

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

LES MATTHEWS, as administrator :
of the estate of George A. :
Matthews and in his own right, :
and LINDA MATTHEWS :
: CIVIL ACTION
v. :
: NO. 99-1799
KEY BANK U.S.A. NAT'L ASSN., :
RECOVERY ENFORCEMENT BUREAU, :
BRIAN S. O'CONNOL, :
JOHN DOE or JOHN DOES, and :
SPRINGFIELD AUTO OUTLET CORP. :

M E M O R A N D U M

WALDMAN, J.

June 17, 1999

Plaintiffs filed a complaint in the Philadelphia Common Pleas Court alleging that in repossessing an automobile from property belonging to plaintiff Linda Matthews, defendants committed various state law torts and violated plaintiffs' rights under the Pennsylvania and United States constitutions. Defendant Key Bank removed the case pursuant to 28 U.S.C. § 1441(a) and moved to dismiss for failure to state a claim. Plaintiffs have filed an amended complaint which eliminated their sole federal claim.

In their state court complaint, plaintiffs alleged that on December 12, 1998 defendants Recovery Enforcement Bureau (Recovery), Brian O'Connell (listed in the caption as "O'Connol") and the John Doe defendants repossessed from the home of

plaintiff Linda Matthews a Hyundai Elantra automobile for which payments had been made by George Matthews during his lifetime and by the administrator of his estate, Les Matthews, after George Matthews died in October 1998. Plaintiffs alleged that Recovery and Mr. O'Connell intimidated Ms. Matthews and threatened to have her and Les Matthews arrested unless she admitted them to a locked garage so they could retrieve the automobile. Plaintiffs alleged that Recovery's license to repossess motor vehicles in Pennsylvania had been terminated on September 30, 1998. Plaintiffs alleged that Key Bank "negligently or intentionally maliciously" retained Recovery, O'Connell and the John Doe defendants to repossess the automobile despite knowing or having reason to know that Recovery and its agents "were not licensed and would use illegal and threatening methods to recover the automobile at all costs, without regard for the civil rights or privacy of the Plaintiffs."

Plaintiffs asserted claims against Key Bank for "Intimidation, Threats, Misrepresentation, Harassment, and Intentional Infliction of Emotional Distress," for violation of plaintiff's civil rights under Pennsylvania law and the Pennsylvania constitution, for fraud and theft by deception, and for "Violation of 42 U.S.C. § 1985(3) and the United States Constitution."

On April 9, 1999, defendant Key Bank filed a notice of

removal pursuant to 28 U.S.C. § 1441(a) based on plaintiffs' federal claim. No other defendant joined in the removal petition.

As plaintiffs asserted claims against nondiverse defendants and asserted the federal law claim only against Key Bank, it is not altogether clear that it was required to obtain the consent of other defendants to remove. Compare, e.g., Moscovitch v. Danbury Hosp., 25 F. Supp.2d 74, 78 (D. Conn. 1998) (only defendants against whom federal law claim is asserted required to consent to removal even though entire case is removed); Parisi v. Rochester Cardiothoracic Assocs., P.C., 1992 WL 470521, *1 (W.D.N.Y. June 29, 1992) ("only those defendants substantively entitled to remove need consent") with, e.g., Doe v. Kerwood, 969 F.2d 165, 168 (5th Cir. 1992); Chaghervand v. CareFirst, Inc., 909 F. Supp. 304, 308 (D. Md. 1995) ("while certain lower courts have 'refined' the unanimity of consent rule to require the consent of only those parties who would independently have the right to remove . . . the majority of courts, including this Court, have rejected that 'refinement'"). As plaintiffs never filed a timely motion to remand, they have in any event waived any procedural defect. See 28 U.S.C. § 1447(c); McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 653 (7th Cir. 1998) (all objections to defects in removal process other than subject matter jurisdiction, including failure of all defendants to join

in removal petition, forfeited if not raised within 30 days of removal); Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995); Michaels v. State of N.J., 955 F. Supp. 315, 321 (D.N.J. 1996).

