

21-0249-cv

Abbo-Bradley, et al. v. City of Niagara Falls, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021

(Argued: May 13, 2022 Decided: July 14, 2023)

Docket No. 21-0249-cv

JOANN ABBO-BRADLEY, individually and as Parent and Natural Guardian of D.B.,
individually and as Parent and Natural Guardian of T.B., individually and as
Parent and Natural Guardian of C.B., MELANIE HERR, ZACHARY HERR,
individually and as Parent and Natural Guardian of C.H., as Parent and Natural
Guardian of H.H., ELENA KORSON, as Parent and Natural Guardian of L.K.,
NATHAN E. KORSON,

Plaintiffs-Appellees,

v.

CITY OF NIAGARA FALLS, NIAGARA FALLS WATER BOARD, CONESTOGA-ROVERS &
ASSOCIATES, CECOS INTERNATIONAL, INC., MILLER SPRINGS REMEDIATION
MANAGEMENT, INC., OCCIDENTAL CHEMICAL CORPORATION, individually and as
Successor in Interest to Hooker Chemicals and Plastics Corporation, OP-TECH
ENVIRONMENTAL SERVICES, ROY'S PLUMBING, INC., SCOTT LAWN YARD, INC.,
SEVENSON ENVIRONMENTAL SERVICES, INC., GLENN SPRINGS HOLDINGS, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Before: CHIN, SULLIVAN, AND MENASHI, *Circuit Judges*.

Appeal from an order of the United States District Court for the Western District of New York (Geraci, J.), entered January 25, 2021, in favor of plaintiffs-appellees -- members of three families residing in the City of Niagara Falls -- remanding this case, along with 18 identical cases, to the State of New York Supreme Court, County of Niagara. Defendants-appellants are companies tasked with remediating disposal sites of hazardous chemicals in accordance with federal law. The initial complaints in these identical cases addressed only one disposal site. The complaints were all amended in 2020, however, to add three additional sites. After the amendments, defendants-appellants sought to remove all 19 cases to federal court on the basis of federal officer and federal question jurisdiction. The district court held that the notice of removal was untimely.

AFFIRMED.

Judge Sullivan concurs in a separate opinion.

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DOUGLAS E. FLEMING III (Sheila L. Birnbaum, Lincoln Davis Wilson, *on the brief*), Dechert LLP, New York, NY, and Kevin M. Hogan, Andrew P. Devine, Joshua Glasgow, and Elizabeth Bove, Phillips Lytle LLP, Buffalo, NY, *for Defendants-Appellants Occidental Chemical Corporation, Glenn Springs Holdings, Inc., and Miller Springs Remediation Management, Inc.*

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Defendant-Appellant Conestoga-Rovers & Associates.*

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Environmental Services, Inc.*

Brian Sutter, Sugarman Law Firm, LLP, Buffalo, NY, *for
Defendant-Appellant Scott Lawn Yard, Inc.*

John M. Masslon II, Cory L. Andrews, Washington
Legal Foundation, Washington, DC, *for Amicus
Curiae Washington Legal Foundation, in support of
Defendants-Appellants.*

CHIN, Circuit Judge:

In this case, defendants-appellants are the City of Niagara Falls ("Niagara Falls"), its water board, and various companies (collectively, "Defendants") tasked with remediation of hazardous waste disposal sites under the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"), 42 U.S.C. § 103. Plaintiffs-appellees ("Plaintiffs") -- members of three families residing in Niagara Falls -- brought this action in the State of New York Supreme Court, County of Niagara, in 2012, seeking damages arising from

purported deficiencies in Defendants' remediation of one Superfund site, the Love Canal.

Between 2013 and 2017, 18 identical complaints were filed by other plaintiffs. In 2013, Defendants removed two of the 19 cases -- including this one -- to the court below on the basis of federal question jurisdiction, but the district court remanded the cases to state court. The cases remained in state court until 2020, when plaintiffs in all 19 cases filed identical amended complaints. The amended complaints alleged additional sources of injury. Defendants again removed the 19 cases, this time on the basis of both federal officer and federal question jurisdiction. The district court held that the removal was untimely and again remanded the cases to state court. Defendants appeal.

