

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

ED HAMMITT AND BRENDA
HAMMITT,

Plaintiffs,

v.

CIVIL ACTION FILE
NO. 4:08-CV-0162-HLM

KEN BUSBIN, TERESA WATSON,
and ROMENEWSBYWATSON.COM,
INC.,

Defendants.

ORDER

This case is before the Court on Plaintiffs' Motion to Remand to State Court [4] and on Defendant Busbin's Motion for Order Permitting Withdrawal of Notice of Removal [6].

I. Background

On December 28, 2007, Plaintiffs filed this lawsuit in the Superior Court of Chattooga County, Georgia. On January 29, 2008, Defendant Busbin filed his answer, in which he asserted, among other things, a defense alleging that 47 U.S.C.A. § 230(e)(3) of the Communications Decency Act ("CDA") barred Plaintiffs' claims. On February 4, 2008, Defendants Watson and RomeNewsByWatson.com filed an answer, in which those Defendants also raised the CDA as a defense.

On August 7, 2008, Defendants Watson and RomeNewsByWatson.com filed a Motion to Dismiss in the Chattooga County Superior Court, arguing that the CDA barred Plaintiffs' claims, and that the CDA preempted those

claims. On or about September 5, 2008, Plaintiffs responded to the Motion to Dismiss.

On October 3, 2008, Defendants removed the case to this Court, citing the Court's federal question jurisdiction. On October 27, 2008, Plaintiffs filed a Motion to Remand to State Court, arguing that Defendants' removal was untimely and that the Court lacks subject matter jurisdiction over this case.

On October 28, 2008, Defendant Busbin, through counsel, responded to the Motion to Remand to State Court by filing a Withdrawal of Notice of Removal and Notice of Consent to Removal. (Docket Entry No. 5.) Defendant Busbin stated: "Defendant Busbin does hereby withdraw as an Applicant for Removal, and corrects his position by hereby consenting to removal of this case by Defendants

Watson [sic], should the Court find removal appropriate. (Id. at 2.) On October 30, 2008, Defendant Busbin filed a Motion for Order Permitting Withdrawal of Notice of Removal. (Docket Entry No. 6.)

As of the date of this Order, the Clerk's docket indicates that Defendants Watson and RomeNewsByWatson.com have responded to the Motion to Remand to State Court. The Court finds that no reply from Plaintiffs is necessary, and therefore concludes that the Motion to Remand to State Court is ripe for resolution by the Court.

II. Discussion

A. The Court Lacks Subject-Matter Jurisdiction

A party seeking to remove an action to this Court bears the burden of establishing that federal jurisdiction exists.

Friedman v. N.Y. Life Ins. Co., 410 F.3d 1350, 1353 (11th Cir. 2005). The Court must construe removal statutes narrowly, resolving all doubts against permitting removal. Allen v. Christenberry, 327 F.3d 1290, 1293 (11th Cir. 2003). Sound reasons exist to limit the exercise of removal jurisdiction. Poll v. Deli Mgmt., Inc., No. 1:07-CV-0959-RWS, 2007 WL 2460769, at *2 (N.D. Ga. Aug. 24, 2007). First, “the removal of cases to federal courts implicates principles of federalism.” Id. Second, “resolving any doubt in favor of remand ‘prevents exposing the plaintiff to the possibility that he will win a final judgment in federal court, only to have it determined that the court lacked jurisdiction on removal, a result that is costly not just for the plaintiff, but for all the parties and for society when the case must be relitigated.’” Id. (quoting Crowe v. Coleman, 113

F.3d 1536, 1538 (11th Cir. 1997)). Third, “the limitations on removal jurisdiction also recognize that the plaintiff is the master of his own complaint.” Id.

