UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RANDY ROSEN, Administrator of the Estate of Rita Rosen, Plaintiffs-Appellees, v. MONTEFIORE, et al., Defendants-Appellants.	No. 22-3170

APPELLEES' REPLY TO APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE

Plaintiff-Appellee Randy Rosen, Administrator of the Estate of Rita Rosen, hereby replies to Defendants-Appellants' response to the Court's April 4, 2022, Order to Show Cause as to why this appeal should not be dismissed for lack of jurisdiction. As this appeal arises from an order remanding a case removed from the Cuyahoga County Court of Common Pleas to federal district court solely on the basis of federal-question jurisdiction, appellate review is barred by 28 U.S.C. § 1447(d). Accordingly, this Court lacks jurisdiction and should dismiss the appeal.

INTRODUCTION

Cases, not claims, are removed from state court to federal court. Thus, when on November 5, 2021, some defendants filed a notice of removal of this case from the Cuyahoga County Court of Common Pleas, with the consent of all defendants

and satisfying all of the requirements set out in 28 U.S.C. § 1446, the case was removed in its entirety. The notice did not invoke 28 U.S.C. § 1442 or § 1443. Since 28 U.S.C. § 1447(d) only allows review of remand orders in cases "removed pursuant to section 1442 or 1443" and this case was not so removed, appellate review of the district court's remand order is unavailable.

The removal notice filed the following week by one of the defendants, Ariel Hyman—whose consent to removal had been provided in the earlier notice—is irrelevant. The first notice of removal divested the state court of jurisdiction, and there was nothing left for Mr. Hyman to remove the following week. In any event, the single oblique reference to 28 U.S.C. § 1442(a)(1), the federal-officer removal statute, in the "argument" section of Mr. Hyman's notice does not render the case "removed pursuant" to that statutory provision.

BACKGROUND

This appeal arises out of a single action initially filed in the Cuyahoga County, Ohio Court of Common Pleas on October 8, 2021, *Rosen v. Montefiore*, Case No. CV 954152. Plaintiff Randy Rosen filed that action on behalf of the estate of his mother, Rita Rosen, a resident of the Montefiore of Menorah Park nursing home in Beachwood, Ohio, who died of COVID-19 in November 2020. He alleges that the failure of the nursing home and individual nursing home administrators to

implement adequate infection control policies at Montefiore led to his mother's death.

On November 5, 2021, Defendants-Appellees Montefiore, the Montefiore Foundation, the Montefiore Home, the Montefiore Housing Corporation, and the Menorah Park Foundation ("Facility Defendants") timely removed the action to the United States District Court for the Northern District of Ohio. *See* 21-cv-02104 ECF 1. In their removal notice, the Facility Defendants invoked 28 U.S.C. § 1441(a) and asserted that removal jurisdiction was appropriate "because Plaintiff's Complaint asserts a claim 'arising under' and governed by federal law within the meaning of 28 U.S.C. § 1331." 21-cv-2104 ECF 1 ¶ 4. No other bases for removal jurisdiction were asserted. The removal notice also stated that "Defendants Ariel S. Hyman, Tina King, and Marie Gelle consent to removal of this action to the United States District Court for the Northern District of Ohio, Eastern Division." 21-cv-2104 ECF 1 ¶ 12.

The following week, although the state court action had already been removed, one of the other defendants, Ariel S. Hyman, filed a notice of removal of the same action. 21-cv-2142 ECF 1. Like the Facility Defendants, Mr. Hyman invoked 28 U.S.C. § 1441(a) as the sole basis for removal, asserting that "this case is removable under 28 U.S.C. § 1441(a) on the basis of 'original jurisdiction' because Plaintiff's Complaint asserts a claim 'arising under' and governed by federal law within the meaning of 28 U.S.C. § 1331." 21-cv-2142 ECF 1 ¶ 4. Under the

heading "Argument and Citation to Authority," the notice repeated this assertion, stating:

> This case is removable under 28 U.S.C.A. § 1441(a) on the basis of "original jurisdiction" because Plaintiff's Complaint asserts a claim "arising under" federal law within the meaning of § 1331. Original jurisdiction is also through an action pursuant to 28 U.S.C. § 1442(a)(1). The Court also has supplemental jurisdiction over state law claims under 28 U.S.C. § 1367.

