

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

DATA SALES CO., INC.,	:	
	:	
Plaintiff	:	
	:	
v.	:	DOCKET NO.: 3:13-CV-02626
	:	
VOLUMEDRIVE, INC.,	:	
	:	"ELECTRONICALLY FILED"
Defendant	:	

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION TO REMAND

A. Procedural History and Factual Background

This is breach of contract and replevin case wrongfully removed to federal court. Data Sales Co. Inc., a Minnesota corporation, by written agreement, leased computer and computer related equipment to VolumeDrive, Inc., a Pennsylvania corporation. VolumeDrive defaulted on its contract and has absconded with some of Data Sales' equipment and the collateral it pledged to secure that equipment. On September 20, 2013, Data Sales filed a complaint against VolumeDrive in the Luzerne County Court of Common Pleas for breach of contract, unjust enrichment

and replevin.¹ Despite its attempts to serve VolumeDrive with the complaint at its last known address of 1143 Northern Boulevard, Clarks Summit, Pennsylvania, Data Sales was unable to effectuate service.

In addition, contemporaneously with the complaint, Data Sales filed a motion for writ of seizure. Pursuant to 1075.1(d) of the Pennsylvania Rules of Civil Procedure, Data Sales served VolumeDrive with that motion on October 14, 2013.² A hearing on that motion was scheduled for October 21, 2013. On October 21, 2013, VolumeDrive appeared for the hearing without a lawyer. Because of that, Luzerne County Court of Common Pleas President Judge Thomas F. Burke, Jr. rescheduled the hearing for Thursday, October 24, 2013. On the eve of the hearing, VolumeDrive filed its notice of removal to the United States Court for the Middle District of Pennsylvania. In its notice of removal, VolumeDrive alleges federal jurisdiction based on diversity and a controversy exceeding \$75,000.

On October 25, 2013, this case was assigned to U.S. District Judge Robert D. Mariani. On October 29, 2013, based on the forum defendant rule, Data Sales filed

¹ It is believed that VolumeDrive is storing Data Sales' equipment and its pledged collateral in Wilkes-Barre, Luzerne County.

² The motion for writ of seizure contained a copy of the complaint.

its motion to remand the case to the Luzerne County Court of Common Pleas. In addition to the remand, Data Sales also moved for costs and fees associated with its motion because VolumeDrive had no reasonably objective basis for removal. This brief is written in support of these motions.

B. Questions Involved

1. Should a case be remanded when the defendant's removal violates the forum defendant rule?
2. Should the court award costs and fees when a defendant has no reasonably objective basis for removal?

C. Argument

1. Because this removal violates the forum defendant rule, this case should be remanded.

Federal courts are courts of limited jurisdiction. Allen v. GlaxoSmithKline PLC, Civil Action No. 07-5045, 1997 U.S. Dist. LEXIS 42491 (E.D. Pa. May 30, 2008) *2 (citing Willy v. Coastal Corp., 503 U.S. 131, 136-37 (1992)). A defendant may remove an action from state court to federal court only when a federal court would have original jurisdiction over the action. Id. (citing 28 U.S.C. § 1441; Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)). However, there is a restriction on the removal of diversity cases known as the forum defendant rule. Under this rule, set forth in

28 U.S.C. § 1441(b)(2), removal is improper if the defendant is a citizen of the state in which the suit is originally filed. Id. (citing Korea Exchange Bank, New York Branch v. Trackwise Sales Corp., 66 F.3d 46, 48 (3d Cir. 1995)).³ The forum defendant rule reflects the notion that there is no concern about favoritism by local courts towards a nonresident plaintiff, so there is no need to protect a resident defendant by allowing resort to federal court. Hegelian v. VT Systems Inc., Civil Action No. 10-899, 2010 U.S. Dist. LEXIS 28438 (E.D. Pa. March 23, 2010) (citing Davenport v. Toyota Motor Sales, USA Inc., 2009 U.S. Dist. LEXIS 116287 (S.D. Ill. Dec. 14, 2009)).

Federal removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of a remand. Allen, U.S. Dist. LEXIS 42491 *2 (quoting Steel Valley Auth. V. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987)). Remanding to state court is appropriate where there is a defect in the removal process. Id. (citing PAS v. Travelers Ins. Co., 7 F.3d 349, 352 (3d Cir. 1993)).