Here, Defendants Watson and RomeNewsByWatson.com argue that removal is proper under 28 U.S.C.A. § 1331, based on the Court’s federal question jurisdiction.¹ Ordinarily, “[t]he presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). Under that rule, “[w]hether a case arises under

¹Diversity jurisdiction under 28 U.S.C.A. § 1332 clearly does not exist in this case, because Plaintiffs and Defendants are Georgia residents. (Compl. ¶¶ 2-4.)

federal law 'must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.'" R.L. Lackner, Inc. v. Sanchez, No. B-05-264, 2005 WL 3359356, at *1 (S.D. Tex. Dec. 9, 2005) (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)). "Usually, federal question jurisdiction is not triggered by the presence of a federal defense; in other words, a defense rather than a claim arising under federal law does not create federal jurisdiction." Id. (citing Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908)).

The well-pleaded complaint rule, however, "is inapplicable under certain circumstances." Franklin v. QHG of Gadsden, Inc., 127 F.3d 1024, 1028 (11th Cir. 1997).

Specifically, “[a] defendant may remove a complaint alleging only state law claims to federal court if the allegations in the complaint involve an area of law that Congress has completely preempted.” Id. The complete preemption doctrine most frequently applies in cases involving claims under the Employee Retirement Income Security Act or the Labor Management Relations Act. R.L. Lackner, Inc., 2005 WL 3359356, at *2 (collecting cases). “Not every federal law gives rise to federal jurisdiction, and federal jurisdiction asserted under the complete preemption doctrine is even less common.” Id.

Defendants’ Notice of Removal is not a model of clarity; however, it appears that Defendants Watson and RomeNewsByWatson.com contend that federal question jurisdiction exists in this case because the CDA, 47

U.S.C.A. § 230(c) preempts Plaintiffs' claims. 47 U.S.C.A.

§ 230(c) provides, in relevant part:

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C.A. § 230. "Congress enacted this provision . . . for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material."

Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122

(9th Cir. 2003). 47 U.S.C.A. § 230(e)(3) also is relevant to this action, and states:

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Id. § 230(e)(3).

Although the CDA is a federal law, it is not the source of Plaintiffs' claims, as alleged in Plaintiffs' Complaint. Rather, Plaintiffs assert a claim for libel arising under Georgia law. (Compl. ¶¶ 17-21.) The Court therefore finds that no claim "arising under" federal law appears on the face of Plaintiffs' Complaint.

In their Notice of Removal, Defendants Watson and RomeNewsByWatson.com assert that they cannot be held liable under 47 U.S.C.A. § 230(c)(1) for allegedly

defamatory statements posted on the Romenebywatson.com website. This language indicates that Defendants Watson and RomeNewsByWatson.com seek to raise a federal defense under the CDA, and does not identify a claim arising under federal law set forth in Plaintiffs' Complaint. As previously noted, "[t]he presence of a federal defense does not trigger federal question jurisdiction." R.L. Lackner, Inc., 2005 WL 3359356, at *3. Consequently, Defendants Watson and RomeNewsByWatson.com's statements, as contained in their Notice of Removal, do not establish that this case involves a claim arising under federal law.

Defendants Watson and RomeNewsByWatson.com also contend, in their Notice of Removal, that the CDA completely preempts Plaintiffs' state law cause of action.

The Court's research uncovered no case from this Circuit addressing the question of whether the complete preemption doctrine applies in a case involving the CDA. Other courts that have addressed this question, however, have concluded that the CDA simply does not completely preempt all state law claims. R.L. Lackner, Inc., 2005 WL 3359356, at *3; Cisneros v. Sanchez, 403 F. Supp. 2d 588, 591-92 (S.D. Tex. 2005); Schwarz v. Comcast Corp., No. Civ. A. 05-2340, 2005 WL 1799414, at *8 (E.D. Pa. July 28, 2005); In re Baxter, No. 01-00026-M, 2001 WL 34806203, at *2 (W.D. La. Dec. 20, 2001). The Court finds the reasoning of those cases persuasive, and applies that reasoning to the instant case. The Court therefore concludes that the complete preemption doctrine simply has no application to this case.

