

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

MP III HOLDINGS, et al.,	:	
Plaintiffs	:	
	:	
v.	:	Civil Action
	:	
HARTFORD CASUALTY INSURANCE	:	
COMPANY	:	No. 05-1569
Defendant	:	

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

May 31, 2005

Plaintiffs, MP III Holdings, Inc. (“MP III”), Peter Morse (“Morse”), and R. Bruce Dalglish (“Dalglish”) (together “MP III”), initiated an action by writ of summons against defendant, Hartford Casualty Insurance Company (“Hartford”), in the Philadelphia County Court of Common Pleas.¹ MP III operated truck-driving schools throughout the United States. Morse and Dalglish were former shareholders and directors of MP III.

MP III made loans to its students and then sold these loans to the Student Finance Corporation (“SFC”). SFC securitized the loans and Royal Indemnity Company (“Royal”) insured payment to the security holders in the event of default. In November, 2000, MP III entered into an agreement with Pennsylvania Business Bank (“PBB”); in return for a loan, MP III granted PBB a blanket lien on all its assets, including its accounts receivable.

¹Plaintiffs’ summons named two defendants: “The Hartford,” and “Hartford Insurance Company.” Defense counsel, John Grugan, Esq., informed the court during the May 13, 2005 hearing that “The Hartford” and “Hartford Insurance Company” are fictitious entities and that “Hartford Casualty Insurance Company” is the properly named defendant.

In early March, 2002, SFC stopped paying for loans it had already purchased and stopped purchasing student loans from MP III. Later that month, Morse and Dalglish sold all their MP III stock to a competitor, Franklin Career Services, Inc. (“Franklin”).

Franklin soon closed numerous MP III schools, refused to pay for the stock it had purchased from Morse and Dalglish, and claimed they had committed fraud during their financial negotiations. Franklin also refused to repay the outstanding loans from PBB. PBB repossessed MP III’s remaining assets and MP III ceased operations. Franklin, PBB, Royal, and the trustees of SFC have brought actions against MP III in three states: Pennsylvania, Texas, and Delaware.

In February, 2001, MP III had purchased a “Special Multi-Flex Policy” from Hartford which provided “commercial general liability coverage.” MP III seeks reimbursement from Hartford under this policy for all its defense costs. Hartford has reimbursed MP III for the defense of the Pennsylvania action,² but not for the Texas and Delaware actions. MP III filed this action in Pennsylvania state court for declaratory relief that Hartford must “fully defend Plaintiffs on all claims” (Compl ¶ 1), and for compensatory and punitive damages.

The writ of summons was issued on June 11, 2004, and the complaint was filed on March 8, 2005. On April 6, 2005, Hartford filed a notice of removal and, on April 12, plaintiffs filed a Motion for Remand on the ground that the notice of removal was untimely.

DISCUSSION

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

²Plaintiffs contend Hartford has provided insufficient reimbursement for their defense costs in the Pennsylvania action.

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.

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, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

The issue is whether the period for filing a notice of removal commenced with: (1) issuance of the summons; (2) pre-complaint correspondence between the parties; or (3) issuance of the complaint. The notice was not filed within thirty days of either the writ of summons, or pre-complaint correspondence; it was filed within thirty days of receipt of the complaint.

Our Court of Appeals interpreted 28 U.S.C. § 1446(b) in Foster v. Mutual Fire, Marine & Inland Insurance Co. 986 F.2d 48 (3d Cir. 1993). Foster originated in the Philadelphia Court of Common Pleas; defendant filed a notice of removal; and plaintiff filed a motion for remand based on § 1446(b) and abstention. The district court held it should abstain and remanded without addressing whether the notice of removal had been timely filed under § 1446(b). Although the Court of Appeals affirmed the district court decision to abstain, it used “the opportunity to resolve the question as to when the time period in § 1446(b) is triggered.” Id., at 50.

The Court of Appeals in Foster concluded that § 1446(b), “requires defendants to file their Notices of Removal within thirty days after receiving a writ of summons, praecipe, or complaint which in themselves provide adequate notice of federal jurisdiction.” Id., at 54.

