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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JUDY CARMONA, as Successor
Representative of LUPE N. CARMONA,
Deceased,

Plaintiff,

v.

JANIS CARMONA, A/K/A, JANIS
KESTER,

Defendant.

CV-S-04-0534-PMP (RJJ)

ORDER

Presently before this Court is Plaintiff Judy Carmona's Motion For Orders To Show Cause Why Defendant Should Not Be Held In Contempt; To Remand Case To State Court; For Prohibition Against Future Filings; And For Attorney's Fees and Cost ("Motion to Remand") (Doc. #4) filed on May 17, 2004. On June 1, 2004, Defendant Janis Carmona a/k/a Janis Kester filed Defendant's Opposition To Plaintiff's "Motion For Orders To Show Cause Why Defendant Should Not Be Held In Contempt; To Remand Case To State Court; For Prohibition Against Future Filings; And For Attorney's Fees and Costs" and Defendant's Motion For Summary Judgment ("Opposition") (Doc. ##5, 6). On June 10, 2004, Plaintiff filed her Reply To "Defendant's Opposition To Motion For Orders To Show Cause Why Defendant Should Not Be Held In Contempt; To Remand Case To State Court; For Prohibition Against Future Filings; And For Attorney's Fees and Costs" and Joinder in Defendant's Motion For Summary Judgment ("Reply") (Doc. #7). On June 21, 2004, Defendant filed her Response to Plaintiff's Joinder in Defendant's Motion For

1 Summary Judgment ("Response to Joinder") (Doc. #8).

2 **I. BACKGROUND**

3 This dispute concerns the survivorship benefits from Lupe N. Carmona's
4 ("Lupe") pension plans with Nevada Resort Associations - International Alliance of
5 Theatrical and State Employees Local 720 Pension Trust ("IATSE") and Hilton Hotels
6 Retirement Plans ("Hilton"). Lupe originally designated Defendant as the beneficiary of
7 these plans, but he later petitioned the Clark County District Court, Family Division
8 ("Family Court") for an order directing the pension plans to pay those benefits to Plaintiff.
9 In various forums, Plaintiff and Defendant since have litigated which party is entitled to the
10 survivor benefits.

11 Lupe and Defendant married on March 7, 1988. (Def.'s Notice of Removal ¶ 4.)
12 On September 3, 1992, Lupe named Defendant as the beneficiary of survivor benefits on
13 both the Hilton and IATSE plans. (Id. ¶ 5.) Lupe retired on October 1, 1992. (Id. ¶ 6.)

14 On October 27, 1994, Lupe filed for divorce in Family Court. (Id. ¶ 7.) Prior to
15 the divorce, both Lupe and Defendant contacted IATSE and Hilton to inquire whether he
16 could change her designation as beneficiary. (Id. ¶ 8.) The providers informed them both
17 orally and in writing that Defendant's designation as beneficiary was irrevocable. (Id. ¶ 9.)

18 Pursuant to a settlement conference, the Family Court granted Lupe and
19 Defendant a divorce on November 4, 1997. (Id. ¶ 10.) It awarded Lupe both his IATSE
20 and Hilton pensions as his sole and separate property. (Id. ¶ 14; Def.'s Opp'n to Pl.'s Mot.
21 to Remand, Ex. 13 at 2-3.) During the marriage, Lupe's benefits in his pension plans had
22 increased more than Defendant's own pension. The Family Court therefore ordered Lupe to
23 pay Defendant \$1,500 "as and for an equalization of the values of the marital portion of the
24 pensions divided herein." (Def.'s Notice of Removal ¶ 12; Def.'s Opp'n to Pl.'s Mot. to
25 Remand at 3.) After the divorce, Lupe petitioned the Family Court for a Qualified
26 Domestic Relations Order ("QDRO") revoking Defendant's designation as the beneficiary.

1 (Def.'s Notice of Removal ¶ 13.)

2 Lupe and Plaintiff were married on November 30, 1997. (Id. ¶ 15.) That same
3 month, Lupe filed a motion asking the Family Court to create a constructive trust for the
4 benefit of his new wife, Plaintiff. (Id.) Lupe contended the divorce decree awarded him
5 the entirety of both pension plans, including the survivor benefits. (Id. ¶ 16-17.) He further
6 asserted that Defendant would be unjustly enriched if she dispossessed him of this property
7 award. (Id.) Defendant claimed that survivor benefits are not death benefits, but an
8 irrevocable interest under both the IATSE and Hilton plans. Thus they were her sole
9 property. (Id. ¶ 18.) On March 25, 1998, the Family Court held Defendant had not waived
10 her rights to the survivor benefits, but the providers could change Defendant's designation
11 as beneficiary if they chose. (Id. ¶ 14.)

