

IN THE SUPERIOR COURT OF COLQUITT COUNTY GEORGIA

NANCY B. CORMIER
Petitioner

Case Number 03-CVD-2211

v.

DENNY C. CORMIER
Respondent, *pro se*

RESPONDENT'S MOTION TO DISQUALIFY JUDGE

Comes now Respondent, DENNY C. CORMIER, *pro se*, to move this Court for an order disqualifying the Honorable Frank Horkan, presiding judge of the Superior Court of Colquitt County, from hearing the above mentioned cause on the grounds that his prejudice against the Respondent precludes the Respondent from obtaining a fair and impartial trial.

Pursuant to Rules 25.4-7, "Procedure upon a Motion for Disqualification", under the Section 25, Recusal, of the Uniform Rules for the Georgia Superior Courts, an affidavit of movant, factually establishing the prejudice alleged is attached, marked as Exhibit A and incorporated by reference. In support of this Motion, Respondent offers the following:

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 thereto:

- 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 Petitioner, and pursuant to Petitioner'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 Petitioner for attorney fees and no finding of ability to pay by the Respondent. 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 Petitioner and state court has resulted in a violation of Denny C. Cormier's Georgia Constitution civil rights, that if permitted will cause him irreparable harm, for which this Motion is the only remedy at law and for which this is proper under the Uniform Rules for the Georgia Superior Courts.
4. The Honorable Frank Horkan threatened Respondent in open court on March 8, 2005 that he would jail Respondent should he exercise his constitutional right of removal to Federal Court, whereupon Respondent exercised his right of removal and is therefore subject to immediate wrongful arrest and incarceration upon his appearance in this Court thereby prejudicing his case and denying him Due Process.
5. The Honorable Frank Horkan has been involved in a long-term business and law practice with counsel for the Petitioner without disclosure to the Respondent and therefore has a conflict of interest.
6. The Honorable Frank Horkan has awarded alimony to Petitioner, who is a deserting spouse, in violation of O.C.G.A 19-6-1(b), prohibiting alimony awards to a deserting spouse, despite a written statement by Petitioner to the effect that she was deserting Respondent.

7. The Honorable Frank Horkan was a named Respondent in a federal lawsuit against the Respondent. (Cormier v. Maria Green, Case No. 6:04-CV-19 (HL)).

WHEREFORE, for the above reasons, the Respondent hereby petitions this Court to:

1. Order that the Honorable Frank Horkan be disqualified as presiding judge over the above mentioned cause.
2. Enter a change of venue as the Respondent 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 Motion to Disqualify Judge.

Respectfully submitted,

DENNY C. CORMIER, pro se
1000 Mallery Street #38
St. Simons Island, GA 31522
Telephone: 270-352-4200
Email: doctorcormier@aol.com

DATED this 26th 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 disqualification of this Court's presiding judge, 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 Respondent or Respondents 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 Respondent 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 Respondent, 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 Petitioner 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 Petitioner 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 Respondent 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 Respondent, Denny C. Cormier.

Disqualification of Superior Court Judge

Authority

Pursuant to Rule 25, “Recusal”, under the Uniform Rules for the Georgia Superior Courts, is proper, and therefore the Honorable Frank Horkan must be disqualified as presiding judge for this case. In particular, his behavior throughout these proceedings warrants recusal in accordance with aforesaid Rules 25.4-7 as follows:

Rule 25.4. Procedure upon a motion for disqualification.

The motion shall be assigned for hearing to another judge, who shall be selected in the following manner:

(A) If within a single judge circuit, the district administrative judge shall select the judge;

(B) If within a two judge circuit, the other judge, unless disqualified, shall hear the motion;

(C) If within a multi judge circuit, composed of three (3) or more judges, selection shall be made by use of the circuits existing random, impartial case assignment method. If the circuit does not have random, impartial case assignment rules, then assignment shall be made as follows:

(1) The chief judge of the circuit shall select a judge within the circuit to hear the motion, unless the chief judge is the one against whom the motion is filed; or

(2) In the event the chief judge is the one against whom the motion is filed, the assignment shall be made by the judge of the circuit who is most senior in terms of service other than the chief judge and who is not also a judge against whom the motion is filed; or

(3) When the motion pertains to all active judges in the circuit, the district administrative judge shall select a judge outside the circuit to hear the motion.

(D) If the district administrative judge is the one against whom the motion is filed, the judge within the district senior in time of service (or next senior in time of service, if the administrative judge is the one senior in the time of service) shall serve in this selection process instead of the district administrative judge.

If the motion is sustained, the selection of another judge to hear the case shall follow the same procedure as outlined above.

Rule 25.5. Selection of judge.

In the instance of any hearing on a motion to recuse or disqualify a judge, the challenged judge shall neither select nor participate in the selection of the judge to hear the motion; if recused or disqualified, the recused or disqualified judge shall not select nor participate in the selection of the judge assigned to hear further proceedings in the involved action.

Rule 25.6. Findings and ruling.

The judge assigned may consider the motion solely upon the affidavits, but may, in the exercise of discretion, convene an evidentiary hearing. After consideration of the evidence, the judge assigned shall rule on the merits of the motion and shall make written findings and conclusions. If the motion is sustained, the selection of another judge to hear the case shall follow the same procedure as established in Rule 25.4 above. Any determination of disqualification shall not be competent evidence in any other case or proceedings.

Rule 25.7. Voluntary recusal.

If a judge, either on the motion of one of the parties or the judge's own motion, voluntarily disqualifies, another judge, selected by the procedure set forth in Rule 25.4 above, shall be assigned to hear the matter involved. A voluntary recusal shall not be construed as either an admission or denial to any allegations which have been set out in the motion.

This case presents precisely the sort of exceptional circumstances that warrant the exercise of this Court's disqualification of its presiding judge.

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, an order to immediately disqualify the Honorable Frank Horkan and quash all proceedings conducted by him after the Notice of Removal of May 26, 2005 and prior to Remand on July 11, 2005, must be granted. Further, it is proper for this Court to instruct the Petitioner and state court to proceed no further in *Cormier v Cormier*, Case Number 03-CVD-2211, until the disposition of the Honorable Frank Horkan as presiding judge has been decided.

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 Respondent hereby petitions this Court to:

1. Order that the Honorable Frank Horkan be disqualified as presiding judge over the above mentioned cause.
2. Enter a change of venue as the Respondent 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 Motion to Disqualify Judge.

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 26th 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

Dwight May, Esq.
PO Box 1660
Moultrie, GA 31776
Attorney for Nancy B. Cormier

Thurbert E. Baker, Attorney General
40 Capital Square SW
Atlanta, Georgia 30334

DENNY C. CORMIER, pro se

1000 Mallery Street #38
St. Simons Island, GA 31522
Telephone: 270-352-4200
Email: doctorcormier@aol.com