

IN THE SUPERIOR COURT OF COLQUITT COUNTY GEORGIA

NANCY B. CORMIER
Plaintiff

Case Number 03-CVD-2211

v.

DENNY C. CORMIER
Defendant, *pro se*

**DEFENDANT'S PETITION FOR A
WRIT OF MANDAMUS**

Comes now DENNY C. CORMIER, *pro se*, to request the Superior Court of Colquitt County, Georgia issue a Writ of Mandamus to the Honorable Frank Horkan, presiding judge, to quash his ultra vires proceedings and orders subsequent to this case having been properly removed to Federal Court on May 26, 2005 and before remand on July 11, 2005 (Attached Notice of Removal and Notice of Notice of Removal).

In support he offers:

1. After proper removal to Federal Court on May 26, 2005 of In Re Cormier v. Cormier, Case Number 03-CVD-2211, from the Superior Court of Colquitt County to the United States District Court, Middle District of Georgia, the Honorable Frank Horkan sua sponte took ultra vires judicial action without jurisdiction,

- A. Ex parte ultra vires hearings were scheduled by the Honorable Frank Horkan for July 7, 2005 and August 1, 2005 in violation of 28 U.S.C. 1441(d), the Superior Court of Colquitt County on that date (Orders Attached).
 - B. The Honorable Frank Horkan also entered ex parte ultra vires orders on June 14, 2005 and July 7, 2005 granting attorney fees to Plaintiff, and pursuant to Plaintiff's Motion for Contempt entered on June 15, 2005 (Motion Attached), all in violation of 28 U.S.C. 1441(d).
 - C. The June 14, 2005 order of the Honorable Frank Horkan granting attorney fees was also in violation of Georgia Superior Court Rules §24.2. "Financial data required", prohibiting awards of attorney's fees unless a financial affidavit has been entered by both parties. This requirement has not yet been met. There has been no substantial evidence admitted to demonstrate need of the Plaintiff for attorney fees and no finding of ability to pay by the Defendant. The court assumed ability to pay.
 - D. On July 7, 2005, another ultra vires order was issued by the Honorable Frank Horkan regarding rulings on motions and scheduling a pre-trial hearing for August 1, 2005.
2. On May 26, 2005, Removal of said Superior Court of Colquitt County, Case No. 03-CVD-2211, was effected with proper Notice of Removal and Notice of Filing Notice of Removal. (Notices in Court File)

3. Such ultra vires conduct by the Plaintiff and state court has resulted in a violation of Denny C. Cormier's Georgia Constitution civil rights that if permitted will cause irreparable harm, for which this writ is the only remedy at law and for which this writ is proper.

WHEREFORE, for the above reasons, the Defendant petitions this Court to:

1. Issue a Writ of Mandamus to the Honorable Frank Horkan and the Superior Court of Colquitt County, to immediately quash, rescind and vacate all ultra vires orders between the period of May 26, 2005 and July 11, 2005, including Orders dated June 14, 2005 and July 7, 2005, during which time the instant case had been removed to Federal District Court, Case Number 6:06-CV-26.
2. Enter a change of venue as the Defendant has a well-founded good faith belief that he cannot receive fair hearings and proceeding in this county venue.
3. Order a stay of all proceedings for the instant case until a decision has been rendered on the aforementioned Writ of Mandamus herein.

Respectfully submitted,

DENNY C. CORMIER, pro se
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St. Simons Island, GA 31522
Telephone: 270-352-4200
Email: doctorcormier@aol.com

DATED this 25th day of July, 2005.

MEMORANDUM OF LAW

Introduction

That a court operate solely within its statutory jurisdiction is one of the most fundamental premises of our judicial system. See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943) (noting that traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction*).

