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

PHILIP I. CARTER, JR., and KATHLEEN CARTER, Plaintiffs, v. INGERSOLL-RAND COMPANY, INC. d/b/a INGERSOLL-RAND COMPANY ARCHITECTURAL HARDWARE, LCN DIVISION and TRU-FIT FRAME AND DOOR CORPORATION, Defendants.	: : : : : : : : : : : : :	CIVIL ACTION NO. 00-6438

M E M O R A N D U M

Padova, J. March , 2001

This matter is before the Court on Plaintiffs' Motion to Remand. For the reasons set forth below, the Court grants Plaintiffs' Motion.

I. Background

On Dec. 19, 2000, Defendant Ingersoll-Rand Co., Inc. ("Ingersoll-Rand") filed "Defendants' Notice of Removal" ("Notice"). The Notice stated: "[D]efendant, Ingersoll-Rand Company requests the above action now pending in the Court of Common Pleas of Philadelphia County, Pennsylvania, be removed to this Court." The Notice was authored by O. Daniel Ansa and Jayne A. Risk ("Risk"), "Attorneys for defendant Ingersoll-Rand Company," and bore Risk's signature. The Notice alleged that "[t]here is complete diversity of citizenship among the parties." (Notice ¶ 10.)

Attached as an exhibit to the Notice was a copy of Plaintiffs' Amended Complaint filed in

the County of Philadelphia Court of Common Pleas Civil Trial Division, naming Ingersoll-Rand and Tru-Fit Frame and Door Corporation ("Tru-Fit") as defendants.

On Jan. 2, 2001, Plaintiffs filed a Motion to Remand on the ground that not all defendants had joined in removal.

On Jan. 4, 2001, both Defendants filed a "Supplemental Clarification to Defendants' Notice of Removal" ("Supplemental Clarification"). This document stated: "The purpose of this supplement to the original Notice of Removal is to clarify that defendants Ingersoll-Rand Company and Tru-Fit Frame and Door Corporation both join in the request to remove this action to federal court." (Supp. Clarification ¶ 3.) It was signed by attorneys for both defendants.

II. Discussion

The procedure for removal of an action from state court to federal court is set forth in 28 U.S.C. § 1446.[1] It is firmly established that § 1446 requires all defendants served in the state court action to join in or consent to removal. Lewis v. Rego Co., 757 F.2d 66, 68 (3d Cir. 1985) ("Section 1446 has been construed to require that when there is more than one defendant, all must join in the

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[1]Section 1446 provides:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) 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. . . . "

28 U.S.C. § 1446 (West 1994).

removal petition."); Landman v. Borough of Bristol, 896 F. Supp. 406, 408 (E.D. Pa. 1995); Januszka v. Kemper Insurance Co., No. CIV.A.94-2242, 1994 WL 236463, at *1 (E.D. Pa. May 26, 1994) ("Present day cases uniformly hold that all defendants who have been served by original process must either join in or consent to the removal of the case to federal court."); Ogletree v. Barnes, 851 F. Supp 184, 186 (E.D. Pa. 1994); Collins v. American Red Cross, 724 F. Supp. 353, 359 (E.D. Pa. 1989); McManus v. Glassman's Wynnefield, Inc., 710 F. Supp. 1043, 1045 (E.D. Pa. 1989); Stokes v. Victory Carriers, Inc., 577 F. Supp. 9, 10 (E.D. Pa. 1983); Balestrieri v. Bell Asbestos Minds, Ltd., 544 F. Supp. 528, 529 (E.D. Pa. 1982); Crompton v. Park Ward Motors, Inc., 477 F. Supp. 699, 701 (E.D. Pa. 1979). Equally well established is the rule that each defendant must join in the notice of removal or express its consent to removal within the thirty-day period defined in § 1446(b). Landman, 896 F. Supp. at 408; Januszka, 1994 WL 236463 at *2 ("the joinder or consent of all named co-defendants upon whom service has been made must also be within thirty days from the date of service."); Ogletree, 851 F. Supp. at 186; McManus, 710 F. Supp. at 1045; Stokes, 577 F. Supp. at 10; Collins, 724 F. Supp. at 359; Balestrieri, 544 F. Supp. at 529; Crompton, 477 F. Supp. at 701. "The removal statutes 'are to be strictly construed against removal and all doubts should be resolved in favor of remand.'" Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) (citations omitted).