12 However, one day after Lupe's death on April 15, 1999, the Family Court ordered
13 the administrators of the IATSE and Hilton plans to change the beneficiary designation
14 pursuant to Lupe's directions. (Id. ¶ 19.) The Family Court stated it would order the
15 establishment of a constructive trust for Plaintiff's benefit if the administrators failed to
16 make the change. (Id.) As before, Defendant argued that after Lupe's death, he and his
17 estate were divested of any further interest in the pension plans, leaving Plaintiff with no
18 interest in the survivor benefits because those benefits now were vested in Defendant. (Id.
19 ¶ 19-20.)

20 Defendant appealed the Family Court's order to the Nevada Supreme Court.¹ (Id.
21 ¶ 23.) On October 21, 2003, the Nevada Supreme Court affirmed the Family Court's order
22

23 ¹ According to Plaintiff, Defendant previously sought relief from the Nevada Supreme Court,
24 and on December 10, 1999, the Nevada Supreme Court denied Defendant's writ application based on
25 the Family Court's lack of jurisdiction over claims under the Employee Retirement Income Security
26 Act. (Mot. to Remand at 13:17-19.) Plaintiff claims this is the initial paper giving notice to Defendant
of the federal question and thereby starting the time for removal under 28 U.S.C. § 1446(b). (Mot. to
Remand at 13, n.20.)

1 establishing a constructive trust. (Def.'s Opp'n to Pl.'s Mot. to Remand, Ex. 8, Carmona v.
2 Carmona, Case No. 36220, Nev. Sup. Ct. Order, Oct. 21, 2004, at 4.) It found the divorce
3 decree awarded Lupe his pension rights including the survivor benefits. (Id.) The Court
4 also addressed Defendant's argument that the Employee Retirement Income Security Act
5 ("ERISA") preempts the Family Court's creation of a constructive trust relating to ERISA
6 regulated benefits. (Id. at 4-6.) The Court stated that although ERISA prohibits alienation
7 of benefits other than to the designated participant or survivor beneficiary, the Retirement
8 Equity Act (REA) of 1984 provided an exception to ERISA's anti-alienation provision,
9 which allowed the designation of an alternate payee through a QDRO.² (Id.)

10 The Nevada Supreme Court also found Defendant had waived her rights to the
11 survivor benefits from Lupe's plans upon her receipt of the \$1,500 payment. (Id. at 6.)
12 Additionally, it found the Family Court's creation of the constructive trust was essential to
13 effectuate Lupe's wishes and it would be inequitable to allow Defendant to retain the
14 benefits because she no longer was married to Lupe at the time of his death. (Id. at 7.) The
15 Nevada Supreme Court also affirmed the Family Court's award of attorney fees to Plaintiff
16 for \$15,000. (Id. at 7-8.)

17 Defendant appealed this decision to the United States Supreme Court. (Def.'s
18 Notice of Removal ¶ 24.) On April 19, 2004, the United States Supreme Court denied
19 certiorari. (Id.)

20 In addition to Defendant's appeals to the Nevada Supreme Court and the United
21 States Supreme Court, Defendant has litigated this case in other courts. Plaintiff asserts that
22 on February 4, 2004, a United States Bankruptcy Court held Defendant did not have a legal
23 or equitable interest in the survivor benefits. (Def.'s Notice of Removal, Ex. 1 at 2
24 (referencing bankruptcy proceeding).) Further, in a separate prior action, this Court held

25 ² Citing 29 U.S.C. § 1056(d)(3) (The anti-alienation provision under § 1056(d)(1) does not
26 apply to qualified domestic orders).

1 that because ERISA permitted state and federal courts to exercise concurrent jurisdiction,
2 the Court would not “relitigate issues where another court had jurisdiction and made a final
3 determination.” Kester v. Gaston, Case No. CV-S-01-0431-PMP (PAL), Order, Doc. #36 at
4 4 (D. Nev. Aug. 14, 2001).

5 On April 2, 2004, the Family Court issued an order requiring Defendant to
6 deposit the survivor benefit funds she received into a constructive trust. (Def.’s Notice of
7 Removal, Ex. 1.) The Family Court noted that both the Bankruptcy Court and the Nevada
8 Supreme Court ruled the funds in question are not Defendant’s property. (Def.’s Notice of
9 Removal, Ex. 1 at 2.) That same day, the Family Court entered two QDROs ordering the
10 two plans to pay the survivor benefits either to Plaintiff or to a constructive trust account for
11 Plaintiff’s benefit. (Def.’s Notice of Removal, Exs. 2 & 3.) On April 28, 2004, Defendant
12 removed this action to federal court.

