

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

THERESA BREWER, and	:	
MARK BREWER, husband and wife	:	
Plaintiffs	:	
	:	
vs.	:	3:CV-01-2080
	:	(CHIEF JUDGE VANASKIE)
GEISINGER CLINIC, INC. d/b/a Geisinger	:	
Medical Group, GEISINGER HEALTH	:	
PLAN, PENN STATE GEISINGER HEALTH	:	
SYSTEM INC., JAY REDAN, M.D., GEHRED:	:	
WETZEL, D.O.	:	
Defendants	:	

MEMORANDUM

This matter is before the Court on plaintiffs’ motion to remand. Plaintiffs argue that the notice of removal, filed in this Court more than 3 ½ years after the removing defendants received the state court complaint in this action, is untimely. For the reasons set forth below, plaintiffs’ motion to remand will be granted.

I. BACKGROUND

On November 2, 2001, Geisinger Clinic, Inc. d/b/a Geisinger Medical Group (“Geisinger Clinic”), along with Penn State Geisinger Health Plan (“GHP”), removed the above-captioned matter from the Court of Common Pleas of Lackawanna County to this Court. The Notice of and Petition for Removal avers that “[n]o matter how ‘artfully crafted’ the Plaintiffs’ Complaint may be, Plaintiffs allege direct negligence against the GHP and Clinic. Plaintiffs’ claims against the GHP and Clinic ‘relate to’ the employee welfare benefit plan through which Plaintiffs

received health benefits.” (Notice of Removal, ¶ 8.) Asserting that plaintiffs seek to recover, enforce and/or clarify rights under an employee welfare benefit plan, and that “Plaintiffs’ allegations are matters of plan administration which are completely preempted” under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001, et seq., the Geisinger Clinic and GHP contend that this matter is removable.¹

The Complaint that initiated this litigation was filed in Lackawanna County Court in February of 1998. Geisinger Clinic was served with the state court Complaint on February 19, 1998. Count IX of the Complaint asserts claims against Geisinger Clinic for “negligent conduct” in connection with the care and treatment of plaintiff Theresa Brewer. Among the instances of alleged negligent conduct averred in ¶ 55 of the Complaint is that Geisinger Clinic was negligent in “providing financial incentives to its physician-employees to reduce the number of tests prescribed for its patients.” (Complaint, ¶ 55(l).)²

Count XI of the Complaint asserted claims of “negligent conduct” against GHP. Among the alleged instances of negligence on the part of GHP was its provision of “financial and other disincentives to the provision of quality healthcare.”

¹ “[A]ny complaint that comes within the scope of [a] federal cause of action necessarily “arises under federal law” and is therefore completely preempted.” Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 271 (3d Cir. 2001). There is no question that claims falling within the scope of ERISA’s civil enforcement provision, 29 U.S.C. § 1132(a), are completely preempted and therefore removable. Id.

²This averment is sometimes referred to by the plaintiffs as the “capitation” claim.

On March 13, 1998, GHP filed preliminary objections to the Complaint, asserting that the averments of the Complaint concerning financial and other disincentives to the provision of quality healthcare indicated that plaintiffs' claims against GHP related to an employee benefit plan and were therefore preempted under Section 514(a) of ERISA, 29 U.S.C. § 1144(a). Geisinger Clinic, represented by separate counsel, also filed preliminary objections to the Complaint, but did not raise the preemption defense. Geisinger Clinic did, however, seek to either strike or secure a more specific pleading of the Complaint's averments pertaining to financial incentives to reduce the number of tests prescribed. (Geisinger Clinic Preliminary Objections, ¶ 8.)

