IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LINDA M. SMITH, et al., Plaintiffs, -v- ALLIED HOME MORTGAGE CAPITAL CORP., et al., Defendants.	CASE NO. 1:07 CV 3746 <u>ORDER GRANTING MOTION FOR REMAND</u>

UNITED STATES DISTRICT JUDGE LESLEY WELLS

Plaintiffs Linda and Larry Smith, husband and wife, initially filed this action in Lorain County Court of Common Pleas on 17 October 2007, Case No. 07 CV 153202, against defendants Allied Home Mortgage Capital Corporation, Allied Home Mortgage Credit Corporation, Allied Home Mortgage Corporation (collectively "Allied Home Mortgage") and Jimmy Condon. The defendants timely removed the case to this Court pursuant to 28 U.S.C. § 1446, predicating their notice of removal on the presumption of complete diversity of citizenship and damages exceeding $75,000, pursuant to 28 U.S.C. §§ 1332 & 1441(a). (Docket No. 1).

The plaintiffs timely filed a motion to remand the case to state court as lacking in original jurisdiction. (Docket No. 9). The defendants responded in opposition to the motion to remand (Docket No. 11), and the plaintiffs submitted a reply brief in support of their motion (Docket No. 12). For the reasons set forth below, this Court will grant the plaintiffs' motion for remand.

I. BACKGROUND

In October 2005, the Smiths refinanced the loan on their residence through mortgage loans from lenders Bank United, FSB and America's Wholesale Lender. Both loans were brokered by defendant Allied Home Mortgage. Defendant Jimmy Condon was an employee of Allied Home Mortgage and served as the loan officer for the Smiths' loan transactions. The plaintiffs' complaint alleges that the defendants received "kick backs" in the form of yield spread premium payments[1] from the Smiths' lenders for arranging the mortgage loans for less favorable terms than what the Smiths were otherwise eligible, and then failed to disclose the kick back payments to the Smiths. (Docket No. 1, Ex. A ¶ 3).

Based on these allegations, the complaint asserts five causes of action: (1) breach of fiduciary duty against Allied Home Mortgage for failure to disclose the yield spread premium payments from the lenders; (2) failure to disclose payments from the lenders in violation of O.R.C. § 1322.07 (B) and (C), against Allied Home Mortgage; (3) failure to provide mortgage loan origination disclosure statements in violation of O.R.C. § 1322.062, against Allied Home Mortgage; (4) breach of fiduciary duty and failure to provide mortgage loan origination disclosure statements in violation of O.R.C. § 1322.062, against Jimmy Condon; and (5) fraudulent inducement against Allied Home Mortgage and Jimmy Condon. Id. ¶¶ 69-104. The plaintiffs' first three claims are brought on behalf of themselves and all other members of a similarly situated class,

[1] A yield spread premium is a payment made by a lender to a mortgage broker. In this case, the plaintiffs' allege the yield spread premium was a bribe from the lenders to the broker to steer the borrowers into a higher-priced mortgage for which they were qualified.

although the plaintiffs have not yet moved for class certification. For each of the five claims, the plaintiffs seek compensatory damages, punitive damages, reasonable attorney fees, and court costs. Id. at ¶ 105.

II. LAW AND ANALYSIS

A defendant may remove a civil case over which the United States District Courts would have original jurisdiction. 28 U.S.C. § 1441(a). The removing party bears the burden of demonstrating that jurisdiction exists. Ahearn v. Charter Township of Bloomfield, 100 F.3d 451, 453-54 (6th Cir. 1996). If a federal court determines it would not have original subject matter jurisdiction over the case, it must remand to state court. See 28 U.S.C. § 1447. Courts should construe removal statutes strictly. Alexander v. Elec. Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994).

