

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

THE QUIGLEY CORPORATION	:	
	:	
v.	:	CIV. NO. 07-1343
	:	
WACHOVIA INSURANCE SERVICES,	:	
INC. et al	:	

Diamond, J.

July 6, 2007

MEMORANDUM

In this commercial dispute, Plaintiff initially proceeded in state court, filing only a writ of summons. Plaintiff subsequently served Defendants with an unfiled draft state court complaint. I must determine whether Defendants acted timely when they removed to this Court within thirty days of receiving the unfiled complaint. I conclude that the removal was premature and remand to the state court.

I. BACKGROUND

On November 18, 2005, Plaintiff Quigley Corporation commenced this action by filing a praecipe for a writ of summons in the Bucks County Common Pleas Court against Defendants Wachovia Insurance Services, Inc. and its predecessor First Union Insurance Services Agency, Inc. Plaintiff served Defendants with the summons the same day.

On March 5, 2007, Plaintiff sent Wachovia a copy of an unfiled draft complaint and a cover letter. Wachovia apparently received the documents the same day. In its letter, Plaintiff asked Defendants to mediate their dispute, and stated that “[i]f we do not hear from you by March 14th, we

will assume that you have no interest in participating in this Mediation and will file our Complaint.” (Doc. No. 1 Ex. B.) The draft complaint includes claims of negligence, breach of contract, breach of covenant of good faith and fair dealing, and a request for a declaratory judgment.

Plaintiff never filed its state court complaint. On April 4, 2007, Defendants removed the case to this Court. In their Notice of Removal, Defendants allege that I have subject matter jurisdiction because the complete diversity exists and because the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332.

Plaintiff has moved to remand, contending that removal was premature because it never filed its state court complaint. Defendants respond that they were compelled to remove the case within thirty days of receiving a copy of the draft complaint or risk waiving their right of removal. See 28 U.S.C. § 1446(b).

II. LEGAL STANDARDS

A defendant may remove a civil action if the federal court would have had original jurisdiction to hear the matter. 28 U.S.C. § 1441(a). Federal diversity jurisdiction exists where the matter involves citizens of different states and an amount in controversy, exclusive of interest and costs, exceeds \$75,000. 28 U.S.C. § 1332. Such an action “shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b).

A defendant seeking to remove must file a notice of removal

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 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).

Once a case is removed, the federal court must remand if it determines that it lacks subject matter jurisdiction. 28 U.S.C. § 1441(c). The removing party “bears the burden of proving that jurisdiction exists.” Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1991). “[R]emoval statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand.” Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992) (citation and quotation marks omitted).

III. DISCUSSION

I must determine whether Plaintiff’s unfiled draft complaint is an “initial pleading” within the meaning of § 1446(b). If it is, Defendants’ receipt of the document triggered the thirty-day period within which Defendants were required to remove; if it is not, then the removal was premature.

In Foster v. Mutual Fire, Marine & Inland Ins. Co., the Third Circuit considered the definition of “initial pleading” as used in § 1446(b). 986 F.2d 48, 49 (3d Cir. 1993). The plaintiff in Foster filed a praecipe for writ of summons in state court and served the writ on the defendant. Id. The plaintiff filed and served the complaint several months later, and the defendant removed within thirty days of receiving the complaint. Id. The Court concluded that the complaint was an “initial pleading,” and stated that “when a writ of summons, a praecipe, or ... a complaint provides adequate

notice to defendant of federal jurisdiction, the thirty-day period is triggered.” Id. The Court rejected the suggestion that correspondence between the parties could provide notice because “‘at a minimum, anything considered a pleading must be something of the type filed with a court.’” Id. at 54 (quoting Rowe v. Marder, 750 F. Supp. 718, 721 (W.D. Pa. 1990)).

In Murphy Bros. v. Michetti Pipe Stringing, Inc., the Supreme Court rejected the suggestion that a summons could constitute an “initial pleading.” 526 U.S. 344 (1999); see Sikirica v. Nationwide Ins. Co., 416 F.3d 214, 223 (3d Cir. 2005) (acknowledging that Murphy Bros. implicitly overruled Foster). The Murphy Bros. Court considered whether the thirty-day period is triggered “on the named defendant’s receipt, before service of official process, of a ‘courtesy copy’ of the filed complaint....” 526 U.S. at 347. The Court held that “a named defendant’s time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of summons, but not by mere receipt of the complaint unattended by any formal service.” Id. at 347-48.