We agree that Defendants' removal was untimely. We therefore AFFIRM the district court's order remanding this case and 18 others to the State of New York Supreme Court, County of Niagara.

BACKGROUND

A. Statutory Framework

When a plaintiff commences a lawsuit in a state court, in appropriate cases a defendant may file a notice of removal to remove the case to

federal district court. If the defendant does so, the notice must contain "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Once a case is removed, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d).

Grounds for removal include, *inter alia*, federal officer jurisdiction and federal question jurisdiction. Federal officer jurisdiction arises from the federal officer removal statute, 28 U.S.C. § 1442(a).¹ Such jurisdiction rests on "the very basic interest in the enforcement of federal law through federal officials." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). Federal question jurisdiction is part of the "original jurisdiction" of the federal district courts. *See* 28 U.S.C. § 1441 ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed"); *see also* 28 U.S.C. § 1332(a) (defining when district courts have original jurisdiction). Such jurisdiction covers any civil action "founded on a claim or right arising

¹ The statute provides, in relevant part, that a case may be removed from state court to federal court when the case is brought against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1).

under the Constitution, treaties or laws of the United States." *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 474-75 (1998).

No matter the grounds for removal, however, a notice of removal must follow the timeliness requirements Congress set forth in 28 U.S.C. § 1446. Section 1446(b)(1) governs removal following receipt of an initial pleading. Generally, a defendant has up to 30 days from receipt of an initial pleading to file a notice of removal. 28 U.S.C. § 1446(b)(1).² There are, however, some exceptions. One such exception is set forth in § 1446(b)(3).

Under § 1446(b)(3), a defendant may "remove a case outside of the ordinary thirty-day window if the basis for removal becomes clear only after a plaintiff files an amended pleading." *Taylor v. Medtronic, Inc.*, 15 F.4th 148, 152-53 (2d Cir. 2021). The statute reads:

Except as provided [in the subsection regarding removal based on diversity of citizenship], if the case stated by the initial pleading is not removable, a notice

² Section 1446(b)(1) provides:

The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant . . . of a copy of the initial pleading . . . or within 30 days after the service of summons upon the defendant if such initial pleading . . . is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b)(1).

of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, 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 removable.

28 U.S.C. § 1446(b)(3).

If a notice of removal is untimely, the case must be remanded to the state court. 28 U.S.C. § 1447.

B. *The Facts*

In the late 1800s, William T. Love began digging a canal to connect the upper and lower parts of the Niagara River. His plan was to use the Niagara River to provide cheap hydroelectric power. Love's plan was shorted, however, by the invention of alternating-current electricity. The half-mile of the canal he had already dug remained unused until Hooker Chemicals and Plastics Corporation ("Hooker") purchased the site (the "Love Canal site"). Hooker is the predecessor in interest of Defendant Occidental Chemical Corporation ("Occidental").

From approximately 1941 to 1953, Hooker, as well as Niagara Falls, used the Love Canal site for waste disposal. In 1953, Hooker deeded the Love Canal site to the Niagara Falls Board of Education, which built an elementary

school on the property. The area was further developed and populated, but residents began noticing a problem with odors and residues. In 1978, the New York State Department of Health began studying the area around the Love Canal site; it found that women living around the site were experiencing greater than normal rates of miscarriages and birth defects. The state government issued a health emergency declaration. Approximately 950 families were ultimately evacuated from the area around the site.

New York State sought to remediate the contamination. It hired some of the Defendant companies to do so. After Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, also known as the Superfund, in 1980, the federal government began to oversee the remediation as well. Eventually, both the federal government and New York State sued Hooker under the Superfund program, seeking injunctive relief and reimbursement of cleaning costs relating to the Love Canal site. On February 23, 1988, the district court (Curtin, *J.*) found Hooker's successor in interest, Occidental, jointly and severally liable for the costs.

Also in 1988, the New York State Department of Health issued a decision finding certain areas around the Love Canal site habitable for residential

use. The federal Environmental Protection Agency issued a Preliminary Close-Out Report and Final Close-Out Report for the area in 1999 and 2004, respectively; these reports reflected a determination that the Love Canal site remediation was complete and protective of human health and the environment as required by the Superfund program.