21-cv-2142 ECF 1 ¶ 12. The notice also stated that "all other defendants consent to removal of this action to the United States District Court for the Northern District of Ohio, Eastern Division," and that "the Facility Defendants separately removed this action." 21-cv-2142 ECF 1 ¶ 21. The district court assigned a new district court docket number to Mr. Hyman's notice of removal.

Mr. Rosen filed motions to remand the case to the Cuyahoga County Court of Common Pleas in both actions. 21-cv-2142 ECF 11; 21-cv-2142 ECF 10. On January 31, 2022, the district court issued an order remanding the action. 21-cv-2104 ECF 23. Although the order was only entered on the docket for action No. 21-cv-2104, the caption of the order referenced both action No. 21-cv-2104 and action No. 21-cv-2142, and explicitly stated that it resolved both pending remand motions. 21-cv-2104 ECF 23 at 1.

Defendants subsequently moved for a stay of the district court's remand orders. 21−cv−2104 ECF 26. In response, on February 17, 2022, the district court vacated its judgment, reinstated No. 21-cv-2104, recalled the papers delivered to the

state court, and stayed proceedings pending appeal of the remand order to this Court. 21-cv-2104 ECF 28. The same day, the Court sua sponte administratively closed Case No. 21-cv-2142 and consolidated the two actions. 21-cv-2142 ECF 24.

Defendants then filed a motion for clarification in the district court. *See* 21-cv-2104 ECF 29. In response, on February 23, 2022, the district court reinstated its remand order and stayed enforcement of that order pending appellate review. *See* 21-cv-2104 ECF 30.

On March 2, 2022, Defendants filed a notice of appeal in Case No. 21-cv-2104.

On April 4, 2022, the Court issued an Order to Show Cause as to why this appeal should not be dismissed for lack of jurisdiction. Dkt. No. 24-1.

ARGUMENT

I. Because the case was removed in its entirety on November 5, 2021, solely on the basis of federal-question jurisdiction, the remand order is unreviewable.

Most remand orders are not reviewable on appeal. Section 1447(d) states an exception to the general rule, though, by allowing appeal from an order "remanding a case to the State court from which it was removed pursuant to section 1442 or 1443." To qualify for the "removed pursuant to section 1442 or 1443" exception, the "defendant's notice of removal must assert the case is removable 'in accordance with or by reason of' one of those provisions." *BP P.L.C. v. Mayor & City Council of*

Balt., 141 S. Ct. 1532, 1538 (2021) (quoting Black's Law Dictionary, at 1401 (rev. 4th ed. 1968)). Section 1442 addresses federal-officer removal, and section 1443 addresses removal of certain civil rights actions.

Section 1447(d) refers to removed "cases," not claims, because, "[i]n a case where a plaintiff has sued multiple defendants in state court, an 'all for one and one for all' rule applies with respect to removal." *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 75 (1st Cir. 2009). "[O]nce the removal petition is properly filed and notice is given, the entire case is transferred to federal court, and the state court is deprived of jurisdiction unless the federal court subsequently remands it." *Seaton v. Jabe*, 992 F.2d 79, 81 (6th Cir. 1993).

Accordingly, Mr. Singer's Cuyahoga County case was removed, in its entirety, when the Facility Defendants filed their notice of removal on November 5, 2021, with the consent of all defendants. The notice did not assert that the case was removable "in accordance with or by reason of" either section 1442 or section 1443. Thus, the district court's order cannot be said to have remanded "a case to the State court from which it was removed pursuant to section 1442 or 1443." 28 U.S.C. § 1447(d). This Court therefore lacks appellate jurisdiction.