In this case, Defendant Tru-Fit neither joined the Notice nor consented to removal within thirty days of receiving the Amended Complaint. Defendants' arguments to the contrary are unpersuasive.

Ingersoll-Rand argues that Tru-Fit joined the Notice. (Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion to Remand ("Ingersoll-Rand Mem.") at 5.) Ingersoll-Rand points

to the title of the Notice, using the plural "Defendants'." Ingersoll-Rand further points to the December 1, 2000, letter from Tru-Fit counsel to Ingersoll-Rand counsel suggesting that they consider removal to federal court[2] and a voice mail message that counsel for Ingersoll-Rand left for counsel for Tru-Fit agreeing to remove the matter. (Ingersoll-Rand Mem. at 5-6.) Ingersoll-Rand argues that the letter and the voice mail are evidence that both Defendants joined the removal. (Ingersoll-Rand Mem. at 5.) Tru-Fit advances a different theory. It argues that the December 1, 2000, letter constituted consent to Ingersoll-Rand's removal. (Defendant Tru-Fit Frame and Door Corporation's Memorandum of Law in Support of Denying Plaintiff's Motion to Remand ("Tru-Fit Mem.") at 2-3.)

The title of the Notice, the December 1, 2000, letter, and the voice mail fail to establish that Tru-Fit joined or consented to Ingersoll-Rand's Notice. Courts consistently have required each defendant to express its position to the court directly, and have held that one defendant's allegation that another defendant joins in removal is insufficient. See Landman, 896 F. Supp. at 409 ("[F]or removal to be allowed under 28 U.S.C. § 1446, each defendant must file its own timely removal petition or file its own timely statement consenting to removal by a co-defendant."). In Landman, one defendant filed a removal petition asserting that its co-defendant consented to removal. Landman, 896 F. Supp. at 408. The petition did not include any documentation signed by the other defendant or its representative. Id. The Court stated: "Unfortunately for both, one defendant's

[2]The letter states:

> I am attempting to verify with my client that it is a New Jersey corporation with its principal place of business located in Pennsauken, New Jersey as is alleged in the Complaint. I assume that your client is not a citizen of the Commonwealth of Pennsylvania. Therefore, there appears to be diversity of citizenship jurisdiction that would entitle us to remove this case to federal court. Please give me a call at your early convenience so that we can discuss this."

(Ingersoll-Rand Mem. Ex. C.)

attempt to speak on behalf of another defendant will not suffice. . . . Statements made in a removal petition concerning a co-defendant's position on removal are inappropriate without some form of filing by the co-defendant." Id. at 409 (citations omitted). See also Michaels v. State of New Jersey, 955 F. Supp. 315, 320-21 (D.N.J. 1996) ("Most courts, however, have held that it is not enough for defendants who have not signed the removal petition to merely advise the removing defendant that they consent thereto, or for a removing defendant to represent such consent to the court on behalf of the other defendants. Rather, most courts require all defendants to voice their consent directly to the court.") (emphasis in original) (citations omitted); Ogletree, 851 F. Supp. 184 (rejecting defendants' argument that allegation in notice that all defendants consented to removal was sufficient, and remanding action to state court); Fellhauer v. City of Geneva, 673 F. Supp. 1445, 1448 (N.D. Ill. 1987) (rejecting defendant's argument that one defense counsel's expression of consent to other defendant's counsel in a telephone conversation established consent to removal, and stating: "The removal statutes require that all defendants communicate their consent to the court -- not to one another.") (emphasis in original).

These cases make clear that the title of the Notice, the December 1, 2000, letter and the voice mail do not establish either joinder or consent by Tru-Fit to Ingersoll-Rand's removal. The letter and voice mail were communications between defendants, not to the Court; therefore they cannot establish Tru-Fit's joinder in or consent to removal. In the cases above cited, an express allegation by one defendant that a co-defendant consented to removal was insufficient to establish joinder or consent; a fortiori in this case, where Ingersoll-Rand did not expressly allege that Tru-Fit joined the removal, the Notice is insufficient to establish Tru-Fit's joinder or consent. Even if the Court were to construe the title of the Notice as an implicit allegation by Ingersoll-Rand that Tru-Fit joined the

Notice, such allegation would be insufficient to effect the joinder or consent of Tru-Fit because Tru-Fit made no individual timely filing with the Court.

