

504 F.Supp.3d 591
United States District Court, S.D. Texas, Houston
Division.

JASON R. BAILEY, MD, P.A., et al., Plaintiffs,
v.
BLUE CROSS & BLUE SHIELD OF TEXAS INC.,
et al., Defendants.

CIVIL ACTION NO. 4:20-CV-1435

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Signed 12/02/2020

Synopsis

Background: Doctor and surgical center brought state court action against defendants, asserting healthcare reimbursement claims. After one defendant filed notice of removal, and ten codefendants filed consents to removal, doctor and surgical center moved to remand for procedural defects.

Holdings: The District Court, [Alfred H. Bennett, J.](#), held that:

^[1] notice of removal failed to affirmatively explain why consent from five codefendants was unnecessary, and thus was procedurally defective, and

^[2] consents to removal that had been signed “by permission” by defendant was procedurally defective.

Motion granted.


Procedural Posture(s): Motion for Remand.

West Headnotes (10)


[1] **Federal Civil Procedure** → Response, reply, and surreply; reply and surreply briefs

Proper sur-replies address new arguments raised for the first time by the opposing party in their reply briefing and not included in the original motion.


[2] **Removal of Cases** → Constitutional and statutory provisions
Removal of Cases → Evidence

Because removal raises significant federalism concerns, the removal statute is strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand.  28 U.S.C.A. § 1446(b)(2)(A).

[3] **Removal of Cases** → Parties to notice or petition


The rule of unanimity, which indicates that, to effectuate proper removal of case, all defendants who have been properly joined and served must join in or consent to removal, requires that all defendants to an action either sign the original notice of removal or timely file written consent to the removal within 30 days of service of the state-court petition.  28 U.S.C.A. § 1446(b)(2)(A).

[4] **Removal of Cases** → Parties to notice or petition

A codefendant who has not been served when the notice of removal is filed need not consent to it in order to effectuate proper removal of case.  28 U.S.C.A. § 1446(b)(2)(A).


[5] **Removal of Cases** → Evidence

Defendants who remove case bear the burden of establishing compliance with the rule of unanimity, which indicates that, in order to

effectuate removal, all defendants who have been properly joined and served must join in or consent to the removal of the action.  28 U.S.C.A. § 1446(b)(2)(A).

case, a defendant must do so itself.

[6] Removal of Cases  Parties to notice or petition

Notice of removal filed by defendant failed to affirmatively explain why consent from five codefendants was unnecessary, and thus was procedurally defective in action brought by doctor and surgical center, asserting healthcare reimbursement claims; while notice indicated that codefendants' consent was not required because codefendants who had not signed written consent had not been properly served and joined, such codefendants were merely nominal defendants, claims of such codefendants were not within court's supplemental jurisdiction, or state-law claims against such codefendants were separate from claims against defendant, notice did not name non-consenting codefendants, delineate codefendants to which each exception applied, or assert codefendant-specific allegations regarding exceptions, and at least one codefendant had been properly served when notice was filed.  28 U.S.C.A. § 1446(a).


[7] Removal of Cases  Parties to notice or petition

The stringent Fifth Circuit standard for consent to removal requires each served defendant, or someone purporting to formally act on its behalf, to file a timely written indication that it has actually consented to removal.


[8] Removal of Cases  Parties to notice or petition

In the Fifth Circuit, for consenting to removal of

[9] Removal of Cases  Parties to notice or petition

Codefendants' consents to removal that had been signed "by permission" by defendant were procedurally defective in action brought by doctor and surgical center, asserting healthcare reimbursement claims; defendant did not file affidavit or any other evidence that codefendants had authorized defendant to formally act on their behalf, and while codefendants pointed to local rule that allowed designation on document that one person had affixed another person's signature by permission under circumstances when signing by permission would have been acceptable on conventionally-filed document, consent to removal required only one signature and was not document where signing by permission was acceptable.  28 U.S.C.A. § 1446(b)(2)(A).

