2002 WL 31509881
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United States District Court,
S.D. New York.

MADDALONI JEWELERS, INC., Plaintiff,
v.
ROLEX WATCH U.S.A., INC., Alan Brill and Laurence Mazio Defendants.

No. 02 Civ. 6438(SAS).
|
Nov. 6, 2002.

Jeweler brought action in state court against watch company and others, asserting claims based on alleged violations of Racketeer Influenced and Corrupt Organizations Act (RICO), prima facie tort, and civil conspiracy. Following removal, jeweler moved to remand. The District Court, Scheindlin, J., held that date of service was date attorney accepted papers without complaint or insistence on written service, rather than date of electronic mail courtesy copy.

Motion denied.

West Headnotes (1)

[1] **Removal of Cases**
Time for Taking Proceedings

Although attorney agreed to accept service on behalf of all defendants, attorney did not agree to accept service by e-mail, and thus date of service was date attorney accepted papers without complaint or insistence on formal service, rather than on date of electronic mail sent as courtesy copy, for purposes of determining defendants' time to remove. 28 U.S.C.A. § 1446(b).

4 Cases that cite this headnote

Attorneys and Law Firms

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Stephen F. Ruffino, Wm. Lee Kinnally, Jr., John F. Flaherty, Gibney, Anthony & Flaherty, LLP, New York, NY, for Defendant Rolex Watch U.S.A., Inc.

Norman A. Bloch, Grover & Bloch, P.C., New York, NY, for Defendant Allen Brill.

William M. Brodsky, Fox Horan & Camerini, LLP, New York, NY, for Defendant Laurence Mazio.

OPINION AND ORDER

SCHEINDLIN, J.

***1** Plaintiff Maddaloni Jewelers, Inc. ("Maddaloni") brought this action against defendants Rolex Watch U.S.A., Inc. ("Rolex"), Alan Brill, and Laurence Mazio (collectively, the "defendants"), in the New York State Supreme Court, New York County, on July 3, 2002, asserting claims against defendants based on violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961, *et seq.* ("RICO"), prima facie tort and civil conspiracy. *See* Affidavit of Daniel Chiu, Plaintiff's Attorney, in Support of Motion to Remand ("Chiu Aff."), ¶ 3. Defendants removed the case to this Court by filing a notice of removal on August 13, 2002, pursuant to 28 U.S.C. § 1331, because the action arises under the laws of the United States, specifically the RICO Act. *See* Notice of Removal, Ex. B to Notice of Motion, at 1. On August 22, 2002, plaintiff moved to remand the case, arguing that defendants failed to file their notice of removal within thirty days following their receipt of plaintiff's initial pleading, as required by 28 U.S.C. § 1446(b). *See* Notice of Motion.

I. BACKGROUND

On July 10, 2002, Daniel Chiu, an attorney with Tarter Krinksy & Drogin LLP, attorneys for plaintiff Maddaloni, called Stephen Ruffino, an attorney with Gibney Anthony & Flaherty, LLP ("GAF"), counsel for Rolex, to inquire whether Mr. Ruffino was authorized to accept service of the summons and complaint on

behalf of all of the defendants.[1] *See* Chiu Aff. ¶ 4. Mr. Ruffino replied that he was authorized to accept service for Rolex and would get back to Mr. Chiu with respect to the individual defendants. *See id.* Mr. Ruffino called Mr. Chiu later that same day and informed him that he was authorized to accept service on behalf of all three defendants. *See id.* ¶ 5. He also asked Mr. Chiu to e-mail a copy of the complaint to him so that he could review it immediately. *See id.* Mr. Chiu e-mailed the complaint to Mr. Ruffino on the evening of July 10, 2002. *See id. See also* Ruffino Decl. ¶ 5.