Tru-Fit argues alternatively that the Supplemental Clarification cured any procedural defect in removal. (Tru-Fit. Mem. at 3-5.) The Supplemental Clarification cannot cure the failure of both Defendants to join in or consent to removal because Defendants filed the Supplemental Clarification more than thirty days after they received the Amended Complaint, and this time limit must be strictly enforced. Both Defendants allege that they received Plaintiffs' Amended Complaint on December 1, 2000. (Defendant, Tru-Fit Frame and Door Corporation's Response to Plaintiff's Motion to Remand ¶ 4; Response of Defendant, Ingersoll-Rand Company, to Plaintiffs' Motion to Remand ¶ 3.) The thirty-day deadline fell on December 31, 2000, a Sunday. January 1, 2001, was a legal holiday. Pursuant to Federal Rule of Civil Procedure 6, the time period in which Defendants could file a timely notice or consent to removal extended to the end of January 2, 2001. Fed. R. Civ. P. 6(a). Defendants filed the Supplemental Clarification on January 4, 2001. This is to say, Tru-Fit first expressed to the Court its consent to removal of the action from state court thirty-four days after receiving the Amended Complaint.

The established doctrine in this district precludes a conclusion that the Supplemental Clarification cured the failure of both Defendants to join in or consent to removal within thirty days of receiving the Amended Complaint. See Ogletree, 851 F. Supp. at 190 ("While a few courts have allowed non-signing defendants to submit affidavits of consent after the thirty-day period had expired, it is well-settled in this district that '[t]he thirty-day limitation is mandatory and the court is without authority to expand it.'") (citations omitted); McManus, 710 F. Supp. at 1045 ("Although § 1446(b)'s thirty-day requirement is not jurisdictional, 'the time limitation is mandatory and must

be strictly construed.' . . . If all defendants do not join the removal petition within the thirty-day period, remand is the proper course."); Collins, 724 F. Supp. at 359 ("The thirty-day limitation is mandatory and the court is without discretion to expand it."); Balestrieri, 544 F. Supp. at 529 ("This 30-day limitation is mandatory and cannot be extended by the court."); Crompton, 477 F. Supp. at 701 (The time limit for removal provided in § 1446 (b) "cannot be extended by consent of the parties or order of the court.").

Tru-Fit argues that "[o]ther Courts have also permitted defendants to cure technical defects in removal petitions." (Tru-Fit Mem. at 4.) Tru-Fit errs by implying that the failure of all defendants to timely join in or consent to removal is a "technical" defect. See Fellhauer, 673 F. Supp. at 1449 ("[I]t is well settled that the failure to join or gain the consent of all defendants in timely fashion is a substantive defect.") (citations omitted). Furthermore, Tru-Fit relies on cases that are inapposite. Michaels permitted defendants who had not signed a removal petition to cure the defect after the thirty-day period by filing their consent with the court only because of the "extraordinary circumstances" that the only party objecting to removal was a defendant who was a nominal party, with respect to which the court dismissed the complaint. Michaels, 955 F. Supp. at 322, 330. Eltman v. Pioneer Communications of America, 151 F.R.D. 311 (N.D. Ill. 1993) excused the failure of a defendant to timely join in or consent to removal because the defendant "appear[ed] to be a nominal party." Eltman, 151 F.R.D. at 315. The court explained that the nominal status of a defendant is "what transforms a defect [in the nominal party's removal procedure] into a 'technicality.'" Id. at 316. Defendants here do not argue that Tru-Fit is a nominal party to this action; therefore, the authority Tru-Fit cites does not support the argument that the Supplemental Clarification cured the procedural defects in Defendants' attempt to remove this action.

III. Conclusion

Tru-Fit made no expression to the Court of joinder in or consent to removal within thirty days of receiving Plaintiffs' Amended Complaint, as required. Following the well established rules governing removal in this district and the command that the removal statutes are to be strictly construed against removal, the Court grants Plaintiffs' Motion to Remand. An appropriate Order follows.

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O R D E R

AND NOW, this day of March, 2001, upon consideration of Plaintiffs' Motion to Remand (Doc. No. 4), Defendant, Tru-Fit Frame and Door Corporation's Response to Plaintiffs' Motion to Remand (Doc. No. 6), and Response of Defendant, Ingersoll-Rand Company, to Plaintiffs' Motion to Remand (Doc. No. 7), **IT IS HEREBY ORDERED** that Plaintiffs' Motion is **GRANTED**. It is further **ORDERED** that this action is **REMANDED** to the County of Philadelphia Court of Common Pleas Civil Trial Division.

BY THE COURT:

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John R. Padova, J.