

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14887
Non-Argument Calendar

D.C. Docket No. 0:14-cv-60268-JIC

THERMOSET CORPORATION,
a Florida corporation,
f.k.a. Thermoset Roofing Corp.,

Plaintiff - Appellant.

versus

BUILDING MATERIALS CORP. OF AMERICA,
a Delaware corporation
d.b.a. GAF Materials Corporation,
ROOFING SUPPLY GROUP ORLANDO LLC,
a Delaware limited liability company,

Defendants – Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(October 31, 2018)

Before WILSON, MARTIN, and JORDAN, Circuit Judges.

PER CURIAM:

This is the second time this case has appeared in our court. The first appeal addressed whether removal jurisdiction existed based on diversity of citizenship among the parties. See 28 U.S.C. §§ 1332(a), 1441(a), (b). Because one of the defendants, Roofing Supply Group Orlando LLC, was not diverse from plaintiff Thermoset Corporation, this court remanded the case to the district court with instructions to remand it to the Florida courts for further proceedings. Thermoset Corp. v. Bldg. Materials Corp. of Am., 849 F.3d 1313, 1321 (11th Cir. 2017).

Thermoset then sought attorney's fees from GAF Materials Corporation, which was the party who removed the case to federal court, under 28 U.S.C. § 1447(c). This statute permits district courts to award fees and costs based on improper removal. Id. Thermoset also asked the district court to conditionally approve an award of attorney's fees under Florida Statutes §§ 501.2105(1) and 768.79. The court denied both of Thermoset's requests, and Thermoset appealed. After careful review, we affirm.

I.

This case arises out of a dispute between Thermoset, a roofing contractor, and Roofing Supply Group Orlando, LLC ("RSGO") together with GAF Materials Corporation which companies manufacture and distribute roofing materials. See

Thermoset, 849 F.3d at 1315. In 2014, GAF removed this case from state court to the U.S. District Court for the Southern District of Florida, alleging diversity of citizenship. GAF's petition for removal stated that RSGO is "a foreign corporation that is incorporated in the state of Delaware and has its principal place of business/nerve center in Texas."

Thermoset did not seek remand of the case to state court. Instead, Thermoset amended its complaint and invoked diversity of citizenship as the basis for federal subject matter jurisdiction. As part of its jurisdictional allegations, Thermoset alleged "Roofing Supply Group Orland LLC ('RSG') is a limited liability company organized under Delaware law, with its principal place of business in Texas."

The district court granted summary judgment for the defendants, and Thermoset appealed. This court then issued a jurisdictional question to the parties based on their failure to allege the citizenship of RSGO's members. See Mallory & Evans Contractors & Eng'rs, LLC v. Tuskegee Univ., 663 F.3d 1304, 1305 (11th Cir. 2011) (per curiam) (holding that, to sufficiently allege the citizenship of an LLC, a party must identify each member of the LLC and provide each member's citizenship). After briefing and oral argument on appeal, our court held the district court lacked subject matter jurisdiction because RSGO was not diverse from Thermoset and was also not a nominal party. Thermoset, 849 F.3d at 1318.

We vacated the district court's summary judgment order and remanded the case to the district court with instructions to return the case to state court for further proceedings. Id. at 1321.

On May 8, Thermoset filed a motion asking this court to award attorney's fees and costs under 28 U.S.C. § 1447(c) and, in the alternative, a conditional award of attorney's fees pursuant to Florida Statutes §§ 501.2105(1) and 768.79. We granted Thermoset's requests for costs for the appeal, directed Thermoset to request costs accrued in the district court from the district court, and transferred Thermoset's request for attorney's fees to the district court for its consideration.

On remand, the magistrate judge recommended that Thermoset's motion for attorney's fees under § 1447(c) as well as its request for a conditional award of attorney's fees be denied. Over Thermoset's objections, the district court adopted the magistrate judge's recommendation. This appeal followed.

II.

We review the district court's denial of a motion for attorney's fees under § 1447(c) for abuse of discretion. Bauknight v. Monroe Cty., 446 F.3d 1327, 1329 (11th Cir. 2006). An order remanding a removed case back to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the

removing party lacked an objectively reasonable basis for seeking removal.”

Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 711 (2005).

Even when the removing party lacks an objectively reasonable basis for seeking removal, district courts have the discretion to consider unusual circumstances that warrant declining to award fees. Id. Those circumstances must be “faithful to the purposes of awarding fees under § 1447(c).” Id. (quotation marks omitted).

