



7 West 21 LI LLC v. Mosseri

2021 | Cited 0 times | S.D. New York | July 18, 2021

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

----- 7 WEST 21 LI LLC, Petitioner, -v-
CLEMENT MOSSERI, Respondent. -----

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20 Civ. 279 (JPC)

ORDER

JOHN P. CRONAN, United States District Judge: Petitioner 7 West 21 LI LLC initiated a holdover petition against its tenant, Respondent Clement Mosseri, in the Civil Court of the City of New York, County of New York, Housing Part, on February 13, 2019. The Petition seeks from Petitioner apartment for failure to abide by the terms of the rental agreement. Respondent, proceeding pro se, removed the proceeding to federal court on January 13, 2020. Before the Court now is Petitioner Motion to Remand, arguing that Respondent untimely.

Petitioner, however, waived its right to object to Respondent on this procedural ground by failing to seek remand within the mandatory deadlines set forth in 28 U.S.C. § 1447(c). given potential jurisdictional issues identified by the Court herein, Petitioner is granted leave to move to remand for lack of subject matter jurisdiction.

I. Background Respondent received a Notice to Cure from Petitioner on or about December 11, 2018, asserting that Respondent failed to comply with an annual re-certification requirement contained in his lease agreement. 1

¶ 4; - The Notice to Cure explained that the apartment Respondent inhabited was subject to certain state laws -Income Housing Tax Credit LIHTC program pursuant to Section 42 of the [Internal Revenue] Notice to Cure at 2-3; see 26 U.S.C. § 42. It further alleged failed to complete [his] annual recertification in its entirety and submit and/or disclose information regarding [his] income and family composition at [his] home Notice to Cure at 1. The notice advised Respondent that unless he completed id. at 2, Petitioner would id. at 1.

Approximately two months later, on February 13, 2019, Petitioner filed a summary holdover petition against Respondent. State Court Record at 6- e Petition incorporates the Notice to Cure and alleges



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pursuant to the . . . written rental agreement and in the manner specified in the Notice to

Id. ¶¶ 6-7. [Respondent] rented said premises the permission of the Petitioner- Id. ¶¶ 9, 12. As with

the Notice to Cure, the Petition contains a paragraph noting that the apartment at issue is subject to various state laws as well as the LIHTC program under 26 U.S.C. § 42. Id. ¶ 13. Petitioner seeks judgment consisting of a and legal fees. Id. at p. 3-4.

1 In ATM One, LLC v. Landaverde, 2 N.Y.3d 472, 475 (2004) (citation omitted).

Respondent filed a Notice of Removal with this Court on January 13, 2020, relying on federal question jurisdiction under 28 U.S.C. § 1331. Notice of Removal ¶¶ 1, 17. 2

Respondent citation to the LIHTC program and section 42 of the Internal Revenue Code. Id. ¶¶ 18-19.

On March 25, 2020, the Court granted leave for Petitioner to file a motion to remand by April 10, 2020. Dkt. 8. 3

The Court extended that deadline numerous times, see Dkts. 14, 17, 20, 25, 29, before Petitioner filed the instant motion on January 29, 2021, The Court set a February 26, 2021 deadline for opposition, Dkt. 35, but

Respondent has not filed one.

II. Discussion A. P Motion to Remand

Petitioner argues that this proceeding should be remanded to state court because was filed outside the 30-day window for removal provided by 28 U.S.C. § 1446(b)(1). Motion to Remand ¶¶ 55-61. While the Court agrees that Respondent did not waived its right to object to this defect by failing to seek remand within 30 days of the filing of the Notice of Removal. See 28 U.S.C. § 1447(c).

Title 28, United States Code, Section 1446 sets out the procedure for removal of civil actions to federal court, including several deadlines a removing defendant must meet. As relevant to this motion, s after

2 The Honorable John G. Koeltl initially presided over this case. The case was reassigned to the undersigned on September 29, 2020.

3 March 25, 2020 Order did not extend any statutorily mandated deadlines, and explicitly advised Petitioner to the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief 28 U.S.C. § 1446(b)(1). The statute also provides ding is not removable, a notice of removal



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may be filed within 30 days after receipt by the defendant . . . of 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 or has become reId. § 1446(b)(3). investigate whether a case is removable[,] . . . [i]f removability is not apparent from the allegations

of an initial pleading or subsequent document, the 30-day clocks of 28 U.S.C. §§ 1446(b)(1) and *Cutrone v. Mortg. Elec. Registration Sys., Inc.*, 749 F.3d 137, 143 (2d Cir. 2014) (citing *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 206 (2d Cir. 2001)).