In Sikirica, the Third Circuit again sought to determine, in light of Murphy Bros., the kinds of documents that constitute “initial pleadings” under § 1446(b). 416 F.3d at 223. The plaintiff initiated a state court action by writ of summons on April 26, 2002. Id. at 219. On July 8, 2002, the plaintiff filed and served the defendant with the complaint. Id. The defendant removed to federal court on July 22, 2002. Id. The Sikirica Court thus had to determine whether the thirty-day period began when the defendant received the summons or the complaint. Id. at 220. The Court held that under Murphy Bros., “a writ of summons alone can no longer be the ‘initial pleading’ that triggers

the 30-day period for removal under the first paragraph of 28 U.S.C. § 1446(b). ... The ‘initial pleading’ here was the complaint, not the summons....” Id. at 223.

In the instant case, Plaintiff served Defendants with a writ of summons and then provided them with a draft of an unfiled complaint. Because under Sikirica Plaintiff’s writ of summons is not an “initial pleading,” I must determine whether the unfiled draft complaint provided to Defendants constitutes an “initial pleading” under § 1446(b). Although the Third Circuit and Supreme Court have not addressed this question, the great majority of judges in this district have held that an unfiled draft complaint does not constitute an “initial pleading.” See, e.g., J.G. Wentworth S.S.C., L.P. v. Sherman, 2004 WL 2577591, at *3 (E.D. Pa. Oct. 19, 2004); Steff v. Town of Salisbury, 1999 WL 761134, at *2 (E.D. Pa. Sept. 21, 1999); Campbell v. Associated Press, 223 F. Supp. 151, 153 (E.D. Pa. 1963); see also Harris v. Med-Tox Labs., Inc., 1997 WL 86458, at * 2 (N.D. Tex. Feb. 26, 1997) (courtesy copy of unfiled petition is not an “initial pleading”); Kerr v. Holland America-Line Westours, Inc., 794 F. Supp. 207, 213 n.5 (E.D. Mich. 1992) (removal period does not begin to run upon receipt of unfiled “‘draft pleadings’, ‘sample’ courtesy pleadings, etc.”). But see Asante v. Audio Visual and Labs, Inc., 2001 WL 1152930, at *2-3 (E.D. Pa. Sept. 19, 2001) (defendant’s receipt of draft complaint can trigger the removal period as long as it is “of the type filed with the court”); Schnable v. Drexel Univ., 1995 WL 412415, at *2-3 (E.D. Pa. July 10, 1995) (same).

The facts in Steff are quite similar to those presented here. The plaintiff had filed a praecipe for a writ of summons in the state court and sent a draft copy of an unfiled complaint to defense counsel. 1999 WL 761134, at *1. Judge Fullam concluded that “what the defendant received was

not ‘the complaint,’” reasoning that “a draft complaint may well undergo substantial revision before being filed.” Id. at *2. Judge Clary reasoned similarly in Campbell:

The paper received by defendant is certainly not one from which it could intelligently ascertain removability since it was subject to later amendment or complete change. In a letter which accompanied the paper in question from plaintiff’s counsel to defendant’s counsel, it was stated that the proposed draft was forwarded to further settlement discussion and that plaintiff’s counsel had agreed to defer filing the original complaint for that purpose. The ‘original complaint’ referred to never having been filed, it follows that the copy of it submitted to defendant was not a copy of the initial pleading.

223 F. Supp. at 153 (internal citation and quotation marks omitted).

I also conclude that Plaintiff’s unfiled draft complaint is not an “initial pleading.” Although intended to threaten litigation (and so encourage mediation), the draft complaint was just that – a draft. Plaintiff was free to alter the document or to refrain from filing it altogether.

Moreover, the draft complaint is not a “pleading” at all. “Pleadings” are commonly understood to be documents filed in court. See Leverton v. AlliedSignal, Inc., 991 F. Supp. 481, 484-85 (E.D. Va. 1997) (“Although a pleading may be defined differently in the federal and state judicial systems, a common thread in both judicial schemes is that for a document to be regarded as a pleading it must, at the very least, be filed with a court.”); Mgmt. Network Group, Inc. v. ITC Group, Inc., 1995 WL 351393, at * 1 (D. Kan. May 23, 1995) (unsigned, unfiled draft petition does not constitute “initial pleading” because “a document, to be considered a pleading, must have been filed with a court”). As Plaintiff’s draft complaint was not filed in any court, it cannot be a “pleading” – initial or otherwise – under § 1446(b).

IV. CONCLUSION

In these circumstances, Plaintiff's unfiled draft complaint was not an "initial pleading" within the meaning of § 1446(b). Thus, because Defendants' removal was premature, I will remand the case to state court. An appropriate Order follows.

BY THE COURT.

/s Paul S. Diamond, J.

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ORDER

AND NOW, this 6th day of July, 2007, it is ORDERED that Plaintiff's Motion to Remand to State Court (Doc. No. 4) is **GRANTED** and this civil action is **REMANDED** to the Court of Common Pleas of Bucks County. The Clerk's Office shall close this case for statistical purposes.

IT IS SO ORDERED.

/s Paul S. Diamond, J.

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