

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

FIRST UNION NATIONAL BANK as	:	
Trustee for the Bondholders and not in its	:	
individual capacity by and through its	:	
servicing agent, Breen Capital Services	:	
Corp.	:	
	:	
	:	
v.	:	
	:	CIVIL ACTION
STEVE A. FREMPONG	:	
A/K/A STEVE FREMPONG	:	
A/K/A STEVE ATUAHENE	:	
	:	
and	:	
	:	
	:	
FIRST UNION NATIONAL BANK as	:	NO. 99-1434
Trustee for the Bondholders and not in its	:	
individual capacity by and through its	:	
servicing agent, Breen Capital Services	:	
Corp.	:	
	:	
	:	
v.	:	
	:	
AGNES MANU	:	

**ORDER**

AND NOW, this        day of June, 1999, pursuant to 28 U.S.C. § 1447(c) (West Supp. 1999),<sup>1</sup> and upon consideration of defendants’ notice of removal and their brief in support of

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<sup>1</sup> “[T]he general rule that federal courts have an ever-present obligation to satisfy themselves of their subject matter jurisdiction and to decide the issue sua sponte applies equally in removal cases. Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir. 1995); see 28 U.S.C. § 1447 (c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”).

jurisdiction, IT IS HEREBY ORDERED that these cases are REMANDED<sup>2</sup> to the Court of

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<sup>2</sup> In July 1998, plaintiff initiated foreclosure proceedings in the Court of Common Pleas of Philadelphia County seeking judgment for \$20,604.41 in unpaid real estate taxes, interest, and fees on property owned by Agnes Manu at 7230 Cornelius Street, Philadelphia. In January 1999, plaintiff initiated a similar action against Steven Frempong-Atuahene, Manu's husband, for unpaid taxes on his property at 5701 North 17th Street in Philadelphia. Frempong-Atuahene and Manu, who are acting pro se in this matter, removed both actions to federal court on March 22, 1999, as a single case.

The court finds that removal was improper and is remanding both cases. Under 28 U.S.C. § 1446 (b), notice of removal must be filed within thirty days after the defendant is served or receives a copy of the initial pleading. According to the state court docket sheet and state court record, defendant Manu was served with the complaint against her on August 8, 1998. No allegation is made in the notice of removal that would provide some basis for extending the period allowed for removal with regard to the action against Manu. Therefore, it appears that the notice of removal as it applies to Manu is untimely and remand to state court is warranted.

Remand of both actions is required because the district court does not have subject matter jurisdiction in either case. A defendant may remove a case from state court to federal court if the federal court would have had original jurisdiction over the case. See 28 U.S.C. § 1441 (a) (1994). Although defendants assert in their notice of removal that jurisdiction is proper under 28 U.S.C. § 1332 (a) (1), in their brief supporting jurisdiction they claim that diversity of citizenship does not exist. See Statutory Basis for Jurisdiction ("Defs.' Brief") at 10. As there is no diversity of citizenship between the parties, the defendants may only remove if this court has federal question jurisdiction over the action. See Wright v. London Grove Township, 567 F. Supp. 768, 770 (E.D. Pa. 1983), aff'd, 729 F.2d 1450 (3d Cir.), cert. denied, 469 U.S. 842 (1984). Usually, the federal question serving as the basis for jurisdiction must appear on the face of the complaint. See Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 840 (1989) (referring to this standard as the "well-pleaded complaint" rule). Thus, defenses based on federal statutory or constitutional law may not normally serve as the jurisdictional basis for removal. See; id. at 842 (defense implicating federal law is insufficient); Ivy Club v. Edwards, 943 F.3d 270, 279 (3d Cir. 1991), cert. denied, 503 U.S. 914 (1992) (same). As the complaint here raises only state law claims, and questions of federal law appear only in the defendants' defense, removal is improper under the well-pleaded complaint rule.

Defendants contend that they are entitled to remove this action based on a statutory exception to the well-pleaded complaint rule which permits the removal of actions "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States." 28 U.S.C. § 1443 (1) (1994). Defendants are entitled to remove cases under this section only if they comply with the two-part test adopted by the Supreme Court in Georgia v. Rachel, 384 U.S. 780, 788 (1966), which requires the defendants to demonstrate "both that the right upon which they rely is a 'right under any law providing for . . . equal civil rights,' and that they are 'denied or cannot enforce' that right in the [state] courts." See also Davis v. Glanton, 107 F.3d 1044, 1047 (3d Cir.), cert. denied, 118 S. Ct. 159 (1997) (applying Rachel test).

