

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

BARRY A. DUBIN, D.D.S. : CIVIL ACTION  
:   
v. :   
:   
PRINCIPAL FINANCIAL GROUP and :   
DAVID HENNINGS, C.F.E. : NO. 01-079

MEMORANDUM ORDER

This case is before the court on plaintiff's motion to remand. The factual and procedural background is set forth in the court's Memorandum Order of April 24, 2001. The parties do not dispute that they are of diverse citizenship and that the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. The issue is whether defendants timely filed their notice of removal under 28 U.S.C. § 1446. The question is whether the court can conscientiously conclude that plaintiff's complaint was not received by defendants' counsel until December 6, 2000 or later.<sup>1</sup>

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1. Plaintiff's alternative contention that the removal period was triggered on July 10, 2000 upon service of the original summons following a settlement demand of \$100,000 by correspondence of August 10, 1999 is rejected. Even accepting that the listing of one's address denotes his residence, residency and citizenship are distinct concepts. See Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389, 389 (1893) (allegation of "residence" insufficient to confer diversity jurisdiction); Krasnov v. Dinan, 465 F. 2d 1298, 1300 (3d Cir. 1972) ("residency in a state is insufficient for purposes of diversity"); Gerrrino v. Ohio Casualty Ins. Co., 423 F.2d 419, 421 (3d Cir. 1970) ("[a]llegations of citizenship are required to meet the jurisdictional requirement"); Darling v. Piniella, 1991 WL 193524, \*4 (E.D. Pa. Sept. 27, 1991) ("[d]iversity jurisdiction is predicated on citizenship, not residency");

(continued...)

Defendants filed their removal notice on January 5, 2001. In his remand motion, plaintiff asserted that he served defendants by mail on November 30, 2000. Plaintiff submitted a certificate of service to the state court attesting to the mailing of a copy of the complaint to defense counsel on November 30, 2000. Defendants responded that they did not receive the complaint until December 8, 2001.<sup>2</sup> The court noted in its initial memorandum order of April 24, 2001 the improbability that it would take a week or more for mail to arrive at a destination within the same zip code area, but allowed defendants to supplement their response with evidence of receipt on or after December 6, 2000.

It now appears that plaintiff served defendants with copies of the complaint on two separate occasions. Plaintiff's counsel represents that a copy was initially mailed from the main

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(...continued)

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"). Moreover, no amount in controversy can be discerned from the praecipe and summons in themselves and what defendants may have perceived from its receipt in view of a settlement demand in prior correspondence is immaterial. See Foster v. Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48, 53-54 (3d Cir. 1993); Rowe v. Marder, 750 F. Supp. 718, 721 (W.D. Pa. 1990), aff'd, 935 F.2d 1282 (3d Cir. 1991).

2. Defendants have since indicated that they actually received the complaint on December 7, 2000.

post office at 30th and Market Streets on November 30, 2000, at the same time the complaint was mailed to the Prothonotary. A second copy, reflecting the Prothonotary's receipt of the complaint on December 1, 2000, was mailed to defendants on December 5, 2000.

The cover letter accompanying the first copy of the complaint is dated November 30, 2000 and the cover letter accompanying the second copy is dated December 5, 2000. Each cover letter is addressed to defendants' attorney at his law firm office. Internal date-stamps affixed by counsel's secretary indicate that the second copy of the complaint was received on December 7, 2000 and the initial copy was received on December 11, 2000. Defendants have now submitted an affidavit of the secretary who states that she "regularly and in the ordinary course of business" date-stamps mail on the date she receives it and is unaware of any reason why this would not have occurred in this case.

The removing party bears the burden of proving the propriety of removal. See Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir. 1995); Cartwright v. Thomas Jefferson Univ. Hosp., 99 F. Supp. 2d 550, 552 (E.D. Pa. 2000). Upon timely challenge, this includes proof of compliance with the procedural time requirements of 28 U.S.C. § 1446(b). See Telesis v. Atlis, 918 F. Supp., 823, 828 (D.N.J. 1996); Kluksdahl v. Muro

Pharm., Inc., 886 F. Supp. 535, 537 (E.D. Va. 1995); Van Fossen v. Hartford Ins. Co., 1993 WL 514575, \*1-2 (E.D. Pa. Dec. 10, 1993); Blow v. Liberty Travel, Inc., 550 F. Supp. 375, 376 (E.D. Pa. 1982). The untimely filing of a notice of removal is a ground for remand under 28 U.S.C. § 1447(c). See Page v. City of Southfield, 45 F.3d 128, 131 (6th Cir. 1995); Telesis, 918 F. Supp. at 828.