On April 21, 1999 plaintiffs filed an amended complaint, both in this court and the Common Pleas Court, in which they deleted the § 1985(3) and federal constitutional claim. Plaintiffs apparently believed that dropping the federal claim which gave rise to removal jurisdiction stripped the federal court of subject matter jurisdiction. It does not. See, Cavallini v. State Farm Mut. Auto. Ins. Co., 44 F.3d 256, 265 (5th Cir. 1995) (plaintiff does not defeat jurisdiction by amending complaint after removal); Ching v. Mitre Corp., 921 F.2d 11, 13-14 (1st Cir. 1990) ("amendment to complaint after removal designed to eliminate the federal claim will not defeat jurisdiction"); Westmoreland Hosp. Ass'n v. Blue Cross of Western Pa., 605 F.2d 119, 123-24 (3d Cir. 1979) (federal jurisdiction determined by state court complaint at time of removal), cert. denied, 444 U.S. 1077 (1980); Clinco v. Roberts, --- F. Supp.2d ---, 1999 WL 98614, *8 (C.D. Cal. Feb. 25, 1999) (well-settled that plaintiffs may not rely on amendment-as-of-right provision of Fed. R. Civ. P. 15(a) to defeat court's jurisdiction) (collecting cases); Hernandez v. Central Power & Light, 880 F. Supp. 494, 496 (S.D. Tex. 1996) (removal jurisdiction determined

at time of removal and subsequent dismissal of claims, whether voluntary or involuntary, does not strip court of jurisdiction).

The day after plaintiffs filed their amended complaint, but one day before it was docketed, Key Bank filed the instant motion to dismiss. Plaintiffs did not respond to the motion, but on May 20, 1999 filed a second amended complaint which also asserts no federal claim. Plaintiffs never sought leave to file the second amended complaint and it does not appear from the record that any defendant consented to the filing. See Fed. R. Civ. P. 15(a); Hinton v. Pacific Enters., 5 F.3d 391, 395 (5th Cir. 1993) (Rule 15(a) permits only one amendment as of right), cert. denied, 511 U.S. 1093 (1994); Berkshire Fashions, Inc. v. The M.V. Hakusan II, 954 F.2d 874, 886 (3d Cir. 1992) (after initial amendment as of right, plaintiffs must obtain leave of court or consent of adverse party before subsequent amendments will be permitted).

To plead a cognizable § 1985(3) claim, a plaintiff must allege facts to show a conspiracy for the purpose of depriving a person or class of persons of equal protection of the laws or equal privileges and immunities, and an act in furtherance of the conspiracy whereby a party is injured in his person or property or is deprived of a right or privilege of a citizen of the United States. See United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott, 463 U.S. 825, 829 (1983); Ridgewood

Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 253-54 (3d Cir. 1999). Section 1985(3) prohibits only conspiracies predicated on "racial, or perhaps otherwise class-based, invidiously discriminatory animus." Id., 172 F.3d at 253 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

The claim in the original complaint referring to violation of § 1985(3) and the United States Constitution contains no allegation that Key Bank conspired with anyone to harm plaintiffs because of their race or any other class-based animus.¹ In any event, plaintiffs have made abundantly clear that they are not pursuing a federal claim. A plaintiff may amend his complaint once as of right if no responsive pleading has been filed. See Fed. R. Civ. P. 15(a). A motion to dismiss is not a "responsive pleading" as that term is used in Rule 15(a). See, e.g., Centifanti v. Nix, 865 F.2d 1422, 1431 n.9 (3d Cir. 1989) (neither motion to dismiss nor motion for summary judgment is "responsive pleading" for purposes of Rule 15(a)); Levy v. Lerner, 853 F. Supp. 636, 638 (E.D.N.Y. 1994), aff'd, 52 F.3d 312 (2d Cir. 1995). A plaintiff cannot be forced to pursue a claim that he withdraws in a properly amended complaint.

¹ It appears that the invocation of the federal constitution refers to equal protection of the law as encompassed by § 1985(3). Plaintiffs do not and cannot identify any federal constitutional right directly secured against conduct by private parties not acting under color of state law or in concert with state officials.