As noted above, Respondent asserts federal question jurisdiction as a basis for removal and relies on the Petition to the LIHTC program and the Internal Revenue Code. Notice of Removal ¶¶ 1, 17-19; see Petition ¶ 13. therefore apparent on the face of the Petition at the time Respondent was served with that pleading on February 20, 2019. See Motion to Remand, Exh. B. 4

At a minimum, Respondent was aware of his alleged basis for removal as of June 11, 2019, when he filed a motion to dismiss the Petition with the state court and cited to federal regulations related to the recertification requirement. See State Record at 36. Using either of these dates as a starting point for section 1446(b) 30-day clock was untimely.

This determination, however, The Second Circuit has held 30-day time limit to remove

4 Nothing in the record suggests that Respondent did not receive notice of the Petition or that the Petition was improperly served. To the contrary, Respondent filed an answer in the state court action on February 25, 2019. State Court Record at 24-26. *Agyin v. Razmzan*, 986 F.3d 168, 182 (2d Cir. 2021) (quoting *Somlyo v. J. Lu-Rob Enters.* object to an untimely notice of removal by timely filing a motion to remand, the objection is

Id.

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section While the Second Circuit has clarified that this deadline is not jurisdictional, it also has made clear *Phoenix Glob. Ventures, LLC v. Phoenix Hotel Assocs., Ltd.*, 422 F.3d 72, 75 (2d Cir. 2005). In *Phoenix Global Ventures* consider a motion to remand that was a day late because it was initially rejected system. Id. at 75-76. The court emphasized, however, was [ing]

Id. at 76.

Courts in this District have construed *Phoenix Global Ventures* as permitting a court to excuse an untimely motion to remand in very limited circumstances, such as when a short delay is caused by technological difficulties or results from a follow individual rules. See *Scantek Med., Inc. v. Sabella*,



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No. 08 Civ. 453 (CM), 2008 WL 2518619, at

Phoenix is that exceptions are permitted to the 30-day deadline only in exceptional circumstances, such as failure to file due to a mechanical Bisesto v. Uher, No. 19 Civ. 1678 (KMK), 2019 WL 2537452, at *5 (S.D.N.Y. June 20, 2019) (excusing a one-day delay in filing a motion to remand which resulted from technical difficulties with the electronic case filing system); Fed Ins. Co v. , 422 F. Supp. 2d 357, 370 (S.D.N.Y. 2006) (deeming a motion to remand timely when the initial motion was made within the 30-day window but was denied without prejudice for failing to comply with the pre-motion conference requirement); cf. Almonte v. Target Corp., 462 F. Supp. 3d 360, 364 (S.D.N.Y. 2020) (finding that a one-day delay precluded [] any excuse for her failure to act timely, whether as a result of procedural or technical difficulties or for any

The Notice of Removal was filed on January 13, 2020, making the Motion to Remand more than eleven months late when it was filed on January 29, 2021. As justification for the delay, Petitioner argues only [sic] or inadvertent failure to take proper steps to apprise [Petitioner] or the Civil Court of the filing of the Removal Notice in January 2020, this Court

Remand ¶ 64. The Court assumes that Petitioner is referring primarily to two items attached to the Motion to Remand. First, Petitioner has attached reflects that a notice of removal was filed with the state court on November 9, 2020. Id., Exh. H.

Second, Petitioner has attached emails dated November 24, 2020 between his counsel and the judge on the Housing Court, in which, among other things, the judge commented that indication in the [state] file that [the case] Id., Exh. I.

This justification falls well short of an that would excuse the failure to comply with section 1447(c). The timing of filing of a notice of removal with the state court is irrelevant to section 1447(c) -day deadline. Section 1447(c)

446(a), in turn, requires that remove any civil action from a State court shall file in the district court 28 U.S.C. § 1446(a) (emphasis added); see Almonte the deadline to file a motion to challenge remand to the date of filing a notice with the district court

5 -day clock is the filing of a notice of removal in federal court, which again in this case occurred on January 13, 2020. Nor can Petitioner argue that it did he Petition to federal court. Petitioner acknowledges that its counsel was advised by the Court of this Remand ¶ 40, and that its counsel appeared for a telephone conference before Judge Koeltl on

March 17, 2020, id. ¶ 46. See also notice of appearance, filed on April 22, 2020). Petitioner was therefore fully aware of the filing of the Notice of Removal in this Court as of at least mid-March 2020, yet waited more than half a year to file the instant motion to remand.



