

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Richard E. Fields, Special Referee

Case No. 2012-CP-27-291

Barbara Clark, Warren E. Hatcher, Cassie Keeton, Daniel Green,
Powell Hampton, Amos Hatcher, Bobby Keeton, James Moseley,
Willie B. Oliver, Individually and as General Officers of the
RMUE Church.....Respondents

v.

Fred Henderson Moore.....Appellant

RESPONDENTS' MEMORANDUM REGARDING
APPELLANT'S NOTICE OF REMOVAL

Respondents respectfully submit that Appellant's Notice of Removal was void and should have no effect on the State Court proceedings. Although normally a notice of removal stays State Court proceedings, the Notice of Removal in this case was so procedurally and factually improper as to be void. Respondents submit that the filing of the Notice of Removal was frivolous on its face and a voiding of the State Court proceedings is exactly the result sought by Appellant when filing the Notice of Removal. Respondent submits that Appellant's Notice of Removal was filed out of time and was otherwise so improper, that the District Court did not have jurisdiction to hear the case.

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SC Court of Appeals

Appellant's Notice of Removal was filed out of time and the record is replete with instances where Appellant consented to and participated in State Court jurisdiction.

BACKGROUND

This case involves a dispute among members of the Reformed Methodist Union Episcopal Church (the "Church"). The Plaintiffs have shown that the Defendant engaged and continues to engage in unlawful and ultra vires activity under the color of his position and now former position at the Church. Specifically, the Plaintiffs have shown that the Defendant converted funds of the Church, unilaterally suspended officers of the Church, unilaterally appointed other officers and unilaterally annointed himself as Bishop for Life, all without any authority under law or under Church by-laws. Perhaps more egregiously, the Defendant has openly ignored prior Orders of this Court and sought to make end runs around such Orders through a variety of procedural manuevers.

Barbara Clark, the initial Plaintiff, filed her initial Summons and Complaint in the Court of Common Pleas for Jasper County, South Carolina, on May 2, 2012, against the Reformed Methodist Union Episcopal Church and Fred Henderson Moore. Ms. Clark alleged one count for accounting and enforcement of her rights and a second count for the removal of Defendant Fred Henderson Moore. Prior to any Answer being filed, Ms. Clark voluntarily dismissed the Church from the action without prejudice and the Voluntary Dismissal was filed on July 9, 2012. The Defendant, Fred Henderson Moore, was subsequently served and Mr. Moore filed his Answer with the Court of Common Pleas for Jasper County on July 16, 2012. Though not separately alleged, the Defendant asserted a general denial and defenses based generally upon a civil court's lack of jurisdiction of an ecclesiastical matter. The Defendant filed no Notice of Removal at that

time. Instead, the Defendant proposed and the Plaintiffs agreed to refer the matter to Judge Richard Fields.

On July 18, 2012, at Appellant's suggestion, the parties consented in writing to an Order of Reference by the Clerk of Court for Jasper County to Retired Circuit Court Judge Richard E. Fields as Special Referee with Finality. The Plaintiff was the moving party of the Order of Reference and Judge Fields and the Defendants both consented to the reference. The parties next engaged in written discovery and depositions and some other pre trial manuevreing. The parties have had several hearings and, at one point by consent, Judge Fields attempted a mediation of the matter, but now the matter is more hotly and bitterly contested than ever.

Some other members of the Church were allowed to intervene as Plaintiffs with Ms. Clark (namely Warren E. Hatcher, Cassie Keeton, Daniel Green, Powell Hampton, Amos Hatcher, Bobby Keeton, James Moseley, and Willie B. Oliver, all in their individual capacities and as General Officers of the Church. The Plaintiffs filed an Amended Summons and Complaint on October 12, 2012. Other than the new parties and the lack of the previously dismissed Church, the body of the Amended Complaint was almost verbatim the original Complaint and, importantly, asserted no new claims or causes of action. The Amended Complaint also changed tenses from what the Defendant was attempting to do to what the Defendant had, by that time, done.

A pre trial conference was held on Wednesday, October 31, at which time a hearing was set, by consent, for Friday, November 2, to deal with actions Defendant proposed to take on November 5. On November 2 at 3:01 p.m., a Notice of Removal was received electronically by the Plaintiff's attorney. There seems to be some question as to

when the Notice of Removal was filed, whether it was filed properly and whether it was served properly. The Plaintiffs filed a Motion to Remand and asserted that removal was improper for several substantive and procedural reasons and that this matter should be remanded to State Court where it has been pending since May of this year. The Plaintiffs also sought sanctions for bad faith removal.