Foster rejected prior district court holdings that “a praecipe and writ of summons can never together constitute an initial pleading.”³ Id., at 52.

After Foster, the United States Supreme Court decided Murphy Bros. v. Michetti Pipe Stringing Inc., 526 U.S. 344 (1999). The issue in Murphy was whether the period for removal began with defendant’s receipt by facsimile of a file-stamped copy of the complaint or when defendant was formally served with the complaint by certified mail. The Supreme Court held the thirty day period for removal does not commence upon the issuance and service of a summons:

if the summons and complaint are served together, the 30-day period for removal runs at once.... if the defendant is served with the summons but the complaint is furnished to the defendant sometimes after, the period for removal runs from the defendant’s receipt of the complaint.

Id., at 354.

Hartford argues Foster is no longer binding because “under Murphy the time to remove cannot commence until the complaint is filed.” (Defendant’s Supplemental Memorandum of Law in Opposition to Plaintiffs’ Motion to Remand, p.4) At least one other district court has examined the apparent conflict between Foster and Murphy and concluded Murphy did not

³ Foster disagreed with two district court holdings that a writ of summons alone could never constitute an “initial pleading” for the purposes of 28 U.S.C. § 1446(b) because, under Rule 1017(a) of the Pennsylvania Rules of Civil Procedure, a writ of summons is not a pleading. Craig v. Lake Asbestos of Quebec Ltd., 541 F.Supp. 182, 184 (D.C.Pa., 1982), Zawacki v. Penpac Inc., 745 F.Supp. 1044, 1046 n.5 (M.D.Pa.,1990).

Under Rule 1017(a), “the pleadings in an action are limited to a complaint, an answer thereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter, a preliminary objection and an answer thereto.” The Pennsylvania Supreme Court relied on this rule in addressing the time limits for objecting to personal jurisdiction. Monaco v. Montgomery Cab Co., 208 A.2d 252, 255 (Pa. 1965) (under Pennsylvania law, “a writ of summons is not a pleading” and “waiting until the complaint is filed [to raise jurisdictional objections] would accord with the policy” of the Pennsylvania Rules of Civil Procedure.) Foster did not mention Rule 1017(a) or Monaco.

overrule Foster. Sprague v. American Bar Association, 166 F.Supp.2d 206, 208 (E.D.Pa. 2001). Sprague reasoned Foster is still binding because “Murphy concerned Alabama civil procedure which does not allow for a writ of summons to commence an action, as does Pennsylvania procedure.” Id.

There are reasons to believe Murphy overruled Foster. First, Murphy’s explicit holding is that the period for removal commences only with the filing of the complaint, not the summons. Second, the Supreme Court considered the history of § 1446(b) and concluded the current statute was intended: (1) “to provide adequate time” for filing a notice of removal; and (2) “to operate uniformly in all States.” Murphy, 526 U.S. at 351.

§ 1446(b) was revised to address procedure in States such as New York where:

service of the summons commenced the action, and such service could precede the filing of the complaint. Under § 1446(b) as originally enacted, the period for removal in such a State could have expired *before* the defendant obtained access to the complaint. To ensure that the defendant would have access to the complaint before commencement of the removal period, Congress in 1949 enacted the current version of § 1446(b). (emphasis in the original).

Id., at 351.

Service of the praecipe or the summons may commence the action in Pennsylvania. If such service precedes the filing of the complaint and provides adequate notice of federal jurisdiction, the period for removal in Pennsylvania may expire *before* the defendant receives the complaint. If the praecipe or the summons can trigger the removal period, a Pennsylvania defendant would not be provided “adequate time” to file a removal petition after learning the nature of the action through service of the complaint.

Foster also precludes § 1446(b) from operating uniformly. Foster can be reconciled with

Murphy if Murphy is construed as binding only in states which do “not allow for a writ of summons to commence an action.” Sprague, 166 F.Supp.2d at 208. However, the period for removal would then be triggered in some states with the filing of a summons providing adequate notice of federal jurisdiction but, in other states, the period for removal would commence only with formal service of the complaint.