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By failing to meet section 1447(c) , Petitioner has waived any challenge to procedural defects in removal. untimely. B. Subject Matter Jurisdiction

The absence of raised at any time by a party or by the court sua sponte *Valentin v. Dollar Tree Stores, Inc.*, No. 21 Civ. 3647 (MKV), 2021 WL 2852039, at *1 (S.D.N.Y. July 8, 2021) (citing *Lyndonville Sav. Bank & Tr. Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000)). -court actions that originally could have been filed in federal court may be removed 5

A separate provision, section 1446(d), governs the filing of a notice of removal with the state court. See 28 U.S.C. § 1446(d). *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 276 (2d Cir. 2005) (emphasis removed) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). Remand is mandatory before final judgment it appears that the district court lacks subject matter jurisdiction. 28 U.S.C.

§ 1447(c); see also *Valentin sua sponte* remand a removed action at any time for lack of subject matter jurisdiction. citing *Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth.*, 435 F.3d 127, 133 (2d Cir. 2006)).

As noted above, Respondent invoked federal question jurisdiction under section 1331 when he removed this case to federal court. Notice of Removal ¶ 1.

States . . . [is an] essential [element] of the . . . cause of action. *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 138 (2d Cir. 2012) (alterations in original) (quoting *Bank -*

question jurisdiction will lie over state-law claims that implicate significant federal issues, *Grable* , 545 U.S. 308, 312 (2005), but only if the claim [s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities, *Shinnecock Indian Nation*, 686 F.3d at 139 (quoting *Grable & Sons Metal Prods., Inc.*, 545 U.S. at 314). Courts in this Circuit have consistently held that subject matter jurisdiction is lacking over claims related to landlord-tenant matters, even when those claims purport to reference or rely on federal law. See *29 Flatbush Ave. Assocs., LLC v. Cain*, No. 17 Civ. 6173 (MKB), 2017 WL 5696485, at *2 (E.D.N.Y. Nov. 27, 2017) -tenant relationship is fundamentally a matter of state law, and federal courts lack subject-matter jurisdiction over state residential landlord- ; *Southerland v. N.Y.C. Hous. Auth.*, claims, including those proceeding under 42 U.S.C. § 1983,

ted to his landlord- *United Mut. Houses, L.P. v. Andujar* disclaimed jurisdiction over landlord- *Galland v. Margules*, No. 05 Civ. 5639 (DC), 2005 WL 1981568, at *1-2 (S.D.N.Y. Aug. 17,

ng] to violations of his constitutional rights within his tial landlord-tenant the [p] question subject-matter jurisdiction over state residential landlord- , 191 F.



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23 (2d Cir. 2006). Particularly instructive is *United Mutual Houses*, where the respondent, like here, attempted to remove a summary holdover petition from New York County Housing Court. 230 F. Supp. 2d at 350-51. The respondent in *United Mutual Houses* removed the action after the petitioner filed a bill of particulars and cited to the same federal law that Respondent in this action relies on for jurisdiction, Income Housing Tax Credit Program. Id. at 352. The respondent in *United Mutual Houses* e bill of particulars. Id. The court reviewed New York law governing these type of proceedings, and found tha citation to the LIHTC program was insufficient to confer jurisdiction because sue in th[e] case . . . is whether [the petitioner] can meet the [state] statutory requirements for maintaining a summary holdover proceeding . . . against [the respondent]. Id. at 354. The court also noted that he Federal Rules of Civil Procedure provide no authorization for summary adjudication of landlord-tenant and remanded the case back to state court after concluding that subject matter jurisdiction was lacking. Id. In light of these authorities, the Court harbors serious concern as to whether it has subject matter jurisdiction to adjudicate this dispute. Accordingly, Petitioner may file a motion to remand based on lack of subject matter jurisdiction. Should Petitioner choose to do so, Petitioner shall file its motion by no later than August 16, 2021.

III. Conclusion is therefore denied. Petitioner may file a motion to remand based on lack of subject matter jurisdiction by August 16, 2021.

The Clerk of Court is respectfully directed to close the motion pending on Docket Number 37 and mail a copy of this Order to the pro se Respondent.

SO ORDERED. Dated: July 18, 2021 _____ New York, New York
JOHN P. CRONAN United States District Judge