Senior Federal District Judge Sol Blatt agreed with the Plaintiffs and remanded the case to State Court on March 12, 2013. Judge Blatt found that the Notice of Removal was not timely filed and the case did not involve a Federal question and, therefore, would not have been removable, even if it were timely filed. Judge Blatt declined to award sanctions, but gave no comment or analysis on the issue of sanctions.

ARGUMENT AND CITATION OF AUTHORITY

Respondents submit that Appellant has waived his right to remove and that the removal proceedings should be found void. Under normal circumstances, when a removal petition is filed and proper notice is given, the entire case is transferred to the federal district court. *See eg. Davis v. Davis*, 267 S.C. 508, 229 S.E.2d 847 (S.C. 1976) (“This Court abhors the appearance of dilatory tactics [h]owever, once removal proceedings to federal court are fulfilled and requisite notice accomplished, the State court loses all jurisdiction in the matter”) *citing Barrett v. Southern Ry. Co.*, 68 F.R.D. 413 (D.C.S.C. 1975); *State of South Carolina v. Moore*, 447 F.2d 1067 (4th Cir. 1971); Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction*, § 3737. Although the Courts which have addressed the matter routinely find the State court loses jurisdiction once a notice of removal is filed, Respondent submits the factual and legal situation presented by this case is unique and presents a particularly egregious abuse of

the removal process. Furthermore, Respondent submits that the removal proceedings in Federal Court were themselves void, because the Notice of Removal was filed out of time.

a. Appellant's Notice of Removal should be void, because it was filed outside the timing deadlines set by the removal statutes.

Some Federal Courts have found that the timing requirements for a removal petition are mandatory. In United States, ex rel. Walker v. Gunn, 511 F.2d 1024 (9th Cir. 1975), a criminal defendant in a State Court trial sought to remove a case during trial. In that case, the District Court summarily denied the petition for removal without any hearing or notice to the petitioner and remanded the case so that the State Court proceedings could proceed without question. The District Court in that case was trying to avoid just such a scenario as presented in State of South Carolina v. Moore, 447 F.2d 1067 (4th Cir. 1971). The petitioner appealed on the basis that he had been denied due process by the summary dismissal of his removal petition. The Ninth Circuit upheld the District Court and held the right of removal, being in derogation of state sovereignty, should not be enlarged beyond what is definite and free from ambiguity. The Ninth Circuit found that the removal petition being untimely, that the District Court was without jurisdiction to decide the merits and that summary dismissal was appropriate.

Although the Court in Walker does not examine the issue further, it follows that if the Federal Court lacked jurisdiction, then the State Court must not have lost jurisdiction. Since the Notice of Removal in this case was filed out of time, it would follow here that the Circuit Court did not lose jurisdiction. Such a holding would alleviate the concerns previously stated by the Fourth Circuit in Moore. In the present case, the untimeliness of the Notice of Removal is not the only problem with the Notice of Removal. Since the

pleadings of the Circuit Court, including the initial and amended Complaints and the Order of Reference showing Appellant's consent to the Special Referee were required to be, and were, attached to the Notice of Removal. Any Court reviewing the Notice of Removal could view the untimeliness of the removal as well as Appellant's repeated consent to State Court jurisdiction and waiver of Federal jurisdiction.

b. Appellant's Notice of Removal was barred on procedural and factual grounds, because it was filed outside of the time allowed for removal and nothing in the original or amended pleadings presented a federal question.

The party seeking to remove a case to Federal Court has the burden of establishing Federal jurisdiction. Mulcahey v. Columbia Organic Chem. Co., Inc., 29 F. 3d 148, 151 (4th Cir. 1994). Therefore, the Defendant bears the burden in the case at bar. It is also the standard, in the event that a motion is made to remand, that any doubt concerning the removal should be resolved in the favor of the party moving to remand. Jennings vs. Cantrell, 392 F. Sup. 563 (1974).

Pursuant to 28 U.S.C. § 1446, a defendant desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant in such action. The notice of removal shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. If the case stated by the initial pleading is not removable, a notice 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.

