Fiskus et al v. Bristol-Myers Squibb Company et al Doc. 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES FISKUS and VICKY FISKUS, *Plaintiffs*, *-against-* BRISTOL-MYERS SQUIBB COMPANY and INHIBITEX, INC., *Defendants*.	14 Civ. 3931 (PAC) **OPINION & ORDER**

HONORABLE PAUL A. CROTTY, United States District Judge:

Plaintiffs Charles and Vicky Fiskus (collectively, "Plaintiffs") seek remand of this action to New York State Court under 28 U.S.C. § 1447(c) because 28 U.S.C. § 1441(b)(2), the forum defendant rule, prohibits Defendants, both residents of New York, from removing the action to federal court here in the Southern District. For the reasons stated below, Plaintiff's motion to remand the action to New York State Court is granted.

BACKGROUND

On Friday, May 30, 2014, plaintiffs filed this action against Defendants Bristol-Myers Squibb Company and Inhibitex, Inc. (collectively, "Defendants") in New York State Supreme Court for negligence arising out of Charles Fiskus's participation in a clinical trial for a hepatitis C drug manufactured, marketed, and distributed by Defendants. On the following business day, Monday, June 2, 2014, prior to service being effected, Defendants removed this action to the Southern District of New York. (Dkt. 1). Plaintiffs timely moved to remand the action on July

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9, 2014. (Dkt. 12).

Defendants argue that removal of the suit was proper because at the time of removal, they had not yet been served. Therefore, section 1441(b) does not yet apply and Defendants are allowed to remove the action. (Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Remand ("Def. Mem."), at 2-7). Plaintiffs argue that such an understanding of the statute is improper and that allowing removal here would produce absurd results contrary to the statute's purpose. (Memorandum of Law in Support of Plaintiffs' Motion to Remand ("Pl. Mem."), at 2-6).

DISCUSSION

I. Applicable Law

In a challenge to the propriety of removal, the party seeking to remove an action bears the burden of establishing federal court jurisdiction. *See Allstate Ins. Co. v. CitiMortgage, Inc.*, 2012 WL 967582, at *2 (S.D.N.Y. Mar. 13, 2012). Courts must "construe all disputed questions of fact and controlling substantive law in favor of the plaintiff" on a motion to remand, and "removal statutes are construed narrowly." *Torchlight Loan Servs., LLC v. Column Fin., Inc.*, 2013 WL 3863887, at *2 (S.D.N.Y. July 24, 2013) (internal citations omitted). "[O]ut of respect for the limited jurisdiction of the federal courts and the rights of states, we must resolve any doubts against removability." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 124 (2d Cir. 2007).

The federal removal statute authorizes removal of a "civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The forum defendant rule provides an exception to removal and prohibits removal where "any of the parties in interest properly joined and served as defendants is a citizen of the State in which

such action is brought." *Id.* § 1441(b)(2). The principle behind allowing removal by nonresident defendants, similar to that of diversity jurisdiction, is that "out-of-state parties might be subjected to undue prejudice in state courts, and thus ought to be afforded the opportunity to have their cases tried to an impartial forum." *Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 475 (2d Cir. 1976) (internal citations omitted); *Eicher v. Macquarie Infrastructure Mgmt. (USA) Inc.*, 2013 WL 4038601, at *2 (S.D.N.Y. Aug. 8, 2013). The purpose of the "properly joined and served" requirement in the forum defendant rule is to prevent plaintiffs from frustrating removal by the expedient of joining resident parties against which it does not intend to proceed. *See Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003); *accord Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 643 n.1 (D.N.J. 2008) (the "properly joined and served" language seeks to prevent "improper joinder[, which is] . . . the practice of naming a forum-resident entity as a defendant solely to prevent an action from being removed to federal court").

II. Analysis

Defendants are both citizens of New York properly named as parties in interest. Here, rather than using the "properly joined and served" requirement as a shield—that is, to prevent gamesmanship by plaintiffs—Defendants seek to use it as a sword to achieve removal, even though it serves no legitimate purpose to do so. The proposed removal capitalizes on the brief time period between filing and service of the complaint, with a tactic made possible by the advent of electronic filing. *See Eicher*, 2013 WL 4038601, at *3 ("Under the Defendants' proffered interpretation of the forum defendant rule, defendants could effectively prevent the imposition of the rule by monitoring state dockets and removing the action before a plaintiff can serve any of the parties."). The Court finds that removal under these circumstances is improper.

"[W]hen, as in this case, a defendant—who indisputably is a proper party to the suit—learns of the suit and removes it to federal court before being served, unconsidered application of the rule serves primarily to reward procedural games instead." *In re IntraLinks Holdings, Inc. Derivative Litig.*, 2013 WL 929836, at *2 (S.D.N.Y. Mar. 11, 2013).

The Court is aware of the split of authority on this issue. While several courts have adhered literally to the statute and allowed pre-service removal by a forum defendant, the Court believes that such an interpretation leads to an unintended result, allowing a "Flash Boys" approach to speedy removal to override the rule's purpose. *See Sullivan*, 575 F. Supp. 2d at 643 (prohibiting pre-service removal by a forum defendant and noting that those courts that have adhered to a too literal interpretation of section 1441(b) "have ignored a less often cited, but equally important, principle of statutory construction which holds that when the literal application of statutory language would either produce an outcome demonstrably at odds with the statute's purpose or would result in an absurd outcome, a court must look beyond the plain meaning of the statutory language."). Here the only defendants involved are New York forum defendants and they are indisputably legitimate defendants. They were not named to frustrate removal. Removal prior to service was enabled by the expedient of continuous monitoring of the electronic docket. Giving appropriate consideration to the statute's purpose, a narrow interpretation of the statute avoids an absurd result, and adheres to the original intent of the rule. It makes no sense to allow removal of an action where service is not achieved (or could even be attempted), when it is barred after service.[1] *See, e.g., Eicher*, 2013 WL 4038601, at *2-3

[1] Defendants argue that Congress adopted their interpretation when it retained the "properly joined and served" language in Section 1441, while making other "sweeping changes" in the Federal Courts Jurisdiction and Venue Clarification Act of 2011. Def. Mem. at 6-7. This argument is rejected. First of all, the argument incorrectly assumes Congressional awareness of the split in interpretations. *See Perez v. Forest Labs., Inc.*, 902 F. Supp. 2d 1238, 1245 n.8 (E.D. Mo. 2012) (noting that Congressional awareness of the conflicting interpretations of this statute is unlikely because most remand orders are unreviewable). Second, the argument ignores the far more likely (and reasonable) possibility that Congress sought simply to preserve the original purpose

(prohibiting pre-service removal by a forum defendant); *Torchlight*, 2013 WL 3863887, at *3 (same). Accordingly, section 1441(b) prohibits Defendants from removing the action to federal court.

CONCLUSION

For the foregoing reasons, the motion to remand is granted. The Clerk of the Court is directed to close this motion and to remand this action to New York Supreme Court, New York County.

Dated: New York, New York
October 1, 2014

SO ORDERED

PAUL A. CROTTY
United States District Judge

of the rule—that is, to prevent plaintiffs from blocking removal by improperly joining irrelevant forum defendants. Thus, Congress's preservation of that language represents an intention to retain the requirement to that end.