

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
CIVIL CASE NO. 6:04-CV-30 (WLS)**

NANCY B. CORMIER
Plaintiff

vs.

DENNY C. CORMIER
Defendant, pro se

_____ /

MOTION TO RECONSIDER ORDER OF REMAND

Comes now the Defendant, DENNY CORMIER, pro se, prays this Court to grant relief in the interests of justice and pursuant to Federal Rules of Civil Procedure, Rule 60 (b), by reconsidering its Order of Remand. In support he offers:

1. This Court remanded this case to Colquitt County Superior Court for lack of subject matter jurisdiction because the contempt proceedings, challenged herein as a 42 USC 1983 claim, arose within the context of a divorce proceeding. It cited In re Matter of the Marriage of Smith, 549 F. Supp. 761(W.D. Texas 5th cir 1982) as supporting authority for the premise that the original state filing governs as to whether subject matter jurisdiction applies for 28 USC 1441 removal.
2. DENNY CORMIER asserts the case is inapposite, does not deal with the original jurisdiction claim pled here under 42 USC 1983, and where the removal of Smith requested the federal court to rule on the merits of a subsequent contempt proceeding in a divorce case, this removal does not request such action by this Court.
3. DENNY CORMIER asserts this case was removed when the contempt order in State court transformed this case from a divorce proceeding into a civil rights violation because of misapplication of O.C.G.A. §§ 19-6-1,3 against him by the Plaintiff and the Colquitt County Superior Court, thereby creating a link between the Plaintiff and the State court, acting under color of law in joint action, and in an intertwined relationship, with state encouragement to deprive Defendant of his civil rights under the 14th Amendment.
4. DENNY CORMIER asserts that the contempt order resulted from a voluntary action by the Plaintiff and the State court, acting under color of law, in its ministerial capacity, not as a neutral adjudicator, when it sought to enforce the constitutionally challenged statute.
5. Further, Smith is merely persuasive in effect, and in fact very low persuasive, as it is the ruling of a U.S. District Court not an appellate U.S. Circuit Court opinion. Furthermore,

the District Court looks only to a Texas appellate court for authority to rule as it did.

(Carlson v. Johnson, 327 S.W.2d 704, 707 (Tex.Civ.App.1959))

6. The Removal by DENNY CORMIER raises a valid 42 USC 1983 claim (expressed eight (8) times in the Notice of Removal) and Federal question subject to Liberty Interest and Privacy Provisions of the 14th Amendment to the U.S. Constitution, as well as Due Process, Equal Protection and Involuntary Servitude concerns with proper subject matter jurisdiction because the State court demanded alimony be paid to a deserting married spouse without a hearing in violation of OCGA 19-6-1(b), despite ample evidence (Attachment A: Letter of desertion, Contempt Order, Relevant Statute), under threat of fines and wrongful imprisonment, causing extreme financial hardship to Defendant.

7. This Court was noticed in a properly completed and submitted JS44 filing that DENNY CORMIER had filed a related independent action in this Court against NANCY CORMIER, Georgia Department and Board of Human Resources, Colquitt County Superior Court (Case No. 6-04-CV-19, The Honorable Hugh Lawson) challenging the constitutionality of the Georgia alimony statutes. The Honorable Hugh Lawson found valid subject matter jurisdiction for claims similar to those raised here. He applied a Younger abstention to the state court unaware no state court case existed because it had been removed.

8. The failure of this District Court's administrative procedures to communicate the existence of these two cases to the respective Judges should not act to penalize and deny DENNY CORMIER his right to have his federal claims heard here particularly when DENNY CORMIER acted in good faith and noticed this Court of the related cases in the JS44 of this case.

9. To Remand this case to the Colquitt County Superior Court creates for all parties an impermissible conflict of interest having been adversaries to DENNY CORMIER over the constitutionality of the Georgia Alimony Statutes. Further, DENNY CORMIER is prejudiced by remand to the Colquitt County Superior Court.

10. The Court can fulfil its duty to the parties and its duty of comity by partially remanding the case for the State court to grant a divorce decree and retaining jurisdiction to adjudicate the claims concerning the constitutionality of the Georgia alimony statutes.

11. Finally, this Court should recognize that, in Georgia, the link between divorce laws and alimony have long since been severed with the abrogation of the Doctrine of Necessaries and the demise of Coverture as a consequence of repeal by the Georgia Legislature.

WHEREFORE the Plaintiff requests this Court reconsider its Order of Remand and instead deny Plaintiff's Motion to Remand. In the alternative to only grant a partial remand

in this case for the State court, to permit granting the parties a divorce while this Court makes a declaratory judgment on whether the Georgia alimony statutes impermissibly infringe the 14th Amendment substantive Due Process clause.