The Appellant stated in the initial Notice of Removal that the Complaint and Amended Complaint involved federal questions (namely Appellant's right to freedom of religion) and that the case could be removed on that ground. Respondents pointed out that the Notice of Removal was filed long after service of the initial Complaint and the Amended Complaint added no new claims. In response to Respondents' Motion to Remand, the Appellant argued that the Amended Complaint restarts his deadline for filing his Notice of Removal, but the initial Complaint and the Amended Complaint are almost identical, except for the addition of Plaintiffs and the realignment of the Church as a party. The Amended Complaint certainly does not assert any new claims or any claims different in nature from the ones asserted in the original Complaint. Appellant was required to file his Notice of Removal within 30 days of his receipt of the initial Summons and Complaint and Appellant failed to file his Notice of Removal within that time. The District Court found that neither the initial Complaint, nor the Amended Complaint, involved any Federal question and noted that the Amended Complaint added no new claims. Accordingly, the District Court found the removal was barred both procedurally and factually.

c. This case did not involve any unique Federal question over which Federal Courts have exclusive jurisdiction.

Pursuant to 28 U.S.C. § 1331, the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. Pursuant to 28 U.S.C. § 1441(c), if a civil action includes- (A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of § 1331 of this

title), and (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action *may* be removed if the action would be removable without the inclusion of the claim described in subparagraph (B). [emphasis supplied]

Appellant argued that this case involves his rights under the United States Constitution and it therefore must be removed, but the “may” in § 1441(c) shows otherwise. Respondents never did contend or concede that this case involves the United States Constitution, but rather rights under State common law. The District Court stated “[c]ontrary to the [Appellant]’s assertion that this case somehow implicates the First Amendment, a review of the amended complaint indicates that this matter simply involves the operation (or rather, the alleged mis-operation) of the church in accordance with its bylaws as well as the alleged handling (or rather, the alleged mis-handling) of the church’s money, and in no way does this case affect the [Appellant]’s freedom to practice the religion of his choice. Respondents have not asked any of the three Courts before which this matter has appeared to make any finding on religion or to enter any Order which would abridge Appellant’s freedom to practice the religion of his choice. Respondents do seek to compel Appellant to follow secular laws and to not thumb his nose at the various tribunals seeking to enforce his compliance. There is no religion which allows members to misappropriate church funds or to remove and replace officers contrary to church bylaws.

- d. Appellant demonstrated a clear, unequivocal intention to litigate in State Court and waived his right to remove by consenting to an Order of Reference to Judge Fields, participating in discovery and depositions, and taking part in pre-trial litigation, all without any objection, and in fact consent to, State Court jurisdiction.*

The right to remove may be waived. *See eg. Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1077 (10th Cir.1999) (noting that a defendant who does not act within the statutory removal deadlines waives its right to remove the action to Federal Court). Courts have held that, once a claim for enforcement of a federal right has been made in state tribunals, a defendant waives its right to removal by "demonstrating a 'clear and unequivocal' intent to remain in state court." *See eg. Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 59 (4th Cir.1991) A clear intent to remain in state court may be shown by taking "substantial defensive action" before removal, *Aqualon v. MAC Equip., Inc.*, 149 F.3d 262, 264 (4th Cir.1998)

Appellant in this case has demonstrated a clear intent to litigate in State Court and to waive any right to remove to Federal Court. Appellant participated in the State Court proceedings for many months, to the extent of agreeing (and even suggesting) to refer the case to a particular Special Referee and then participating in discovery, depositions and pretrial litigation, and Appellant should be estopped from seeking removal now on grounds of laches and waiver.

- e. Although a notice of removal generally ends the jurisdiction of the State Court until an Order to Remand is filed, this case presents an egregious example and falls outside the general rule.*

When a removal petition is filed and proper notice is given, the entire case is transferred to the federal district court. *See eg. Davis v. Davis*, 267 S.C. 508, 229 S.E.2d 847 (S.C. 1976) ("This Court abhors the appearance of dilatory tactics [h]owever,

once removal proceedings to federal court are fulfilled and requisite notice accomplished, the State court loses all jurisdiction in the matter”) *citing* Barrett v. Southern Ry. Co., 68 F.R.D. 413 (D.C.S.C. 1975); State of South Carolina v. Moore, 447 F.2d 1067 (4th Cir. 1971); Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction*, § 3737.

The Fourth Circuit Court of Appeals addressed whether state court proceedings were void or voidable in State of South Carolina v. Moore, 447 F.2d 1067 (4th Cir. 1971) (“We are concerned that this construction of § 1446 makes it susceptible to substantial abuse by individuals seeking to interrupt or delay state trials. Since § 1443 permits the filing of a removal petition at any time before trial in state court, the conclusion that subsequent proceedings in the state court, before remand, are absolutely void creates a great potential for disruption of judicial proceedings in the state courts. It permits one wishing to delay a state trial to do so, even though his removal petition is subsequently found to be frivolous.”) The Court reluctantly determined that the state court proceedings subsequent to the removal petition were void, but the Court stated concern and frustration for the potential for abuse.

