

1/29/01

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

POCONO SPRINGS CIVIC  
ASSOCIATION, INC.,

Plaintiff,

v.

RICH ONE, INC. and DAVID PITTI,

Defendants.

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NO. 00-CV-2034

(CHIEF JUDGE VANASKIE)

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**ORDER**

January 29, 2001

**THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:**

Plaintiff, Pocono Springs Civic Association, Inc. ("Pocono Springs"), commenced this suit against Defendants, Rich One, Inc. ("Rich One") and David Pitti ("Pitti"), seeking to collect delinquent dues and assessments for vacant lots owned by Rich One and located in Pocono Springs Estates. On September 11, 2000, Rich One's attorney, Warren Schloesser, accepted service of the Complaint on behalf of Rich One. Pitti, who has been the President, Vice-President, Secretary, Treasurer, sole shareholder and sole member of the Board of Directors of Rich One since 1988, was personally served with the Complaint on October 20, 2000. On November 20, 2000, Pitti filed a Notice of Removal based upon diversity jurisdiction (Dkt. Entry #1). Thereafter, on December 20, 2000, Pocono Springs filed a Motion for Remand pursuant to

28 U.S.C.A. § 1447(c) (Dkt. Entry #7).<sup>1</sup>

The removal statute, 28 U.S.C. § 1446(b), provides that “[t]he 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 . . . .” This thirty-day requirement “cannot be extended by consent of the parties or order of the court.” Crompton v. Park Ward Motors, Inc., 477 F.Supp. 699, 700 (E.D.Pa. 1979). Although there is disagreement among courts as to this statute’s application to cases involving multiple defendants who are served on different days, “[t]he majority of courts to reach this issue have concluded that the thirty-day clock begins to run when the first defendant is served, and that such a defendant cannot later consent to a removal petition brought by a later-served codefendant.” Yellow Cab Co. of Pittsburgh v. Gasper, 994 F.Supp. 344, 346 (W.D.Pa. 1998); see also Januszka v. Kemper Ins. Co., Civ.A.No. 94-2242, 1994 WL 236463 (E.D.Pa. May 26, 1994); Thompson v. Louisville Ladder Corp., 835 F.Supp. 336 (E.D.Tex. 1993); Greensmith Co., Inc. v. Com Sys., Inc., 796 F.Supp. 812 (D.N.J. 1992).

It is undisputed that on September 11, 2000, Attorney Schloesser accepted service of Pocono Springs’ Complaint on behalf of Rich One. Therefore, Rich One had thirty days from

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<sup>1</sup> Pocono Springs argues three separate grounds for remand: (1) lack of diversity jurisdiction; (2) Rich One failed to file a timely consent to removal; and (3) the Notice of Removal was untimely. Because removal was improper due to Rich One’s failure to timely file a Notice of Removal, as well as to timely consent to Pitti’s removal petition, Pocono Springs’ contention that there is a lack of diversity jurisdiction will not be addressed.

this date, or until October 11, 2000, to file a notice of removal. Because Rich One failed to act within this time period, it is precluded from later consenting to Pitti's removal petition.<sup>2</sup>

Furthermore, the fact that Pitti is the sole shareholder, director, and officer of Rich One supports the decision to apply the majority "first-served defendant" rule and remand this case to state court. In Gasper, the court was presented with the question of "whether a previously served defendant which did not initially seek removal within thirty days of service upon it of the original complaint may join the removal petition of a new defendant joined outside that thirty-day period." Id. at 344. Emphasizing that all of the defendants in the case were closely held corporations owned and controlled by one man, the court found that such a situation "militates strongly in favor of applying the majority rule and remanding the case." Id. at 349 (citing Eltman v. Pioneer Communications, 151 F.R.D. 311, 318 n.15 (N.D.Ill. 1993) ("The rationale for preserving the later-served defendant's removal right would not apply, for example, in the instances when defendants are actually part of the same operating entity rather than separate

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<sup>2</sup> Pitti notes that in a Case Management Conference held on January 17, 2001, this Court framed the issue in this case as whether Rich One timely sought removal after service of the Complaint on Rich One. Pitti contends that in its Motion for Remand, Pocono Springs "frames the issue solely and exclusively in terms of Pitti's receipt of the Complaint in his capacity as president of the corporation, without reference to any requirement that Rich One must remove the action within thirty days after service upon it." (Pitti's Brief (Dkt. Entry #19, p.3.) Pitti concludes, therefore, that because this issue was not raised within thirty days of removal as required by 28 U.S.C. § 1447(c), it has been waived. It is not necessary to address the merits of this argument, since regardless of whether this issue has been waived, remand is still proper due to Rich One's failure to timely consent to Pitti's Notice of Removal.

and distinct entities.”); Higgins v. Kentucky Fried Chicken, 953 F.Supp. 266, 270 (W.D.Wis. 1997)). The court stated that since the owner of the defendant corporations was on notice of the fact that the case was removable as soon as the first defendant was served with the complaint, “[i]t would serve no legitimate purpose to allow the joinder of another, related defendant to work an exception to the thirty-day removal rule . . . .” Id.