If Denny Cormier cannot petition for mandamus, he "has no other avenue of relief; [he] will be prejudiced in a way not correctable on appeal since [he] will have been forced to endure proceedings in a court that lacks jurisdiction. *Seedman v. United States Dist. Court, 837 F.2d 413, 414 (9th Cir. 1988) (per curiam)

28 U.S.C. 1446

28 U.S.C 1446 (d) unambiguously states this court was divested of all jurisdiction after a proper removal was effected. 28 U.S.C. 1446 (d),

"Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and **the State court shall proceed no further unless and until the case is remanded.**"

Effect of Removal on State Jurisdiction

28 U.S.C. 1446 governs the procedure for Removal of a state action to a federal court. The facts in the above motion demonstrate full compliance with the federal statute.

A defendant seeking removal must "file in the district court of the United States for the district and division within which such action is pending a notice of removal...."

28 U.S.C. § 1446(a) (2004). In a civil action, the filing of the notice "shall effect the

removal and the State court shall proceed no further unless and until the case is remanded.” Id. at § 1446(d). In fact, a state court has a "duty ... to proceed no further in the cause.” Steamship Co. v. Tugman, 106 U.S. 118, 122 (1882); Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 842 (1st Cir. 1988).

Since 1882, courts have consistently held that upon the filing of the petition for removal, the jurisdiction of the state court absolutely ceases, and that of the federal court immediately attaches. Steamship, 106 U.S., at 122-23. Accordingly, upon the filing of the notice of removal, unless and until remand, all further proceedings in state court are void *ab initio* because they are in fact *coram non judice*. Id.; see Hyde Park Partners, 839 F.2d, at 842 (hearing and temporary restraining order issued by state court void *ab initio* where entered following removal to federal court); Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875, 880 (1st Cir. 1983) (citing E.D. Systems Corp. v. Southwestern Bell Telephone, 674 F.2d 453, 458 (5th Cir. 1982) and Arango v. Guzman Travel Advisers Corp., 621 F.2d 1371, 1374, 1375 (5th Cir. 1980) for the proposition that post-removal Civil No. 04-2288(DRD) 3 proceedings in state court are void *ab initio* once the case is removed); Sweeney v. Resolution Trust Corp., 16 F.3d 1, 4 (1st Cir. 1994) (“purported judgment” entered by state court void *ab initio* where entered following removal to federal court); Hernandez-Lopez v. Com. of Puerto Rico, 30 F.Supp.2d 205, 211 (D. P.R. 1998); accord In re Diet Drugs, 282 F.3d 220, 231-232 (3d Cir. 2002); State of South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971); Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir. 1957); Ward v. Resolution Trust Corp., 972 F.2d 196, 198 (8th Cir. 1992); California ex rel. Sacramento Metropolitan Air Quality Management Dist., v. United States, 215 F.3d 1005, 1011 (9th Cir. 2000).

The removal of a case from state court to federal court effects a transfer of the entire action, including all the parties and all the claims, to the federal court. City of Gainesville v. Brown-Crummer Investment Co., 277 U.S. 54, 60 (1928); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1376 (5th Cir. 1980); Murphy v. Kodz, 351 F.2d 163, 167 (9th Cir. 1965); Hartlein v. Illinois Power Co., 601 N.E.2d 720, 726 (Ill. 1992). A defendant, upon filing a notice of removal, “shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk” of the state court, which effects the removal. 28 U.S.C. § 1446(d). At that point, “the [s]tate court shall proceed no further unless and until the case is remanded.” *Id.*

“After compliance with the removal statute[,] the jurisdiction of the [s]tate court is suspended until there has been a remand.” Levine v. Lacy, 204 Va. 297, 300, 130 S.E.2d 443, 445 (1963); accord Yarnevic v. Brink’s, Inc., 102 F.3d 753, 754 (4th Cir. 1996); Maseda v. Honda Motor Co., 861 F.2d 1248, 1254 (11th Cir. 1988); Allman v. Hanley, 302 F.2d 559, 562 (5th Cir. 1962). “Any subsequent proceedings in state court on the case are void ab initio.” Maseda, 861 F.2d at 1254-55 (citing Steamship Co. v. Tugman, 106 U.S. 118, 122 (1882)); accord South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971). A later determination that the removal petition was not proper does not change that outcome. See Maseda, 861 F.2d at 1254 n.11; Moore, 447 F.2d at 1073; United States v. Silberglitt, 441 F.2d 225, 227 (2d Cir. 1971); Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir. 1957).

