

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
DES MOINES, IOWA
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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PRINCIPAL RESIDENTIAL
MORTGAGE, INC.,

Plaintiff,

v.

UNITED FINANCIAL
MORTGAGE CORP.,

Defendant.

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Civil No. 4-99-CV-90672

MEMORANDUM OPINION AND
ORDER GRANTING MOTION
TO REMAND

The Court has before it Defendant's Motion to Remand to the Iowa District Court for Polk County. The motion is fully submitted.

I. Facts

Plaintiff Principal Residential Mortgage, Inc. ("Principal") filed a Petition and Jury Demand for this contract action in the Iowa State Court for Polk County on August 18, 1999. A copy of the petition was served on Defendant United Financial Mortgage Corp. ("United") on or around August 24, 1999. (Second Notice of Removal ¶ 2.) Defendant filed a Notice of Removal in the U.S. District Court for the Northern District of Illinois based upon diversity jurisdiction on September 9, 1999. (Second Motion for Remand ¶ 3.) Plaintiff filed a Motion for Remand. The U.S. District Court for the Northern District of Illinois remanded the case due to "improper removal" on November 3, 1999. (Minute Order of 11/3/99 by Hon. Marvin E. Aspen of the U.S. District Court for the Northern District of Illinois.) Although the Minute Order does not state what constituted improper removal, it appears that Defendant had removed to the wrong district

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court¹ and failed to plead the requisite amount in controversy to satisfy 28 U.S.C. § 1332 diversity jurisdiction.² The U.S. District Court for the Northern District of Illinois ordered Defendant to pay Plaintiff's costs and expenses incurred as a result of the improper removal. There is no indication that Defendant filed a motion with the U.S. District Court for the Northern District of Illinois to transfer the case to a federal court with proper venue.

Defendant filed a second Notice of Removal on November 29, 1999 in the U.S. District Court for the Southern District of Iowa. The second Notice of Removal is based upon the same complaint and legal theory of diversity jurisdiction as the first Notice of Removal. There is no indication that Plaintiff amended the Complaint dated August 18, 1999. Plaintiff again moved to remand on December 7, 1999. Defendant resisted and Plaintiff filed a reply.

Plaintiff argues that this case should be remanded because the 30 day time limit for filing a Notice of Removal stated in 28 U.S.C. § 1446(b) expired before Defendant filed its Notice of Removal with this Court. Defendant argues that 28 U.S.C. § 1446(b) includes an exception that provides a new 30 day time period that begins running from the date of the U.S. District Court for the Northern District of Illinois' order remanding to state court.

II. Analysis

It is the removing party's burden to show that removal jurisdiction is proper. *See In re Business Men's Assur. Co. of America*, 992 F.2d 181, 183 (8th Cir. 1993); *Iowa Comprehensive*

¹28 U.S.C. § 1446 requires that removal be to "the district court of the United States for the district and division within which such action is pending." The removed action had been pending in the Iowa District Court for Polk County. Therefore, by removing to the Northern District of Illinois, Defendant had removed to the wrong federal district.

²Plaintiff's Motion to Remand filed in the U.S. District Court for the Northern District of Illinois states that Defendant did not allege that the amount in controversy exceeded the jurisdictional requirement of \$75,000 exclusive of interest and costs. Instead, it appears that Defendant plead only \$50,000 in controversy. (First Motion to Remand ¶ 5.)

Petroleum Underground Storage Tank Fund Bd. 990C80656 v. Amoco Oil Co., 883 F. Supp. 403, 407 (N.D. Iowa 1995). This Court's removal jurisdiction must be strictly construed and all doubts must be resolved in favor of remand. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *McCorkindale v. American Home Assur. Co./A.I.C.*, 909 F. Supp. 646, 650 (N.D. Iowa 1995); *In re Business Men's Assur. Co. of America*, 992 F.2d at 183. The purpose of strictly construing removal statutes is to limit the federal courts' authority to that expressly provided by Congress and to protect the States' judicial powers. *Dawson v. Orkin Exterminating Co., Inc.*, 736 F. Supp. 1049, 1050 (D. Colo. 1990). Because removal is entirely a statutory right, the relevant procedures, including time limitations, must be followed. *First Nat. Bank & Trust Co. in Great Bend v. Nicholas*, 768 F. Supp. 788, 790 (D. Kan. 1991); *Jennings Clothiers of Ft. Dodge, Inc. v. U.S. Fidelity & Guaranty Co.*, 496 F. Supp. 1254 (N.D. Iowa 1980).

