

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

FERNANDO TELLADO AND :  
KATHLEEN TELLADO : CIVIL ACTION  
 :  
v. :  
 :  
 :  
 : NO. 04-CV-3382  
ROTO-DIE, INC., ET AL. :

**SURRICK, J.**

**MARCH 29, 2005**

**MEMORANDUM & ORDER**

Presently before the Court is Plaintiffs' Motion to Remand (Doc. No. 3). For the following reasons, Plaintiffs' Motion will be granted.

**I. BACKGROUND**

On April 12, 2004, Plaintiffs filed a complaint in the Court of Common Pleas of Philadelphia County against six (6) Defendants.<sup>1</sup> *Tellado v. Roto-Die, Inc.*, Civ. A. No. 040401459 (Pa. Ct. Com. Pl. filed Apr. 12, 2004). On May 10, 2004, Defendant Austin-Hunt filed a notice of removal on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiffs filed a motion to remand, which we granted on August 6, 2004. *Tellado v. Roto-Die, Inc.*, Civ. A. No. 04-CV-2022, 2004 U.S. Dist. LEXIS 15750 (E.D. Pa. Aug. 6, 2004).

While the motion to remand was pending, Plaintiffs filed a second complaint in the Court of Common Pleas of Philadelphia County against nine (9) Defendants. *Tellado v. Roto-Die, Inc.*,

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<sup>1</sup>These Defendants were: (1) Roto-Die, Inc. ("Roto-Die"); (2) FECO Engineered Systems, Inc. ("FECO"); (3) Park-Ohio Industries, Inc.; (4) Tocco, Inc; (5) Austin-Hunt Corporation ("Austin-Hunt"); and (6) Production Products, Inc. ("Production Products").

Civ. A. No. 040600535 (Pa. Ct. Com. Pl. filed June 9, 2004). In addition to naming the six (6) Defendants in the first state action, Plaintiffs also named as Defendants: FECO, A Park Ohio Company; Park Ohio Holdings Corporation; and Sabina Manufacturing (“Sabina”). On July 16, 2004, Defendants Austin-Hunt and Roto-Die filed a Notice of Removal to this Court on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332.<sup>2</sup> (Doc. No. 1.)

## **II. LEGAL STANDARD**

Under 28 U.S.C. § 1441(a), a defendant in a state court action may remove the case to federal court if the federal court could have originally exercised jurisdiction over the matter. 28 U.S.C. § 1441(a) (2000). A case removed to federal court may be remanded to state court “if at any time before final judgment it appears that the district court lacks subject matter jurisdiction” over the claim. *Id.* § 1447(c) (2000). The removing party bears the burden of proving to a legal certainty that federal subject matter jurisdiction exists. *Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004). Because § 1441 is strictly construed against removal, *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), all doubts about whether a plaintiff satisfies the diversity requirement must be resolved in favor of remand. *Samuel-Bassett*, 357 F.3d at 403.

## **III. LEGAL ANALYSIS**

Plaintiffs argue that removal is not proper because not every Defendant consented to the removal. (Doc. No. 3 at unnumbered 4-8.) Through the “rule of unanimity,” § 1446 has been construed to require that all defendants join in a removal petition or consent to removal of the

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<sup>2</sup>Defendants also filed a Praecipe to Transfer Case to Federal Court with the Court of Common Pleas of Philadelphia which was docketed on July 21, 2004. (Doc. No. 8.)

case.<sup>3</sup> *Jordan v. Phila. Housing Auth.*, Civ. A. No. 91-6191, 1991 U.S. Dist. LEXIS 15970, at \*3 (E.D. Pa. Nov. 5, 1991) (citing *Lewis v. Rego Co.*, 757 F.2d 66, 68 (3d Cir. 1985)). In their Notice of Removal, Defendants Austin-Hunt and Roto-Die aver that every Defendant, except Feco Engineered Systems, Inc.,<sup>4</sup> consents to the removal.<sup>5</sup>

Plaintiffs assert that the rule of unanimity is not satisfied because Defendant Production Products did not consent to removal. Robert Rosenthal, a claims adjuster for Selective Insurance Company assigned to manage this case, signed the consent form. (Doc. No. 1 Ex. E; Doc. No. 6 Ex. D (“Rosenthal Aff.”) ¶ 1.) Rosenthal asserts that “Selective Insurance Company pursuant to its 2002 liability policy covering Production Products, Inc. had the right and duty to consent to issues of venue, including removal to Federal Court.” (Rosenthal Aff. ¶ 2.) Despite Rosenthal’s apparent belief that he had the authority to consent to removal for the company, Production Products continued to pursue the litigation in state court even after Austin-Hunt and Roto-Die filed their Notice of Removal. On July 23, 2004, counsel for Production Products entered his appearance on behalf of the company in the Court of Common Pleas of Philadelphia County and

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<sup>3</sup>The unanimity rule can be disregarded when: (1) the non-joining defendant is a nominal party; (2) the defendant has been fraudulently joined; or (3) a defendant had not been served when the removing defendants filed their notice of removal. *Shepard v. City of Philadelphia*, Civ. A. No. 00-CV-6076, 2001 U.S. Dist. LEXIS 783, at \*4 n.1 (E.D. Pa. Jan. 31, 2001); *Johnson v. Pa. Dep’t of Corr.*, Civ. A. No. 99-5325, 2000 WL 136802, at \*2 (E.D. Pa. Feb. 7, 2000). Defendant Production Products does not aver that any of these exceptions apply. In fact, while Production Products filed an Answer, Affirmative Defenses, and Crossclaim in this action (Doc. No. 10), it did not object to Plaintiffs’ Motion to Remand.