A proper filing of a notice of removal immediately strips the state court of its jurisdiction. 28 U.S.C. § 1446(d), State of South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971).

The Ultra Vires Conduct

An official act does not become ultra vires if the officer was statutorily empowered to act but may have acted erroneously. Wyoming v. United States, 279 F.3d 1214, 1229-30 (10th Cir. 2002). Here the Plaintiff and state court were not statutorily empowered to act. On the contrary, they were explicitly prohibited from acting pursuant to 28 U. S.C. 1446 (d)

The conduct of the Plaintiff and state court after proper removal on May 26, 2005 was ultra vires. 28 U.S.C. 1446 transferred all jurisdiction to the federal district court if proper notice of removal was performed. It was.

Even more egregious than the ultra vires conduct of the Superior Court County Court and judge was that they all were fully aware and cognizant of 28 U.S.C. 1446 as evidenced by the same Defendant having presented the same legal argument when the state case had been removed prior on June 22, 2004. (Attached Notice of Removal of June 22, 2004.). At that time, they followed 28 U.S.C. 1446 and proceeded no further until the case was remanded.

The ultra vires proceedings to be quashed and rescinded were ex parte the Defendant, Denny C. Cormier.

Writ of Mandamus

Authority

It is well-established that mandamus is appropriate to correct and vacate actions that are not authorized by law. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); In re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997); In re Excel Corp., 106 F.3d 1197, 1200-01 (5th Cir.), cert. denied, 118 S. Ct. 159 (1997)

In this case, the Plaintiff and state court disregarded the plain language of 28 U.S.C. 1446. Mandamus thus is plainly an appropriate remedy. In re Burlington Northern, 822 F.2d 518 (5th Cir. 1987); In re M.P.W. Stone, 986 F.2d 898 (5th Cir. 1993).

This case presents precisely the sort of exceptional circumstances that warrant the exercise of this Court's mandamus jurisdiction.

Conclusion

“ [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949)

For the above stated reasons, a Writ of Mandamus to the Honorable Frank Horkan to immediately quash, rescind and vacate all orders and proceedings after the Notice of Removal of May 26, 2005 and prior to remand on July 11, 2005, must be granted.

Prayer for Relief

“...probably in the words of Chief Baron Gilbert, that, 'if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., Hab. Corp., B. 10.” Ex Parte Siebold, 100 U.S. 371 (1879)

WHEREFORE, for the above reasons, the Defendant petitions this Court to:

1. Issue a Writ of Mandamus to the Honorable Frank Horkan and the Superior Court of Colquitt County, to immediately quash, rescind and vacate all ultra vires orders between the period of May 26, 2005 and July 11, 2005, including Orders dated June 14, 2005 and July 7, 2005, during which time the instant case had been removed to Federal District Court, Case Number 6:06-CV-26.
2. Enter a change of venue as the Defendant has a well-founded good faith belief that he cannot receive fair hearings and proceedings in this county venue.
3. Order a stay of all proceedings for the instant case until a decision has been rendered on the aforementioned Writ of Mandamus.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served via U.S. mail on this 25th day of July, 2005 to:

Clerk of the Superior Court of Colquitt County
9 South Main Street
Moultrie, GA 31768

Clerk of the Supreme Court of Georgia
244 Washington Street, Room 572
Atlanta, GA 30334

Honorable H. Arthur McLane, Chief Judge (N)
Lowndes County Courthouse
Post Office Box 1349
Valdosta, GA 31603-1349

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