In an Order dated March 31, 2000, the Honorable S. John Cottone of the Court of Common Pleas of Lackawanna County denied the defendants' preliminary objections concerning ERISA preemption, punitive damages, lack of informed consent, and lack of specificity. Judge Cottone, however, granted preliminary objections concerning claims of "corporate negligence." In an Opinion filed on April 6, 2000, Judge Cottone explained the rationale for his holdings. In the course of explaining his reasoning for dismissing claims of "corporate negligence," Judge Cottone stated that "Count IX is Dismissed." (April 6, 2000 Opinion in Brewer v. Geisinger Clinic, et al. (Court of Common Pleas of Lackawanna County, 98-Civil-733), at 8.) Judge Cottone, however, then went on to address Geisinger Clinic's challenge to averments concerning financial incentives, finding that the allegations of the

complaint “are sufficiently specific to enable the Defendants to defend.” (Id. at 9.)

On May 8, 2000, GHP moved for reconsideration of Judge Cottone’s Order, insisting that the claims against it were preempted. On June 30, 2000, Geisinger Clinic filed a brief in support of GHP’s Motion for Reconsideration, asserting that the allegations in plaintiffs’ complaint concerning “financial incentives” compelled a conclusion that plaintiffs’ claims against GHP were preempted. (Geisinger Clinic Memorandum in Support of GHP Motion for Reconsideration at 4.)

In an Opinion dated June 1, 2001, Judge Cottone rejected the arguments of GHP and Geisinger Clinic. Accordingly, he reaffirmed his earlier decision, concluding that “Plaintiffs’ medical malpractice claim [against GHP] is not preempted by ERISA.” (Id. at 5.)

On August 17, 2001, Geisinger Clinic moved for judgment on the pleadings, asserting that the only claim remaining against it was the loss of consortium cause of action asserted on behalf of plaintiff-husband in Count X of the Complaint. The premise for Geisinger Clinic’s contention was the purported dismissal of Count IX of the Complaint.

In reaction to the motion for judgment on the pleadings, plaintiff, on August 30, 2001, moved for clarification of the state court’s order dated March 31, 2000. Its motion pointed out that Count IX of the Complaint had asserted “claims of liability against the clinic based on theories of corporate liability as well as direct negligence, namely capitation.” (Motion for Clarification, ¶ 3.) The Motion for Clarification also noted that plaintiffs had understood Judge

Cottone as having dismissed only the claim of corporate negligence, leaving undisturbed the claims of direct negligence, including the capitation claim. (Id., ¶¶ 6-7.)

By Memorandum and Order dated October 4, 2001, Judge Cottone addressed plaintiffs' Motion for Clarification. Agreeing with plaintiffs' position, Judge Cottone ruled that he intended that only the corporate negligence claim in Count IX be dismissed. He observed that, in this regard, the Geisinger Clinic "never raised an objection to the Plaintiffs' capitation averment," so that it was not dismissed by the March 31st Order. (Id. at 2.)

On or about October 24, 2001, the Geisinger Clinic filed preliminary objections to Count IX of the Complaint. The preliminary objections demur to the "capitation claim on the ground that it is related to a claim for benefits provided pursuant to an employee welfare benefit plan" (Id., ¶ 3.)

On November 2, 2001, Geisinger Clinic and GHP filed a Notice of and Petition for Removal in this Court. On November 30, 2001, plaintiffs moved to remand the matter, asserting that the Notice of Removal was untimely. The motion has been fully briefed and oral argument on the motion has been conducted.³ The motion for remand is ripe for disposition.

II. DISCUSSION

The party removing an action to federal court bears the burden of proving the propriety of removal. See Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir. 1995). "Upon timely

³It should be noted that GHP did not file a brief in opposition to the motion to remand, nor did it appear at oral argument.

challenge, this includes proof of compliance with the procedural time requirements of 28 U.S.C. § 1446(b).” Dubin v. Principal Financial Group, No. Civ. A. 01-079, 2001 WL 520812, * 1 (E.D. Pa. May 15, 2001).

