

FILED

02/25/2020

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 19-0385

DA 19-0385

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 47

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SAGE FINANCIAL PROPERTIES, LLC,  
and HORIZON PROPERTIES, INC.,

Plaintiffs and Appellees,

v.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant and Appellant.

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APPEAL FROM: District Court of the Seventh Judicial District,  
In and For the County of Richland, Cause No. DV-19-27  
Honorable Katherine M. Bidegaray, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jean E. Faure, Jason T. Holden, Faure Holden, P.C., Great Falls, Montana  
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For Appellees:

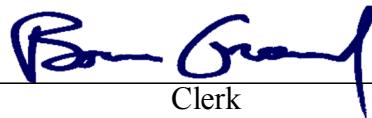
Gerry P. Fagan, Adam J. Tunning, Moulton Bellingham PC, Billings,  
Montana

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Submitted on Briefs: January 2, 2020

Decided: February 25, 2020

Filed:

  
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Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Defendant Fireman’s Fund Insurance Co. (“Fireman’s Fund”) appeals the Seventh Judicial District Court’s order denying as untimely its motion for substitution of judge. We reverse, holding that Fireman’s Fund’s substitution motion was timely because federal law halts any proceedings in the state court once a notice of removal is filed, unless and until the case is remanded.

## **PROCEDURAL BACKGROUND**

¶2 On February 28, 2019, plaintiffs Sage Financial, LLC and Horizon Properties, Inc. (collectively, “Horizon”) sued Fireman’s Fund in the Seventh Judicial District Court, Richland County, based on Fireman’s Fund’s denial of an insurance claim for damage to property owned by Horizon. A summons was issued on February 28 and served upon Fireman’s Fund on March 15. Twenty days later, on April 4, Fireman’s Fund filed a notice of removal to the United States District Court for the District of Montana, alleging diversity of citizenship.

¶3 After determining that the parties lacked complete diversity, the U.S. District Court granted Horizon’s motion for remand to state court on June 6. On June 18, the federal court filed notice of its return of the original file to the state district court. That same day, Fireman’s Fund filed a motion for substitution of judge. Ninety-five days had elapsed since Fireman’s Fund was served.

¶4 The District Court denied the motion, reasoning that under § 3-1-804(1)(a), MCA, the defendant has “thirty calendar days after the first summons is served or an adverse party

has appeared[]” to file a motion for substitution of judge. Because ninety-five days had elapsed between the date Fireman’s Fund was served and the date it filed its motion for substitution, the court ruled the motion untimely. This appeal followed. M. R. App. P. 6(3)(k).

## **STANDARD OF REVIEW**

¶5 A district court’s determination whether to substitute a judge is a question of law that we review for correctness. *Labair v. Carey*, 2017 MT 286, ¶ 11, 389 Mont. 366, 405 P.3d 1284 (citing *Mines Mgmt. v. Fus*, 2014 MT 256, ¶ 5, 376 Mont. 375, 334 P.3d 929).

## **DISCUSSION**

¶6 *1. Did the District Court err in denying Fireman’s Fund’s motion for substitution of judge as untimely?*

¶7 Section 3-1-804(1)(a), MCA, provides: “In a civil action . . . [a] motion for substitution by the party served must be filed within 30 calendar days after service has been completed in compliance with M. R. Civ. P. 4.” Fireman’s Fund argues that removal to federal court suspends the state court’s jurisdiction and automatically stays the thirty-day period for filing a motion for substitution of judge under this section. Because twenty days elapsed between its receipt of service of summons on March 15 and its filing of a notice of removal on April 4, Fireman’s Fund calculates that ten days remained to file a motion to substitute. It asserts that those ten days did not start running until June 18, when the state court resumed jurisdiction upon remand from the federal court. Fireman’s Fund thus contends that its June 18 motion for substitution of judge was timely. Though we have

not before considered the question, Fireman's Fund argues that the federal removal statute—28 U.S.C. § 1446(d)—and a body of state court decisions compel the conclusion that removal to federal court tolls the substitution timeline.

¶8 Horizon responds that, under the plain language of § 3-1-804(1)(a), MCA—which provides no exceptions or tolling periods—Fireman's Fund's motion for substitution was untimely when it did not file the motion within thirty days of service. Horizon argues that the precedent Fireman's Fund cites is not on point and that, although removal to federal court divests a state court of the power to rule on a case, it does not strip that court of jurisdiction, impact state law timing periods, or impose restrictions on state courts following remand. Horizon also advances a public policy argument: parties might abuse the judicial substitution process were the Court to accept Fireman's Fund's position.

