

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ERLAND ANDERSON, d/b/a
ANDERSON DAIRY SYSTEMS,

Plaintiff

OPINION AND
ORDER
00-C-0312-C

v.

FEDERATED MUTUAL
INSURANCE COMPANY,

Defendant.

In this civil action, plaintiff Erland Anderson, d/b/a Anderson Dairy Systems, seeks to remand this case to the Circuit Court for Barron County, Wisconsin, contending that defendant Federated Mutual Insurance Company failed to strictly comply with a requirement of the federal removal statute, 28 U.S.C., § 1446(a), and that in any event, the state courts should hear this case because the parties are intimately connected with the state and the case may involve novel issues of state law. I conclude that defendant's failure to comply strictly with § 1446(a)'s requirement that all relevant documents be attached to the notice of removal does not warrant a remand of the case to state court. Having reached that decision, I need not

consider plaintiff's argument that the state forum is a better one for this case because of the parties' connection with the state and the allegedly unsettled law to be applied in this case.

From the parties' briefs and from the record, I find the following facts solely for the purpose of deciding plaintiff's motion.

FACTS

Plaintiff Erland Anderson is a Wisconsin resident. He filed his summons and complaint in this case in the Circuit Court for Barron County, Wisconsin, on or around March 29, 2000. In it, he seeks indemnification from defendant Federated Mutual Insurance Company for a \$150,000 judgment entered against him in an earlier case filed in the Barron County court. Plaintiff served defendant with the summons and complaint on or around April 25, 2000.

On May 18, 2000, defendant Federated Mutual Insurance Company filed its notice of removal pursuant to 28 U.S.C. § 1446(a). The notice was filed in this court on May 22, 2000. On its face, the notice indicates that the basis for federal jurisdiction is diversity of citizenship. In addition, it states that the amount in controversy is over \$75,000 and that defendant and plaintiff reside or have their principal place of business in states different from each other. Also, the notice indicates that three exhibits are attached: Exhibit A (a summons and complaint); Exhibit B (the special verdict from Barron County Case No. 96-CV-4); and Exhibit

C (the judgment against plaintiff entered in the Barron County case). In reality, none of the exhibits were attached. On May 22, 2000, defendant attempted to correct the omission by filing copies of Exhibits A, B and C. They were received by this court on May 30, 2000. However, the summons and complaint (Exhibit A) that defendant filed were not the summons and complaint filed in this case. Rather, it was the summons and complaint from the first Barron County action.

On June 16, 2000, plaintiff filed the present motion to remand. Reacting to plaintiff's criticism that defendant had filed the wrong summons and complaint as Exhibit A, defendant filed the correct summons and complaint on June 28, 2000.

OPINION

28 U.S.C. §1446(a) allows a defendant to remove a civil action from a state court to a district court if the defendant files a notice of removal “containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served upon such defendant or defendants in such action.” 28 U.S.C. § 1446(b) provides that “The 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, . . . ”

It is undisputed that the notice of removal that was filed in Barron County on May 18, 2000 was served within thirty days after defendant received plaintiff's summons and complaint. It is also undisputed that the notice of removal was defective because it failed to include the correct summons and complaint and that the error was not corrected until June 28, 2000, more than two months after defendant received plaintiff's summons and complaint and over one month after the expiration of the 30-day limit for filing a notice of removal in accordance with 28 U.S.C. § 1446.

Plaintiff's motion to remand this action to the Wisconsin circuit court on the basis of defendant's failure to comply strictly with the requirements of 28 U.S.C. § 1446 will be denied for several reasons. First, the court has discretion to decline to remand a case based on a 28 U.S.C. § 1446 technical filing error. See Moore's Federal Practice, § 107.41(1)(c)(ii)(A)(2000) (district court *may* remand removed action for any defect in removal procedure).

Second, the type of defect is a technical and curable one rather than a substantive error. Where the error is "technical" as opposed to substantive, it may be corrected, even in cases in which the 30-day filing limit of 28 U.S.C. § 1446 has expired. See Riehl v. National Mutual Insurance Company, 374 F.2d 739, 741-42 (1967) ("failure by a defendant to attach a complaint has been held to be a technical and curable defect").

Third, even though the notice of removal that was filed on May 18, 2000 was

incomplete, it contained enough information to inform this court that the basis for subject matter jurisdiction is diversity of citizenship. Because the notice of removal in this case informed the court of all the facts necessary to determine the basis for jurisdiction in federal court, it was not critical that the proper pleading was not filed with the notice.

Finally, the removal defect was not prejudicial to the plaintiff. In International Gateway Communications, Inc., 922 F. Supp.122 (N.D. Ill. 1996), as in this case, the defendant failed to attach the summons that plaintiff had served upon it and failed to correct the error before the 30-day period had run. Nevertheless, the court determined that the defendant's procedural defect was not prejudicial to the plaintiff because the plaintiff had prepared the summons and was familiar with its contents. That is true here. Plaintiff is intimately familiar with the summons and complaint he served on defendant. He was not prejudiced by defendant's failure to attach these documents to the notice of removal.

Having found removal proper, I will not consider defendant's contacts with the state or the value of having a state court decide state law issues. These arguments do not defeat a proper petition for removal.

ORDER

IT IS ORDERED that the motion of plaintiff Erland Anderson, d/b/a Anderson Dairy Systems to remand this action to the Circuit Court for Barron County, Wisconsin is DENIED.

Entered this 15th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge