plaintiff had colorable grounds for removal of the counterclaims. Plaintiff contends that Defendants' motion should be denied because it believed that the counterclaims were a direct attack on the confirmed plan and because the Court raised the issue of subject-matter jurisdiction sua sponte. The Plaintiff cites Sandoval v. New Mexico Technology Group LLC, 174 F. Supp.2d 1224, 1235 (D. N.M. 2001), to support its argument. In that case, the

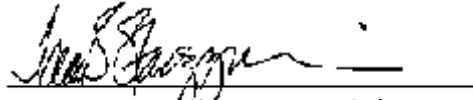
district court exercised its discretion not to award fees and costs due to "the closeness of the issues" and because the issue was raised sua sponte. Id.

However, unlike Sandoval, the issues in the instant case were not that close. Subject-matter jurisdiction is a matter of well-settled law, at least in the circumstances of this case as Judge Bohanon found them. Compare, Gibson v. Tinkey, 822 F. Supp. 347, 349 (S.D. W.Va. 1993)(granting motion for fees and costs where removal was improper where the grounds for removal were contrary to established law), with Moline Machinery, Ltd. v. Pillsbury Co., 259 F. Supp.2d 892, 905-06 (D. Minn. 2003) (denying motion for fees and costs where decision was a close one and issue was one of first impression). The removal of the Defendants' counterclaims was not proper because there was no basis for subject-matter jurisdiction. As noted in the Remand Order, the outcome of the counterclaims would have no conceivable effect upon the administration of the bankruptcy estate. The plan was confirmed several years ago. Indeed, there is no bankruptcy estate in existence to administer. It appears that it was Plaintiff who transformed a collection action into a case dealing with the confirmed bankruptcy plan. Thus, there was no close issue concerning subject-matter jurisdiction.

Moreover, and indeed more important in the Court's view, is that Plaintiff's belief of the soundness of the removal is immaterial since the award of fees and costs under § 1447(c) is intended to reimburse the non-removing party for expenses arising from improper removals. See Gibson, 822 F. Supp. at 349 ("The trend among the circuits construing the amended version of § 1447(c), however, is to award attorney fees without reference to a particular state of mind or improper purpose."). That is, the statute charges the losing party with the cost of the litigation, making it an exception to the "American Rule".

The only issue left unresolved is the amount of fees and costs to be awarded. The Defendants have submitted an affidavit and billing statements in support of their request for more than \$13,000 in fees and costs, and have request fees for the instant motion as well. Plaintiff has not addressed the amount of the expenses requested by Defendants; had it been successful in defeating the award of any fees, there would have been no reason to address the amount of the fees requested. Therefore the Court will set a preliminary hearing on this specific issue, with the instruction to the parties to

consult with each other to determine whether further litigation is necessary.



James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 18, 2004, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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