MEMORANDUM OF LAW ON MOTION TO RECONSIDER ORDER OF REMAND

Standard of Reconsideration

Reconsideration is allowed under Federal Rules of Civil Procedure, Rule 60(b). Particularly, Subpart (6) “confers broad discretion on the trial court to grant relief when appropriate to accomplish justice [and] it constitutes a grand reservoir of equitable power to do justice in a particular case.” Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986), cert. denied, 480 U.S. 908 (1987). Furthermore, “it is properly invoked where there are extraordinary circumstances, or where the judgment may work an extreme and undue hardship[.]” Id.; see also Virgin Atl. Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992).

In Re Matters...Smith

This court reads Smith incorrectly. Smith deals with removal jurisdiction under 28 USC §§ 1441 and 1442, not as was pled here under 42 USC 1983. Thereupon, this case transformed into a civil rights violation when the State court knowingly acted under color of law and ruled against its state law to grant alimony to a spouse who deserted.

Smith requested the federal court to re-examine and review the merits of the state court contempt proceeding. Here Defendant, DENNY CORMIER, asks a declaratory judgment of the validity of the statutes applied against him to deny him his Liberty Interest property and privacy rights — not the intrinsic merits of the contempt allegation. At issue in Smith were federal statutes that conflicted with the State court property distribution order predicated on a voluntary settlement agreement between the parties. At issue here are fundamental constitutional rights which conflict with a State statute that involuntarily denies DENNY CORMIER his constitutional rights.

Partial Remand is a Suitable Remedy

Wisconsin Dept. of Corrections v. Schacht, 97 S. Ct. 461 (1998), rejects the argument that if subject matter jurisdiction is lacking over one claim in a multi-claim case, the entire case must be remanded under § 1447(c). This court can do proper comity by remanding the claim for divorce between the parties to the State court and retaining jurisdiction to rule on the constitutionality of the Georgia alimony statutes.

Severing claims to retain jurisdiction is appropriate. Where federal and state law claims are joined, the court has the power to retain the federal claims and to remand the state law claims, in effect severing the action. Emrich v. Touche Ross & Co., 846 F.2d. 1190 (9th Cir. 1988). In addition, where removal was based on a federal question, and the federal claim has been eliminated, the court may either retain, remand or dismiss supplemental state claims. Taylor v. First of America Bank-Wayne, 973 F.2d. 1284, 1287 (6th Cir. 1992).

Conclusion

This case long since ceased to be a family law dissolution of marriage proceeding. It was transformed into a civil rights violation action where a declaratory judgment challenge to the Georgia alimony statutes is proper and necessary. The case law the order relied upon is inapposite. A defect in this Court's administrative procedure to communicate related cases should not penalize the Defendant. The Defendant should not be sent back to the State court that is his adversary in a lawsuit over the same constitutional challenge to the statute it is seeking to apply and enforce against him.

Prayer for Relief

WHEREFORE the Defendant prays this Court deny Plaintiff's Motion to Remand, recognize it has subject matter jurisdiction on the 42 USC 1983 claim, and grant the declaratory judgment relief requested; further, Defendant prays this Court grant a partial remand to State court to grant the parties a divorce decree, and permit the parties to put on evidence to substantiate the original jurisdiction 42 USC 1983 claims to grant the declaratory relief requested.

Respectfully Submitted,

Denny C. Cormier, pro se
1000 Mallory Street, # 38
St. Simons Island, Georgia, 31522
Telephone 912-634-8675
Fax: None
Email doctorcormier@aol.com

Date: November 22, 2004

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion has been served via U.S. mail to John J. Jones, Senior Assistant Attorney General, and Laura W. Hyman, Assistant Attorney General, Department of Law, 40 Capitol Square, S.W., Atlanta, Georgia 30334-1300, Clerk of the Superior Court of Colquitt County, 9 South Main Street, Moultrie, GA 31768 and to Dwight May, Esq., Attorney for Nancy B. Cormier, P.O. Box 1660, Moultrie, GA 31776, this 22nd day of November, 2004.

Respectfully Submitted,

Denny C. Cormier, pro se
1000 Mallory Street, # 38
St. Simons Island, Georgia, 31522
Telephone 912-634-8675
Fax: None
Email doctorcormier@aol.com

DENNY -

8/21/03

I JUST NEEDED TO GET AWAY FOR A WHILE TO GIVE BOTH OF US A CHANCE TO THINK THINGS OVER BY OURSELVES. YOU HAVE THIS GREAT NEW OPPORTUNITY NOW AND THIS TIME I THINK WE SHOULD CONSIDER FACTORING IN WHAT WE BOTH WANT FOR THE FUTURE INSTEAD OF JUST BEING ONE-SIDED. I'M OK AND I'LL BE IN TOUCH WITH YOU SOON.

