

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-2844

Office of Lawyers Professional Responsibility

Appellee

v.

Jill Clark

Appellant

Jill Clark, et al.

v. OLPR, et al.

Appeal From U.S. District Court for the District of Minnesota – Minneapolis
(0:12-cv-01373-JRT)

MEMORANDUM IN SUPPORT OF THE
OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY'S
MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

The Office of Lawyers Professional Responsibility (appellee) brings this motion pursuant to Rule 47A(b), Federal Rules of Appellate Procedure for the Eight Circuit (FRAP) for summary disposition of Jill Clark's (appellant's) appeal of the district court's order remanding her attorney disciplinary case to state court. This Court lacks jurisdiction to hear the remand appeal and the appeal should be summarily dismissed.

BACKGROUND

The procedural history of this matter is set out in the district court's August 2, 2012, order (Document 18). As set out in that order, on February 10, 2012, the Director of the Office of Lawyers Professional Responsibility (OLPR), filed a petition for disciplinary action against appellant. On March 2, 2012, appellant filed an answer to the petition. The Minnesota Supreme Court referred the petition to the Honorable Gerald J. Seibel, District Court Judge for the Eighth District of the State of Minnesota. On June 8, 2012, appellant filed a notice of removal with the Federal District Court. The district court remanded the case to the Minnesota Supreme Court on June 15, 2012. On June 27, 2012, Referee Seibel recommended that appellant be immediately transferred to disability inactive status pursuant to the Minnesota Rules on Lawyers Professional Responsibility 28(c) due to appellant's assertion that she possessed a disability and was unable to assist in her defense.

On July 27, 2012, appellant filed for re-removal with the district court. On August 2, 2012, the district court issued its order. The court provided that: 1) the matter was remanded to the Minnesota Supreme Court and 2) Jill Clark, Jill Clark, LLC, and Jill Clark P.A., were enjoined from removing the state attorney disciplinary proceedings to federal court and were prohibited from filing any new lawsuits or pleadings or other papers in the district court concerning the state attorney disciplinary proceeding against Jill Clark without obtaining prior written approval from a United States District Court Judge or a United States Magistrate Judge. Appellant

subsequently filed notice of appeal with the district court and on August 7, 2012, the appeal was docketed by this Court.

ARGUMENT

“By statutory mandate, ‘an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.’” *Bauer v. Transitional School District of the City of St. Louis et al.*, 255 F.3d 478, 480 (8th Cir. 2001) (internal citations omitted) (citing 28 U.S.C. § 1447(d)). As the court in *Bauer* noted, “Congress has permitted only one exception to this rule: ‘an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.’” *Id.* at 481.

Appellant’s notice of appeal does not identify the basis for the appeal (Document 21). However, in her motion to the district court seeking, for the second time, to remove her attorney disciplinary matter to federal court, appellant cites to 28 U.S.C. § 1443 (Document 14, paragraph 25). Presumably, this is the basis for appellant’s appeal of the remand order because otherwise, the district court order on the remand is clearly not reviewable on appeal or otherwise.¹ 28 U.S.C. § 1443. It provides in part:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or all persons within the jurisdiction thereof.

¹ While this Court clearly lacks jurisdiction to hear an appeal of the order for remand, less clear is the question of whether jurisdiction is lacking concerning an appeal of the district court’s order enjoining Jill Clark, LLC, and Jill Clark P.A., from removing the state attorney disciplinary proceedings to federal court and from filing any new pleadings without obtaining prior written approval from district court. Accordingly, the OLPR’s motion for summary dismissal focuses on the appeal of the remand order. Nonetheless, this Court still could, pursuant to FRAP 47A(a), summarily dismiss the balance of the appeal if it found that it was frivolous and entirely without merit.

However, to the extent that appellant is attempting to appeal the remand of this matter pursuant to § 1443, the effort to remove must fail. Appellant's mere citation to § 1443 is not sufficient to establish jurisdiction by this Court. Appellant must be able to make a showing that § 1443 actually applies. If not, as other courts have recognized, appellant would be able to continue in her delay and interference with the state jurisdiction. "If a bald citation to § 1443 could support appellate jurisdiction then the removing party could readily delay remand and prolong interference with state jurisdiction that § 1447(d) clearly seeks to minimize." *Miller v. Lambeth*, 443 F.3d 757, 760 (10th Cir. 2006). This Court may, and should, look beyond the "bald citation" to 1443 contained in appellant's "notice of re-removal and counterclaim" (Document 14). A review of appellant's citation to § 1443, demonstrates that it is nothing more than a "bald citation."

Under 28 U.S.C. § 1443, appellant must show that she relies upon a law providing for equal civil rights stated in terms of racial equality. *Neal v. Wilson*, 112 F.3d 351, 355 (8th Cir. 1997). Appellant must show that she is denied or cannot enforce that right in state court. "Removal is warranted only if it can be predicated by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." *Id.* at 355 (citing *Georgia v. Rachel*, 384 U.S. 780, 800, 86 S.Ct. 1783, 1796 (1966)). Appellant has made no such showing and can make no showing that there is a state law preventing her from raising her federal claims in state court, nor has she shown the basis for an "equally firm prediction" that she will be unable to protect her federal rights in state court.

As the district court found when it remanded the matter to the Minnesota Supreme Court the first time, "the fact that Clark [appellant] has asserted federal rights in this proceeding does not grant this Court jurisdiction. To obtain the right to remove, Clark must demonstrate that there is a state law preventing her from raising federal claims in state court or a basis for an 'equally firm prediction' that she will be unable to

protect her federal rights in state court. The Court has reviewed all of the materials submitted by Clark, and finds that Clark has not shown any likelihood that she will be unable to raise her federal claims in state court. This Court therefore has no subject matter jurisdiction." (Document 10, internal citations omitted.)

It is indisputable that state courts have exclusive jurisdiction over the license held by lawyers admitted to practice law in those states. *In re Rhodes*, 370 F.2d 411, 413 (8th Cir. 1967); *In re Daly*, 189 N.W.2d 176, 179 (Minn. 1971). While appellant may assert defenses to the state disciplinary charges based on her federal rights, these affirmative defenses do not give her the right to remove. The district court has properly remanded appellant's attorney disciplinary matter to State court. Appellant has no basis to appeal that remand order and this Court should summarily dismiss any attempt at appeal.

CONCLUSION

The district court's order remanding appellant's attorney disciplinary case to State court is not reviewable on appeal or otherwise. Accordingly, the appeal is not within the Court's jurisdiction and this matter may be summarily dismissed.

Dated: August 20, 2012.

Attorney for Appellee
Office of Lawyers Professional Responsibility



MARTIN A. COLE
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY

Attorney No. 148416
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102-1218
(651) 296-3952