

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

SHARON KIRBY	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	NO. 05-03076
KRISHAN LAL MALL and	:	
GTI GURSIMRAN TRANSPORT, INC.	:	
	:	
Defendants.	:	

Diamond, J.

October 17, 2005

MEMORANDUM

Plaintiff argues that Defendants acted untimely when they removed this motor vehicle accident case over four months after it was filed in Pennsylvania state court, and between two and three months after it was served. I agree and remand. I deny Plaintiff's request for counsel fees and costs.

BACKGROUND

Sharon Kirby alleges that on January 25, 2004, she was driving in Philadelphia, Pennsylvania, when a tractor trailer owned by GTI Gursimran Transport, Inc. and operated by GTI employee Krishan Lal Mall crashed into her car, injuring her. (Plaintiff's Mot. for Remand at ¶¶ 2, 3). Mr. Mall is a citizen of Canada, and GTI is a Canadian corporation. (Id. at ¶¶ 4, 5). GTI designated Process Agent Service Company, Inc. as its process agent. (Id. at ¶ 35.) James D. Campbell, Jr., a lawyer with an office in Harrisburg, serves as the registered agent in Pennsylvania for PASCI. (Id. at ¶ 36).

Following the accident, Plaintiff repeatedly tried to contact GTI but received no response. (Stip. of Facts at ¶¶ 6-8). In April 2004, Plaintiff wrote to Campbell, seeking the name of GTI's insurance company. (Id. at ¶¶ 9, 35-36). Campbell responded that he did not know, and suggested that Plaintiff contact the Federal Motor Carrier Safety Administration of the Department of Transportation. (Id., Ex. E, Letter from James D. Campbell, Jr. to Kim A. Heard). On June 9, 2004, Plaintiff learned that GTI was not listed with the FMCSA. (Stip. of Facts at ¶ 14).

Plaintiff filed suit against Mall and GTI in the Philadelphia Common Pleas Court on February 9, 2005. (Id. at ¶ 15). On February 11, 2005, Plaintiff sent by registered mail a copy of the Complaint to GTI in Canada; it was returned with the notation "moved." (Id. at ¶¶ 16, 17). On March 11, 2005, Plaintiff asked the Sheriff of Dauphin County to serve the Complaint on GTI in care of Campbell. (Id. at ¶ 18). On March 18, 2005, the Sheriff executed an Affidavit stating explicitly that he had served the Complaint on Campbell by handing a copy to Campbell's administrative assistant, Lynne Schmick, on March 16, 2005. (Id. at ¶ 19).

Campbell alleges that the Sheriff did not actually leave the Complaint at Campbell's office. (Id. at ¶ 20). Campbell also alleges that he did not learn of the Complaint until he received a Ten Day Notice from Plaintiff dated April 19, 2005. (Id. See also Def. Memo. of Law in Opp. to Plaintiff's Motion for Remand at p. 2). On April 22, 2005, Campbell wrote to Plaintiff's counsel, stating that he had never received a copy of the Complaint. (Stip. of Facts, Ex. N, Letter from James D. Campbell, Jr. to Bruce L. Neff). Accordingly, on April 26, 2005, Plaintiff mailed to Campbell a copy of the Complaint and the Sheriff's Affidavit of Service. (Stip. of Facts, Ex. O, Letter from Bruce L. Neff to James D. Campbell, Jr.). Campbell acknowledged that he received these papers on April 28, 2005. (Stip. of Facts, Ex. P, Letter from James D. Campbell, Jr. to Bruce L. Neff).

Campbell subsequently contacted PASCI and learned that Defendant GTI had lost its authority to operate in the United States on June 15, 2004. (Stip. of Facts at ¶ 24).

The parties agree that Plaintiff served Mall with the Complaint on April 24, 2005. (Plaintiff's Mot. for Remand at ¶ 6).

On June 24, 2005, Mall and GTI filed a Notice of Removal. (Stip. of Facts at ¶ 33). On July 8, 2005, Plaintiff moved to remand, arguing that the Notice of Removal was untimely. (Plaintiff's Memo. of Law in Support of its Petition for Removal [sic] at p. 2). Plaintiff also sought the attorneys' fees and costs she incurred in seeking remand. (Id. at p. 5-6).

LEGAL STANDARDS

Federal law provides that a defendant may remove a case "within thirty days after the receipt by the defendant" of the complaint. 28 U.S.C. § 1446(b). Remand is compulsory when a removal petition is improper on its face. Cameron v. Hodges, 127 U.S. 322, 32 L. Ed. 132, 8 S. Ct. 1154 (1888). The Supreme Court has long obligated federal courts to construe § 1446(b) strictly, requiring remand if any doubt exists as to whether removal was proper. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 85 L. Ed. 1214, 61 S. Ct. 868 (1941). Thus, removal outside the thirty days provided by § 1446(b) "is a sufficient ground on which to remand" for facial invalidity. Blow v. Liberty Travel, Inc., 550 F. Supp. 375 (E.D. Pa. 1982).

DISCUSSION

I. The Sheriff's Affidavit Is Conclusive On The Issue Of Service Of Process

The Supreme Court has held that formal service of process triggers § 1446(b)'s thirty day clock. See Murphy Brothers, Inc. v. Michetti Pipestringing, Inc., 526 U.S. 344, 347-48 (1999). The parties have stipulated that Plaintiff served Mall with the Complaint on April 24, 2005. Thus, the

parties agree that the thirty day removal clock had expired with respect to Mall by the time Defendants sought removal some sixty-one days later, on June 24, 2005. See Letter of Clarification to the Stipulation at 1. GTI asserts, however, that Plaintiff never properly served her Complaint on GTI before it removed the matter to this Court. Accordingly, GTI contends that the § 1446(b) thirty day clock never began to run, and that its removal was thus timely.