[10] Removal of Cases  Parties to notice or petition

Correspondence between the parties that occurred during the thirty-day notice period following service of state-court petition, but was not filed with court until the period had expired, cannot be used in the Fifth Circuit to satisfy the removal statute's requirement that, in order to effectuate proper removal, all defendants who have been properly joined and served must join in or consent to removal of action within 30 days of service of state-court petition.  28 U.S.C.A. § 1446(b)(2)(A).

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ORDER

[Alfred H. Bennett](#), United States District Judge

*593 ^[1]Before the Court are Plaintiffs' Motion to Remand for Procedural Defects (Doc. #29), the Removing Defendants' Response (Doc. #45), and Plaintiffs' Reply (Doc. #47).¹ The Court also held an oral hearing on the Motion to Remand on November 4, 2020. Having reviewed the parties' arguments and applicable legal authority, the Court grants the Motion to Remand.

Plaintiffs Jason R. Bailey, MD, P.A. and Lone Star Surgical Centers, P.A. ("Plaintiffs") asserted healthcare reimbursement claims against 19 defendants in the 80th Judicial District Court, Harris County, Texas on March 12, 2020. Doc. #1, Ex. 3. One of those defendants, Enterprise Products Partners L.P. ("EPP"), was allegedly served on March 23, 2020 and filed a Notice of Removal ("Notice") on April 22, 2020 with Consents to Removal ("Consents") from ten codefendants (collectively "Removing Defendants"). *Id.* ¶ 3, Ex. 32–41. Plaintiffs filed a Motion to Remand for Procedural Defects ("Motion") on May 22, 2020, arguing that the Notice lacks timely *594 written consent from all codefendants and that the Consents signed "with permission" do not meet the Fifth Circuit's high standard for consent to removal. Doc. #29 at 8.

[2] [3] [4] [5]"Because removal raises significant federalism concerns, the removal statute is strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand." [Gutierrez v. Flores](#), 543 F.3d 248, 251 (5th Cir. 2008) (internal quotations omitted). To effectuate proper removal, "all defendants who have been properly joined and served must join in or consent to the removal of the action." [28 U.S.C. § 1446\(b\)\(2\)\(A\)](#). This is referred to as the "rule of unanimity" and requires "that all defendants to an action either sign the original [notice of] removal or timely file written consent to the removal ... within thirty days of services of the state-court petition." [Powers v. United States](#), 783 F.3d 570, 576 (5th Cir. 2015). A codefendant who has not been served when the notice of removal is filed need not consent to it. [Getty Oil Corp., a Div. of Texaco v. Ins. Co. of N. Am.](#), 841 F.2d 1254, 1261 n.9 (5th Cir. 1988). The defendants who remove the case "bear the burden of establishing compliance with the rule of unanimity." [Breitling v. LNV Corp.](#), 86 F. Supp. 3d 564, 570 (N.D. Tex. 2015).

^[6]Plaintiffs first argue that the Notice is procedurally defective because Defendant EPP did not obtain timely consent from all codefendants. Doc. #29 at 5. Although a

notice of removal need only contain “a short and plain statement of the grounds for removal,” “if a removing defendant fails to obtain the consent to remove [from] any codefendants, the notice of removal must affirmatively explain why consent of those defendants was unnecessary.” 28 U.S.C. § 1446(a); *Breitling*, 86 F. Supp. 3d at 570.

Here, Defendant EPP’s Notice contained Consents for ten of its eighteen codefendants. Doc. #1 ¶ 13; *Id.* Ex. 32–41. The Notice stated that “Defendants Texas Children’s Hospital, Texas Children’s Health Plan and Health Select, Inc.” were dismissed prior to removal, and thus did not need to consent to removal. *Id.* ¶ 14. For the five remaining codefendants, the Notice stated:

The consent of any remaining Defendants is not required for one or more of the following reasons. Any Defendants who have not signed a written consent to this removal have not been properly served and joined based on the State Court record. Additionally, or alternatively, any Defendants who have not signed a written consent to this removal are merely nominal defendants. For example, they are not necessary for a judgment on any claims, including any claims against this Defendant (Enterprise). Additionally, or alternatively, any claims against any Defendants who have not signed a written consent to removal are not within the supplemental jurisdiction of this Court.... Moreover, the state-law claims against the Defendants who have not provided written consent are separate and independent from the claims against Enterprise.