<sup>4</sup>According to Defendants, Feco Engineered Systems, Inc. could not consent because it “is no longer in existence.” (Doc. No. 1 ¶ 11.)

<sup>5</sup>As part of their Notice of Removal, Defendants Austin-Hunt and Roto-Die included a document styled as a “Unanimous Consent to Remove to Federal Court.” (Doc. No. 1 Ex. E.)

demanded a jury trial.<sup>6</sup> (Doc. No. 8.) When a party ostensibly agrees to removal but continues to pursue state litigation, “[s]uch action seriously undermines any representations regarding [the Defendant’s] alleged consent to the removal.” *Ogletree v. Barnes*, 851 F. Supp. 184, 190 (E.D. Pa. 1994). In *Ogletree*, one of the defendants continued to litigate in the state court action by obtaining subpoenas for the production of medical records, even after the other defendants had filed a notice of removal. *Id.* The *Ogletree* court found that this action militated against finding that the defendant consented to remove the action to federal court. Because there was not unanimous consent to the removal, the court remanded the action to state court. *Id.*

Here, Production Products filed a pleading in state court after Austin-Hunt and Roto-Die filed the Notice of Removal. Such conduct belies any claim by Rosenthal that he had the authority to bind the company to a decision to pursue the litigation in federal court. While other Defendants raise various arguments in support of Rosenthal’s ability to act on behalf of Production Products (Doc. No. 4 at unnumbered 2; Doc. No. 6 at unnumbered 5-6), Production Products itself has inexplicably chosen not to respond to Plaintiffs’ Motion to Remand. Since Production Products has chosen not to enlighten us concerning the authority, if any, of Selective’s claims adjuster to consent to the removal, we will not speculate as to the understanding between Selective Insurance Company and Production Products in this regard.

Even though Rosenthal lacked the authority to consent to the removal on behalf of Production Products, Production Products could have filed a timely notice of removal or consent up until August 6, 2004. 28 U.S.C. § 1446(b) states:

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<sup>6</sup>The same counsel also entered an appearance on behalf of Production Products in this action on August 23, 2004. (Doc. No. 5.)

The notice or removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, 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, or within thirty days after the service of the summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b) (2000); *see also* *Murphy Bros., Inc. v. Michetti Pipe Stringing*, 526 U.S. 344, 354 (1999). Thus, in situations where there are multiple defendants, *all* of the defendants must consent to removal within thirty (30) days of the service of the complaint.

For the limited purpose of evaluating Production Products's removal options, we will assume that the "later-served defendant" rule applies, whereby "each defendant to an action is entitled to thirty days after service to remove an otherwise removable action and . . . all defendants can consent to that removal, even if their own thirty-day periods have expired,"<sup>7</sup> *Liberty Mut. Ins. Co. v. Bayer Corp.*, Civ. A. No. 02-343, 2002 U.S. Dist. LEXIS 12581, at \*5 (D. Del. July 8, 2002) (quoting *Griffith v. Am. Home Prods.*, 85 F. Supp. 2d 995, 998 (E.D. Wa. 2000)). Defendant Production Products was personally served with the Complaint on July 7, 2004. (Doc. No. 3 Ex. D.) This Defendant could have removed the state action to federal court or consented to such removal on or before August 6, 2004. However, the only pleading that Production Products filed during that time period was an entry of appearance and jury demand in state court. (Doc. No. 8.) Because Production Products did not "clearly and unambiguously" consent to Austin-Hunt and Roto-Die's Notice of Removal in a timely manner, the "rule of unanimity" was not satisfied and removal of this action was defective. *See Ogletree*, 851 F.

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<sup>7</sup>There is some dispute regarding whether a defendant may join in the notice of removal of another defendant if its own thirty-day period has expired. *See Tellado*, 2004 U.S. Dist. LEXIS 15750, at \*4; *Liberty Mut. Ins. Co. v. Bayer Corp.*, Civ. A. No. 02-343, 2002 U.S. Dist. LEXIS 12581, at \*6-7 (D. Del. July 8, 2002).

Supp. at 190. Thus, we must remand this matter to the Court of Common Pleas of Philadelphia County.

An appropriate Order follows.

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	:	NO. 04-CV-3382
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**ORDER**

AND NOW, this 29th day of March, 2005, upon consideration of Plaintiffs' Motion to Remand (Doc. No. 3, No. 04-CV-3382), and all papers submitted in support thereof and in opposition thereto, it is ORDERED that Plaintiffs' Motion is GRANTED and the Clerk of Court is directed to REMAND this case to the Court of Common Pleas of Philadelphia County.

IT IS SO ORDERED.

BY THE COURT:

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S:/R. Barclay Surrick, Judge