A federal district court has diversity jurisdiction over any civil action where the matter in controversy exceeds $75,000, exclusive of interests and costs, and is between citizens of different states. 28 U.S.C. § 1332(a). "[T]he amount in controversy should be determined from the perspective of the plaintiff, with a focus on the economic value of the rights he seeks to protect." Woodmen of the World/Omaha Woodmen Life Ins. Soc. v. Scarbro, 129 Fed.Appx. 194, 195 (6th Cir. 2005)(quoting Buckeye Recyclers v. CHEP USA, 228 F.Supp.2d 818, 821 (S.D.Ohio 2002), internal quotation marks omitted). The amount in controversy is gauged "from the vantage point of the time of removal." Everett v. Verizon Wireless, Inc., 460 F.3d 818, 822 (6th Cir. 2006). When a plaintiff alleges a specific amount of damages in the complaint, that amount controls unless it appears to a legal certainty that the plaintiff in good faith cannot claim the jurisdictional

amount. Klepper v. First Amer. Bank, 916 F.2d 337, 340 (6th Cir.1990) (citing St. Paul Mercury Indem. Co., 303 U.S. at 288-289). If, however, the plaintiff seeks to recover some unspecified amount of damages, as in the case before this Court, the defendant may still remove to federal court by proving by a preponderance of the evidence that the plaintiffs' claims meet the amount in controversy requirement. Gafford v. Gen. Elec. Co., 997 F.2d 150, 158 (6th Cir.1993); see Everett, 460 F.3d at 822 (explaining that the defendant's burden is satisfied when it proves the amount in controversy "more likely than not" exceeds $75,000). The defendants' burden of proof is a relatively light burden which does not "require the defendant to research, state and prove the plaintiff's claim for damages." Hayes v. Equitable Energy Resources Co., 266 F.3d 560, 572 (6th Cir. 2001).

Punitive damages are included in the amount in controversy calculations, unless it appears to a legal certainty that such damages cannot be recovered. Smith v. Nationwide Property and Cas. Ins. Co., 505 F.3d 401, 408 (6th Cir. 2007). Attorney fees are generally not considered in determining the amount in controversy for purposes of diversity jurisdiction, unless, as in this case, the fees are expressly provided for by contract or statute. Williamson v. Aetna Life Ins. Co., 481 F.3d 369, 376 (6th Cir. 2007).

In this case, the parties agree that the plaintiffs are diverse from each defendant, thereby satisfying the diverse citizenship requirement of §1332(a), but they dispute whether the amount in controversy exceeds the $75,000 requirement.

In their notice of removal, the defendants assert that the value of the plaintiffs' claims will more than likely exceed the $75,000 requirement.[2] (Docket No. 1). To satisfy this threshold, the defendants first value the plaintiffs' claims for reasonable attorney fees at $105,000, predicting that each of the plaintiffs' three attorneys will work 175 hours on the case at a rate of $200 per hour. Id. ¶ 41. The removal notice further estimates the plaintiffs' compensatory damages at $41,435 by valuing each of the plaintiffs' five claims at $8,287, an amount equal to the yield spread premiums and broker review fee paid to Allied Home Mortgage in connection with the Smiths' loan transactions.[3] (Docket No. 1 ¶¶ 43-44, Ex. D and E). The notice concludes that these calculations combined with the potential for punitive damages more than exceed $75,000.

In its motion to remand, the plaintiffs contend that the defendants failed to satisfy their burden of proof in demonstrating the amount in controversy exceeds $75,000, and further argue that (1) the obstacles created by Ohio law make an award of punitive damages and attorney fees unlikely; (2) the plaintiffs will not likely succeed in their plea for punitive damages because it is unlikely they will prevail in demonstrating

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[2] Since the value of the plaintiffs' claims is determined at the time of removal for purposes of establishing diversity jurisdiction and this case was not removed pursuant to 28 U.S.C. § 1332(d), the value of the claims of unnamed members of the putative class are not considered in determining whether the amount in controversy has been met. See Everett, 460 F.3d at 823.