Current residents, including Plaintiffs, moved into the area. But as time went on, the residents apparently began noticing medical problems, including:

[B]irth defects, chromosomal abnormalities, bone marrow abnormalities, neurological injuries and/or toxicity, cardiac conditions, pulmonary symptoms, unexplained fevers, skin conditions, behavioral problems, learning disabilities, and dental problems or complications.

Joint App'x at 2117. Chemicals were "visible to the naked eye" in the area. *Id.* at 2118. Plaintiffs' homes became "virtually unsalable." *Id.*

C. *The Proceedings Below*

As noted, this case is one of 19 identical cases filed against Defendants between 2012 and 2017. The cases alleged injury as a result of toxic exposure from the Love Canal site. In 2013, Defendants removed two cases to federal district court on the basis of federal question jurisdiction. On August 22,

2013, the district court remanded the cases back to state court, concluding that it lacked federal jurisdiction. *See Abbo-Bradley v. City of Niagara Falls*, No. 13-CV-487, 2013 WL 4505454, at *1, *12 (W.D.N.Y. Aug. 22, 2013); *see also Pierini v. City of Niagara Falls*, No. 13-CV-498, 2013 WL 4505461, at *1, *12 (W.D.N.Y. Aug. 22, 2013). As the 17 other related cases alleging toxic exposure from the Love Canal site were filed, Defendants did not remove them within thirty days of filing. Thus, all 19 cases remained in state court until 2020.

On January 6, 2020, plaintiffs in all 19 cases filed identical amended complaints alleging that the toxic exposure was also from three additional sites. These sites were the sewers around the Love Canal site, an area around 96th Street and Colvin Boulevard in Niagara Falls where sewer remediation took place, and a chemical plant in the Niagara Falls owned by Occidental. Thereafter, in a notice of removal dated January 31, 2020, Defendants removed all 19 cases to federal court on the basis of both federal officer and federal question jurisdiction. On March 16, 2020, plaintiffs in the 19 cases moved to remand. The magistrate judge (McCarthy, J.) recommended that the motion be granted. On January 25, 2021, the district court explained that it found "no error

in [the] recommendation" and granted Plaintiffs' motion for remand. Special App'x at 4.

This appeal followed.

DISCUSSION

While orders remanding a case to state court generally are not reviewable, we do have appellate jurisdiction over remand orders if an asserted ground for removal was federal officer jurisdiction. 28 U.S.C. § 1447(d). On appeal, we may "consider all of the defendants' grounds for removal" rather than only federal officer jurisdiction. *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1543 (2021). Thus, we review *de novo* Defendants' asserted federal officer *and* federal question grounds. *See Agyin v. Razmzan*, 986 F.3d 168, 173-74 (2d Cir. 2021). Defendants have "the burden of establishing that removal is proper." *United Food & Com. Workers Union, Loc. 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994).

Before we reach the issue of federal jurisdiction, however, we must answer the threshold question of whether Defendants' notice of removal was timely, as timeliness is a dispositive issue. The district court held that Defendants' removal was untimely. We agree.

A. *Applicable Law*

A defendant has up to thirty days from receipt of an initial pleading to file a notice of removal. 28 U.S.C. § 1446(b)(1); *see Cutrone v. Mortg. Elec. Registration Sys., Inc.*, 749 F.3d 137, 142 (2d Cir. 2014). When, as here, a defendant seeks to remove a case more than thirty days after the initial pleading was filed, the defendant may do so if the case meets the two requirements of 28 U.S.C. § 1446(b)(3).³ First, "the case stated by the initial pleading" must be "not removable." 28 U.S.C. § 1446(b)(3); *see Cutrone*, 749 F.3d at 142. Second, a defendant must file the notice of removal within thirty days after receipt of a "paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3); *see Cutrone*, 749 F.3d at 142. Such a paper includes "an amended pleading." 28 U.S.C. § 1446(b)(3).

