

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Town of Stetson,)
)
 Plaintiff)
)
 v.) Civil No. 00-210-B
)
 James Marcello,)
)
 Defendant)

ORDER OF REMAND

This matter is before the Court on the Notice of Removal filed by Defendant James Marcello. The case originated in the Maine District Court, District Three, Division of Western Penobscot, Newport, Maine. Because this Court does not have jurisdiction of the subject matter of the original complaint, I will promptly remand the matter to the Newport District Court.

Factual Background

On May 4, 1998, the District Court entered judgment against the Defendant in this Land Use Action. The Defendant was ordered to pay a civil penalty of \$100.00, to pay attorney fees in the amount of \$1,000.00, and to discontinue the use of a structure in Stetson, Maine, which the Court found not to be in compliance with the Town of Stetson Building Code. The District Court's Order was affirmed by the Superior Court and ultimately by the Law Court. *See Town of Stetson v. Marcello*, Mem. 99-87 (July 1, 1999), *cert. denied*, 120 S. Ct. 356 (1999).

Alleging that the Defendant failed to comply with the original order, on July 20, 2000, the Town of Stetson filed a Motion for Contempt in the Newport District Court. Sometime prior to August 24, 2000, the Defendant was served with a contempt subpoena and on August 24 he filed a Motion to Quash the subpoena. On the same date, the Defendant filed a Motion for Sanctions. All three motions are now set for hearing in the Newport District Court on December 26, 2000 at 8:30 a.m.

Defendant also filed, on September 14, 2000, a Motion for Summary Judgment, a Notice of Removal to the Superior Court, and a Demand for Jury Trial. All three of those pleadings were denied by the District Court on October 5, 2000. On October 16, 2000, the Defendant filed a Notice of Removal to this Court.

Discussion

The Court is satisfied that it does not have subject matter jurisdiction over Stetson's action. It is the party seeking to invoke this Court's jurisdiction who bears the burden of pleading the facts essential to show jurisdiction is proper. *See McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 189 (1936). Where it is the defendant who seeks removal from the state court, jurisdictional uncertainties are resolved in favor of the plaintiff, whose right to choose a forum remains paramount. *See Burns v. Windsor Ins.*, 31 F.3d 1092, 1095 (11th Cir. 1994) (citations omitted). Although the Plaintiff in this action has not yet moved for remand pursuant to 28 U.S.C. § 1447(c) (Supp. 2000), when a notice of removal is defective for lack of subject matter jurisdiction, the Court may enter a remand order *sua sponte*. *See Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37, 40 (2nd Cir. 1991); *see also Modern Office Sys., Inc. v. Aim Caribbean Express, Inc.*, 802 F.

Supp. 617, 618 (D. P.R. 1992) ("Subject matter jurisdiction can be entertained at any time and it can be either raised by the Court sua sponte or by the parties to the proceedings.")

Removal is permitted only when the claim could have been brought originally in federal court. *See* 28 U.S.C. § 1441(a) (1994). Accordingly, we look first to the Plaintiff's Complaint to determine whether removal jurisdiction exists. Plaintiff's Complaint has not been included with the record filed on Removal, but apparently the original complaint was a Land Use Violation. There is no federal claim normally alleged in that sort of complaint nor is a Federal claim alleged in the Town's Motion for Contempt. *See* 28 U.S.C. § 1331 (1993). The pleadings establish that the Town of Stetson is a municipal corporation in the State of Maine and the Defendant a resident of the town. Thus, there is also no basis on which the Court could find diversity jurisdiction. *See* 28 U.S.C. § 1332 (1993 & Supp. 2000) (permitting jurisdiction over suits between citizens of different states only where the amount in controversy exceeds \$75,000).

The remaining question is whether Defendant has proved jurisdiction despite its patent absence from the state court pleadings. Defendant makes three claims in support of his Notice of Removal. He asserts that the District Court's denial of his jury demand is a denial of "civil rights," that prejudice or local influence permeates the case, and that the temper and character of the judge are flawed. In essence the Defendant wants to appeal the District Court's decision denying his jury trial demand and obtain from this Court injunctive relief against the continuing proceedings in State court. However, this Court is without power to review those decisions. *See District of Columbia Court of App. v. Feldman*, 460 U.S. 462, 476 (1983). Defendant has not asserted a basis upon which

the matter could have been brought in this Court, therefore it is not properly removed pursuant to section 1441.

As an aside, it also bears noting that Defendant has filed his Notice of Removal more than thirty days after service of the Motion for Contempt and more than two years after he first appeared in the action before the state court. The procedures governing removal provide that a Notice of Removal must be filed within thirty days of Defendant's receipt of a copy of the initial pleading. *See* 28 U.S.C. § 1446(b) (1994). Even if one were to assume that the Motion for Contempt was the "initial pleading" in this case, the Defendant's Notice of Removal is not timely. This time limit is mandatory, and may not be enlarged by agreement of the parties, or order of the court. *See Diaz v. Swiss Chalet*, 525 F. Supp. 247 (D. P.R. 1981). However, because the Town has not yet moved pursuant to 28 U.S.C. § 1447(c) for a remand of this matter to the state court, I refrain from basing this order on the timeliness defect. "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction *must* be made within 30 days after the filing of the notice of removal under section 1446(a)." 28 U.S.C. § 1447(c) (emphasis added).

Conclusion

For the foregoing reasons, I hereby REMAND this action to the Newport District Court from which it was removed.

SO ORDERED.

George Z. Singal
United States District Judge

Dated this 24th day of October, 2000

STETSON, TOWN OF
plaintiff

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v.

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