Id. ¶¶ 14–18. The Notice does not name the five remaining un-consenting codefendants, delineate which codefendants each exception applies to, or assert codefendant-specific allegations regarding the exceptions. *Id.* At least one of the non-consenting codefendants, McCurdy Services, Inc., had in fact “been properly served” when the Notice was filed. Doc. #45, Ex. 3 at 61. Accordingly, the Court finds that the Notice failed to “affirmatively explain” why timely consent of the five

codefendants “was unnecessary.” See *Breitling*, 86 F. Supp. 3d at 570.

*595 [7] [8] Additionally, Plaintiffs argue that six of the ten Consents filed with the Notice were invalid because they were signed “with permission” by Defendant EPP. Doc. #29 at 8. The “stringent Fifth Circuit standard” for consent to removal “requires ‘each served defendant,’ or someone ‘purporting to formally act on its behalf,’ to file a timely ‘written indication ... that it has actually consented to’ removal.” *Grand Texas Homes, Inc. v. Am. Safety Indem. Co.*, No. 3:12-CV-1773-M, 2012 WL 5355958, at *2 (N.D. Tex. Oct. 30, 2012) (quoting *Getty Oil*, 841 F.2d at 1262 n.11). Put simply, for consenting to removal, “a defendant must do so itself.” *Getty Oil*, 841 F.2d at 1262 n.11. The only court in the Fifth Circuit to accept consents to removal “signed in the name of [codefendants’] attorneys ... with permission” specifically noted that the consents were “accompanied by an affidavit swearing under penalty of perjury that all [codefendants] had consented” and that such a practice was “explicitly allow[ed]” by the local rules of that court. *Rupert v. Winter*, No. 3:10-CV-0799-N, 2012 WL 13102348, at *3 n.6 (N.D. Tex. Jan. 24, 2012).

[9] [10] Here, Defendant EPP did not file an affidavit nor any other evidence that codefendants had authorized Defendant EPP to formally act on their behalf.² As such, Removing Defendants argue that their conduct is permitted under the Southern District of Texas Local Rule for “documents containing multiple persons’ signatures,” which allows “[a] designation on a document that one person has affixed another person’s signature ‘by permission’ ... under circumstances when signing by permission would be acceptable on a conventionally filed document.” S.D. TEX. PAT. R. 8(C)(4). But a consent to removal requires only one signature and is not a conventionally filed document where signing by permission is acceptable. Recognizing that “removal raises significant federalism concerns” that require courts to construe the removal statute strictly and resolve any doubts in favor of remand, the Court finds the Consents signed “with permission” to be procedurally defective. See *Gutierrez*, 543 F.3d at 251.

For the foregoing reasons, the Motion is hereby GRANTED and this case is REMANDED to the 80th Judicial District Court, Harris County, Texas for further proceedings.

It is so ORDERED.

All Citations

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Footnotes

- ¹ Additionally, Removing Defendants filed a Motion for Leave to File Sur-Reply (Doc. #52), to which Plaintiffs filed a Response (Doc. #58). Proper sur-replies address “new arguments raised for the first time by the opposing party in their reply briefing and not included in the original motion.” *BHL Boresight, Inc. v. Geo-Steering Sols., Inc.*, No. 4:15-CV-00627, 2017 WL 3634215, at *2 (S.D. Tex. Aug. 24, 2017). Because Removing Defendants’ proposed sur-reply is limited to two claims Plaintiffs raised for the first time in their Reply, the Motion for Leave is GRANTED.
- ² On June 12, 2020, Removing Defendants filed portions of email communications in which counsel for each of the six codefendants gave Defendant EPP permission to sign the Consents on their behalf. Doc. #46, Ex. 6 at 4–28. But “correspondence between the parties that occurred during the thirty-day notice period, but was not filed with court until the period had expired,” “cannot be used in the Fifth Circuit to satisfy the removal statute’s consent requirement.” *Grand Texas Homes*, 2012 WL 5355958 at *3. Defendant EPP’s notice period ended on April 22, 2020. See Doc. #1 ¶ 1. Accordingly, the Court may not consider the emails.

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