NANCY

P.S. ALL THE FILES YOU'LL NEED FOR THE HOUSEHOLD EXPENSES ARE IN THE PLASTIC BOX ON THE SOFA... KEYS TO THE STORAGES ALSO.

FILED - CLERK OF SUPERIOR COURT
COLQUITT COUNTY, GA

2004 MAY 26 PM 3:31

CAROLYN M. BEAZEL, CLERK

IN THE SUPERIOR COURT OF COLQUITT COUNTY
STATE OF GEORGIA

NANCY B. CORMIER	:	CIVIL ACTION FILE NO.
PLAINTIFF	:	03-CVD-2211
VS.	:	
DENNY C. CORMIER, M.D.	:	<u>ORDER ON</u>
DEFENDANT	:	<u>MOTION FOR CONTEMPT</u>

The plaintiff's motion for contempt against the defendant having come before the court for hearing on the 25th day of May, 2004, and the Court being fully advised in the premises; it is, therefore,

CONSIDERED, ORDERED AND ADJUDGED as follows:

1. The defendant, DENNY C. CORMIER, is in arrears in payment of temporary alimony to the plaintiff, NANCY B. CORMIER, as set forth in the Temporary Order entered in the above-stated action in the sum of \$8,000.00. The defendant has shown no legal or justifiable reason or excuse for his failure to pay temporary alimony, as aforesaid, and such failure has been willful and intentional and the defendant is in willful contempt of this Court's Temporary Order.
2. The Sheriff of Colquitt County, Georgia, is directed to immediately incarcerate the defendant, DENNY C. CORMIER, in the common jail of Colquitt County, Georgia, and retain him there until further order of the Court; provided, however, that the defendant may purge himself of contempt, as follows:

Pg. 1 of 3 pgs.

a. By paying \$2,000.00 of the alimony arrearage to the plaintiff on or before 5:00 o'clock p.m. on Friday, May 28, 2004;

b. By paying plaintiff's attorney's fees incurred in this matter in the sum of \$750.00 on or before 5:00 o'clock p.m. on Friday, May 28, 2004;

c. By paying the balance of the alimony arrearage in the sum of \$6,000.00 to plaintiff on or before 9:30 o'clock a.m. on Tuesday, June 22, 2004;


d. By making all of the aforesaid payments to the Clerk of Colquitt County Superior Court, together with the statutory handling fee thereon;

e. In the event the defendant fails to make any payment as set forth herein, the Clerk of Colquitt County Superior Court is directed to make affidavit of such failure to the Sheriff of Colquitt County, and the Sheriff is directed to immediately incarcerate the defendant in the common jail of Colquitt County, Georgia, and retain him there until further order of this Court. In the event of such occurrence, the defendant has provided the following addresses as his home and business addresses to enable the proper authorities to locate him, to-wit: 1000 Mallery St., St. Simons Island, GA 31522; 116 Smith St., Tennille, GA 31089; and Johnson County Center Community Health, 609 W. Elm St., Apt. B, Wrightsville, GA 31096.


3. The defendant shall, on or before June 11, 2004, ship Pg. 2 of 3 pgs; Colquitt CAF#03-CVD-2211; Order.

to the plaintiff via a reputable moving company, i.e. Mayflower, etc., all personal property awarded to her in the Temporary Order entered in this action. The defendant shall prepay all shipping fees and the plaintiff shall reimburse the defendant one-half of said fees upon her receipt of the property and a copy of the shipping invoice reflecting the defendant's prepayment of same. The defendant shall request the shipping company to make an inventory of all property received for shipping, with a copy of said inventory to be provided to the plaintiff.


SO ORDERED, this 26th day of May, 2004, Nunc Pro Tunc the 25th day of May, 2004.


 JUDGE, SUPERIOR COURTS
 SOUTHERN JUDICIAL CIRCUIT

Prepared By:


 DWIGHT H. MAY
 GA BAR NO. 478950
 ATTORNEY FOR PLAINTIFF
 P.O. Box 1660
 Moultrie, GA 31776
 229/985-1724

Approved As To Form & Content:
 By Dwight H.
 May w/exp.
 Permission


 GUYTON O. TERRY, III
 GA BAR NO. 702555
 ATTORNEY FOR DEFENDANT
 P.O. Box 1185
 Valdosta, GA 31603
 229/247-1133

Pg. 3 of 3 pgs; Colquitt CAF#03-CVD-2211; Order.

Relevant Georgia Statutes

19-6-1(b): A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by that party's adultery or desertion. In all cases in which alimony is sought, the court shall receive evidence of the factual cause of the separation even though one or both of the parties may also seek a divorce, regardless of the grounds upon which a divorce is sought or granted by the court.

19-6-3(d): On application, an order allowing temporary alimony shall be subject to revision by the court at any time and may be enforced either by writ of fieri facias or by attachment for contempt.