

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOSEPH H. SCOTT, ESQUIRE, :
 Plaintiff, :
 :
 v. : CA 04-301L
 :
VINCENT P. MURRAY :
 Defendant. :

REPORT AND RECOMMENDATION

This case arises out of Plaintiff's representation of Defendant in a criminal matter in the state courts in 1995 and 1996. Plaintiff Joseph H. Scott, Esquire ("Plaintiff"), filed, in state court, "an action to recover costs incurred for goods and services provided by the Plaintiff to the Defendant." Complaint at 1. Defendant Vincent P. Murray ("Defendant") removed the action to this court, and the matter came before this Magistrate Judge on August 23, 2004, for a pretrial scheduling conference pursuant to Fed. R. Civ. P. 16.

At that time, the court expressed doubt as to whether subject matter jurisdiction existed and directed the parties to submit memoranda by September 13, 2004, addressing that issue. See Order for Memoranda re Jurisdiction dated August 23, 2004 ("8/23/04 Order"). Defendant's memorandum was received by the court on September 10, 2004. See memorandum entitled Subject Matter Jurisdiction ("Defendant's Mem."). To date, Plaintiff has not filed his memorandum. See Docket in Scott v. Murray, CA 04-301L.

After reviewing the papers filed in this matter and conducting independent research, the court has concluded that subject matter jurisdiction is lacking. Accordingly, I recommend that the action be remanded to state court. The court has determined that no hearing is necessary.

Facts and Travel

Plaintiff is a licensed, practicing attorney who resides in Rhode Island. See Complaint ¶ 1. Defendant is also a Rhode Island resident. See id. ¶ 2. According to Plaintiff's Complaint, on or about September 25, 1995, he was retained by Defendant to provide legal services in connection with a criminal matter. See id. ¶ 3. The Complaint recites that Plaintiff provided professional legal services to Defendant until December 2, 1996. See id. ¶ 4. Plaintiff states that this representation resulted in 119.4 billable hours, at the rate of \$115.00 per hour, and costs of \$132.00 for a total of \$13,863.00, of which Plaintiff paid the sum of \$5,260.50 on account. See id. ¶¶ 4-5. In Plaintiff's view, Defendant owes an outstanding balance of \$8,602.50 as of December 31, 1996, plus interest at the rate of 18 per cent per annum amounting to \$5,137.46 to March 31, 2000, for a total of \$13,739.96. See id. ¶ 6. Plaintiff alleges that Defendant has refused to pay the outstanding balance. See id. ¶7.

Plaintiff filed a Complaint in the Rhode Island Superior Court on or about April 4, 2000. On or about May 1, 2000, Defendant filed an Answer to Complaint and Counterclaim in Compliance with Rule 13(a). Plaintiff's Answer to Defendant's Counterclaim was filed on or about May 19, 2000. On or about July 20, 2004, Defendant removed the action to this court.

A pretrial conference pursuant to Fed. R. Civ. P. 16 was scheduled for August 23, 2004. See Notice and Order dated August 11, 2004. As noted above, at that conference the court expressed reservations as to whether subject matter jurisdiction existed and whether the action had been timely removed to this forum. Plaintiff indicated that he had no objection to the removal and that he was willing to proceed in this forum. The court subsequently concluded that it was unnecessary for the parties to

address the second question and directed the parties to submit memoranda by September 13, 2004, addressing the issue of subject matter jurisdiction. See 8/23/04 Order at 2. Defendant filed his memorandum on September 10, 2004. See Defendant's Mem. As of the date of this Report and Recommendation, Plaintiff had not filed his memorandum as directed. See Docket in Scott v. Murray, CA 04-301L.

Discussion

"[A] court has an obligation to inquire sua sponte¹ into its subject matter jurisdiction, and to proceed no further if such jurisdiction is wanting." White v. Gittens, 121 F.3d 803, 806 (1st Cir. 1997)(quoting In re Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988)); see also McCulloch v. Velez, 364 F.3d 1, 5 (1st Cir. 2004)("It is black-letter law that a federal court has an obligation to inquire sua sponte into its own subject matter jurisdiction.");² In re Sheridan, 362 F.3d 96, 100 (1st Cir. 2004)(noting that "the courts are duty-bound to inquire, *sua sponte*, even absent objection by any party," into the question of subject matter jurisdiction); Neal v. Wilson, 920 F.Supp. 976, 983 (E.D. Ark. 1996)("Any action taken by a federal court which lacks subject matter jurisdiction is a nullity

¹ Sua sponte means "[w]ithout prompting or suggestion; on its own motion" Black's Law Dictionary 1464 (8th ed. 2004).

² In McCulloch v. Velez, 364 F.3d 1 (1st Cir. 2004), the Court of Appeals for the First Circuit also noted that before a court can dismiss an action under Fed. R. Civ. P. 12(b)(1), "the party asserting the existence of subject matter jurisdiction must be given notice that the issue is in dispute and an adequate opportunity to ascertain and present relevant facts and arguments supporting his claim of jurisdiction," id. at 6. Here, the parties were given notice at the August 23, 2004, pretrial conference that the court had doubts as to its jurisdiction, and the parties were directed to submit memoranda addressing the issue of subject matter jurisdiction. See Order for Memoranda re Jurisdiction dated August 23, 2004 ("8/23/04 Order"). Defendant did so on September 10, 2004. See memorandum entitled Subject Matter Jurisdiction ("Defendant's Mem.").