[3] The plaintiffs entered into two mortgage loan agreements, brokered by Allied Home Mortgage. The first loan was made by Bank United, FSB in the amount of $208,473.26. (Docket No. 1 Ex. D). Bank United paid a yield spread premium to Allied Home Mortgage in the amount of $7,854.00 for brokering the loan, and the plaintiffs paid Allied Home Mortgage $195.00 for a broker review fee. Id. The second loan was made by America's Wholesale Lender in the amount of $23,800.00. (Docket No. 1 Ex. E). America's Wholesale Lender paid Allied Home Mortgage $238.00 in connection with this loan. Id. In estimating the compensatory damages for plaintiffs' first three claims, the defendants estimate the plaintiffs would be entitled to an amount equal to the fees paid to the broker by the lenders and the plaintiffs for each claim. (Docket No. 1 ¶ 43).

the defendants acted with malice; and (3) Ohio law caps punitive damages at two times the amount of compensatory damages. (Docket No. 10). In their reply brief, the plaintiffs also assert that the defendants over estimated the amount of compensatory damages they may be entitled to. (Docket No. 12).

To determine whether the amount in controversy in this matter exceeds $75,000, the Court considers the value of the plaintiffs' claims from the perspective of the plaintiffs at the time of removal. See Woodmen of the World, 129 Fed. Appx. at 195. The Smiths' first four causes of action seek to recover the actual and punitive damages arising from the fees paid directly to the defendants by the lenders and the plaintiffs, as well as damages resulting from the defendants' failure to disclose the loan origination documentation. (See Docket No. 1 Ex. A ¶¶ 105-106). Ohio law codifies the compensatory damages for these claims to be no less than "all compensation paid directly and indirectly to a mortgage broker from any source, plus reasonable attorney's fees and court costs." O.R.C. § 1322.11(A)(2). Based on this statutory remedy, the compensatory damages for counts 1 – 4 can be valued at $8,287 collectively, the total amount of fees paid to the defendants from the lenders and the plaintiffs (see footnote 3). As the punitive damages for the plaintiffs' first four claims could be capped at two times the amount of the compensatory damages pursuant to §§ 1322.11(B) and 2315.21(D)(2)(a),[4] punitive damages in this case could amount to $16,574. Thus, the compensatory and punitive damages for counts 1 - 4 are valued at $24,861, leaving a

[4] The plaintiffs' punitive damages are capped under §2315(D)(2)(a) if such causes of action are construed as tort claims.

$50,139 gap to be filled by damages for the fraudulent inducement claim and reasonable attorney fees in order to reach the $75,000 threshold.

In their notice of removal, the defendants estimate the value of the plaintiffs' fifth claim for relief to be "similar" to that of the first three claims, but offer no reason justifying this estimation. (See Docket No. 1 ¶ 44). The defendants further estimate the plaintiffs' reasonable attorney fees to amount to $105,000, reasoning that each of the plaintiffs' three attorneys will work 175 hours on this case at a rate of $200 per hour. Id. ¶ 41. This calculation is based on the defendants' prediction as to the amount of time the plaintiffs' counsel will spend researching voluminous records in discovery and conducting depositions of party and expert witnesses, as well as time spent on other litigation activities such as planning conferences, case management conferences, settlement conferences, and motion practice. Id. at ¶ 40.

The defendants' estimations as to the damages for the claim of fraudulent inducement and the monetary value of the plaintiffs' attorney fees are far too speculative for the Court to add more than $50,000 to the amount in controversy for the sole purpose of exercising jurisdiction over this action. Under Ohio law, the damages for the plaintiffs' fraudulent inducement claim would be valued at an amount equal to the injury arising from the fraud. See Medical Billing, Inc. v. Medical Management Sciences, Inc., 212 F.3d 332, 338 (6th Cir. 2000). The defendants offer no analysis as to the potential injury the plaintiffs may have suffered should they prevail on their fraud claim, but instead assume the value of the claim will equal the value of the other causes of action with no explanation as to why. Moreover, with respect to estimating the

amount of reasonable attorney fees, the defendants' abstract description as to how many hours the plaintiffs' attorneys are likely to spend on this case is nothing more than a laundry list of ordinary litigation activities. An estimation of $105,000 in attorney fees to recover claims worth approximately $25,000 appears, without further explanation, excessive. Neither the defendants nor this Court can surmise at this early stage in the litigation how many hours each of plaintiffs' attorney will need to spend to prosecute the plaintiffs' claims.