The third reason why Foster cannot be reconciled with Murphy is that the Supreme Court implicitly held a writ of summons does not qualify as an initial pleading under § 1446(b) even if served on defendant.⁴ The Court cited the 1949 Senate Report explaining revising of § 1446(b):

In some States suits are begun by the service of a summons or other process without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section, is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20 days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and relief prayed for.

S.Rep. No. 303, 81st Cong., 1st Sess., 6 (1949).

If Murphy overruled Foster, Hartford filed its notice of removal timely because the thirty day period for removal commenced with filing the complaint. If Foster survives, the issue is whether Foster applies to both paragraphs of § 1446(b) or only the first. Foster explained a summons is an initial pleading under § 1446(b) that triggers the period for filing a notice of removal if it provides “adequate notice of federal jurisdiction.” Foster, 986 F.2d at 54.

The summons served on Hartford did not provide adequate notice of federal jurisdiction.⁵

⁴The Pennsylvania Supreme Court reached the same conclusion in Monaco. 208 A.2d at 255.

⁵ Plaintiffs’ writ of summons failed to state: (1) where MP III is incorporated; (2) its principal place of business; (3) where Morse and Dalglish are citizens; and (4) an amount in

MP III's argument is that Hartford's notice was untimely under the second paragraph of 28 U.S.C. § 1446(b) because the period for removal was triggered by correspondence, or "other papers," that were exchanged prior to the filing of the complaint.⁶ MP III asserts that Foster defined what constitutes an initial pleading under the first paragraph of § 1446(b) but not what constitutes "other paper" under the statute's second paragraph.

In Foster, the Court of Appeals limited "the scope of its inquiry to court-related documents," to prevent district courts from having to sift through "potentially large amounts of correspondence to perform subjective evaluation of defendant's knowledge." Id., at 53. "The inquiry begins and ends within the four corners of the pleading." Id.

Several district courts nonetheless have held that non-court filed documents may provide adequate notice of federal jurisdiction because Foster only interpreted the phrase "initial pleading" in the first paragraph and did not consider the meaning of "other paper" in the second paragraph of § 1446(b). See Cabibbo v. Einstein/Noah Bagel Partners, L.P., 181 F.Supp.2d 428, 432-33 (E.D.Pa., 2002) (answers to interrogatories could be "other paper" sufficient to put

controversy exceeding \$75,000.

⁶In August, 2002, Plaintiffs provided Hartford a copy of PBB's complaint which lists Morse and Dalglish as citizens of Pennsylvania and MP III as a Delaware corporation with its principal place of business in Pennsylvania. (Plaintiffs' Motion for Remand, Ex. 4). This document was not filed in this action nor served upon Hartford. On February 4, 2005, plaintiffs gave Hartford an itemized list of attorney's fees and that same day counsel for Hartford wrote a letter stating plaintiff claimed "nearly \$700,000" in damages. (Plaintiffs' Motion for Remand, Ex. 13).

Hartford has already contributed more than \$600,000 for attorneys' fees in the Pennsylvania litigation. Hartford was presumably aware of the facts establishing federal diversity jurisdiction when it made its decision to reimburse plaintiffs for the Pennsylvania action but not for the Delaware and Texas actions. This decision was made before the complaint was filed.

defendant on notice of removability); see also, Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 756 n.6 (3d Cir., 1995) (dissenting on other grounds); but see, Penmont Benefit. Serv., Inc., v. Costellano, No. Civ. A. 03-6903, 2004 WL 1551745, at *2 (E.D.Pa. July, 9, 2004) (Foster mandates district courts disregard correspondence between counsel); Textile Chem. Co. v. Aetna Cas. & Surety Co., No. Civ. A. 97-2142, 1997 WL 537408, at *2 (E.D.Pa. Aug. 5, 1997) (letter from plaintiff “falls within category of extraneous documents”).