Defendant relies on diversity of citizenship, pursuant to 28 U.S.C. § 1332, as its jurisdictional basis of removal. Defendant's Notice of Removal to the U.S. District Court for the Southern District of Iowa properly pleads the requisite amount in controversy and diversity of citizenship of the parties. However, the parties do not dispute that the U.S. District Court for the Southern District of Iowa has diversity jurisdiction. The issue before the court is whether Defendant used the correct procedure to properly remove to this Court. The procedural requirements for removal are outlined in 28 U.S.C. § 1446.

Plaintiff argues that United failed to satisfy the following requirement of 28 U.S.C. § 1446(b):

The notice of removal of a civil action . . . shall be filed within **thirty days** after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based

28 U.S.C. § 1446(b) (emphasis added). Defendant timely filed its first Notice of Removal in the

U.S. District Court for the Northern District of Illinois on September 9, 1999, approximately 16 days after receiving the initial pleading. (Second Motion for Remand ¶¶ 2, 3.) After the U.S. District Court for the Northern District of Illinois remanded, Defendant filed a second Notice of Removal with this Court on November 29, 1999. Thus, Defendant filed the second Notice of Removal approximately 103 days after receiving the initial pleading. On its face, the second Notice of Removal appears to be untimely because it was filed more than 30 days after Defendant received a copy of the initial pleading.

However, Defendant argues that 28 U.S.C. § 1446(b) includes an applicable exception to the general rule:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable

28 U.S.C. § 1446(b) (emphasis added). The purpose of this statutory exception makes common sense. If the initial pleading contains no facts substantiating removal, then the defendant will not be penalized when new facts arise that would allow removal. The exception "seems to contemplate new facts which become of record in some new pleading or paper and which alter the earlier encumbrances to removal," *Nolan v. Boeing Co.*, 715 F. Supp. 152, 155 (E.D. La. 1989). Thus, the statutory exception allows a defendant to remove a formerly non-removable case based on new information, even more than 30 days following receipt of the initial pleading. Notably, the absence of this exception would allow a plaintiff to deny a defendant's right to remove by pleading no facts stating a basis for federal jurisdiction in its initial complaint, and then, after the expiration of thirty days, amending its pleading to state facts that would justify federal jurisdiction.

The critical portion of 28 U.S.C. § 1446(b) as it applies to the case at hand is the introductory qualifying language of the exception. Defendant ignores this language in its resistance. The exception only applies "[i]f the case stated by the initial pleading is not removable" Therefore, Defendant must show that the initial pleading did not establish facts warranting removal. Defendant does not establish such facts.

The initial pleading in the case at hand is the Petition and Jury Demand filed in the Iowa State Court for Polk County on August 18, 1999. Defendant apparently believed that the initial pleading established facts allowing removal to federal court because it filed a Notice of Removal in the U.S. District Court for the Northern District of Illinois. Also, Defendant states in its second Notice of Removal that the requisite \$75,000 in controversy to establish federal diversity jurisdiction "appears from the plaintiff's complaint." (Second Notice of Removal ¶ 5). Because Plaintiff has not amended its initial complaint, it appears that Defendant could have ascertained that the requisite \$75,000 for diversity jurisdiction was at issue when Defendant first received a copy of the initial pleading on or around August 24, 1999. Thus, because the case stated by the initial pleading was removable, the 28 U.S.C. § 1446(b) exception does not apply.

Failure to timely file a notice of removal is a procedural defect requiring remand to the state court. *See* 28 U.S.C. § 1447(c); *First Nat'l Bank & Trust Co. in Great Bend v. Nicholas*, 768 F. Supp 788, 790 (D. Kan. 1991); *Howard v. Northwest Airlines, Inc.*, 793 F. Supp. 129, 131 (S.D. Tex. 1992); *Knudsen v. Samuels*, 715 F. Supp. 1505, 1507 (D. Kan. 1989); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993) ("Any defect in the removal procedure, or the lack of subject matter jurisdiction, requires a remand."). Defendant does not cite any contrary case law, and the court is unable to find any case law, that would dictate a contrary result under these circumstances. Defendant's Notice of Removal to this Court is untimely because it was

filed more than 30 days after Defendant received the initial pleading. Therefore, Plaintiff's Motion to Remand is GRANTED.

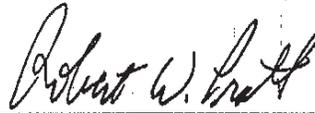
Finally, Plaintiff requests payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal as allowed by 28 U.S.C. § 1447(c). The Court hereby grants such payment in accord with Plaintiff's Exhibits one and two attached to the Motion to Remand and Reply.

III. Conclusion

Plaintiff's Motion to Remand (docket no. 3) is GRANTED. Defendant is ordered to pay Plaintiff the just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

IT IS SO ORDERED.

Dated this 5th day of April, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE