

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

Vincent J. Fumo,	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION NO.
Geoff Gallas; Peter G. Friesen, Esq.; Law Offices of	:	NO. 00-CV-4774
Peter G. Friesen, Esq.; Glenn J Brown, Esq.; and	:	
Palissery and Brown.	:	
Defendants.	:	

Memorandum and Order

YOHN, J.

February , 2001

Plaintiff filed this action in state court. One of the defendants then removed it to this court. Plaintiff has moved to remand. He argues that the moving defendant failed to meet the procedural requirements for removal under 28 U.S.C. § 1446(b) and that the district court lacks subject matter jurisdiction over the suit. After briefing and oral argument I have determined that plaintiff is correct on both counts, and I will, therefore, remand.

Honorable Vincent J. Fumo filed a praecipe for a writ of summons in the Court of Common Pleas of Philadelphia Count on May 8, 2000. Notice of Removal (Doc. No. 1) Ex. B. The writ was served on Geoff Gallas on May 11, 2000, on Glenn J. Brown and his law firm on May 16, 2000, and on Peter Friesen and his law firm on August 24, 2000. Fumo’s Supplemental Mem. of Law in Support of Mot. to Remand (Doc. No. 5) Ex. A, B, C. The writ of summons states that the cause of action is “wrongful use of civil process.” Notice of Removal Ex. B.

On August 31, 2000, all of the defendants were served with a petition to amend the

complaint. Notice of Removal at ¶ 4, Ex. A at 23 (Certificate of Service). Attached to the petition was a copy of the amended complaint, which identified two causes of action: wrongful use of civil proceedings under 42 Pa.C.S.A. § 8351 and common law abuse of process. *Id.* The amended complaint specifies that Fumo seeks relief under state law. *Id.*

Friesen filed a notice of removal of this lawsuit on September 20, 2000. Notice of Removal. Plaintiff Fumo moved to remand on October 6, 2000. Mot. to Remand (Doc No. 3). On October 18, 2000, defendants Geoff Gallas, Glenn Brown, and Palissery and Brown filed their consent to removal. Gallas Consent (Doc. No. 7); Brown Consent (Doc. No. 6). Friesen also filed a motion to amend his notice of removal. Friesen Mot. to Am. Notice of Removal (Doc. 9).¹

Fumo's complaint stems from Gallas' earlier federal suit against the Supreme Court of Pennsylvania and various individuals including Fumo. Notice of Removal Ex. A at ¶ 17; *Gallas v. Supreme Court of Pennsylvania*, No. C.A. 96-6460, WL 256972 (E.D.Pa. May 15, 1997). Brown, Friesen, and their law firms represented Gallas in that federal action. Notice of Removal Ex. A at ¶ 18. Gallas claimed that Fumo violated Gallas' First Amendment speech rights, his Fourteenth Amendment due process rights, and tortiously interfered with a contract between him and the state's Supreme Court. *See Gallas*, WL 256972 at * 5. Gallas sought to enforce his claims against Fumo under 42 U.S.C. § 1983. *Id.* Fumo eventually won judgment against Gallas in that lawsuit and the decision was affirmed the by Third Circuit. *Gallas v. Supreme Court of*

¹ Friesen moves to add the notices of consent by Gallas, Brown, and his law firm. These notices were already filed on October 18, 2000. Furthermore, Friesen does not, in the motion to amend, ask that the notices be filed retroactively through a nunc pro tunc order. Consequently, Friesen's motion to amend is redundant and denied.

Pennsylvania, 211 F.3d 760 (3d Cir. 2000).

1. Requirement of Joint and Timely Removal Petitions

A defendant seeking to remove a civil action from a state court must file a notice of removal with thirty days of receipt, through service or otherwise, 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). “If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after [the defendant’s receipt], through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is... or has become removable....” *Id.* Also, where there is more than one defendant, all served defendants must join in the removal petition within thirty days of their receipt of pleadings from which removability may be ascertained. *See, e.g., Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995); *Lewis v. Rego Co.*, 757 F.2d 66, 68-69 (3d Cir. 1985).

The timeliness of Friesen’s notice of removal and the co-defendants’ consents to join depends on when the 30 day period began to toll. If the “four corners” of the pleading state enough to discern the existence of federal jurisdiction, receipt of the pleading commences tolling of § 1446(b)’s 30 day period. *See Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 986 F.2d 48, 53-54 (1993). The writ of summons and Fumo’s proposed complaint state the names and addresses of the parties and state Fumo’s cause of action. Initially Friesen alleged that this court had subject matter jurisdiction because these state court causes of action raise a “substantial federal question”. If he is correct in either of these arguments (a matter which will be addressed subsequently), then both the writ of summons and the proposed complaint, one received on August 24th and the other on August 31st, suffice to commence tolling. Therefore, the

remaining defendants in the Fumo suit had, at the latest, until the end of September to join and thereby procedurally perfect Friesen's notice. But Gallas, Brown, and his law firm waited until October 18 to file their consents. Friesen's notice of removal does not meet the procedural requirements of § 1446(b),² and Fumo's suit will therefore be remanded.

2. Requirement of Jurisdiction

“Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.” *Caterpillar*, 482 U.S. at 392 (citing 28 U.S.C. 1441(a)). “Absent diversity of citizenship, federal-question jurisdiction is required.” *Id.* (citing 28 U.S.C. § 1331). And, “[t]he presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal [question] jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.” *Id.* There is a corollary to the well-pleaded complaint rule: where a complaint is based on state law, federal question jurisdiction arises nonetheless if (1) “some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims” or (2) by virtue of complete preemption, the “plaintiff's claim is really one of federal law.” *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 310 (3d Cir. 1994). Finally, the burden of establishing

² Co-defendant's failure to join “may be disregarded where: (1) a non-joining defendant is an unknown or nominal party; or (2) where a defendant has been fraudulently joined.” *Balazik* 44 F.3d 209, 213 n 4. Otherwise, the procedural requirements of § 1446(b) are mandatory. *See Lewis*, 757 F.2d at 68 (“Removal is a statutory right, and the procedures to effect removal must be followed[.]”); *Ogletree v. Barnes*, 851 F.Supp. 184, 190 (E.D.Pa. 1994) (“While a few courts have allowed non-signing defendants to submit affidavits of consent after the thirty-day period had expired, it is well-settled in this district that the thirty-day limitation is mandatory and the court is without authority to expand it.”).

jurisdictional grounds for removal rests with the defendant. *Goepel*, 36 F.3d at 309.

The parties agree that the plaintiff and some of the defendants are residents of the Commonwealth of Pennsylvania, and therefore, the court does not have jurisdiction by virtue of diversity. *See, e.g., the Mennen Co. v. Atl. Mut. Ins. Co.*, 147 F.3d 287, 290 (1998) (complete diversity of citizenship requirement). The writ of summons clearly indicates that Fumo’s claim is for wrongful use of civil process under state law, and the proposed complaint clearly states a state-law wrongful use of civil process claim and a state-law abuse of process claim.

Friesen argues, however, that Fumo’s suit, because it alleges misuse of a federal proceeding, presents a federal question. Def.’s Mem in Opposition to Motion to Remand (“Def.’s Mem.”) at 6-9. In one version of his argument, Friesen concludes that Fumo’s suit presents a substantial question of federal law – namely the viability of the underlying actions against Fumo.³ However, a previously dismissed federal action does not cause a subsequently filed state court action for a malicious prosecution to “arise under” federal law. Although the state court may have to determine the legally viability of the underlying claim, “[a] factfinder must determine what the defendant knew or believed about the facts.” *See Berg v. Leason*, 32 F.3d 422, 425 (9th Cir. 1994); *Bannar v. Miller*, 701 A.2d 232, 238 (Pa. Super. 1997) (holding that the reasonableness of believing in the validity of a legal claim is a question of fact); *McKibben v. Schmotzer*, 700 A.2d 484, 493 (Pa. Super. 1997) (“Usually, the existence of

³ Friesen claims that Fumo’s suit raises the viability of the underlying § 1983-enforced civil rights in *Gallas v. Supreme Court of Pennsylvania*. Notice of Removal at ¶ 5. Friesen also characterizes Fumo’s suit as alleging violation of Rule 11 of the Federal Rules of Civil Procedure. *Id.* at ¶ 6. This characterization is inaccurate. The proposed complaint merely cites Rule 11 as part of the historical facts leading up to the state law claims for wrongful use of civil process and abuse of process. Notice of Removal Ex. A (proposed complaint) at ¶ 21.

probable cause [an element of both wrongful use of civil process and of abuse of process] is a question of law for the court rather than a jury question, but may be submitted to the jury when facts material to the issue of probable cause are in controversy.”); 42 Pa.C.S.A. § 8352 (Supp. 2000). As in *Berg*, the court in this action need only decide whether the underlying claim was “legally tenable,” the cause action is created by state law and the state law controls the standard by which the strength of the federal claim in the underlying action is measured. Furthermore, “federal law is not dispositive because the degree of strength required to put the underlying federal claim over the probable cause threshold is determined by state law.” *See Berg*, 32 F.3d at 425. There is, therefore, no substantial question of federal law in this action.

In the second version of his argument, Friesen concludes that federal law completely preempts Fumo’s state law causes of action. Def.’s Mem. at 6-9. Federal law completely preempts state law if and only if (1) “the statute relied upon by the defendant as preemptive contains civil enforcement provisions within the scope of which the plaintiff’s state claim falls[,]” and (2) there is “a clear indication of Congressional intention to permit removal despite the plaintiff’s exclusive reliance on state law.” *Goepel*, 36 F.3d at 311. Complete preemption has been found in areas such as labor relations, ERISA, bankruptcy, immigration and trademark law. Friesen points to no federal statute with civil enforcement provisions that are within the scope of the plaintiff’s state claims. Furthermore, there is nothing in the federal law, as found under Rule 11 or otherwise, that creates a federal common law tort of wrongful use of civil process and that preempted state law claims for wrongful use of civil proceedings or abuse of process. Therefore, there is no clear indication of congressional intent to completely preempt the field, and in particular, state law claims for wrongful abuse of civil proceedings or abuse of

process. This conclusion is reinforced by the fact that Congress has delegated concurrent jurisdiction to adjudicate federal civil rights claims to both state and federal courts. *See Allen v. McCurry*, 449 U.S. 90, 99-100 (1980). Thus, federal law does not completely preempt Fumo's state law causes of action, there is no federal court jurisdiction over this action, and it must be remanded.

3. Conclusion

In order to remove Fumo's suit, Friesen must comply with the procedural requirements and must show that the court has jurisdiction over Fumo's suit. Friesen did not comply with procedural requirements, and the court does not have jurisdiction over Fumo's suit. Accordingly, the court grants Fumo's motion to remand.