On July 11, 2002, Mr. Chiu mailed a copy of the summons and complaint to Mr. Ruffino along with a stipulation setting forth defendants' time to answer the complaint. *See* Chiu Aff. ¶ 5; Stipulation, Ex. C to Chiu Aff. On July 15, 2002, Mr. Ruffino received the summons, complaint, and stipulation. *See* Ruffino Decl. ¶ 6. He signed and dated the stipulation July 15, 2002, which he asserts is when he gave plaintiff permission to serve GAF. *See* Ruffino Decl. ¶ 7; Stipulation, Ex. 1 to Ruffino Decl. He also added in handwriting "as of July 15, 2002" to the second paragraph of the stipulation and initialed that change. *See* Ruffino Decl. ¶ 8. Mr. Ruffino also claims he then called Mr. Chiu, explained the change, and told him he needed to countersign the change before Mr. Ruffino would accept service.[2] *See id.* Mr. Ruffino faxed the signed and dated stipulation to Mr. Chiu and Mr. Chiu added his initials to the change and faxed the stipulation in its final form back to Mr. Ruffino. *See id.* ¶ 9.

***2** Plaintiff asserts that Mr. Ruffino agreed to accept service on July 10, and was in fact served on July 10 by e-mail transmission of the complaint, making the language in the stipulation regarding July 15 irrelevant. *See* Chiu Reply Aff. ¶ 4. Plaintiff contends that defendants attempted to stipulate to an extension of the 30–day removal period by inserting the language "as of July 15, 2002" into the stipulation that extended defendants' time to answer the complaint.[3] *See* Chiu Aff. ¶ 7.

Defendants maintain that N.Y. C.P.L.R. § 2104 requires all stipulations to be in writing.[4] As a result, defendants argue that GAF's agreement to accept service on behalf of all defendants was not effected until July 15, 2002, when Mr. Ruffino signed and agreed to the stipulation in writing. *See* Defendants' Joint Memorandum of Law in Opposition to Plaintiff's Motion to Remand, at 3–4.

II. LEGAL STANDARD

Removal of actions from state court is authorized by section 1441 of Title 28 of the United States Code, which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court ... where such action is pending." 28 U.S.C. § 1441(a). In the event plaintiff moves to remand the action, the defendant bears the burden of establishing by "competent proof" that removal was proper. *See United Food & Commercial Workers Union v. CenterMark Props. Meriden Square, Inc.,* 30 F.3d 298, 301 (2d Cir.1994). "Because the party seeking to remove the action bears the burden of establishing federal jurisdiction, it is the removing party who must convince this Court that removal was proper." *Quinones v. Minority Bus Line Corp.,* No. 98 Civ. 7167, 1999 WL 225540, at *2 (S.D.N.Y. Apr.19, 1999) (citing *Mermelstein v. Maki,* 830 F.Supp. 180, 184 (S.D.N.Y.1993)). Therefore, the defendants bear the burden of demonstrating that their removal of this action was timely.

III. DISCUSSION

Procedures for removal are set forth in section 1446 of Title 28 of the United States Code. Pursuant to section 1446(b), notice of removal must be filed "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." Thus, once a defendant receives a copy of the initial pleading the thirty-day period for filing notice of removal is triggered, provided that service of the initial pleading is proper.

Plaintiff contends that the case must be remanded because defendants' notice of removal was filed after expiration of the thirty-day time period set forth in section 1446(b). Plaintiff argues that the thirty-day period began to run on July 10, 2002, when Mr. Chiu e-mailed the Complaint to Mr. Ruffino. Defendants concede they received a copy of the complaint via e-mail on July 10, 2002. However, defendants argue that this copy of the complaint was a mere courtesy copy and as such did not trigger the thirty-day removal period. Defendants rely on the following language from *Murphy Bros. v. Michetti Pipe Stringing,* 526 U.S. 344, 347–48, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999):

> ***3** [A] named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.

Defendants argue that the thirty-day period began to run on July 15, 2002, when both the summons and complaint were received by GAF.

In *Murphy Bros.,* the Supreme Court rejected the "receipt rule." *Id.* at 356. The "receipt rule" embodied the notion that the removal period under section 1446(b) began to run on receipt of a copy of the complaint, however informally, despite the absence of any formal service of process. *See id.* The Second Circuit has interpreted *Murphy Bros.* to hold that "the commencement of the removal period [can] only be triggered by formal service of process, regardless of whether the statutory phrase 'or otherwise' hints at some other proper means of receipt of the initial pleading." *Whitaker v. American Telecasting, Inc.,* 261 F.3d 196, 202 (2d Cir.2001). [5] "[I]f the complaint is filed in court prior to any service, the removal period runs from the service of the summons." *Murphy Bros.,* 526 U.S. at 354. Thus, "[i]n the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant." *Id.* at 350.