Appellants rely on the removal notice filed by Mr. Hyman the week after the Facility Defendants removed the case to the Northern District of Ohio. But a case can only be removed once (until and unless it has been remanded), and thus the

notice of removal was a nullity. *See, e.g.*, *Williams v. Equifax Info. Servs. LLC*, 359 F. Supp. 2d 1284, 1286 (M.D. Fla. 2005) ("Strict construction of 28 U.S.C. § 1446 leads this Court to the certain conclusion that the filing of only one notice of removal is contemplated."). As Mr. Hyman acknowledged in his notice, the cases had already been removed—the notice even cited the federal court docket numbers. *See, e.g.*, 21-cv-2142 ECF 1 ¶¶ 6, 21.[1]

There was thus no case still pending in state court for Mr. Hyman to remove. As one district court observed in a related case, "Hyman's consent to the 11/5/2021 removal implies that he consented to removal on the basis of federal question jurisdiction *only*." *Estate of Spring v. Montefiore Home*, 2022 WL 1120381, at *6 n.2 (N.D. Ohio Apr. 14, 2022). As the "case" had already been removed to federal court, Mr. Hyman's purported second removal was a nullity. *Cf. Balleteros v. Pocta*, 2021 WL 979240, at *4 (E.D. Va. Mar. 16, 2021) (second notice of removal while case was pending in federal court could not cure inadequate first notice of removal).

Relying on district court decisions from outside this Circuit, Appellants suggest that *each* notice of removal was "proper and effective." Dkt. 26 at 2. Those

[1]Appellees agree with Appellants that the failure to file a separate notice of appeal in district court action No. 21-cv-2142, which the district court had consolidated with No. 21-cv-2104 prior to the filing of the notice of appeal, does not impact this Court's jurisdiction. *See Seneca Ins. Co. v. Daniel*, 93 F. App'x 872, 873 (6th Cir. 2004) (citing *Felts v. Campbell*, No. 96-6729, 1998 WL 13403 (6th Cir. Jan. 7, 1998); *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978)).

decisions do not support Appellants here. Two of the decisions stand for the proposition that the rule of unanimity can be satisfied by, and thus removal effectuated by, either each defendant filing a separate notice of removal or a single notice of removal expressing the consent of all the defendants. *See Shaffer v. Northwestern Mutual Life Ins. Co.*, 394 F. Supp. 2d 814, 819–20 (N.D.W. Va. 2005); *Sullivan v. Leaf River Forest Prod., Inc.*, 791 F. Supp. 627, 629 (S.D. Miss. 1991).[2] Where defendants choose the former path, removal is not effectuated until the last defendant files a separate notice of removal. Here, though, the defendants chose the latter path. And under this Court's precedent, all the requisite elements for removal established by section 1446 were present on November 5, 2021. *See Harper v. AutoAlliance Int'l Inc.*, 392 F.3d 195, 202 (6th Cir. 2004).

The other two district court decisions cited by Appellants reflect that "a defendant seeking removal generally has the right to amend its removal petition to include either missing or imperfectly stated grounds for removal." *Muhlenbeck v.*

[2] *Sullivan*'s holding that "the differences in defendants' removal petitions do not affect the propriety of the removal petitions," because a federal court should "consider all applicable jurisdictional grounds *sua sponte* whether or not the grounds were raised by a party to the lawsuit" in a notice of removal, is contrary to the weight of authority, which holds that a failure to raise a basis for removal in a notice of removal constitutes waiver. *See, e.g.*, *Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 4 (1st Cir. 2014); *Ervast v. Flexible Prods. Co.*, 346 F.3d 1007, 1012 n. 4 (11th Cir. 2013). In any event, sua sponte consideration of a ground for removal would not satisfy section 1447(d)'s requirement that the *notice of removal* must be based on section 1442 or 1443 for an appeal to lie from a remand order.

KI, LLC, 304 F. Supp. 2d 797, 799 (E.D. Va. 2004); *Davis v. Citibank, N.A.*, No. 4:14 CV 1129 CDP, 2014 WL 6673520, at *3 (E.D. Mo. Nov. 24, 2014). This rule is irrelevant to the circumstances here, as the defendants who filed the first removal notice never amended it. And even if one defendant could amend another defendant's notice of removal—a dubious proposition at best—Mr. Hyman did not purport to do so here.

