

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARINE MIDLAND BANK	:	CIVIL ACTION
s/b/m ACQUISITION TO FIRST	:	
FEDERAL SAVINGS & LOAN OF	:	
ROCHESTER	:	
	:	
	:	
v.	:	
	:	
MARLA MASCIANTONIO BRAVO	:	NO. 00-369

M E M O R A N D U M

WALDMAN, J.

February 11, 2000

Defendant Marla Bravo filed a Notice of Removal of this case from the Philadelphia Court of Common Pleas on January 20, 2000. Defendant asserted in the Notice that removal jurisdiction exists under 28 U.S.C. §§ 1441(a) and 1441(b) because the property underlying this foreclosure case is subject to a federal notice of forfeiture and the above parties are of diverse citizenship. The Notice of Removal suffers from substantial deficiencies.

It appears from the state court complaint and docket that plaintiff has sued three defendants in addition to Marla Bravo, although she has listed only herself in the caption of the Notice of Removal. No other defendant has joined in the removal.¹ All defendants who are served must join in a removal petition pursuant to 28 U.S.C. § 1441(a) or § 1441(b). See Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995);

¹ It also appears that no other defendant was served with the removal petition.

Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994); Doe v. Kerwood, 969 F.2d 165, 168 (5th Cir. 1992); Johnson v. Helmerick & Payne, Inc., 892 F.2d 422, 423 (5th Cir. 1990); Gibson v. Inhabitants of Town of Brunswick; 899 F. Supp. 720, 721 (D. Me. 1995); Landman v. Borough of Bristol, 896 F. Supp. 406, 409 (E.D. Pa. 1995); Jackson v. Roseman, 878 F. Supp. 820, 826 (D. Md. 1995); Ogletree v. Barnes, 851 F. Supp. 184, 186-87 (E.D. Pa. 1994); McManus v. Glassman's Wynnefield, Inc., 710 F. Supp. 1043, 1045 (E.D. Pa. 1989); Collins v. American Red Cross, 724 F. Supp. 353, 359 (E.D. Pa. 1989).²

Defendants must remove a case within thirty days of the receipt of a copy of the initial pleading or paper setting forth a removable claim. See 28 U.S.C. § 1446(b). In the instant case, the removed claim is asserted in a pleading which was filed and served over fifteen months ago. Even the notice of forfeiture to which defendant seems to attach significance was admittedly received by her 54 days before the Notice of Removal

² Each defendant must join within thirty days of receipt of the initial pleading with a removable claim by the first defendant entitled to petition for removal. See Getty Oil, Div. Of Texaco v. Ins. Co. of North America, 841 F.2d 1254, 1263 (5th Cir. 1988); Teitelbaum v. Soloski, 843 F. Supp. 614, 615 (D.C. Cal. 1994); Johnson v. Baltimore City Police Dep't., 757 F. Supp. 677, 679 (D. Md. 1991); Schmidt v. National Organization for Women, 562 F. Supp. 210, 212 (N.D. Fla. 1983); Balestrieri v. Bell Asbestos Mines, Ltd., 544 F. Supp. 528, 530 (E.D. Pa. 1982).

was filed.³

In the absence of a federal question, a case is not removable at all if any defendant is a citizen of the forum state. See 28 U.S.C. § 1441(b). It is not clear that each defendant is a citizen of a state other than Pennsylvania.⁴

³ A case which becomes removable on the basis of diversity jurisdiction may not be removed at all more than one year after its commencement. See 28 U.S.C. § 1446(b). This action was commenced well over a year ago. Many courts have held that the one year limit is an absolute jurisdictional bar. See Green Point Savings Bank v. Hidalgo, 910 F. Supp. 89, 92 (E.D.N.Y. 1995) ("the one-year limitation in section 1446(b) goes to subject matter jurisdiction"); Santiago v. Barre National, Inc., 795 F. Supp. 508, 510 (D. Mass. 1992) ("the one-year bar is absolute"); Brock v. Syntex Laboratories, Inc., 791 F. Supp. 721, 722-23 (E.D. Tenn. 1992) (granting untimely remand motion because one year ban on removal of diversity cases is "jurisdictional"), aff'd, 7 F.3d 232 (6th Cir. 1993); Robinson v J.F. Cleckley & Company, Inc., 751 F. Supp. 100, 105 (D.S.C. 1990) ("congressional intent in promulgating the one-year cap on removal was to limit federal jurisdiction"); Foiles by Foiles v. Merrell Nat. Laboratories, 730 F. Supp. 108, 110 (N.D. Ill. 1989) ("one-year limit is jurisdictional").