....").

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441. **If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed.** See [28 U.S.C.] § 1447(c). For this case--as for many cases where there is no diversity of citizenship between the parties--the propriety of removal turns on whether the case falls within the original "federal question" jurisdiction of the United States district courts: "The district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1976 ed., Supp. V).

Franchise Tax Board of California v. Construction Laborers Vacation Trust for S. California, 463 U.S. 1, 7-8, 103 S.Ct. 2841, 2845, 77 L.Ed.2d 420 (1983)(footnote omitted)(emphasis added); see also Mills v. Harmon Law Offices, P.C., 344 F.3d 42, 45 (1st Cir. 2003)(quoting 28 U.S.C. § 1447(c)).

The party invoking federal jurisdiction carries the burden of proving its existence. See Coventry Sewage Assocs. v. Dworkin Realty Co., 71 F.3d 1, 4 (1st Cir. 1995); Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57, 60 (1st Cir. 1993); Gorman v. Abbott Labs., 629 F. Supp. 1196, 1203 (D.R.I. 1986). Since Defendant removed the instant case to this court, he has the burden of proving that jurisdiction exists. See Danca v. Private Health Care Sys., Inc., 185 F.3d 1, 4 (1st Cir. 1999).

It is clear in the instant action that there is no diversity of citizenship between Plaintiff and Defendant, who are both Rhode Island residents. See Complaint ¶¶ 1-2; see also 28 U.S.C.

§ 1332(a)(1).³ Thus, subject matter is present only if the case falls within the federal question jurisdiction of this court. See Franchise Tax Board, 431 U.S. at 8, 103 S.Ct. at 2845.

Defendant argues, in both the Notice of Removal and his memorandum, that federal question jurisdiction exists. See Notice of Removal at 4; Defendant's Mem. at 2, 6.⁴ Specifically, he contends that Plaintiff's ineffectiveness, negligence, and failure to disclose a conflict of interest resulted in violations of Plaintiff's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. See Notice of Removal at 1-4; Defendant's Mem. at 1-5.⁵

It is "settled law that a case may not be removed to federal court on the basis of a federal defense"⁶ ... even if the defense is anticipated in the plaintiff's complaint, and even if both

³ Section 1332 provides, in relevant part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between--

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state ... as plaintiff and citizens of a State or of different states.

20 U.S.C. 1332(a).

⁴ Pagination by the court.

⁵ Defendant also asserts that Plaintiff is a state actor, thereby bringing the action within the parameters of 42 U.S.C. § 1983. See Notice of Removal at 3; Defendant's Mem. at 2-3.

⁶ The court expresses no opinion as to whether or not Defendant has a meritorious federal defense. Section 1447(c) "unambiguously precludes federal courts from reaching the merits of a removed case when it lacks subject matter jurisdiction over the dispute." Mills v. Harmon Law Offices, P.C., 344 F.3d 42, 45 (1st Cir. 2003)(citing cases).

parties admit that the defense is the only question truly at issue in the case." Franchise Tax Board, 463 U.S. at 14, 103 S.Ct. at 2848. This is known as the "well-pleaded complaint rule," id. at 9, 13, 103 S.Ct. at 2846, 2848, and it bars removal of this action to federal court.

[U]nder the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case "arises under" federal law. "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

Id. at 10-11, 103 S.Ct. at 2847 (quoting Gully v. First National Bank, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936)) (second alteration in original)(footnote omitted); see also Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908)("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.").

There is nothing on the face of Plaintiff's Complaint which would show that the action "arises under" the U.S. Constitution or federal law. On the contrary, Plaintiff states that "[t]his is an action to recover costs incurred for goods and services provided by the Plaintiff to the Defendant." Complaint at 1. Plaintiff then identifies himself and Defendant, see id. ¶¶ 1-2; provides background regarding the dates and circumstances of his representation of Defendant, see id. ¶¶ 3-4; lists the number of billable hours, the hourly rate, the costs, the total amount due, and the sum paid by Defendant to date, see id. ¶¶ 4-6; asserts that "Defendant has refused and not paid the outstanding balance due Plaintiff," id. ¶ 7; and demands judgment against Defendant in the amount of \$13,739.96 plus costs, see id. at 2.

Congress has given the lower federal courts jurisdiction

to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the Plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

Franchise Tax Board, 463 U.S. at 27-28, 103 S.Ct. at 2856.

Plaintiff's Complaint in the instant action does neither. Thus, subject matter jurisdiction is lacking, and Defendant may not remove the case to this court. The case should be remanded to state court, and I so recommend.

Conclusion

For the reasons stated above, I recommend that this matter be remanded to the state court because this court lacks subject matter jurisdiction. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
October 28, 2004