

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

ALBERT JOHNSON,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
VERTIS, INC, ET AL.	:	No. 02-6711
Defendants.	:	

MEMORANDUM AND ORDER

SCHILLER, J., **October** , **2002**

Presently before the Court is Plaintiff Albert Johnson’s motion to remand this matter to state court on the ground that removal was procedurally defective under 28 U.S.C. § 1446. Plaintiff commenced this product liability action by filing a complaint naming multiple defendants on July 19, 2002 in the Court of Common Pleas of Philadelphia County. On August 12, 2002, two of the Defendants, Vertis, Inc. (“Vertis”) and Webcraft Technologies, Inc. (“Webcraft”), filed a notice of removal, alleging that this Court had jurisdiction under 28 U.S.C. § 1332 on the basis of the parties’ diversity of citizenship. Thereafter, other Defendants joined the notice of removal.

Plaintiff filed a motion to remand on September 11, 2002, arguing that all Defendants had not joined or consented to the removal notice in a timely fashion. Under the removal statute, a removal notice must be filed within thirty days after the receipt by the defendant of a copy of the complaint. *See* 28 U.S.C. § 1446(b). Moreover, under the so-called rule of unanimity, “[f]ailure of all defendants to join [a notice of removal] is a ‘defect in removal procedure’ within the meaning of § 1447(c). . . .” *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995) (citation omitted). There are, however, narrow exceptions to the unanimity requirement.

One such exception, upon which Defendants rely, provides that “defendants who have not been served with the initial pleadings pursuant to 28 U.S.C. § 1446(b) at the time the notice of removal is filed are also not required to join in the notice of removal or otherwise consent to removal.” *Johnson v. Sec’y of Pa. Dep’t of Corrs.*, 2000 WL 136802, at *2 (E.D. Pa. Feb. 7, 2000) (quoting *Ogletree v. Barnes*, 851 F. Supp. 184, 187 (E.D. Pa.1994)). In arguing that the instant case falls within this exception, Defendants correctly point out that all Defendants were not served with the complaint prior to the filing of the notice of removal on August 12, 2002, but overlook the fact that two Defendants had been served by that date but had not then consented to removal. *See* Pl.’s Mot. to Remand, Ex. A (Civil Docket Report). Because these non-joined Defendants had been served prior to the filing of the notice of removal, no exception to the joinder rule is applicable, and the notice of removal is defective such that remand is warranted. *See Caraffa v. City of Philadelphia*, Civ. A. No. 87-3058, 1987 U.S. Dist. LEXIS 7847, 1987 WL 16309, at *1 (E.D. Pa. Aug. 28, 1987). In opposing Plaintiff’s motion, Defendants Vertis and Webcraft note that the docketing system in the state court was delayed in reflecting that certain affidavits of service had been filed. In light of the alleged delay, Defendants suggest that their failure to seek the consent of those Defendants should be excused. I disagree. “[T]he complaint clearly identifies the names and addresses of all the defendants. Given the requirements of Section 1446, defendants were not justified in waiting for proof of service to be filed given the short period of time in which they have to remove the action.” *Id.* at *2; Pl.’s Compl. at 2 (listing names and addresses of all defendants). *But see Laurie v. AMTRAK*, Civ. A. No. 01-6145, 2002 U.S. Dist. LEXIS 11838, at *4-5 (E.D. Pa. Mar. 13, 2002) (finding diligent defendant excused from obtaining consent from codefendants for whom no proof of service appeared on state court docket).

There is an additional reason that the removal in this action was procedurally defective. Defendant CIT Group¹ was served on July 31, 2002, but did not file its joinder of the notice of removal until September 25, 2002. Thus, CIT Group did not timely join the removal, and remand is warranted for this reason as well. *See Balistieri v. Bell Asbestos Mines, Ltd.*, 544 F. Supp. 528, 529 (1982) (“Where all defendants have not timely joined in a petition to remove . . . the cases have been remanded to state court. . . .” (citations omitted)).

Accordingly, I grant Plaintiff’s motion and remand this matter to the Court of Common Pleas of Philadelphia County.²

¹ Defendants speculate in a footnote that CIT Group may be a nominal party, and, as such, not required to join the notice of removal. *See Balazik*, 44 F.3d at 213 n.4 (noting that unanimity rule may be disregarded where non-joining defendant is a nominal party). Defendants bear the burden of showing the appropriateness of removal, *see, e.g., Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), and mere speculation about the status of party as “nominal” does not provide a sufficient basis for denying Plaintiff’s motion.

² Because the removal statute, 28 U.S.C. § 1446, does not directly address when the thirty-day period begins to run in a case involving multiple defendants served at different times, I do not find that Defendants’ arguments in opposition to Plaintiff’s motion to remand to be frivolous, unfounded, or lacking any colorable basis. Thus, I decline to award Plaintiff attorney’s fees or costs.

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ORDER

AND NOW, this day of **October, 2002**, upon consideration of Defendants' Notice of Removal, Defendants' Amended Notice of Removal, Plaintiff's Motion to Remand, Defendant's Response, and Plaintiff's Reply thereto, it is hereby **ORDERED** that:

1. Plaintiff's Motion to Remand (Document No. 10) is **GRANTED IN PART AND DENIED IN PART**. Plaintiff's motion is **GRANTED** to the extent it seeks a remand of this matter to the Court of Common Pleas of Philadelphia County, and **DENIED** to the extent it seeks attorney's fees and costs.
2. The Clerk of the Court is directed to **REMAND** this matter to the Court of Common Pleas of Philadelphia County.

BY THE COURT:

Berle M. Schiller, J.