Finally, Appellants' suggestion that the Supreme Court's decision in *BP* means that *any order* that addresses federal-officer removal is appealable in its entirety, Dkt. 26 at 5, misstates the holding of that case and the plain text of section 1447(d). Neither the decision nor the statute state that appellate review is available any time a party references in proceedings, or a district court addresses, jurisdiction under section 1442 or 1443. Rather, a remand order is reviewable in its entirety only where a defendant "assert[ed] the case is removable 'in accordance with or by reason' of" section 1442 or 1443" in the notice of removal that brought the case from state to federal court. *BP*, 141 S. Ct. at 1538. The November 5, 2021 notice of removal did not invoke federal officer removal, and thus there is no appellate jurisdiction. *Cf. Wood v. Crane Co.*, 764 F.3d 316, 325 (4th Cir. 2014) (declining to consider section 1442 as a basis for removal where defendant had "made a strategic decision not to assert" that basis in notice).

II. Mr. Hyman did not purport to remove the case pursuant to section 1442 or 1443.

In addition to the fact that Mr. Hyman's removal notice had no effect because the case was no longer pending in state court when the notice was filed, the notice cannot be the basis for appellate jurisdiction because it did not "assert the case is removable 'in accordance with or by reason of'" section 1442 or 1443, as *BP* requires for the exception to section 1447(d)'s bar on review to apply. *See* 141 S. Ct. at 1538; *see also* 28 U.S.C. § 1446(a) (requiring a notice of removal to contain "a short and plain statement of the grounds for removal").

Like the Facility Defendants' notice, Mr. Hyman's notice (twice) stated that "[t]his case is removable under 28 U.S.C. § 1441(a)," which provides for removal of certain cases within the original jurisdiction of the federal courts; the notice invoked federal-question jurisdiction pursuant to 28 U.S.C. § 1331 as the claimed basis for original jurisdiction. *See, e.g.*, 21-cv-2142 ECF 1 ¶¶ 4, 12. The notice went on to address, in detail, the theory of federal-question jurisdiction—complete preemption—before concluding:

> Therefore, Plaintiff's Complaint invokes a federal question for which the governing federal law "completely preempts" Plaintiff's state law claims, and removal is proper under 28 U.S.C. § 1441(a).

In contrast to the three explicit assertions that the case was removable under 28 U.S.C. § 1441(a), the removal notice made only a passing reference to section 1442(a)(1) in a section entitled "Argument and Citation to Authority," stating that

"Original jurisdiction is also through an action pursuant to 28 U.S.C. § 1442(a)(1)." 21-cv-2142 ECF 1 ¶ 12. This reference to section 1442(a)(1) does not mean that the case was removed pursuant to that statute. As one district court noted in addressing the same language in another case, "Hyman's sole mention of § 1442(a) in his Notice is nearly impossible to parse." *Spring*, 2022 WL 1120381, at *6 n.2. To the extent it is intelligible, the sentence in the notice citing section 1442(a) refers to that provision (incorrectly) only as a basis for "original jurisdiction" under section 1441(a)(1). Original jurisdiction, of course, is a distinct concept from *removal* jurisdiction, which is all that section 1442(a) provides. Here, as a basis of removability—which is the relevant inquiry under the standard adopted by the Supreme Court in *BP*—Mr. Hyman's notice of removal solely invoked section 1441(a). *Cf. County of San Mateo v. Chevron Corp.*, __ F.4th __, 2022 WL 1151275, at *18 n.23 (9th Cir. Apr. 19, 2022) (holding that a "reference to 'federal common law'" in notice of removal was insufficient to invoke admiralty jurisdiction); *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (finding notice of removal did not invoke federal-question jurisdiction where it explicitly invoked diversity as basis for removal jurisdiction and merely referenced a federal statute in "background and facts" section of notice); *Thompson v. Gulf Stream Coach, Inc.*, 2007 WL 2413108, at *2–3 (W.D. Mich. Aug. 21, 2007) (holding notice did not invoke federal-question jurisdiction where it explicitly cited diversity as the basis

for removal). Accordingly, his notice (in any event ineffective because the case was already removed) did not render the case "removed pursuant to" section 1442, and the exception to section 1447(d)'s reviewability bar does not apply.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request the Court dismiss the appeal for lack of jurisdiction.

May 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

May 3, 2022

/s/ Adam R. Pulver
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