IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

SCOTT HOWELL d/b/a
MAYFIELD GROCERY,

Plaintiff,

v. No. 1:08-cv-01291-JDB

NAUTILUS INSURANCE COMPANY
and TOM CROSS,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AS A RESULT OF IMPROPER REMOVAL

Before the Court is Plaintiff's Motion for Attorney's Fees as a Result of Improper Removal (D.E. 27) filed by Scott Howell d/b/a Mayfield Grocery ("Plaintiff"). Plaintiff asserts that this action was removed improvidently because there is no federal question and no diversity jurisdiction. Defendants have filed their Response in Opposition to Plaintiff's Motion for Attorney's Fees and Memorandum in Support (D.E. 29). This matter was referred to the Magistrate Judge for determination. After considering the pleadings and record in this cause, the Court finds that assessing attorney fees against Nautilus Insurance Company and Tom Cross ("Defendants") is not appropriate and DENIES the Motion.

BACKGROUND

Plaintiff filed this lawsuit on October 20, 2008 in Hardeman County, Tennessee Circuit Court. ("Complaint"). On November 25, 2008, Defendants removed the lawsuit to the Western District of Tennessee pursuant to 28 U.S.C. § 1441. On November 26, 2008, Defendants filed a

Motion to Dismiss, seeking to dismiss the claims against Defendant Cross. (D.E.3). On December 18, 2008, Plaintiff filed his Motion to Remand and Response in Opposition to Motion to Dismiss. (D.E. 4). On referral, the Magistrate Judge recommended the Motion to Remand be granted and the Motion to Dismiss be taken up in state court. (D.E.26). The District Court adopted this Report and Recommendation. (D.E. 28)

ANALYSIS

28 U.S.C. §1447 (c) (2002) provides that this Court may order that Defendants be required to pay "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The Supreme Court has held that "[a]bsent unusual circumstances, the 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 (2005); *accord Chase Manhattan Mortgage Corp. v. Smith*, 507 F.3d 910 (6th Cir. 2007). As this Court explained, "[t]he decision to award attorney fees is within the district court's discretion." *Matthews v. Kindred Healthcare, Inc.* 2005 U.S. Dist. LEXIS 38295, *16 (W.D. Tenn. Dec. 7, 2005) (citing *Morris v. Bridgestone/Firestone, Inc.*, 985 F. 2d. 238, 240 (6th Cir. 1993)).

This Court finds that Defendants have demonstrated that they had "an objectively reasonable basis" in seeking removal, based on the particular procedural history and facts of this case. Plaintiff filed this lawsuit in the Circuit Court of Hardeman County, Tennessee on October 20, 2008 against Defendants. The presence of Mr. Cross as a defendant effectively prevented the diversity of citizenship necessary for federal jurisdiction. The sole claim against Defendant Cross was based on the Tennessee Consumer Protection Act ("TCPA"), T.C.A. § 47-18-101, *et seq.* On November 25, 2008, the case was removed, and Defendants filed a Motion to Dismiss

on behalf of Defendant Cross the next day. Plaintiff, on December 17, 2008, filed a Motion to Remand, and subsequently filed a Motion for Leave to File Amended Complaint. Defendants argue that at the time this case was removed, the allegations against Defendant were so insufficient that Plaintiff had to amend the Complaint so as to withstand the Motion to Dismiss. Indeed, in granting Plaintiff's Motion to Amend this Court observed that Plaintiff was seeking "to clarify and bolster the TCPA claim against Defendant Cross" (D.E. 18, p. 3). Considering the original Complaint, and Defendants' related Motion to Dismiss, it cannot be said that at the time of seeking removal Defendants lacked an objectively reasonable basis for seeking the removal of this action to federal court. Accordingly, Plaintiff's Motion for Attorney's Fees is DENIED.

As an aside, even if this Court had found that Plaintiff was entitled to recover attorney fees, the Magistrate Judge notes that the amount claimed is excessive and would have not only reduced the amount of hours spent, but likewise would have found that the rates sought are excessive given the customary prevailing rates for the work performed. As Plaintiff's attorneys are aware, in *Sainaam,* this Court determined that an attorney with a similar level of experience was entitled to recover $175 per hour. See *Sainaam v. Am. Nat'l Prop. & Cas. Co.*, No. 08-1149, 2008 W.L. 4346679, *2 (W.D. Tenn. 2008).

IT IS SO ORDERED.

s/Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

Date: February 22, 2010

ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE ORDER. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.