⁴ Also, defendant filed an answer, counterclaims and pretrial motions in state court where, as noted, this litigation has proceeded for over a year. The state court issued a detailed scheduling order, ruled on various potentially dispositive motions, held a status hearing and listed the case for trial. In such circumstances, courts have held that a defendant waives any right to remove. See Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986) ("[e]ven a defendant who petitions timely may have waived its right to removal by proceeding to defend the action in state court or otherwise invoking the processes of that court"); Kam Hon, Inc. v. Cigna Fire Underwriters Ins. Co., 933 F. Supp. 1060, 1064 (M.D. Fla. 1996) (remanding sua sponte for waiver of right to remove by defendant who filed responsive pleading in state court).

Because of the defects in the removal process, this case is subject to remand by February 19, 2000, the 30th day from the filing of the Notice of Removal. See 28 U.S.C. § 1447(c).⁵

In any event, the court cannot conscientiously conclude that it has subject matter jurisdiction. "Federal courts have an ever-present obligation to satisfy themselves of their subject matter jurisdiction and to decide the issue sua sponte." Liberty

⁵ It reasonably appears that in this circuit a court may also remand for such defects on its own motion within 30 days. See Korea Exchange Bank v. Trackwise Sales Corp., 66 F.3d 46, 51 (3d cir. 1995) (30 day limit applies "to motions brought by a party" and "to sua sponte remand orders"). See also Hamilton v. Aetna Life and Cas. Co., 5 F.3d 642, 644 (2d Cir. 1993) (procedural defect waived by failure of party "or the court sua sponte to raise the matter within 30 days of removal"); Maniar v. F.D.I.C., 979 F.2d 782, 785-86 (9th Cir. 1992); Cassara v. Ralston, 832 F. Supp. 752, 754 (S.D.N.Y. 1993) ("sua sponte remand for procedural defects is contemplated by the removal statute and is consonant with the policies underlying removal"). It seems quite unlikely that Congress would not have contemplated timely action by a federal court on its own initiative in response to a defendant who removes for some perceived advantage a case pending for over a year in a state court in a manner which violates virtually every procedural requirement imposed by Congress. The need for court action may be particularly acute in the absence of service of the removal petition on parties who otherwise could object. See, e.g., General Insurance Co. of America v. Telecon New York, Inc., 1996 WL 389265, *2 (S.D.N.Y. July 11, 1996) (granting defendant's motion to remand for untimeliness of removal by co-defendant); Metro Furniture Rental, Inc. v. Alessi, 770 F. Supp. 198, 200 (S.D.N.Y. 1991) (nonconsenting defendant who wishes to move to remand must do so within thirty days of "filing" of removal notice). It seems quite unlikely that Congress intended to preclude such action when a case has progressed to the point of trial, even with the acquiescence or contrivance of the plaintiff. The principal purposes of the time limits on removal and remand is to prevent tactical maneuvering and to avoid a transfer from a court in which the litigation has substantially progressed.

Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir. 1995). See also Bregman v. Alderman, 955 F.2d 660, 664 (11th Cir. 1992) (sua sponte remand where diversity of citizenship of parties not apparent from pleadings); Steel Valley Authority v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987) ("lack of subject matter jurisdiction voids any decree entered in a federal court"); Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986) (federal jurisdiction must be properly pled).

That the federal government may have filed a notice of forfeiture against the subject property does not convert Marine Midland's state court claim of mortgage default into one arising under federal law. See, e.g., New England Explosives Corp. v. Maine Ledge Blasting Specialist, Inc., 542 F. Supp. 1343, 1346 (D. Me. 1982) (that federal government had asserted interest in property at issue in state court action to enforce plaintiff's lien does not transform claim into one arising under federal law). That Marine Midland and the state court defendants may ultimately be claimants in a federal administrative proceeding or judicial forfeiture action does not alter the character of the instant action which is determined from the face of plaintiff's pleadings. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987); Allstate Insurance Co. v. 65 Security Plan, 879 F.2d 90,

93 (3d Cir. 1989).⁶

To demonstrate diversity jurisdiction, defendant points to purported allegations in paragraphs 1 and 2 of the state court complaint that plaintiff's principal place of business is in New York and that defendant Bravo is a resident of Pennsylvania. The copy of the state court complaint submitted by defendant in fact contains no such allegations. It merely lists a New York and "last known" Pennsylvania address for plaintiff and defendant Bravo respectively.

