IP 05-1383-C H/S Royster v Bd of Church Ext
Judge David F. Hamilton Signed on 3/2/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES R. ROYSTER, LARRY W. ROYSTER, CARL A. ROYSTER, JOAN ROYSTER HARTLIFF, Plaintiffs, vs. BOARD OF CHURCH EXTENSION, HOME MISSIONS OF THE CHURCH OF GOD, INC., AIG FSC SECURITIES CORPORATION, Defendants.	))))))))))))))	NO. 1:05-cv-01383-DFH-VSS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES E. ROYSTER, LARRY W. ROYSTER, CARL A. ROYSTER, and JOAN ROYSTER HARTLIFF,	)	
Plaintiffs,	)	
v.	)	CASE NO. 1:05-cv-1383-DFH-VSS
BOARD OF CHURCH EXTENSION and HOME MISSIONS OF THE CHURCH OF GOD, INC. and AIG FSC SECURITIES CORPORATION,	)	
Defendants.	)	

ENTRY ON MOTION TO REMAND

Plaintiffs are the children of Louis S. Royster and Beulah Mae Royster and allege that they are beneficiaries of charitable remainder trusts established by their parents. Plaintiffs' parents died in 1999 and 2000, and plaintiffs assert that they are entitled to income distributions under the trusts. Plaintiffs filed an action in state court alleging that the trustee Board of Church Extension of the Church of God, Inc. has breached its duties as trustee. Plaintiffs seek monetary and equitable relief from the Board. The complaint also named as defendant AIG FSC Securities Corporation, which is alleged to hold some of the funds in question but is not alleged to have acted wrongfully. Plaintiffs have since dismissed AIG FSC Securities as a defendant.

The case was removed to this court by Jeff J. Marwil in his capacity as receiver for the Board, a position he holds by appointment of this court in *United States Securities and Exchange Commission v. Church Extension of the Church of God, Inc., et al.*, No. 1:02-cv-1118-DFH-VSS. The notice of removal relies on 28 U.S.C. § 1442(a)(3), which authorizes removal of both civil and criminal state court actions against "Any officer of the courts of the United States, for any act under color of office or in the performance of his duties." See *Ely Valley Mines, Inc. v. Hartford Accident and Indemnity Co.*, 644 F.2d 1310, 1312 (9th Cir. 1981) (affirming removal of state court action against receiver appointed by federal court).

Plaintiffs have moved to remand the action to state court. Plaintiffs contend first that the receiver's removal was defective because the other defendant, AIG FSC Securities, did not consent in writing to the removal. Removal ordinarily requires such consent, or at least an explanation of why the other defendant has not so consented. See *Speciale v. Seybold*, 147 F.3d 612, 616 n.4 (7th Cir. 1998), citing *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 368 (7th Cir. 1993). Such consent is not required, however, where the removal is based on the right of a federal officer to remove. *E.g.*, *Ely Valley Mines, Inc.*, 644 F.2d at 1315, following *Bradford v. Harding*, 284 F.2d 307, 309-10 (2d Cir. 1960) (recognizing that contrary rule could defeat federal officer's right to remove).

Plaintiffs next argue that the judicially created probate exception to diversity jurisdiction calls for a remand here. See generally *Storm v. Storm*, 328 F.3d 941, 943-44 (7th Cir. 2003) (explaining origin and scope of probate exception and finding that tort action that was practical equivalent of will contest was properly remanded to state court). The argument is not persuasive for two reasons. First, the probate exception applies to cases that would otherwise fall within the court's jurisdiction based on diversity of citizenship. The exception does not apply to cases with other grounds for federal jurisdiction, as in this case. Second, this does not seem to be a probate case, but a claim for breach of contracts and torts allegedly committed by a trustee. The case does not seem to challenge the original validity of the trusts, but the conduct of the trustee in carrying out its obligations under the trusts. This case therefore seems to be much closer to *Hamilton v. Nielsen*, 678 F.2d 709 (7th Cir. 1982), which held that a federal court could exercise jurisdiction over claims against a will executor for alleged negligence in managing the estate.

Finally, plaintiffs argue that the court should exercise discretion under 28 U.S.C. § 1441(c) and § 1441(e)(6) to remand the case. By their terms, these provisions do not apply to this case.

Accordingly, the plaintiffs' motion to remand this action to state court is hereby denied.

So ordered.

Date: March 2, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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