In pertinent part, § 1446(b) provides:

The notice of removal of a civil action or proceeding shall be filed within 30 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 30 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

The second sentence of § 1446(b) is applicable “only when ‘it may be first ascertained that the case [not previously removable] is one which has become removable.’” 14C Wright, Miller & Cooper, Federal Practice and Procedure § 3732 (3rd ed. 1998). In Foster v. Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48, 54 (3d Cir. 1993), our court of appeals held that “§ 1446(b) requires defendants to file their Notices of Removal within 30 days after receiving a writ of summons, praecipe, or complaint which in themselves provide adequate notice of federal jurisdiction” “The inquiry is succinct: whether the document informs the reader, to a substantial degree of specificity, whether all the elements of federal jurisdiction are present.” Id. at 53 (quoting Rowe v. Marder, 750 F.Supp. 718, 721 (W.D. Pa. 1990), aff’d, 935 F.2d 1282 (3d Cir. 1991).

In this case, there can be no dispute that the Complaint disclosed the basis of federal court jurisdiction on which Geisinger Clinic and GHP now rely to remove this action. In paragraph 8 of the Notice of and Petition for Removal, Geisinger Clinic and GHP assert that “Plaintiffs’ claims arise under ERISA and are preempted and removable to federal court as a matter of right.” The claims to which Geisinger Clinic and GHP make reference were asserted in the Complaint that was served on them in February of 1998. It therefore follows that the notice of removal, filed more than 3 ½ years after the removing parties were served with the Complaint, is untimely.

Geisinger Clinic argues, however, that the removal period did not begin to run until October 4, 2001, when, in its view, Judge Cottone reinstated Count IX of the Complaint. Geisinger Clinic contends that the dismissal of Count IX, purportedly effected by the April 6, 2000 Opinion of Judge Cottone,⁴ “relates back” to the filing of the original Complaint. The gist of Geisinger Clinic’s argument is that Judge Cottone’s April 6, 2000 Opinion signified that there was no viable federal cause of action to remove in the first instance. Only when Judge Cottone took, in the view of Geisinger Clinic, the unusual step of reinstating Count IX, did the action then become removable. Geisinger Clinic acknowledges, however, that if Judge Cottone had not dismissed Count IX in April of 2000, an attempt to remove the action at that time on the basis of

⁴ It bears noting that the Order signed by Judge Cottone on March 31, 2000 did not dismiss Count IX. Instead, the Order merely granted the preliminary objections “concerning corporate negligence.”

the Complaint's averments would have been untimely. Geisinger Clinic also candidly concedes that it knows of no authority supporting its "relation back" theory. Geisinger Clinic asks that the Court apply equitable principles, asserting that it would be fundamentally unfair to deny it a right to remove after it learned that Count IX was still viable.

Geisinger Clinic's contention runs counter to the plain and unambiguous terms of 28 U.S.C. § 1446(b), as well as the case law applying that section. An action must be removed within 30 days of receipt of a pleading that discloses a basis for federal court jurisdiction. The Complaint that Geisinger Clinic received in February of 1998 meets this standard. The removal statute contains no exception where a claim is dismissed and is later reinstated. See Rashid v. Schenck Const. Co., 843 F. Supp. 1081 (S.D. W.Va. 1993)(State Supreme Court order directing "reinstatement" of action did not start a new the removal period).

Furthermore, it is well-settled that "[r]emoval statutes must be strictly construed against removal." Scott v. Greiner, 858 F. Supp. 607, 610 (S.D. W.Va. 1994). In this regard, "[t]he statutory time limit for removal is to be construed 'narrowly and against federal jurisdiction.'" Connors v. City of Philadelphia, No. Civ. A. 94-2145, 1994 WL 198659, * 1 (E.D. Pa. May 20, 1994). The removal period "cannot be enlarged by continuances, demurrers, motions to set aside service of process, pleas in abatement, or by stipulation of the parties, or by orders of the court extending the time to answer." Coco v. Alzheimer, 46 F. Supp. 321, 323 (W.D. La. 1942). These general principles admit no room for application of "equitable principles." In fact, the rule

of strict construction that requires that doubts as to the timeliness of removal be resolved in favor of state court jurisdiction is at odds with Geisinger Clinic's resort to equity.

