

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

GEORGE L. MILLER :
 :
 v. : CIVIL ACTION
 : NO. 07-4506
 :
 ANTHONY J. SANTILLI, et al. :
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MEMORANDUM

O'Neill, J

February 7, 2008

Before me for disposition is plaintiff's Motion to Remand and Abstain. The removing defendants'¹ contention is that because a Judge of the Court of Common Pleas, Philadelphia County resorted to federal law in order to hold that plaintiff Trustee had standing to assert a state cause of action in state court, that decision made the action removable to this Court. Moving defendants also contend that by enacting § 544(b) of the United States Bankruptcy Code Congress converted plaintiff's state law claim into a federal question for purposes of subject matter jurisdiction. Defendants maintain that because § 544(b) incorporates state law, and also because the Bankruptcy Code gives plaintiff standing to pursue a state law cause of action, the action is necessarily a matter of federal law. Defendants argue that otherwise plaintiff has no cause of action.

The principal case relied upon by defendants is Robinson Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371 (3d Cir. 1978). However, Robinson does not support defendants' contention. The issue in Robinson was whether Congress intended that the scope of the Tax

¹Defendant U.S. Bank did not join in the removal nor in the opposition to plaintiff's motion to abstain and remand. Instead U.S. Bank separately moved for severance and remand.

Injunction Act's term "tax under State law" was to be given a uniform construction as a matter of federal law or a variable construction by reference to or incorporation of state law. Id., 581 F.2d at 374. Similarly the issue herein is whether the use of § 544(b) to give plaintiff standing to bring a state court case of action converted plaintiff's state law claim to a federal claim arising under the Bankruptcy Code. In Robinson the Court of Appeals recognized that on a few occasions Congress expressly adopted or incorporated state law to serve as the source of substantive federal law. However, the Court of Appeals also reasoned that where Congress expressly incorporated state law it evidenced a particular purpose in conforming federal substantive standards of conduct to applicable state law. Id. Accordingly, Robinson held that "Congress' power to implement or limit federal courts' jurisdiction is so fundamental that we decline to infer a congressional intent to leave a jurisdictional provision dependent on state law absent an unambiguous and express incorporation by statute." Id., 581 F.2d at 375. Section 544(b) does expressly and unambiguously incorporate state law relating to voidable or fraudulent transfers. See, 11 U.S.C. §544(b). In this case the state court determination simply permitted plaintiff to pursue a state cause of action in state court. It did not - as defendants posit - convert plaintiff's claim into a federal one.

Moreover, because the right of removal is statutory a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress. Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 280-282, 38 S.Ct. 237,239 - 240 (1918) (citing, Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 1877 WL 18470 (1877)). The long standing rule established by the Supreme Court in Great Northern is that:

[I]n the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a

case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case nonremovable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.

Id., 246 U.S. at 281-282. Plaintiff initiated this matter in the Court of Common Pleas, Philadelphia County. Despite defendants' assertions that by failing to appeal the state court determination plaintiff embraced the federal nature of its cause of action, plaintiff made no voluntary action which made this matter removable.

I am also mindful of the rule that a removing defendant bears a heavy burden of persuasion. Because this court's lack of jurisdiction would make any decree issued in this case void and continuation of litigation in federal court futile the removal statute should be strictly construed and all doubts resolved in favor of remand. Abels v. State Farm Fire & Cas. Co., 770 F.2d 26 (3d Cir. 1985). I conclude that defendants' have not met their burden. Because this court lacks subject matter jurisdiction over plaintiff's claims the matter will be remanded to state court.

An appropriate order follows.

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CIVIL ACTION
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ORDER

AND NOW, this 7th day of February, 2008, it is ORDERED that:

1. Plaintiff's Motion to Remand is GRANTED and this case is remanded to the Court of Common Pleas of Philadelphia County;
2. Defendant U.S. Bank's Motion to Sever and Remand is DISMISSED as MOOT;
and,
3. The motions of Richard G. Wilson, Esquire, William Z. Pentelovitch, Esquire, and Emily Rome, Esquire for leave to appear pro hac vice are DISMISSED as MOOT.

THOMAS N. O'NEILL, JR., J.