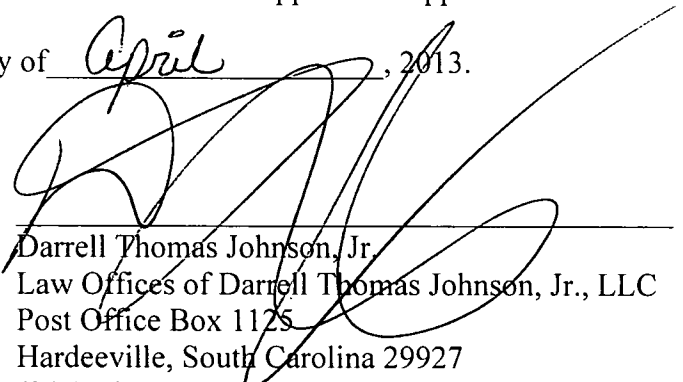
The present case presents an egregious abuse of the removal process. In short: (1) the Notice of Removal was filed months after service of the original Summons and Complaint and Appellant admitted the Amended Complaint added no new claims; (2) Appellant consented to an Order of Reference to a particular Special Referee; (3) Appellant participated in discovery, depositions and pre-trial litigation prior to the filing of the Notice of Removal; (4) The Notice of Removal was filed on the eve of (or arguably during) trial and only when Appellant realized that State Court proceedings were not going his way. It bears mention that Appellant has openly defied the State

Court. Respondent does not lightly accuse opposing parties of violating Rule 11 or acting in a frivolous or disrespectful manner, but the facts in this case speak for themselves.

CONCLUSION

Respondents submit that the State Court proceedings should be allowed to continue, because the removal proceedings were void and were merely an attempt to delay an inevitable unfavorable ruling in State Court. Although a notice of removal usually divests the State Court of jurisdiction, the right to remove is statutory, must be strictly construed, and can be waived. The Notice of Removal was filed out of time and Appellant repeatedly consented to and participated in State Court proceedings, including consenting to a specific Special Referee. Under Appellant's argument, this appeal which Appellant filed is also void, because it was filed after the Notice of Removal. Counsel for Respondents does not make accusations of frivolity or Rule 11 violations lightly, but the facts in this case call for no other characterization. This Court should find that the removal proceedings were void and that the proceedings before Judge Fields should stand, pending a decision by this Court on the merits of Appellant's appeal.

Respectfully submitted this ^{9th} day of April, 2013.



Darrell Thomas Johnson, Jr.
Law Offices of Darrell Thomas Johnson, Jr., LLC
Post Office Box 1125
Hardeeville, South Carolina 29927
(843) 784-2142
Attorney for Respondents

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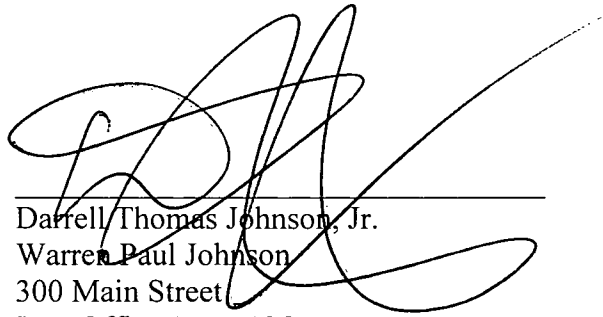
v.

Fred Henderson Moore.....Appellant

PROOF OF SERVICE

I, Darrell Thomas Johnson, Jr., do hereby certify that I have, this 9th day of April, 2013, placed a copy of the Respondents' Memorandum Regarding Appellant's Notice of Removal in the United States Postal Service, with sufficient postage attached, and addressed to the following:

Eduardo K. Curry, Esquire
CURRY & HOUSEY, P.A.
Post Office Box 42270
North Charleston, SC 29423



Darrell Thomas Johnson, Jr.
Warren Paul Johnson
300 Main Street
Post Office Box 1125
Hardeeville, South Carolina 29927
(843) 784-2142/(843) 784-5770 (facsimile)
djohnson1@hargray.com
Attorney for Respondents

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