The key question in this determination is whether defendants waived formal service of process, and if so, what the scope of that waiver was and whether that waiver needed to be in writing pursuant to N.Y. C.P.L.R. § 2104. Mr. Ruffino maintains he never discussed waiver with Mr. Chiu, and never intended to waive service of process. *See* Ruffino Decl. ¶ 10. Plaintiff maintains defendants did waive formal service because service was not made in accordance with the Federal Rules of Civil Procedure or the CPLR, as the pleadings were sent by e-mail and first-class mail rather than personal delivery. *See* Chiu Reply Aff. ¶ 9. Plaintiff concludes that GAF's agreement to accept the papers and its acknowledgment of receipt of the papers could only be a waiver of formal service of process. *See id.*

An agreement regarding the manner of service of process need not be reduced to writing. *See Cohen v. Coleman,* 110 Misc.2d 419, 442 N.Y.S.2d 834, 836 (Sup.Ct. Queens Co.1981) ("[T]he legislature has not seen fit to require that an agreement as to the manner of service of process be reduced to writing, and the court will not strain to read such a requirement into CPLR 2104."); NY Jur.2d Trial § 234 (2002). However, Mr. Ruffino did not agree to accept service by e-mail. Rather, he agreed to accept service on behalf of all defendants. *See* Chiu Aff. ¶ 5. Without a clearer acceptance by Mr. Ruffino to Mr. Chiu to accept service via e-mail, there simply was no acceptance of service by e-mail.

***4** If there were a waiver of formal service of process, it occurred on July 15, 2002, when GAF accepted the papers without complaint or insistence on formal service. The complaint sent by e-mail on July 10 was a courtesy copy and did not trigger defendants' time to remove pursuant to section 1446(b). *See Murphy Bros.,* 526 U.S. at 349–356. Therefore, defendants' removal was timely.

IV. CONCLUSION

For the reasons stated above, plaintiff's motion to remand is denied.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31509881

Footnotes

1 Mr. Ruffino asserts that Mr. Chiu called him on July 9, 2002, and that he called Mr. Chiu back on July 10, 2002. *See* Declaration of Stephen Ruffino in Opposition to Remand Motion ("Ruffino Decl."), ¶¶ 2–4. He also asserts that he told Mr. Chiu on July 9 that if he received authorization to accept service, it would be on the condition that plaintiff agree to an extension of time for defendants to respond to the complaint. *See id.* ¶ 3. Mr. Chiu allegedly told him he would ask his superiors whether the plaintiff was willing to agree to that condition. *See id.* According to Mr. Ruffino, on July 10, he called Mr. Chiu to tell him he would accept service for all defendants provided plaintiff agreed to the extension. *See id.* ¶ 4. Mr. Chiu told him the extension of time was approved and Mr. Chiu agreed to draft a stipulation for their signatures. *See id.*

2 Mr. Chiu disputes this assertion. *See* Reply Affidavit of Daniel Chiu in Further Support of Motion to Remand ("Chiu Reply Aff ."), ¶ 7. Instead, Mr. Chiu states that Mr. Ruffino's secretary called and asked him to initial the change, but neither she nor anyone else explained the change or told him that GAF's acceptance of service was conditioned upon his initialing the change. *See id.*

3 Parties cannot stipulate to enlarging the 30–day period contained in 28 U.S.C. § 1446(b). *See Dutton v. Moody,* 104 F.Supp. 838 (S.D.N.Y.1952).

4 N.Y. C.P.L.R. § 2104 states that "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." N.Y. C.P.L.R. § 2104 (McKinney 2002). While plaintiff argues that defendants' reliance on Section 2104 is misplaced in this federal action, at the time of stipulating this was a state court proceeding.

5 Plaintiff argues that *Murphy Bros.* should be limited to its facts and applied only to situations in which the parties are engaged in settlement negotiations. However, neither the Supreme Court nor the Second Circuit has implied such a limitation on the holding of *Murphy Bros..*