All doubts concerning the propriety of removal are resolved in favor of remand. Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085 (1991); Barkley v. City of Philadelphia, 2001 WL 360102, \*2 (E.D. Pa. Apr. 3, 2001); Apoian v. American Home Products, Corp., 108 F. Supp. 2d 454, 456 (E.D. Pa. 2000). Absent waiver, this includes doubts regarding the timeliness of removal. See Somlyo v. J. Lu-  
Rob Enterprises, Inc., 932 F.2d 1043, 1046 (2d Cir. 1991); Century Assets Corp. v. Solow, 88 F. Supp. 2d 659, 663 (E.D. Tex. 2000); Big B. Automotive Warehouse Distributors, Inc. v. Cooperative Computing, Inc., 2000 WL 1677948, \*3 (N.D. Cal. Nov. 1, 2000); Botelho v. Presbyterian Hosp. in the City of New York, 961 F. Supp. 75, 77 (S.D.N.Y. 1997).

Plaintiff's counsel certified that he mailed a copy of the complaint to defense counsel on November 30, 2000. The cover letter accompanying the initial copy of the complaint is dated November 30, 2000. The complaint which was mailed to the

Prothonotary on the same day and from the same place was received on December 1, 2000. The second copy of the complaint which was mailed on December 5, 2000 was received by defense counsel two days later on December 7, 2000. According to defendants, although mailed six days after the first copy, the second copy arrived four days earlier.<sup>3</sup>

Plaintiff's counsel has represented to two courts that a copy of the complaint was mailed to defense counsel on November 30, 2000, at the same time the complaint was mailed to the Prothonotary. He attests that this is his standard practice. For counsel knowingly to misrepresent such a material fact would constitute professional misconduct. See Rules of Professional Conduct 3.3(a)(1) & 8.4(a).

It is unquestioned that the Prothonotary received the mailing addressed to him on December 1, 2000. In the absence of a postmarked envelope or an actual recollection of receipt by an appropriate employee of defense counsel, and resolving any doubt in favor of remand, the court concludes that an initial copy of

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3. Defendants say they "suspect" that plaintiff's counsel's letter of November 30, 2000 with a copy of the complaint was not actually mailed until much later, and note that in any event plaintiff has not proved receipt by defense counsel of a copy of the complaint prior to December 7, 2000. As noted, however, it is defendants who bear the burden of proof. The law presumes that a letter properly addressed and placed in a post office reached its destination in the usual time and was received by the addressee. See Iowa Lamb Corp. v. Kalene Industries, Inc., 871 F. Supp. 1149, 1153 (N.D. Iowa 1994) (citing numerous cases). While rebuttable, this is "a very strong presumption." Id. It is not overcome by suspicion.

the complaint was mailed on November 30th as represented and received within five days thereof.<sup>4</sup>

**ACCORDINGLY**, this                      day of May, 2001, **IT IS**  
**HEREBY ORDERED** that plaintiff's Motion for Remand will be  
**GRANTED.**<sup>5</sup>

**BY THE COURT:**

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**JAY C. WALDMAN, J.**

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4. The court does not suggest that defense counsel's secretary was less than diligent in stamping mail. Even the most conscientious persons assigned to receive and process mail for an office, however, can misplace or misdirect a particular item. The thirty day removal period is triggered upon receipt by a mailroom or other employee responsible for receiving mail. See Botelho, 961 F. Supp. at 78; Maglio v. F.W. Woolworth, Co., 542 F. Supp. 39, 41 (E.D. Pa. 1982). There is also no requirement, of course, that a defendant wait until the deadline to file a notice of removal. There is no suggestion that defense counsel made any inquiry of plaintiff's counsel or otherwise to attempt to reconcile the eleven day disparity between the date of the cover letter and certificate of service and that stamped by his secretary. Had he done so or simply accepted the earlier date as a matter of prudence and caution, there would have remained ample time to remove within the required period.

5. The court will not grant plaintiff's request for attorney fees and costs. The court has "broad discretion" in determining whether to award such expenses. Mints v. Educ. Testing Serv., 99 F. 3d 1253, 1260 (3d Cir. 1996). While a finding of bad faith on the part of the removing party is not required, courts may consider whether the removal was frivolous or was reasonably undertaken in good faith and with some colorable basis. See id. at 1261; Daleske v. Fairfield Communities, Inc., 17 F.3d 321, 324-25 (10th Cir.), cert. denied, 511 U.S. 1082 (1994); Robinson v. Computer Learning Centers, 1999 WL 817745, \*3 (E.D. Pa. Oct. 12, 1999); Eyal Lior v. Sit, 913 F. Supp. 868, 878 (D.N.J. 1996); Mooreco Int'l. V. Elsaq Bailey Process Automation, 881 F. Supp. 1000, 1007 (E.D. Pa. 1995). It does not appear that the removal herein was frivolous, unreasonable or lacking in any colorable basis.