Likewise, in the instant case, since Pitti is the sole shareholder, director, and officer of Rich One, he was placed on notice on September 11, 2000 of the lawsuit commenced by Pocono Springs. Therefore, if Pitti wanted the case removed to federal court, he should have caused a notice of removal to be filed on behalf of Rich One within thirty days from that date.

Pitti argues that he was not personally served with the Complaint in his individual capacity until October 20, 2000, and that, as such, he filed a timely notice of removal on November 20, 2000 on behalf of himself, individually, and in his capacity as President of Rich One. Pitti contends “that any argument based upon the premise that Pitti in his capacity as the sole officer, director and shareholder of Rich One would somehow take a position opposing that of Pitti acting in his individual capacity is, at best, illogical and to the contrary elevates form over substance.” (Pitti’s Brief (Dkt. Entry #19, p.3.)

There are, however, two critical flaws in Pitti’s argument. First, as previously discussed, Rich One was served on September 11, 2000, and, therefore, it was required to file a notice of removal within thirty days from that date. Rich One’s failure to do so precludes it from later

consenting to Pitti's removal petition.

Second, even if Rich One's failure to file a timely notice of removal does not preclude it from later consenting to Pitti's removal petition, remand is still proper since Rich One failed to timely consent to Pitti's notice of removal. The Third Circuit has construed § 1446 to require that all defendants consent to a removal petition. Landman v. Borough of Bristol, 896 F.Supp. 406, 408 (E.D.Pa. 1995) (citing Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied., 498 U.S. 1085 (1991)). Most courts agree that this joinder or consent must be within thirty days from the date of service. Januszka, 1994 WL 236463, at \*2. There is, however, a split of decisions regarding whether the thirty-day period runs from the date of service upon the first-served defendant or the date upon which each individual defendant is served. Id. (citing Getty Oil v. Insurance Co. of North America, 841 F.2d 1254, 1262-62 (5th Cir. 1988); McKinney v. Board of Trustees if Maryland Community College, 955 F.2d 924, 928 (4th Cir. 1992)). Regardless of which date is used to calculate the running of the thirty-day period for joinder or consent, Rich One's consent to Pitti's Notice of Removal was untimely. Rich One did not timely consent to Pitti's Notice of Removal.<sup>3</sup> To the contrary, Rich One did not

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<sup>3</sup> Obviously, Rich One could not consent to Pitti's Notice of Removal within thirty days of the date of service of the Complaint on Rich One, since Pitti did not file said notice until November 20, 2000. Rich One could have, however, consented to Pitti's Notice of Removal within thirty days of the date of service of the Complaint on Pitti, but failed to do so. To the contrary, Rich One did not formally consent to Pitti's Notice of Removal until it filed its Response to Pocono Springs' Motion for Remand.

formally consent to Pitti's Notice of Removal until December 29, 2000, which is well beyond either thirty day period.<sup>4</sup>

Pitti urges this Court to find that requiring Rich One to formally consent to Pitti's Notice of Removal, despite the fact that Pitti is the sole shareholder, director, and officer of Rich One, is "illogical" and "elevates form over substance." However, the fact that Pitti is the sole shareholder, director, and officer of Rich One does not allow an assumption that when Pitti filed a Notice of Removal, it was also on behalf of Rich One. A defendant must "clearly and unambiguously join in or otherwise consent to" the removal petition of a co-defendant. Ogletree v. Barnes, 851 F.Supp. 184, 190 (E.D.Pa. 1994); see also Landman, 896 F.Supp. at 408-409.

Moreover, although Rich One argues that removal is appropriate since Pocono Springs has not been prejudiced by these procedural defects, "[r]emoval is a statutory right, and the defendants must comply strictly with the procedures to effect removal." Prowell v. West Chem. Products, Inc., 678 F.Supp. 553, 554 (E.D.Pa. 1988); see also Januszka, 1994 WL 236463, at \*2. "There is nothing in the removal statute that suggests that [this Court] has 'discretion' to overlook or excuse prescribed procedures." Id. at \*3.

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<sup>4</sup> Glover v. W.R. Grace & Co., 773 F.Supp. 964 (E.D.Tex. 1991), upon which Pitti relies to oppose the motion to remand, is both contrary to the weight of precedent and, in any event, distinguishable. Glover did not involve the failure of a related party to consent to removal in a timely manner. Furthermore, the joinder in the removal in Glover was only four days late. Here, by way of contrast, Rich One's consent to removal was over 60 days late even if the clock did not begin to run until Pitti was served. Indeed, Rich One did not join in the removal notice until after Pocono Springs moved for a remand.

**THEREFORE**, for the foregoing reasons, **IT IS HEREBY ORDERED THAT:**

- (1) Pocono Springs' Motion for Remand (Dkt. Entry #7) is **GRANTED**;
- (2) The Clerk of Court is directed to **REMAND** this matter to the Court of Common Pleas of Wayne County; and
- (3) The Clerk of Court is directed to mark this case as **CLOSED** in this Court.

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Thomas I. Vanaskie, Chief Judge  
Middle District of Pennsylvania

Filed: 1/29/01

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