The court, however, retains supplemental jurisdiction over plaintiffs' state-law claims. See 28 U.S.C. § 1367(a). Whether to exercise such jurisdiction is a matter of the court's discretion. See City of Chicago v. International College of Surgeons, 118 S. Ct. 523, 533 (1997); Hudson United Bank v. LiTenda Mortgage Corp., 142 F.3d 151, 157 (3d Cir. 1998). In determining whether to exercise supplemental jurisdiction, the court considers "the values of judicial economy, convenience, fairness and comity." International College of Surgeons, 118 S. Ct. at 534; Hudson United Bank, 142 F.3d at 157.

When all federal claims are eliminated before trial, even by voluntary dismissal, federal courts generally decline to exercise supplemental jurisdiction over remaining state law claims. See Sullivan v. Conway, 157 F.3d 1092, 1095 (7th Cir. 1998); McClelland v. Gronwaldt, 155 F.3d 507, 520 (5th Cir. 1998) ("dismissal of all federal claims weighs heavily in favor of declining [supplemental] jurisdiction"); Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) ("where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so"); Lovell Mfg. v. Export-Import Bank of the U.S., 843 F.2d 724, 734 (3d Cir. 1988); Burke v. Mahanoy City, 40 F. Supp.2d 274, ---, 1999 WL 116291, *14 (E.D. Pa. Mar. 3, 1999); Johnson v. Cullen, 925 F. Supp. 244, 242 (D. Del.

1996); Litz v. City of Allentown, 896 F. Supp. 1401, 1414 (E.D. Pa. 1995); Renz v. Shreiber, 832 F. Supp. 766, 782 (D.N.J. 1993); 13B Charles Alan Wright et al., Federal Practice and Procedure § 3567.2 (1984).

This case has been recently removed. It is in an incipient stage. All of plaintiffs' present claims arise solely under Pennsylvania law. There is no apparent consideration of judicial economy, convenience or fairness which would justify exercising supplemental jurisdiction. The interests of comity are clearly best served by allowing the state courts to adjudicate plaintiffs' state law claims.

Accordingly, the court will dismiss this action consistent with 28 U.S.C. § 1367(c).²

² When an action which includes state law claims has been improvidently removed in the absence of original jurisdiction, there is no doubt that the case may be remanded pursuant to 28 U.S.C. § 1447(c). The Third Circuit has at least suggested that even when original jurisdiction exists, a remand is authorized by § 1367(c) once all federal claims have been dismissed. See Hudson United Bank, 142 F.3d at 157-58. See also Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1237 (10th Cir. 1997) (suggesting after adjudication of federal claim in properly removed case that novel supplemental claim "should be remanded"). A reading of § 1367(d), however, seems to suggest that Congress contemplated only dismissal under § 1367(c) of claims asserted under § 1367(a). An earlier version of § 1367(c) expressly provided that upon dismissal of federal claims, a court "may dismiss or remand" supplemental claims. See ITAR-TASS Russian News Agency v. Russian Kurier, 140 F.3d 442, 447 n.1 (2d Cir. 1998). No reference to remand appears in the version of the statute which was enacted. In any event, no useful purpose would be served by a remand in this case as plaintiffs have already filed an identical amended complaint in the Common Pleas Court.

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

LES MATTHEWS, as administrator :
of the estate of George A. : CIVIL ACTION
Matthews and in his own right, :
and LINDA MATTHEWS :
 :
 :
v. :
 :
 :
KEY BANK U.S.A. NAT'L ASSN., :
RECOVERY ENFORCEMENT BUREAU, :
BRIAN S. O'CONNOL, :
JOHN DOE or JOHN DOES, and :
SPRINGFIELD AUTO OUTLET CORP. : NO. 99-1799

O R D E R

AND NOW, this day of June, 1999, consistent
with the accompanying memorandum, **IT IS HEREBY ORDERED** that
defendant Key Bank's Motion to Dismiss is **GRANTED** in that the
above action is **DISMISSED** pursuant to 28 U.S.C. § 1367(c),
without prejudice to plaintiffs to pursue their state law claims
in their pending action in the Philadelphia Common Pleas Court.

BY THE COURT:

JAY C. WALDMAN, J.