The district court adopted the magistrate judge’s recommendation to decline an award of attorney’s fees under § 1447(c). Despite ruling that GAF lacked an objectively reasonable basis for removal, the magistrate judge recommended against the award of attorney’s fees because of Thermoset’s own “negligence in failing to diligently investigate and adequately plead the necessary jurisdictional facts” when it filed its amended complaint in federal court, and because Thermoset did not seek remand.

Thermoset’s failure to seek remand and filing of a complaint with improper citizenship allegations are proper grounds for denying Thermoset’s request for attorney’s fees. See Martin, 546 U.S. at 141, 126 S. Ct. at 711 (using “plaintiff’s delay in seeking remand” as an example of an unusual circumstance that might warrant no award of attorney’s fees). Like the magistrate judge, we reject Thermoset’s argument that it “had no reason to question and then independently investigate the citizenship of the parties” as incorrect. Well before Thermoset filed

its amended complaint, this court ruled that the citizenship of a limited liability corporation depended in turn on the citizenship of its members. See Rolling Greens MHP, L.P. v. Comcast SCH Holdings, L.L.C., 374 F.3d 1020, 1022 (11th Cir. 2004) (per curiam). Thermoset should have known its allegations about RSGO's citizenship did not support subject matter jurisdiction. And it should have known it could seek remand based on the defective allegations in GAF's removal petition. For these reasons, the district court's denial of attorney's fees under § 1447(c) is affirmed.

III.

Thermoset also sought a "conditional" award of appellate attorney's fees under the Florida Deceptive and Unfair Trade Practices Act, Florida Statute § 501.2105(1), and Florida's offer-of-judgment statute, Florida Statute § 768.79. These statutes permit a party to recover attorney's fees when it is ultimately the prevailing party in the state-court litigation. Essentially, Thermoset asked the district court to rule that Thermoset would be entitled to appellate attorney's fees should it prevail in the state trial court litigation. The district court denied Thermoset's request on the ground that the conditional award of attorney's fees was not necessary. We review the district court's decision for abuse of discretion. See Menchise v. Akerman Senterfitt, 532 F.3d 1146, 1149 (11th Cir. 2008).

Thermoset says its unusual request for a conditional award of attorney's fees is necessary under Florida law. It says that Florida's Fourth District Court of Appeals, whose decisions will be binding on the state trial court now hearing Thermoset's case, allows only an appellate court to authorize recovery of appellate attorney's fees. Watson v. Stewart Tilghman Fox & Bianchi, P.A., 195 So. 3d 1163, 1169 (Fla. 4th DCA 2016); Devido v. Curry, 973 So. 2d 1287, 1288 (Fla. 4th DCA 2008). In light of these holdings, Florida appellate courts grant conditional appellate attorney's fee requests like Thermoset's here. E.g., Go Realty Grp. FL, LLC v. PNC Bank Nat'l Ass'n, 154 So. 3d 1230 (Fla. 4th DCA 2015) (per curiam). Thermoset is concerned that it will not be able to recover the fees incurred in connection with its prior appeal to this court unless a federal court conditionally awards fees.

We do not read these decisions as broadly as does Thermoset. In a long line of cases, the Fourth District Court of Appeals has held that, "to obtain fees and costs for the preparation of an appeal, a litigant must first request the fees from the appellate court." Gieseke v. Gieseke, 499 So. 2d 839, 839 (Fla. 4th DCA 1986) (per curiam). These decisions are based on Florida Rule of Appellate Procedure 9.400(b), which provides in relevant part that "a motion for attorneys' fees . . . shall be served not later than . . . the time for service of the reply brief[.]" The rule further provides that "[t]he assessment of attorneys' fees may be remanded to the

lower tribunal.” Id. We understand these decisions of the Fourth District Court of Appeals to view this rule of appellate procedure as granting Florida appellate courts the authority to rule on appellate attorney’s fees while correspondingly limiting the authority of state trial courts to do so without authorization from an appellate court. See Watson, 195 So. 3d at 1169; Devido, 973 So. 2d at 1288; Gieseke, 499 So. 2d at 839.

In other words, these decisions address the authority of Florida trial courts to assess appellate attorneys’ fees after remand from Florida appellate courts. However, we do not read them to prevent the state trial court from awarding fees incurred by Thermoset while the case was pending in federal courts. Because it is not necessary for a federal court to award attorney’s fees conditionally under these circumstances, the district court did not abuse its discretion by deeming such an award premature.

AFFIRMED.