¶9 Title 28, United States Code §§ 1446 and 1447 govern procedure for removal of civil actions from state to federal court and for remand from the federal court. Pertinent here:

Promptly after the filing of [a] notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal *and the State court shall proceed no further unless and until the case is remanded.*

28 U.S.C. § 1446(d) (emphasis added). If the federal court determines at any point that it lacks subject matter jurisdiction, it must issue an order remanding the case. 28 U.S.C. § 1447(c). The statute instructs the federal court clerk to mail a certified copy

of the remand order to the clerk of the state court. “The State court may *thereupon* proceed with such case.” 28 U.S.C. § 1447(c) (emphasis added).

¶10 Fireman’s Fund cites numerous state court decisions supporting its position that removal to federal court suspends both state court jurisdiction and state law timelines. *Limehouse v. Hulsey* is illustrative. 744 S.E.2d 566 (S.C. 2013). In *Limehouse*, the Supreme Court of South Carolina held that the defendant’s thirty-day state statutory time period to file an answer tolled while the case was removed to federal court because the state court’s jurisdiction was suspended or held in abeyance until the case was properly remanded. *Limehouse*, 744 S.E.2d at 577. “When the state court resumed jurisdiction, it had a duty ‘to proceed as though no removal had been attempted.’ Thus, the time for filing an Answer was tolled until the state court resumed jurisdiction.” 744 S.E.2d at 577 (internal citation omitted). Numerous courts have applied the same logic to other state law limitation periods. This includes timelines for conducting discovery (*Jatczyszyn v. Marcal Paper Mills*, 27 A.3d 213 (N. J. Sup. Ct. 2011)); for filing a petition for writ of error (*Quaestor Invs., Inc. v. Chiapas*, 997 S.W.2d 226 (Tex. 1999)); for filing a notice of appeal (*General Electric Credit Corp. v. Smith*, 484 So. 2d 75 (Fla. App. Ct. 1986)); for obtaining an order of continuance pursuant to a state’s “five-year rule” (*Southern Bell Tel. & Tel. Co. v. Perry*, 308 S.E.2d 848 (Ga. App. 1983)); and the time within which a defendant must appear and plead (*Lucky Friday Silver-Lead Mines Co. v. Atlas Mining Co.*, 395 P.2d 477 (Idaho 1964)).

¶11 That § 3-1-804(1)(a), MCA, has no explicit reference to removal or to tolling makes no difference. The very nomenclature of the federal statutes—removal—conjures a dispossession or transport of the matter from the state court’s hands and distills the law’s plain language directing that court to “proceed no further” while the matter pends before the federal court. 28 U.S.C. § 1446(d). We agree with state courts around the country that removal to federal court holds the state court’s jurisdiction in abeyance and suspends state law filing deadlines. Timelines cannot meaningfully operate when the state court is powerless to act. The potential for abuse that Horizon suggests is unlikely, given the federal court’s ability to impose “just costs and any actual expenses, including attorney fees,” in an order of remand. 28 U.S.C. § 1447(c).

¶12 We hold accordingly that the District Court incorrectly concluded that Fireman’s Fund’s § 3-1-804(1)(a), MCA, motion to substitute was untimely. Removal to federal court—effectuated when a defendant files a notice of removal and gives written notice to all adverse parties pursuant to 28 U.S.C. § 1446(d)—suspends state court jurisdiction and tolls the thirty-day period a party has to file a motion for substitution of judge. The clock begins to run again once state court jurisdiction resumes in accordance with 28 U.S.C. § 1447(c).

¶13 Fireman’s Fund was served on March 15 and filed its notice of removal on April 4. Therefore, before removal, twenty of its thirty days within which to file a motion for substitution had elapsed. Fireman’s Fund filed its motion for substitution on June 18, the

same day the state court clerk received notice that the federal court had ordered remand and returned the original state court documents. The motion was timely.

## **CONCLUSION**

¶14 The District Court erred in denying as untimely Fireman's Fund's motion for substitution of judge. We reverse the court's June 28, 2019 order and remand for further proceedings consistent with § 3-1-804, MCA.

/S/ BETH BAKER

We concur:

/S/ MIKE McGRATH  
/S/ JAMES JEREMIAH SHEA  
/S/ JIM RICE  
/S/ INGRID GUSTAFSON