

ADDENDUM

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(N.D. Ill. July 27, 1992) ADD-4

Only the Westlaw citation is currently available.
 United States District Court, N.D. Illinois, Eastern
 Division.
 PEOPLE OF THE STATE OF ILLINOIS ex rel. Lisa
 Madigan, Attorney General of the State of Illinois,
 and ex rel. Michael Waller, State's Attorney of Lake
 County, Illinois, Plaintiff,
 v.
 John TARKOWSKI, Defendant.
No. 05 C 6114.
 Jan. 3, 2006.

[Evan James Mcginley](#), Illinois Attorney General,
 Environmental Bureau North, Chicago, IL, Lisle A.
 Stalter, [Margaret Ann Marcouiller](#), Lake County
 State's Attorney Office, Waukegan, IL, for Plaintiff.
 John Tarkowski, Wauconda, IL, pro se.

MEMORANDUM OPINION AND ORDER

[KENNELLY, J.](#)

*1 In 1999, the federal government sued John Tarkowski, a Wauconda homeowner, alleging that conditions on his property violated federal environmental laws. *United States v. Tarkowski*, Case No. 99 C 7308 (N.D.Ill.) Mr. Tarkowski prevailed at trial, and the ruling in his favor was affirmed on appeal in April 2001. [United States v. Tarkowski, 248 F.3d 596 \(7th Cir.2001\)](#). In November 2004, the Illinois Attorney General and the State's Attorney of Lake County sued Mr. Tarkowski in state court, alleging that the same conditions violated Illinois environmental laws. Mr. Tarkowski was served with summons in February 2005. He filed two separate motions to dismiss, both of which were denied, and he took an appeal from the denial of one of the motions. Mr. Tarkowski also took additional procedural steps in state court.

On October 21, 2005, Mr. Tarkowski removed the state court case to this Court. He alleges that the state officials' suit is frivolous and was filed in retaliation for his successful defense of the federal government's suit and for his filing of a Freedom of Information Act case in state court. Mr. Tarkowski also contends that the state officials' suit is barred by the doctrine of

res judicata as a result of the ruling in his favor in the federal government's suit. Mr. Tarkowski further claims that he has not received and cannot receive a fair hearing in state court, and that the state court has denied him certain federal constitutional protections. He contends that the state officials have conspired with federal officials and others to prevent him from using his property and ultimately to drive him off.

Upon reviewing Mr. Tarkowski's notice of removal, the Court entered an order questioning the existence of jurisdiction and deferring consideration of his motion for appointment of counsel pending determination of whether federal jurisdiction existed. *See* Order of Nov. 11, 2005. A few days thereafter, the state officials moved to remand the case to state court. The Court has considered the parties' memoranda. We conclude that removal of the case to this Court was improper and therefore grant the motion to remand.

Mr. Tarkowski removed the case to this Court based on [28 U.S.C. §§ 1331, 1441, 1443](#) and [1446](#). [Section 1331](#) is not a removal statute; [section 1446](#) does not create a right to removal but rather provides the procedures by which removal is accomplished.

[Section 1441](#) permits removal of any suit over which the district courts have original jurisdiction. The federal courts would not have original jurisdiction over the state officials' suit against Mr. Tarkowski. The suit is brought pursuant to state, not federal law, and the parties are not of diverse citizenship. Federal question jurisdiction exists over a state law claim if the claim is really one of federal law. *See* [Franchise Tax Bd. of State of Calif. v. Construction Laborers Vacation Trust for Southern Calif.](#), 463 U.S. 1, 13, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); [In re County Collector of County of Winnebago, Illinois \(Appeal of O'Brien\)](#), 96 F.3d 890, 896 (7th Cir.1996). A claim made under state law may be deemed to arise under federal law if a well-pleaded complaint would establish that the plaintiff's right to relief under state law requires resolution of a substantial question of federal law. *Id.* at 10, 13. A state law claim may not, however, be removed to federal court based on the existence of a federal defense. *Id.* at 10, 14.

