UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Carla Surrat	*	Civil Action # **2:08-cv-00940**
	*	
vs.	*	Judge Engelhardt
	*	
Christopher Wallen, et al	*	Magistrate Judge Chasez

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO REMAND

Plaintiff respectfully requests remand for the following reasons: (1) the removing entity, Zurich, is a *non-party* to this litigation, and non-parties cannot remove cases; (2) there was no timely removal by any served party, and the removal was not joined by the only served party at the time of removal; even if these defects could be ignored, there is no jurisdiction owing to (3) insufficient proof of diverse citizenship and (4) insufficient proof of the amount in controversy.

1. A Non-Party Cannot Remove An Action To Federal Court

Zurich is not a party to this litigation; but it filed the removal notice. 28 USC § 1441(a) allows "defendants" in an "action" pending in state court to remove. It grants no right of removal to any person or entity other than a "defendant."

The removal statute is strictly construed because removal deprives state courts of cases rightfully before them in the plaintiff's chosen and otherwise perfectly legitimate forum, see *Gasch v. Hartford Accident & Indemnity Co.*, 491 F.3d 278, 281-82 (CA5 2007). So construed, this issue is not difficult.

Non-defendants can't remove cases to federal court. Zurich is not even a party to this suit. The removal notice filed by Zurich states that it removed it because it is the insurer of defendant Wallen, and "is appearing on behalf of Wallen as his insurer" (removal notice, para. 2). Thus, the only entity removing this lawsuit to federal court is a non-party.

"Common sense and the practicalities of pleading dictate that no non-party to a state court proceeding has a mature right to remove that proceeding to federal court." *FDIC v. Lloyd*, 955 F.2d 316 (CA5 1992). This applies even if the non-party claims to have an interest in the litigation or to be the "real" party in interest. See *Housing Auth. of Atlanta v. Millwood,* 472 F.2d 268, 272 (CA5 1973); *Lester v. Exxon Mobil Corp.*, 2007 WL 1029507 (EDLA 2007); *Ortiz v. Centennial Life Ins. Co.*, 1994 WL 80902 (EDLA 1994); *Newman & Cahn, LLP v. Sharp,* 388 F. Supp. 2d 115, 117 (EDNY 2005); *In re Marshall*, 2006 WL 3349556 (ED Cal. 2006); *American Home Assur. Co. v. RJR Nabisco Holdings Corp.,* 70 F. Supp. 2d 296, 298-99 (SDNY 1999); *Adams v. Adminastar Defense Servs., Inc.,* 901 F. Supp. 78, 79-80 (D. Conn. 1995); *Matter of MacNeil Bros. Company*, 259 F.2d 386, 387 (CA1 1958).

2. There Is No Timely Removal or Consent Under § 1446(b)

Even if a nonparty had the right to remove, this suit must still be remanded because the removal notice is not filed or *joined in* by all *served defendants*. In this case there was only one served defendant at the time of removal, Mr. Wallen (as stated in the removal notice, para. 2). He did not remove, join in the removal, or file written consent.

The served defendant(s) must remove within 30 days of service. 28 USC § 1446(b). Also, all served defendants must explicitly join in the removal, within 30 days of the date the first defendant is served:

> In cases involving multiple defendants, courts have interpreted the latter provision to require all served defendants to join in the removal.[FN1] *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir.1990). Further, the rule in the Fifth Circuit regarding such cases involving multiple defendants is that the thirty-day period established by section 1446(b) begins to run immediately after the *first* defendant is served. *Getty Oil Div. of Texaco v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir.1988). The failure of a defendant to join in a removal petition or consent to such action within the thirty-day time limitation is a nonjurisdictional defect. *Robertson v. Ball*, 534 F.2d 63, 65, n. 2 (5th Cir.1976). Yet it is well-settled that the statutory time limitation is mandatory and must be strictly complied with; the time period cannot be extended by stipulation of the parties or by order of the court. 28 U.S.C. § 1446; *Sea Robin Pipeline Co. v. New Medico Head Clinic Facility*, 1995 WL 479719, *1 (E.D.La. Aug.14, 1995) (citing *Skidmore v. Beech Aircraft*, 672 F.Supp. 923, 925 (M.D.La.1987)).
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> FN1. This does not mean that every defendant must actually sign the notice of removal. However, there must be some timely filed written document from each served defendant, or its authorized representative, indicating that it has consented. *Getty Oil Div. of Texaco v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1262, n. 11 (5th Cir.1988). This rule is subject to exceptions. For example, joinder is not required of defendants who have not been served at the time the notice of removal is filed. *See Albonetti v. GAF Corp. Chem. Group*, 520 F.Supp. 825, 827 (S.D.Tex.1981) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534, 540-41, 59 S.Ct. 337, 350, 83 L.Ed. 334 (1939)).

Sciortino v. National Railroad Passenger Corp., 2005 WL 1431697 (EDLA 2005); see also *Casley v. Barnette*, 2005 WL 517495 (EDLA 2005); *Morales v. Shaffer*, 2007 WL 3237457 (EDLA 2007).