Contentions similar to that advanced here by Geisinger Clinic have been rejected. For example, in Kurt Orban Co. v. Universal Shipping Corp., 301 F. Supp. 694 (D. Md. 1969), the removing party contended that the "removable status" of a state court complaint was destroyed when the removing party filed a motion questioning the state court's jurisdiction, and that the "removable status" was not restored until the motion challenging state court jurisdiction was denied. In granting the motion to remand, the district court observed that the removing party's argument was a "flat recognition that 'the case stated by the original pleading is . . . removable and hence not within the exception of the second paragraph of Section 1446(b).'" Id. at 699.

In Beckley, Singleton, DeLanoy, Jemison & List, Chartered v. Spademan, 694 F. Supp. 769 (D. Nev. 1988), the defendant argued that because his motion to quash service of process was successful, the 30-day removal period did not begin to run until service of process had been perfected. Finding that the defendant's contention was inconsistent with the principle that removal statutes be construed narrowly, the court granted the motion to remand. Id. at 772.

The court explained:

[T]here is on the record, because a motion to quash was filed, an express acknowledgment of the receipt by defendant of the initial pleading in January, 1998. There is no good reason why the time period for removal should not run from that receipt. If the action

had been then removed, the federal court was competent to decide the motion to quash service. This action was removed improvidently.

Id.

_____The rationale of these decisions supports the conclusion that a “relation back” doctrine should not be applied in the removal context. As noted above, removal statutes are subject to strict construction, and there is no suggestion in the removal statute that “relation back” principles should be used to judge the timeliness of a notice of removal. As in Kurt Orban Co., the “relation back” argument tendered here “is a flat recognition” that the action was removable at its inception. Significantly, the Complaint has not been amended and there has been no change to the nature of this litigation since its filing. The filing of preliminary objections did not toll the removal period. See Davis v. Baer, 599 F. Supp. 776, 778 (E.D. Pa.1984). The removal period thus expired thirty days after February 19, 1998, the date on which Geisinger Clinic was served with the Complaint.

“Where the right of removal has been lost by failure to file a petition within the statutory period, it cannot be restored by order of the Court or by stipulation of the parties.” Peter Holding Co. v. LeRoy Foods, Inc., 107 F. Supp. 56, 57 (D. N.J.1952). Accordingly, the motion to remand will be granted.⁵ An appropriate Order follows.

⁵Plaintiffs seek an award of attorney’s fees and costs incurred in connection with their motion to remand. Whether to award costs and fees in connection with a motion to remand is committed to the trial court’s “broad discretion.” Mints v. Educational Testing Service, 99 F.3d

(continued...)

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

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⁵(...continued)

1253, 1260 (3rd Cir.1996). Among the factors to be considered are “whether the removal was frivolous or was reasonably undertaken in good faith and with some colorable basis.” Dubin, supra , 2001 WL 520812, *2 n. 5. While Geisinger Clinic conceded that it had no authority to support its position in this matter, it was confronted with a somewhat unique situation – the reinstatement of a claim previously dismissed. Although I find Geisinger Clinic’s position to be without merit, it cannot be said to have been frivolous or lacking any colorable basis. Accordingly, fees and expenses will not be awarded.

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SYSTEM INC., JAY REDAN, M.D., GEHRED :
WETZEL, D.O. :
Defendants :

ORDER

NOW, THIS ____ DAY OF JANUARY, 2002, for the reasons set forth in the foregoing
Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Plaintiffs' Motion to Remand (Dkt. Entry 5) is **GRANTED**.
2. The Clerk of Court is directed to remand this matter to the Court of Common Pleas of Lackawanna County, and to mark this matter in this Court **CLOSED**.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

FILED: 1/15/02