13 **I. DISCUSSION**

14 Plaintiff applies for several forms of relief in her Motion to Remand. First, she
15 requests the Court remand the case to state court for defective and untimely removal and
16 lack of jurisdiction. Second, she seeks attorney fees. Third, she requests the Court enjoin
17 Defendant from any further filings and hold Defendant in contempt in order to persuade her
18 to comply with the QDRO and disgorge the benefits she receives from Lupe’s pensions.
19 Defendant opposes remand and brings a countermotion for summary judgment. In her
20 Reply, Plaintiff also moves for summary judgment.

21 **A. Untimely Removal**

22 Plaintiff contends removal is untimely because Defendant knew in 1999 that the
23 action involved ERISA claims. Defendant responds that she did not learn of her federal
24 claim until the Family Court issued its QDRO orders in April 2004.

25 Removal jurisdiction under 28 U.S.C. § 1441(a) gives federal district courts
26 jurisdiction over “any civil action brought in a State court of which the district courts of the

1 United States have original jurisdiction.” Federal district courts have “original jurisdiction
2 over all civil actions arising under the Constitution, laws, or treaties of the United States.”
3 28 U.S.C. § 1331. “An action can be removed from the state court to the federal court if it
4 could have been filed in federal court originally.” Holfer v. Aetna US Healthcare of Cal.,
5 Inc., 296 F.3d 764, 767 (9th Cir. 2002) (citation omitted).

6 “The burden of establishing federal jurisdiction falls on the party invoking
7 removal.” Harris v. Provident Life and Accident Ins. Co., 26 F.3d 930, 932 (9th Cir. 1994).
8 Additionally, “[t]he removal statute is strictly construed against removal jurisdiction.”
9 Holfer, 296 F.3d at 767 (citation omitted). Furthermore, “[w]here doubt regarding the right
10 to removal exists, a case should be remanded to state court.” Matheson v. Progressive
11 Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003).

12 Under 28 U.S.C. § 1446(b), the defendant must file the notice of removal “within
13 thirty days after the receipt . . . of a copy of the initial pleading setting forth the claim for
14 relief upon which such action or proceeding is based.” If the initial pleading is not
15 removable, a notice of removal “may be filed within thirty days after receipt . . . of a copy
16 of an amended pleading, motion, order or other paper from which it may first be ascertained
17 that the case is one which is or has become removable.” 28 U.S.C. § 1446(b).

18 Additionally, the Ninth Circuit Court of Appeals has held the removal of an
19 ERISA claim is waivable. Cantrell v. Great Republic Ins. Co., 873 F.2d 1249, 1256 (9th
20 Cir. 1989). The Cantrell court acknowledged that ERISA matters preempt state law causes
21 of action and are removable to federal court. Id. at 1253. However, when the plaintiff’s
22 complaint gives notice of a federal question, the time for removal begins and the defendant
23 must remove within thirty days of the original complaint or Defendant waives removal over
24 the ERISA claim. Id. at 1256.

25 Defendant bases her removal on the argument that the survivor benefits are her
26 vested irrevocable interest and her sole and separate property under ERISA. (Def.’s Notice

1 of Removal ¶ 18.) Defendant argued throughout her motion before the Family Court, filed
2 on April 28, 1999, that ERISA precluded the court from divesting her survivorship benefits.
3 (Reply, Ex. 1 at 21.) Additionally, Plaintiff argued before the Nevada Supreme Court that
4 ERISA prohibited the Family Court from ordering a constructive trust over the survivor
5 benefits. (Def.'s Opp'n to Pl.'s Mot. to Remand, Ex. 8 at 4-7.) On October 21, 2003, the
6 Nevada Supreme Court affirmed the Family Court, and ruled that ERISA did not preclude
7 the Family Court's actions. (Id.)

8 Furthermore, Plaintiff filed suit in this Court, basing jurisdiction on ERISA and
9 asserting claims to recover ERISA benefits. Kester v. Gaston, Case No. CV-S-01-0431-
10 PMP (PAL), Compl., Doc. #1 (D. Nev. Apr. 16, 2001). In dismissing that prior case, this
11 Court stated:

12 Essentially, Kester is asking the United States District Court of Nevada
13 to allow the relitigation of issues where Judge Gaston made a final
14 determination and the Nevada Supreme Court has the matter under
15 review. ERISA allows concurrent jurisdiction between federal district
16 courts and state courts. 29 U.S.C. § 1132(e)(1). Kester choose [sic] to
17 originally litigate in the Eighth Circuit Court of Clark County. This
18 Court will not relitigate issues where another court had jurisdiction and
19 made a final determination. Additionally, a United States District
20 Court does not have the authority to review the final judgment of state
21 court proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923);
22 Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

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25 Kester v. Gaston, Case No. CV-S-01-0431-PMP (PAL), Order, Doc. #36 at 4 (D. Nev. Aug.
26 14, 2001).³

27 Defendant herself argued years ago that this dispute involves ERISA law. For
28 Defendant to now assert that she only learned of the federal nature of this action on April 2,

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³ Since the Court issued this Order, the Nevada Supreme Court made a final decision affirming the Family Court's decision. This Court still will not relitigate issues decided by another court with proper jurisdiction, and the Court still lacks authority to review the final judgment of state court proceedings.