Because of § 1443 (1)'s historical pedigree, the Supreme Court concluded that it only

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provided a basis for removing claims under “any law providing for specific civil rights in terms of racial equality.” Rachel, 384 U.S. at 792. Defendants rely upon the Fair Housing Act, which, because it specifically prevents discrimination in housing “on the basis of race,” is an “equal civil rights” statute that satisfies the first prong of the Rachel test. See Sofarelli v. Pinellas County, 931 F.2d 718, 724-25 (11th Cir. 1991) (counterclaims under Fair Housing Act were properly removed); Water’s Edge Habitat, Inc. v. Pulipati, 837 F. Supp. 501, 504-05 (E.D.N.Y. 1993) (though Fair Housing Act guarantees “equal civil rights” as required by § 1443 (1), FHA claim alleging discrimination on basis of familial status does not support removal under that section). In their notice of removal, defendants also list 42 U.S.C. §§ 1983, 1985(3), and 1986 as bases for jurisdiction. They did not, however, discuss the applicability of these statutes in their brief or the notice of removal. Consequently, the court has no basis for analyzing the propriety of removal pursuant to §§ 1983, 1985 (3), or 1986 and will confine its discussion to defendants’ claims under the Fair Housing Act. (Moreover, because none of these statutes expressly provide for equal rights on the basis of racial equality, it is debatable whether they are even “equal civil rights” statutes within the meaning of § 1443 (1). See, e.g., Davis, 107 F.3d at 1049-50 (determining that “status of § 1985 (3) as an ‘equal civil rights’ statute is . . . unclear, with strong arguments on both sides in terms of the jurisprudence”); Smith v. Winter, 717 F.2d 191, 194 (5th Cir. 1983) (stating that § 1983 does not satisfy first prong of 1443 (1) test).).

Defendants claim that the instant action is part of a conspiracy of retaliation against them for having engaged in conduct protected by § 3605 and § 3617 of the Fair Housing Act. See Defs.’ Brief at 8. Section 3605 states that “It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race . . . . 42 U.S.C. § 3604 (a) (1994). Section 3617 makes it “unlawful to coerce, intimidate, threaten, or interfere with any person . . . on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section . . . 3605 . . . of this title.” 42 U.S.C. § 3617 (1994). Defendants state that they applied for a loan (from whom is unclear; no allegation is made that it was plaintiff) to rehabilitate properties at 751-755 N. 47th Street (not the property at issue here), that they received tentative approval of the loan, spent about \$10,000 in preparation for the rehabilitation, and that they ultimately were denied the loan because of their race and the City of Philadelphia’s (“the City”) desire to obtain the property and turn it over to a white developer. See Defs.’ Brief at 14. Defendants contend that they intended the rehabilitation of the property to be “a vehicle to get some black developers into such big project so that they could obtain some experience and use that as a platform for future developments” with the city, state, and federal governments, or for filing a race discrimination suit against the City. See id. at 2-3. Defendants also assert that the foreclosure proceeding is part of an ongoing conspiracy of retaliation for their having filed a race discrimination suit against the City. See id. at 8. Interpreting the allegations broadly, defendants appear to meet the first prong of Rachel. They are less successful with the second.

In applying the second prong, courts “traditionally required the denial of rights “to be manifest in a ‘formal expression of state law,’ [but since Rachel] a defendant can now sustain pre-trial removal where a federal civil rights statute ‘[o]n its face . . . prohibits prosecution of any person’ seeking to exercise that civil right.” Davis, 107 F.3d at 1050. Defendants maintain that

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William H. Yohn, Jr., J.

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§ 3617 contains almost identical language to that of the Voting Rights Act which the Fifth Circuit held met this standard. See Whatley v. City of Vidalia, 399 F.2d 521 (5th Cir. 1968). Even assuming that § 3617 meets the standard set forth in Rachel, defendants nevertheless have failed to justify removal under § 1443 (1). Nothing in § 3617 (or any of the other statutes cited by defendants) gives defendants the right not to pay property taxes or immunizes them from foreclosure proceedings. See, e.g., City of Greenwood v. Peacock, 384 U.S. 808, 826-27 (1966) (defendants failed second prong because law relied upon did not create right to obstruct streets, drive car without license, bite police officer, or other actions for which they were arrested; nor did it confer immunity from prosecution on those charges); Davis, 107 F.3d at 1050 (holding that defendants in defamation case who claimed that suit was retaliation for having filed race discrimination suit failed to meet second prong because law did “not confer an absolute right on private citizens to defame others” or immunize them from state civil actions); cf. Whatley, 399 F.2d at 524 (holding removal proper because defendants alleged that state court action sought to prevent conduct that Fair Housing Act gave them an “absolute right to carry out”). Moreover, defendants have shown no close connection between their non-payment of taxes and any protected conduct such that the foreclosure proceeding should be viewed as prohibited retaliatory or intimidating conduct. See Conrad v. Robinson, 871 F.2d 615 (holding removal proper where speech that was subject of state court defamation action, although itself not protected conduct, was so closely connected to defendant’s prior protected activity that state suit qualified as prohibited retaliatory action under Title VII). Consequently, defendants have failed to satisfy the requirements of § 1443 (1).

Defendants also cite § 1443 (2) as authorizing removal. This section pertains only to removal by “federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights,” and thus, has no application here. Peacock, 384 U.S. at 824.

Alternatively, defendants seek to invoke the court’s power under the All Writs Act, 28 U.S.C. § 1651. In “exceptional circumstances” a district court employ this statute “to remove an otherwise unremovable state court action to ‘prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.’” Davis, 107 F.3d at 1047 n.4. To the court’s knowledge, no such previous orders exist. Moreover, defendants have failed to present any exceptional circumstances that would justify removal.