Although Foster did not define “other paper,” the statute should be interpreted in accordance with accepted principles of statutory construction. The second paragraph identifies three specific types of papers providing notice of federal jurisdiction: (1) pleadings; (2) motions; and (3) orders. These papers are all court-filed documents. Under the cannon of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the ones specifically enumerated. Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991). “Other paper” should mean other types of court-filed documents.

MP III asserts it did send Hartford court-filed documents providing adequate notice of federal jurisdiction. In August, 2002, Plaintiffs sent Hartford a copy of PBB’s complaint averring Morse and Dalglish are citizens of Pennsylvania, and MP III is a Delaware corporation with its principal place of business in Pennsylvania. (Plaintiffs’ Motion for Remand, Ex. 4). On April 22, 2004, it “sent the Hartford the Fifth Amended Petition (or Complaint) in a Texas state court case, Royal Indemnity Company v. MP III Holdings, Inc., et al.” (Plaintiffs’ Reply Brief in Support of Remand, p.3). This complaint allegedly alerted Hartford to the amount in controversy in this action.

Under either Murphy or Foster, MP III did not provide adequate notice of federal jurisdiction by sending these two complaints to Hartford because it did so before the writ of summons was served in this action. Murphy held the removal period is triggered by formal service of the complaint, and Foster rejected the idea that documents exchanged prior to initiating the action by writ of summons or complaint can provide adequate notice of federal jurisdiction. “If defendants rely on what they actually know and move prior to receiving a complaint or other formal court document, they risk plaintiffs’ filing a motion to quash removal as premature.” Foster, 986 F.2d at 53. It is also doubtful whether a document filed in another proceeding and sent to defendant can provide adequate notice of federal jurisdiction.

MP III also points to documents exchanged after the issuance of the summons to demonstrate that Hartford had been provided adequate notice of federal jurisdiction. According to MP III, Hartford “bates labeled the [Texas complaint] and produced it back to Plaintiffs in response to their pre-Complaint discovery.” (Plaintiffs’ Reply Brief in Support of Remand, p.3). MP III has also produced a letter, dated February 4, 2005, in which Hartford stated MP III claimed “nearly \$700,000” in damages. (Plaintiffs’ Motion for Remand, Ex. 13).

MP III argues that a document, produced by a defendant, may establish adequate notice of federal jurisdiction. It is likely that Hartford knew federal jurisdiction existed long before it filed its notice of removal. Although Foster limited its analysis to the first paragraph of § 1446(b), it determined district courts should not focus their attention on defendant’s actual knowledge. Foster, 986 F.2d at 53. Foster rejected what it termed the “subjective inquiry approach.” Id., 51. Under Foster, plaintiff must provide defendant with adequate notice of federal jurisdiction, and plaintiff must provide this notice in a court filed document.

The second paragraph of § 1446(b) also places the burden on plaintiff to provide adequate notice of federal jurisdiction to defendant: “notice of removal may be filed within thirty days after *receipt by the defendant*, through service or otherwise...” (emphasis added).

The court concludes plaintiff did not provide adequate notice of federal jurisdiction until it filed its complaint in this action. Defendant’s notice of removal was timely.

CONCLUSION

Plaintiffs’ Motion for Remand will be DENIED because defendant timely filed its notice of removal within thirty days of receiving adequate notice of federal jurisdiction from the complaint. An appropriate order follows.

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AND NOW, this 31st day of May, 2005, after a hearing held on May 13, 2005 at which all parties were heard, and upon consideration of plaintiffs’ Motion for Remand (Paper #3), defendants response thereto (Paper #5), plaintiffs’ Reply Brief in Support of Remand (Paper #7), defendants’ response thereto (Paper #8), and the parties supplemental briefs (Papers #10 and 11), it is **ORDERED** that plaintiffs’ Motion for Remand (Paper #3) is **DENIED** for the reasons stated in the foregoing Memorandum.

/s/ Norma Shapiro

Norma L. Shapiro, S.J.