The parties have stipulated that on March 18, 2005, the Dauphin County Sheriff executed an Affidavit stating that on March 16, 2005, he served the Complaint on James Campbell by handing a copy to Campbell's administrative assistant. (Stip. of Facts at ¶ 19). GTI has submitted an affidavit from Campbell in which he states that although his administrative assistant signed for the Complaint on March 16, 2005, she did not actually receive a copy of the Summons or Complaint from the Sheriff. (Affidavit of James D. Campbell, Jr., Esq. at ¶ 10). Thus, GTI contends that the thirty day clock did not start to run on March 16th. I cannot accept this argument.

Pennsylvania courts have "long adhered" to the rule that "in the absence of fraud, the return of service of a sheriff, which is full and complete on its face, is conclusive and immune from attack by extrinsic evidence." Hollinger v. Hollinger, 206 A.2d 1, 4 (Pa. 1964). In challenging the facially complete Dauphin County Sheriff's return, Campbell has not alleged fraud. Accordingly, I may not consider the "extrinsic evidence" of the Campbell affidavit. (Affidavit of James D. Campbell, Jr., Esq. at ¶ 10). Rather, Pennsylvania law compels me to conclude that Plaintiff served Campbell on March 16, 2005. In these circumstances, GTI's June 24th removal was untimely.

II. Campbell Was GTI's Designated Agent Under The Federal Motor Carrier Statute

GTI next contends that because Campbell was no longer its agent for service of process on March 16, 2005, even if he received the Complaint on that date, it was not valid process on GTI.

I disagree.

Under the Federal Motor Carrier Statute, GTI, a Canadian corporation, was required to maintain a process agent in every state in which it operated. The FMCS further required GTI to designate the agent in writing, and file the designation "with the Department of Transportation and each state in which the carrier operates" 49 U.S.C.S. § 13304.

GTI has stipulated that it had designated Campbell as its agent for service of process before June 15, 2004, when it was authorized to operate in the U.S. (Stip. of Facts at ¶¶ 35-36). GTI contends that after it lost its operating authority, Campbell's status as GTI's agent for service of process terminated as well. (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Remand at p. 3-4). The law provides exactly the opposite.

Federal regulations provide that a carrier subject to the FMCS may change the designation of its agent for service of process only by appointing a new agent, unless the company has ceased its operations for one year or longer. 49 C.F.R. 366.6. In the instant case, the parties have stipulated that GTI ceased operating on June 15, 2004. (Stip. of Facts at ¶ 24). According to the Dauphin County Sheriff's return, Campbell received Plaintiff's Complaint less than one year after GTI ceased operating. GTI has not suggested that it ever canceled or changed the designation of its process agent during the year following its June 15, 2004 loss of operating authority. See Def. Response in Opp. to Plaintiff's Mot. for Remand at ¶ 7; Defendant's Memo. of Law in Opp. to Plaintiff's Mot. for Remand at p. 2; Aff. of James D. Campbell, Jr., Esq. at ¶ 10. Thus, under the plain text of 49 C.F.R. 366.6, Campbell continued to serve as GTI's agent for service of process until June 2005.

In these circumstances, the March 16, 2005, service on GTI started the running of the thirty-day removal clock under § 1446(b). As GTI did not remove until June 24, 2005, its Notice was

untimely. Accordingly, I will remand this case to the Philadelphia Common Pleas Court. See Blow, 550 F. Supp. at 375.

III. Plaintiff's Request For Attorneys' Fees And Costs

Plaintiff contends that because "Defendants knew or should have known that the time to file their Notice of Removal had expired before June 24, 2005," they are obligated to pay the costs and fees she incurred in securing a remand. (Plaintiff's Memo. of Law in Support of its Petition for Removal [sic] at p. 6). I "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal" of a matter that I subsequently remand. 28 U.S.C. § 1447(c). The Third Circuit has held that district courts have "broad discretion and may be flexible in determining whether to require the payment of fees under [28 U.S.C. § 1447(c)]." Mints v. Educ. Testing Serv., 99 F.3d 1253, 1257-58 (3d Cir. 1996). For instance, when the removal motion involves close legal questions, a district court may decline to award costs and fees. See e.g. Roxbury Condominium Ass'n, Inc. v. Anthony S. Cupo Agency, 316 F.3d 224, 228 (3d Cir. 2003). In the instant case, it does not appear that GTI's removal was either abusive or obviously unreasonable. Accordingly, I decline to award attorneys' fees or costs to the Plaintiff.

BY THE COURT:

PAUL S. DIAMOND, J.

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SHARON KIRBY	:	
	:	CIVIL ACTION
-v-	:	
	:	
KRISHAN LAL MALL and	:	No. 05-03076
GTI GURSIMRAN TRANSPORT, INC.	:	

ORDER

AND NOW this 12th day of October, 2005, upon consideration of Plaintiff's Motion to Remand, the Response of Plaintiff, and any related submissions, it is **ORDERED** that the Motion is **GRANTED**. Plaintiff's request for attorneys' fees and costs is **DENIED**.

The Clerk of Court is directed to remand the file to the Prothonotary of the Court of Common Pleas of Philadelphia County.

The Clerk's Office shall close this case for statistical purposes.

AND IT IS SO ORDERED.

Paul S. Diamond, J.