Mr. Whalen was served on January 16, 2008. See Exh. A (copy of certified letter, receipt card, and affidavit of service); Exh. B (copy of USPS online delivery confirmation). He was the first served defendant, and so he had 30 days to remove, which he did not. This itself is reason to remand. Compounding this, if an actual defendant *had* removed, this removal would be defective and require remand, because Mr. Whalen did not join in the removal within 30 days of service.

3. Insufficient Evidence of Citizenship

The removal notice describes the citizenship of the plaintiff, Mr. Whalen, and nonparty Zurich, but does not describe the citizenship of Hertz.

Exercise of the diversity jurisdiction (28 USC § 1332(a)) requires complete diversity, *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806), and so the removing party must allege and prove that every party is diverse from all parties on the opposite side, *Howery v. Allstate*, 243 F.3d 912 (CA5 2001), even as to a party who has not yet been served with the suit. See *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883-84 (CA5 1998).

The failure to allege and prove the citizenship of Hertz is fatal. The Court should remand for lack of subject matter jurisdiction.

4. The Requisite Amount in Controversy Is Not Present

Lastly, even if Zurich could remove, and all the other defects in removal procedure and jurisdiction could be overlooked, this case should be remanded because of insufficient proof of the amount in controversy. 28 USC § 1332(a).

In a removed case without a numerical damage allegation in state court, the federal district court must first examine the complaint to determine whether it is "facially apparent" that the amount in controversy exceeds $75,000.00. If it is not thus apparent, the court may rely on "summary judgment-type" evidence to ascertain the amount in controversy. *White v. FCI USA, Inc.*, 319 F.3d 672 (CA5 2003). Federal courts presume they lack jurisdiction until the removing party proves by a preponderance the presence of the jurisdictional amount. See *Howery, supra*; *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 882 (CA5 2000).

Zurich does not attempt any "summary judgment-type" evidence, instead pointing only to the boilerplate laundry list of claimed damages categories in the state court petition. There is no information about the specific injuries caused, and thus nothing concrete for a federal court to evaluate to determine whether the jurisdictional amount required by Congress is actually in play. As noted in a similar case where the injuries are not specifically identified in the petition:

> The petition has no description whatsoever of the claimed "injuries," "disability" or medical expenses that would allow any reasonable estimation that the amount in controversy exceeds $75,000. Were the injuries mere cuts and scrapes, or were they broken bones or severe internal injuries? Were the

> medical expenses $300 for an office visit, or was an expensive surgery or other care required? Is the alleged "disability" a partial, temporary limitation of a finger that caused no lost wages, or is it claimed to be total, permanent and career ending? Are the alleged future medical expenses claimed to include frequent or expensive care, or will they be no more than an office visit or follow-up examination? None of these situations, based on the meager information available in the petition and notice of removal, is more likely than any other. A person is left to simply guess, and that is not sufficient for a removing party to have met its burden under the "facially apparent" test.
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> In *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880 (5th Cir.2000), the plaintiff's request for various categories of damages was treated as relevant, but the plaintiff's petition in that case also set forth some facts about the injuries that indicated a potentially significant amount of such damages was at stake. The *Gebbia* petition described injuries to the plaintiff's right wrist, left knee and patella, and upper and lower back. The petition in this case, in contrast, includes *no* facts about the nature or extent of the "injuries" to any Plaintiff.
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> If the scant facts set forth in this petition, combined with a prayer for certain categories of damages (prayed for in almost every personal injury case of any magnitude) were deemed adequate to allow federal diversity jurisdiction, there would be very few slip and fall, car accident or other personal injury cases that would not meet the amount in controversy requirement. Congress's imposition of a $75,000 threshold for removal of such cases would be eviscerated. *See Guillory v. Chevron Stations, Inc.*, 2004 WL 1661201 (E.D.La.2004)(distinguishing *Gebbia* and remanding knee injury case despite claims for several categories of damages).

Saxon v. Thomas, 2007 WL 1115239 at *2, 3 (WDLA 2007).

No proof has been offered which would allow the Court to find by a preponderance that the amount in controversy exceeds $75,000.

Conclusion

There are at least four compelling reasons to remand this case. First, Zurich is a nonparty and could not remove the case. Second (somewhat relatedly), the failure of all- indeed *any*- served defendants to remove or join in a timely removal notice within 30 days of service on Mr. Whalen requires remand. Third, there has been insufficient proof of diversity. Fourth and finally, the requisite amount in controversy is not present. Plaintiff respectfully requests remand to state court.

Respectfully Submitted,

EDWARD J. WOMAC, JR. & ASSOCIATES
A LIMITED LIABILITY COMPANY

*/s/Brian King*_____
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CERTIFICATE OF SERVICE

I certify that on February 22, 2008, I filed this pleading via the Court's CM/ECF system which will send electronic notification to the following:

Darleen D. Peters

*/s/Brian King*_____
BRIAN KING