Some of our sister circuits have recognized a "judicially-created revival exception to the thirty-day requirement." *Johnson v. Heublein, Inc.*, 227 F.3d 236, 241 (5th Cir. 2000). The Fifth, Seventh, and Tenth Circuits have adopted the revival doctrine. *See id.*; *see also Wilson v. Intercollegiate (Big Ten) Conf. Athletic*

³ Different requirements may apply under 28 U.S.C. § 1446(b)(3) for removal based on diversity of citizenship. There is no diversity of citizenship here and neither party argues that there is.

Ass'n, 668 F.2d 962, 965 (7th Cir. 1982); *Henderson v. Midwest Refin. Co.*, 43 F.2d 23, 25 (10th Cir. 1930). The Fifth Circuit case establishing the revival doctrine is also binding precedent in the Eleventh Circuit. *See Cliett v. Scott*, 233 F.2d 269, 271 (5th Cir. 1956); *see also* Joseph H. Varner et al., *Clear!: Reviving the Right to Removal*, 64 Fed. Law. 32, 37 & n.100 (2017) (discussing the Fifth Circuit split to form the Eleventh Circuit).

The revival doctrine allows for removal even when the requirements of § 1446(b)(3) are not met -- that is, the initial pleading was removable, or the notice was not filed within thirty days. *See Johnson*, 227 F.3d at 241 (explaining that the revival exception restores "a lapsed right to remove an initially removable case . . . when the complaint is amended so substantially as to . . . constitute essentially a new lawsuit"). We have never recognized the revival doctrine, nor have we ever considered a case applying the revival doctrine.

B. *Analysis*

Defendants argue that their motion for removal is timely under both § 1446 and the revival doctrine. **[Blue 24, 42]** We are not persuaded.

1. **28 U.S.C. § 1446(b)(3)**

As Defendants sought to remove pursuant to an amended and not initial pleading, the applicable subsection is § 1446(b)(3). Thus, to be timely, "the case stated by [Plaintiffs'] initial pleading" must not have been removable, 28 U.S.C. § 1446(b)(3), and Defendants' notice of removal must have been filed "within thirty days after receipt" of a paper, such as Plaintiffs' amended complaint, "from which it may first be ascertained that the case is one which is or has become removable." *Id.* Defendants' notice of removal does not meet either requirement; hence, it was untimely.

a. ***Case Stated by Initial Pleading***

First, any basis for federal jurisdiction in Plaintiffs' amended complaint also existed in their original complaint. The original complaint alleged injury resulting from improper remediation of a site subject to remediation under the Superfund program. The amended complaint alleged the same injury, resulting from remediation under the same Superfund program, but included remediation of three additional sites. In fact, at oral argument on appeal, Defendants conceded that Plaintiffs' amended complaint does not establish jurisdiction in a way that is different from their original complaint.

Oral Argument at 01:13-:24, *Abbo-Bradley v. City of Niagara Falls* (2d Cir. May 13, 2022) (No. 21-249). And Defendants do not argue otherwise in their papers.

This concession is dispositive. For Defendants' removal to succeed under the plain language of the statute, the case stated by the initial pleading must not have been removable. 28 U.S.C. § 1446(b)(3) ("[I]f the case stated by the initial pleading is not removable . . ."). As any grounds for removal between Plaintiffs' initial and amended complaints remain the same, Defendants cannot meet the first requirement if the amended complaint is removable.⁴

In arguing to the contrary, Defendants point to decisions of our sister circuits emphasizing that a ground for removal appearing for the first time must only be "a different set of facts that state a new ground for removal."

O'Bryan v. Chandler, 496 F.2d 403, 410 (10th Cir. 1974); *see S.W.S. Erectors, Inc. v.*

⁴ The case stated by Plaintiffs' initial pleading may have been removable. We have found federal question jurisdiction in a case with strong parallels to this one. *See Bartlett v. Honeywell Int'l, Inc.*, 737 F. App'x 543 (2d Cir. 2018) (summary order). In *Honeywell*, we explained that the issues "rais[ing] disputed, substantial federal issues" leading to federal question jurisdiction included "whether [defendant] has complied with a consent decree . . . and the circumstances under which [Superfund] might preempt the residents' state tort law claims," *id.* at 546 -- which are the same questions raised here by both Plaintiffs' initial complaint and their amended complaint. But even if the case stated by the Plaintiffs' initial pleading were not removable, then the case stated by the amended complaint would also not be removable, and the order to remand still would be appropriate.

