

Case Name: Clifford Welch v Norfolk Southern Railway Company

Date Decided: May 27th, 2009

Originally Filed in: ()

Decided by: (State)

Court: U.S.D.C. Southern District of Illinois

Judge: Judge Murphy

Citation: 2009 WL 2365596

Background:

Plaintiff, Clifford Welch (Welch), brought this action against defendants, Norfolk Southern Railway Company (Norfolk) and Triple Crown Services Company (Triple Crown), seeking recovery for negligence pursuant to Federal Employers' Liability Act (FELA). The defendants have removed this case to federal Court in diversity jurisdiction. Norfolk and Triple Crown argued that Welch's FELA claim was fraudulent and thus not subject to the prohibition on removal of FELA actions. Welch has moved for remand of this action to state court on grounds that removal is untimely and section 1445(a) bars removal of his FELA claim.

Issue:

Is Norfolk's removal of Welch's FELA claim appropriate?

Overall Issues Discussed or Touched Upon in this Case:

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Held:

A defendant seeking to remove a case must file notice of removal within thirty days after service of the complaint in the case. If a case is not removable at the outset however, a notice of removal may be filed within 30 days after defendant receives "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 removable". Welch argued that because Norfolk and Triple Crown were served with his complaint February 12, 2009 and removal was not effected until March 17, 2009 that the removal is untimely. The Defendants contended that even though Norfolk was served, Triple Crown was never served because service was effected on a person not an authorized agent of Triple Crown for service of process. Furthermore, the Defendants argued that removal was timely because it was effected within thirty days of the date that they discovered Welch's FELA claim was fraudulent. This Court however, rejected the defendant's arguments. This Court relied on the "first-served" defendant" rule which holds a properly-served defendant's failure to effect timely removal of a case operates as a waiver of the right to remove that case with respect to all later-served defendants. This Court adopts the first-served rule rather than the last-served because it is consistent with the general principle that removal statutes are to be construed narrowly. Moreover, this Court rejected Norfolk and Triple Crown's argument on

the ground of timely removal because they removed it within 30 days of discovering Welch's claim fraudulent because the defendants were doubtless aware of their asserted grounds for removal of this case. Accordingly this Court held that Norfolk and Triple Crown failed to timely remove this case and it is therefore denied.

Comments:

Failure to effect timely removal under Â§1446(b) is a procedural defect in removal, not jurisdictional one, and it is waived unless raised by a plaintiff within thirty days of removal. This requirement is mandatory and strictly applied. Welch has raised a timely objection to the procedural defect in the removal of this case and the Court remanded the case. Steve Gordon
<http://www.Gordon-Elias.com>