Federal subject matter jurisdiction is a limited jurisdiction. Gafford, 997 F.2d at 159. Congress intentionally limited access to federal courts in diversity cases through the amount-in-controversy requirement. Id. With respect to cases instituted in state court, the U.S. Supreme Court wrote –

> There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end. For if such were the purpose suit would not have been instituted in the first instance in the state but in the federal court.

St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290-91 (1938). In cases where the plaintiff seeks to recover an unspecified amount of damages that is not self-evidently greater than the $75,000 threshold, the defendants bear the burden of proof in demonstrating that the plaintiffs' claims "more likely than not" satisfy the federal amount in controversy requirement. Gafford, 997 F.2d at 158. Given the pure speculation as to the value attached to the plaintiffs' fifth cause of action and estimated attorney fees, the defendants have failed to meet their burden by a preponderance of the evidence.

III. CONCLUSION

For the reasons set forth above, the plaintiffs' motion to remand is granted and this action is returned to the Lorain County Court of Common Pleas. The Clerk of Courts shall mail a certified copy of this order to the Clerk of the Lorain County Court of Common Pleas, in accordance with 28 U.S.C. § 1447(c).

IT IS SO ORDERED.

/s/ Lesley Wells
UNITED STATES DISTRICT JUDGE

Date: 29 February 2008

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LINDA M. SMITH, et al.,	CASE NO. 1:07 CV 3746
Plaintiffs,	
-v-	ORDER OF REMAND
ALLIED HOME MORTGAGE CAPITAL CORP., et al.,	
Defendants.	

UNITED STATES DISTRICT JUDGE LESLEY WELLS

This Court, having filed its order granting the plaintiffs' motion to remand to state court, hereby remands this case to the Ohio Court of Common Pleas for Lorain County, the state court from which it was removed, for further action on the plaintiffs' complaint.

A certified copy of this Order of Remand shall be mailed by the Clerk of the United States District Court for the Northern District of Ohio to the Clerk of the Ohio Court of Common Pleas for Lorain County.

IT IS SO ORDERED.

/s/ Lesley Wells
UNITED STATES DISTRICT JUDGE

Date: 29 February 2008

United States District Court
Northern District of Ohio
Office of the Clerk
2-161 Carl B. Stokes United States Court House
801 West Superior Avenue
Cleveland, Ohio 44113-1830

Geri M. Smith
Clerk of Court

(216) 357-7000

DATE: February 29, 2008

ADDRESS: Lorain County Court of Common Pleas
Common Pleas Courthouse
2nd Street
Elyria, Ohio 44035

SUBJECT: Remand to Lorain County Court of Common Pleas

USDC Case No.: 1:07cv3746

CCCP Case No.: 07cv153202

CASE NAME: Linda M. Smith, et. al. v. Allied Home Mortgage Capital Corp, et. al.

FILED
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CLERK, U.S. DISTRICT COURT
N.D. OHIO
CLEVELAND

Dear Clerk:

On February 29, 2008, the Honorable Lesley Wells, United States District Judge, entered an Order remanding the above-mentioned case to your Court. I am enclosing certified copies of our docket sheet and the order of remand. Other documents in this case can be accessed electronically on the internet at:

http://ecf.ohnd.uscourts.gov

Please acknowledge receipt of this remand by returning a time-stamped copy of this letter in the enclosed envelope. Thank you.

Sincerely,

Geri M. Smith, Clerk

By: Barbara L. Bir
Deputy Clerk