1 2004 is meritless. To the extent Defendant argues she was not served with any paper
2 indicating a federal issue from which to remove, the Court notes that the Nevada Supreme
3 Court issued its order affirming the Family Court on October 21, 2003. In that order, the
4 Nevada Supreme Court expressly rejected Defendant's ERISA arguments. As of at least
5 that date, Defendant had been served with "a copy of an amended pleading, motion, order
6 or other paper from which it may first be ascertained that the case is one which is or has
7 become removable." 28 U.S.C. § 1446(b). Under even the most generous view of the
8 proceedings in this case, Defendant had to remove the action no later than thirty days from
9 October 21, 2003. Defendant did not remove the action until April 28, 2004. Because the
10 time for removal long since has expired, Defendant's attempted removal is untimely and
11 this Court lacks jurisdiction. Accordingly, the Court will remand this action to state court.

12 **B. Vexatious Litigant**

13 Plaintiff argues Defendant has abused the judicial process through her numerous
14 filings in various courts. Plaintiff further requests the Court take action to discourage
15 Defendant from further legal maneuvering and to encourage Defendant to comply with the
16 Family Court's orders. The Court is remanding the case back to the state Family Court. It
17 is for that court to enforce compliance with its own orders.

18 **C. Cross Motions for Summary Judgment**

19 Because the Court lacks jurisdiction, it will not address the parties' cross motions
20 for summary judgment. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998)
21 ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to
22 declare the law, and when it ceases to exist, the only function remaining to the court is that
23 of announcing the fact and dismissing the cause.") (quotation omitted).

24 **D. Attorney Fees**

25 Plaintiff requests attorneys fees and costs for Defendant's improper removal.
26 "An order remanding the case may require payment of just costs and any actual expenses,

1 including attorney fees, incurred as a result of the removal." 28 U.S.C. 1447(c).
2 "[Attorney] fees are proper when removal is wrong as a matter of law, even if the
3 defendant's position is 'fairly supportable.'" Holfer, 296 F.3d at 770 (citation omitted). "A
4 fee award rendered under such circumstances is not punitive, it simply reimburses plaintiffs
5 for 'wholly unnecessary litigation costs' inflicted by the defendants." Id. (citation omitted).

6 The Court finds Defendant's untimely removal was wrong as a matter of law.
7 Therefore, Plaintiff has twenty days to file an affidavit and itemization of costs and
8 attorneys fees incurred solely with respect to Defendant's attempted removal.

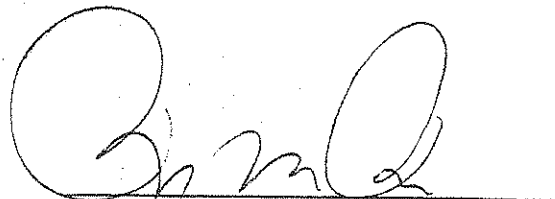
9 **II. CONCLUSION**

10 IT IS THEREFORE ORDERED that Plaintiff Judy Carmona's Motion For
11 Orders To Show Cause Why Defendant Should Not Be Held In Contempt; To Remand
12 Case To State Court; For Prohibition Against Future Filings; And For Attorney's Fees and
13 Cost (Doc. # 4) is hereby GRANTED to the extent that this action is hereby remanded to the
14 District Court, Family Division, Clark County, Nevada. Plaintiff must file an affidavit and
15 itemization of just costs and attorneys fees within twenty (20) days from the date of this
16 Order. Plaintiff's Motion to Remand is DENIED in all other respects.

17 IT IS FURTHER ORDERED that Defendant Janis Carmona a/k/a Janis Kester's
18 Motion For Summary Judgment (Doc. #6) is hereby DENIED.

19 IT IS FURTHER ORDERED that Plaintiff Judy Carmona's Joinder in
20 Defendant's Motion For Summary Judgment (Doc. #7) is hereby DENIED.

21
22 DATED: August 23, 2004

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25 PHILIP M. PRO
26 Chief United States District Judge