For the reasons discussed above, the Court concludes that Plaintiffs' Complaint does not present a federal question, and that the complete preemption doctrine does not apply to this case. Federal question jurisdiction thus does not exist in this case. Additionally, diversity jurisdiction clearly is not present in this case. Consequently, the Court lacks subject matter jurisdiction over the case, and must remand the case to the Superior Court of Chattooga County, Georgia. 28 U.S.C.A. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

B. Defendants Watson and RomeNewsByWatson.com's Notice of Removal Is Untimely

Alternatively, the Court finds that the Notice of Removal is untimely filed by Defendants Watson and RomeNewsByWatson.com is untimely. 28 U.S.C.A. § 1446(b) governs the time period for filing a notice of removal, and states:

The notice of removal of a civil action or proceeding shall be filed 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, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which

it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C.A. § 1446(b). The Court must construe the thirty-day period strictly. Green v. Clark Ref. & Mktg., Inc., 972 F. Supp. 423, 424 (E.D. Mich. 1997). A failure to file a notice of removal within the thirty-day period is an absolute bar to removal, even if removal would have been proper if the notice had been filed in a timely fashion. Id. Defendants Watson and RomeNewsByWatson.com, as the removing parties, bear the burden of showing that removal is appropriate. Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976).

Here, Defendants' answers, which Defendants filed in the Floyd County Superior Court on January 28, 2008, and

February 4, 2008, raised the CDA as a defense. Further, Defendants Watson and RomeNewsByWatson.com raised the argument that the CDA preempted or barred Plaintiffs' claims in their Motion to Dismiss filed in the Chattooga County Superior Court on August 7, 2008. At the very least, Defendants Watson and RomeNewsByWatson.com and their counsel clearly were aware of their CDA preemption arguments, which form the basis of the Notice of Removal, by the time Defendants Watson and RomeNewsByWatson.com filed their Motion to Dismiss.²

Defendants Watson and RomeNewsByWatson.com,

²The Court finds unpersuasive Defendants Watson and RomeNewsByWatson.com's contention that they did not become aware that the CDA purportedly preempted Plaintiffs' claims until Defendants Watson and RomeNewsByWatson.com received Plaintiffs' response to their Motion to Dismiss. Defendants Watson and RomeNewsByWatson.com raised the very arguments that they contend support their Notice of Removal in their initial brief in support of their Motion to Dismiss.

however, failed to file their Notice of Removal within thirty days after Defendants Watson and RomeNewsByWatson.com filed their Motion to Dismiss. Under those circumstances, the Notice of Removal clearly is untimely.

C. Summary

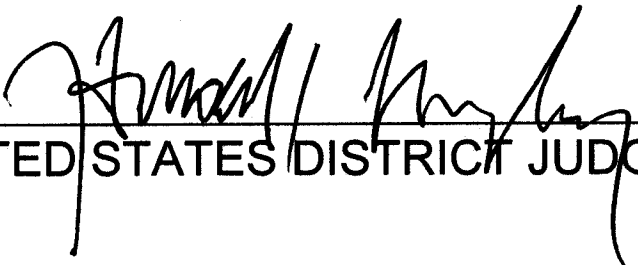
In sum, the Court finds that the Court lacks subject-matter jurisdiction over this case, and that removal is improper. The Court further concludes that the Notice of Removal is untimely. The Court consequently grants Plaintiffs' Motion to Remand to State Court.

III. Conclusion

ACCORDINGLY, the Court **GRANTS** Plaintiffs' Motion to Remand to State Court [4], and **REMANDS** this case to the Superior Court of Chattooga County, Georgia. The

Court **GRANTS** Defendant Busbin's Motion for Order
Permitting Withdrawal of Notice of Removal [6].

IT IS SO ORDERED, this the 17th day of November,
2008.


UNITED STATES DISTRICT JUDGE