

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

WESLEY CROSS

v.

**YOUTH ADVOCATE PROGRAMS, INC.,
et al.**

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CIVIL NO. 06-3729

Kauffman, J.

November 20, 2006

MEMORANDUM AND ORDER

Now before the Court is Plaintiff Wesley Cross's Motion to Remand this action to the Court of Common Pleas of Philadelphia County. For the reasons that follow, the Motion will be granted.

I. BACKGROUND

In December 2002, Philadelphia's Juvenile Court placed Plaintiff on juvenile probation and ordered him to participate in rehabilitation programs administered by Defendant Youth Advocate Programs, Inc. ("YAP"). Complaint at ¶ 10. Defendant Orlando Bey was the counselor assigned by YAP to work with Plaintiff. *Id.* at ¶ 11. Plaintiff alleges that, from January 2003 to July 2003, Bey sexually assaulted him on almost a daily basis and threatened to have him put in jail if he did not comply with his requests for sexual acts. *Id.* at ¶¶ 12, 14.

Plaintiff filed the present action in the Court of Common Pleas of Philadelphia County on June 17, 2005, asserting claims against Bey for assault and battery, child molestation, sexual abuse, and intentional infliction of emotional distress. Plaintiff also asserted claims against YAP and the other named defendants for negligent hiring, training and supervision, and the violation

of a "special relationship." On August 22, 2006, all Defendants, except Bey, filed a petition to remove the case to federal court. Bey consented to removal on August 24, 2006. Plaintiff then filed the instant Motion to Remand.

II. LEGAL STANDARD

A defendant in state court may remove to federal court if the federal court has original jurisdiction over the action. 28 U.S.C. § 1441. The defendant, as the removing party, has the burden to show that federal jurisdiction exists. See Pullman Co. v. Jenkins, 305 U.S. 534, 540 (1939). "Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts should be resolved in favor of remand." Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3d Cir. 1985). Thus, "if there is any doubt as to the propriety of removal, the case should not be removed to federal court." Brown v. Gov't of the Virgin Islands, 75 F.3d 860, 865 (3d Cir. 1996).

III. ANALYSIS

Defendants contend that this Court has original jurisdiction under 28 U.S.C. § 1331, which confers original jurisdiction to district courts over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "[T]he question [of] whether a claim 'arises under' federal law must be determined by reference to the 'well pleaded complaint.'" Merrell Dow Pharms., Inc v. Thompson, 478 U.S. 804, 804 (1986)) (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983)). A well-pleaded complaint can raise a federal question either by: (1) asserting a cause of action that was "created by federal law;" or (2) including a state-law claim that "implicate[s] significant

federal issues." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005).

Defendants argue that this case asserts a federal question because Plaintiff's claim for the violation of a "special relationship," while never explicitly invoking a federal statute, must be pursuant to 42 U.S.C. § 1983. Answer at ¶¶ 1, 4-6. The Court need not reach this issue, however, because Defendants' removal was untimely.

28 U.S.C. 1446(b) provides:

The notice of 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 . . .

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, 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 one which is or has become removable . . .

As with other aspects of removal, "a large body of cases supports the proposition that the above [time] requirement is to be strictly construed." Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co., 247 F. Supp. 578, 583-584 (E.D. Pa. 1965). Furthermore, "the thirty-day limitation is mandatory and the court is without discretion to expand it." Collins v. American Red Cross, 724 F. Supp. 353, 359 (E.D. Pa. 1989).

In this case, the "special relationship" claim that Defendants argue gives rise to federal jurisdiction was added by Plaintiff on June 28, 2006, in his Fourth Amended Complaint. Defendants failed to file their notice of removal until August 22, 2006, well beyond the thirty-day limitation period. Defendants argue that the limitations period did not commence until the filing

of the Fifth Amended Complaint on August 1, 2006. However, Plaintiff asserted his "special relationship" claim in its entirety in the Fourth Amended Complaint, and did not alter it in the Fifth Amended Complaint. Thus, Defendants could have ascertained from the Fourth Amended Complaint the basis for asserting "that the case is one which is or has become removable." 28 U.S.C. 1446(b). Accordingly, the Notice of Removal was untimely.

IV. CONCLUSION

For the foregoing reasons, the Court will grant Plaintiff's Motion to Remand to the Court of Common Pleas of Philadelphia County. An appropriate order follows.

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AND NOW this 20th day of November 2006, upon consideration of Plaintiff's Motion to Remand (docket no. 7), Defendants' Opposition thereto (docket no. 8), Plaintiff's Response to Defendants' Opposition (docket no. 9), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED**. Accordingly, the above-captioned action is **REMANDED** to the Court of Common Pleas of Philadelphia County. The Clerk of the Court shall mark this case **CLOSED**.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.