³ Section 1441(b)(2):

A civil action otherwise removable solely on the basis under section 1331(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

In Allen, the plaintiff, a citizen of Arkansas, filed suit against a citizen of Pennsylvania in the Philadelphia Court of Common Pleas. Prior to being served, the defendant removed the case to federal court. Relying on a literal reading of 28 U.S.C. § 1441(b)(2), the defendant claimed that the forum defendant rule did not prevent removal because removal occurred prior to the complaint being served. Id. The Allen court rejected this argument and remanded the case. It reasoned that there was no sound reason to conclude that the purpose of the “joined and served” requirement is to allow unserved, in-state defendants to remove the case by claiming that § 1441(b) does not apply based on lack of service before removal. Id. *4. Instead, based on the law’s intent to avoid gamesmanship, the Allen court concluded that the “joined and served” requirement only applies when there are multiple named defendants. Id.

Many other courts have reached the same or similar conclusions. Swindell-Filiaggi et al., v. CSX Corp. & Conrail, 922 F. Supp. 2d 514, 521 (E.D. Pa 2013) (case remanded under forum defendant rule despite lack of service prior to removal because interpretation of “joined and served” produces absurd result); Snider v. Sterling Airways, Civil Action No. 12-cv-3054, 2013 U.S. Dist. LEXIS 5750 (E.D. Pa. January 15, 2013) *3 (case remanded under forum defendant rule despite in state

defendant not being served before removal because “race to remove” does not advance purposes of diversity rule); Spitzer v. The Lincoln Nat. Life Ins. Co., Civil Action No. 12-5910, 2013 U.S. Dist. LEXIS 105513 (July 29, 2013 E.D. Pa) *4 (case remanded under forum defendant rule because removing defendant could not establish it was not Pennsylvania citizen); Miller v. Piper Aircraft, Inc., Civil Action No. 08-5961, 2009 U.S. Dist. LEXIS 32451 (E.D. Pa. April 15, 2009) *6 (case remanded under forum defendant rule because plaintiff acted diligently in effectuating service, there was no allegation of fraudulent joinder, was plaintiff’s forum choice and no party was prejudiced); Sullivan v. Novartis Pharmaceuticals Corp., 575 F. Supp. 2d 640, 645-47 (D. N.J. 2008) (case remanded under forum defendant rule despite removal occurring before service because plain meaning interpretation of 1441(b) defies common sense, Congressional intent and leads to bizarre results).

Here, as a Pennsylvania citizen, VolumeDrive has violated the forum defendant rule by removing the case to federal court in Pennsylvania. 28 U.S.C. § 1441(b)(2). As the Allen court observed, there is no sound reason to allow this unserved, in-state defendant to remove this case by claiming that § 1441(b) does not apply based on lack of service. VolumeDrive’s efforts to avoid service should

not be rewarded by a literal reading of 28 U.S.C. § 1441(b)(2). To conclude otherwise would undermine the intent of the forum defendant rule, lead to bizarre results and would only encourage legal gamesmanship, a practice the rule was designed to avoid. VolumeDrive cannot meet its heavy burden that this case is properly before the federal court. Accordingly, this case should be remanded to the Luzerne County Court of Common Pleas.

2. Because there was no reasonably objective basis for removal, VolumeDrive should pay Data Sales's costs and fees associated with this motion to remand.

28 U.S.C. § 1447 (c) permits the court to order payment of costs and actual expenses, including attorney's fees, incurred as a result of a removal. Absent unusual circumstances, courts may award attorney's fees under 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Spitzer, 2013 U.S. Dist. LEXIS 105513 *4 (citing Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005)). Conversely, when an objectively reasonable basis exists, fees should be denied. Id. In Spitzer, the court concluded no objectively reasonable basis for removal existed, in part, because precedent was clear. Id. As a result, the removing defendant was ordered to pay costs and actual expenses, including attorney's fees.

The case at hand is just as clear. The forum defendant rule clearly prohibits VolumeDrive from removing this case to federal court in Pennsylvania and its removal was not objectively reasonable. Consequently, VolumeDrive should pay Data Sales' costs and actual expenses associated with its motion to remand.

Respectfully submitted,

LAW OFFICE OF ANDREW D. BIGDA

BY: /s/ Andrew D. Bigda, Esquire
Attorney ID No.: 74675
900 Rutter Avenue
Forty Fort, PA 18704
(570) 714-4001
abigda@bigdalaw.com

Attorney for Plaintiff,
DATA SALES CO., INC.