Infax, Inc., 72 F.3d 489, 493 (5th Cir. 1996) ("[S]ection 1446(b) contemplates a valid second petition for removal that alleges new facts in support of the same theory of removal."). There is no dispute that Plaintiffs set forth new facts in their amended pleading. The amended pleading "alleged, for the first time, that Plaintiffs' claimed injuries were caused by inadequate remediation at three other CERCLA sites separate from Love Canal." Defs.-Appellants' Br. at 10; *see* Pls.-Appellees' Br. at 5 (Plaintiffs "added allegations describing additional sources of toxic exposures"). But this case differs from those Defendants cite as support.

Even if a change in the pleaded facts *could* cause a case to "become removable," the new facts alleged by Plaintiffs do not. That is so because the additional sites here do not affect the basis for jurisdiction. In *O'Bryan*, the Tenth Circuit held that a motion to remove "was based on a different ground or set of facts than the first removal petition" when the facts as to the location of an allegedly libelous statement -- the basis for federal jurisdiction -- were changed. 496 F.2d at 411. And, in *S.W.S. Erectors*, the Fifth Circuit explained that removal "under diversity jurisdiction using newly acquired facts from [a deposition transcript]" was appropriate because the "deposition constitutes a new paper . . . that changed the facts regarding the removableness of the case." 72

F.3d at 494. In both of those cases, the changed fact affected whether federal jurisdiction could properly be asserted at all.

Here, there is a crucial difference -- the changed facts do not affect whether federal jurisdiction can properly be asserted. Defendants could assert the same basis for federal officer and federal question jurisdiction regardless of whether Plaintiffs alleged their injury was caused by the Love Canal site and the three additional sites, the three additional sites alone, or any one of the sites. Plaintiffs' factual changes did not affect whether the case stated by the original pleading was removable.

b. *First Be Ascertained That the Case Is Removable*

Additionally, Defendants do not meet the second requirement, that the notice of removal be filed within 30 days from when "it may first be ascertained that the case is one which is or has become removable."

28 U.S.C. § 1446(b)(3). As discussed above -- and as Defendants themselves conceded -- Plaintiffs' amended pleading does not establish jurisdiction in a different way from Plaintiffs' initial pleading. The removability of the cases, if any, could "first be ascertained" in the original complaints, and Defendants did not seek to remove (for a second time in two of the cases and for the first time in

17 of the cases) until many years later. Therefore, based on the plain language of the statute, Defendants do not meet this requirement.

2. *Revival Doctrine*

Nor does the revival doctrine save Defendants' untimely removal. We need not adopt or reject the revival doctrine because, in any event, this case does not fall within the parameters of the doctrine established by our sister circuits. Plaintiffs' amendments did not change their complaint so substantially as to "constitute essentially a new lawsuit." *Johnson v. Heublein, Inc.*, 227 F.3d 236, 241 (5th Cir. 2000). Amicus curiae, who urges us to adopt the revival doctrine, also acknowledges that "for the revival doctrine to apply, [the] claims [raised in plaintiff's original complaint] must be minor compared to the amended complaint's claims." Amicus Br. at 15.

At bottom, Plaintiffs continue to allege the same injuries, against the same Defendants, caused by the same toxins, and resulting in the same damages. The amended complaint highlighted only additional sources of already-alleged injury. Even if we were to deviate from Congress's clear statutory language on timeliness and consider the revival doctrine, the changes in Plaintiffs' pleadings

are not substantial, and the amendments did not result in essentially new lawsuits.

CONCLUSION

For the reasons set forth above, Defendants' notice of removal was untimely. Accordingly, without reaching the question of whether federal jurisdiction exists, we AFFIRM the district court's January 25, 2021, order remanding the above-captioned case, and 18 related cases, to the State of New York Supreme Court, County of Niagara.