Even a showing that plaintiff's principal place of business is in New York and that defendant Bravo resides in Pennsylvania would not establish diversity jurisdiction. See Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389, 389 (1893) (allegation of "residence" insufficient to confer diversity jurisdiction); Grace v. American Central Ins. Co., 109 U.S. 278, 284 (1883); Midlantic Nat'l Bank v. E.F. Hansen, 48 F.3d 693, 696 (3d Cir.) (corporation is citizen both of state of incorporation and of state in which its principal place of business is located), cert. dismissed sub nom. E.F. Hansen v.

⁶ That proceedings in the instant action may now be subject to a stay in either court pending resolution in forfeiture proceedings of the innocent owner status of plaintiff Marine Midland or a claiming defendant does not, of course, alter the requirements for removal. Questions of forfeitability and innocent owner status cannot be determined in the instant action, but must be presented and resolved in discrete forfeiture proceedings. See U.S. v. One Single Family Residence at 6900 Miraflores Ave., 995 F.2d 1558, 1561 (11th Cir. 1993); U.S. v. 92 Buena Vista Ave., 937 F.2d 98, 102 (3d Cir. 1991), aff'd 507 U.S. 111 (1993).

Midlantic Nat'l Bank, 515 U.S. 1184 (1995); Rodriguez v. SK & F Co., 833 F.2d 8, 9 (1st Cir. 1987) (same); Wisconsin Knife Works, 781 F.2d at 1282 (same); Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972) ("residency in a state is insufficient for purposes of diversity"); Guerrino v. Ohio Casualty Ins. Co., 423 F.2d 419, 421 (3d Cir. 1970) ("[a]llegations of citizenship are required to meet the jurisdictional requirement"); Wymard v. McCloskey & Co., Inc., 342 F.2d 495, 497 (3d Cir.) (same), cert. denied sub nom. McCloskey & Co. v. Wymard, 382 U.S. 823 (1965); Darling v. Piniella, 1991 WL 193524, *4 (E.D. Pa. Sept. 27, 1991) ("[d]iversity jurisdiction is predicated on citizenship, not residency"); Stanko v. LeMond, 1991 WL 152940, *1 (E.D. Pa. Aug. 6, 1991) ("citizenship" and "residence" are "different concepts"); Brooks v. Hickman, 101 F.R.D. 16, 18 (W.D. Pa. 1984) ("diversity jurisdiction is based on citizenship, not residence"); Forman v. BRI Corp., 532 F. Supp. 49, 51 (E.D. Pa. 1982) ("allegations of residency do not properly invoke [diversity] jurisdiction").

"[T]here is a long line of authority for the proposition that when diversity of citizenship is the basis of asserting removal jurisdiction, it must exist not only at the time the original action is filed in state court but also at the time removal is sought to federal court." Charles Alan Wright et al., *Federal Practice and Procedure* § 3723 (3d ed. 1998). There

has been no showing as to the citizenship of any party in the fall of 1998 or at the time of removal. Missing completely are any allegations regarding the three named co-defendants and their citizenship at the pertinent times.⁷

The court concludes that it has neither federal question nor diversity jurisdiction. The court would be inclined to remand on its own motion within the thirty day period for the various procedural defects noted above. Consistent with 28 U.S.C. § 1447(c), the court will remand this case for lack of subject matter jurisdiction. An appropriate order will be entered.

⁷ It appears from the state court record that this omission is not inadvertent. Two of the defendants whose "last known addresses" were in Philadelphia could not be located, were ultimately made parties via alternative service and subsequently defaulted. It thus appears that the actual state of their citizenship at neither the commencement of the action nor the time of removal can be ascertained. That a party is subject to default judgment, of course, does not effect his dismissal from the action. He remains a party in the removed action, and his citizenship thus remains pertinent in establishing diversity jurisdiction. See Brooks v. Clark, 199 U.S. 502, 511-13 (1886) (defaulting party and judgment remain part of removed action); Murray v. Ford Motor Co., 770 F.2d 461, 463-64 (5th Cir. 1985) (same and thus federal court properly set aside state default judgment after removal); Tarbell v. Jacobs, 856 F. Supp. 101, 104-05 (N.D.N.Y. 1994) (same and denying plaintiff's request to enforce state default judgment); Robert E. Diehl, Inc. v. Morrison, 590 F. Supp. 1190, 1192 (M.D. Pa. 1984) (defaulting defendant in state court mortgage foreclosure action remains party who may remove case and move to set aside state default judgment).

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MARLA MASCIANTONIO BRAVO : NO. 00-369

O R D E R

AND NOW, this day of February, 2000,
consistent with the accompanying memorandum and pursuant to 28
U.S.C. § 1447(c), **IT IS HEREBY ORDERED** that the above action is
REMANDED to the Philadelphia Court of Common Pleas.

BY THE COURT:

JAY C. WALDMAN, J.