*2 Having carefully reviewed the state officials' complaint against Mr. Tarkowski, and having considered Mr. Tarkowski's arguments, the Court can only conclude that the claims against Mr. Tarkowski indeed arise under state, not federal law. The fact that the state prohibitions cited in the complaint may be parallel to federal prohibitions does not make the complaint "really" one under federal law. Mr. Tarkowski's claims of *res judicata* and retaliation-defenses he can raise in the state court case, we might add-do not change the fact that the claims against him are made under Illinois, not federal law. A claim made under state law does not present a federal question simply because the opposing party contends that the claim somehow impacts or undermines an earlier federal ruling. See [In re County Collector, 96 F.3d at 897](#).

[Section 1443\(1\)](#) provides for removal of any state proceeding in which the defendant "is denied or cannot enforce a right under any law providing for the equal civil rights of citizens of the United States." Mr. Tarkowski invokes this provision and contends that his equal protection and due process rights are being violated in state court. But the Supreme Court has held that [§ 1443\(1\)](#) applies only if the right allegedly being denied to the removing party arises under a federal law providing for civil rights based on race; it has also required the removing party to show that he cannot enforce that federal right due to some formal expression of state law, such as a state legislative or constitutional provision, as opposed to a denial that is first made manifest in the course of litigation. See, e.g., [Johnson v. Mississippi, 421 U.S. 213, 219, 95 S.Ct. 1591, 44 L.Ed.2d 121 \(1975\)](#); [Georgia v. Rachel, 384 U.S. 780, 792, 803, 86 S.Ct. 1783, 16 L.Ed.2d 925 \(1966\)](#); [State of Indiana v. Haws, 131 F.3d 1205, 1209 \(7th Cir.1999\)](#). Mr. Tarkowski's claims of retaliation and of unfair proceedings in state court do not provide a basis for removing the case against him; a contention that the removing party is being denied or will be denied due process or equal protection because the case against him is a sham, corrupt, or without evidentiary basis does not meet the requirements for removal under [§ 1443\(1\)](#). [Johnson, 421 U.S. at 219](#); [City of Greenwood v. Peacock, 384 U.S. 808, 825, 86 S.Ct. 1800, 16 L.Ed.2d 944 \(1966\)](#). In his response to the motion to remand, Mr. Tarkowski also contends that the state officials have brought their suit in order to prevent him from using the property he resides upon. Assuming that is true (a

question the Court need not and does not address), the purported right is not one that arises under a federal law providing for civil rights based on race.

Mr. Tarkowski's final contention concerns a "proposed counter-complaint" that he says was filed with this Court during the pendency of *United States v. Tarkowski*. He attaches to his papers a letter he wrote to the Court on January 1, 2000, in which he noted that he previously had requested appointed counsel and a special prosecutor, and stated that he was enclosing "a *pro se* rough draft prepared Counterclaim for the Court's consideration, subject to revisions if the Special Prosecutor deems it necessary, before filing and serving on the named defendants..." The accompanying "rough draft" was a proposed claim against federal agencies and state officials, including the State's Attorney of Lake County and the Illinois Environmental Protection Agency, for (among other things) conspiracy to deny Mr. Tarkowski his rights. In his response to the motion to remand, Mr. Tarkowski refers to this as a claim that was "filed with the U.S. District Court, but not yet heard." The Court disagrees with this characterization. Mr. Tarkowski's "rough draft" was never filed as a counterclaim in the earlier case. His letter to the Court made it clear that he was offering the document for the consideration of counsel if the Court determined to appoint one, as we did on January 7, 2000, just a few short days after Mr. Tarkowski's letter; he did not request filing of the "rough draft." Neither Mr. Tarkowski nor his appointed counsel took any steps after that date to file a counterclaim or to pursue litigation of the claims included in Mr. Tarkowski's "rough draft." In any event, Mr. Tarkowski's proposed counterclaim in the earlier federal case has no bearing on whether the Court now has jurisdiction over the case brought by the state officials that Mr. Tarkowski has removed from state court. If what Mr. Tarkowski is suggesting is that his contentions regarding the motives and purposes of the state officials should have been determined in this Court, in the context of the earlier lawsuit against him by the federal government, then the time to make that known to the Court would have been before our entry of judgment back in the year 2000, not in 2005.

Conclusion

*3 Mr. Tarkowski's motion for leave to proceed *in*

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(Cite as: 2006 WL 18916 (N.D.Ill.))

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forma pauperis is granted [docket no. 3-1]; his motion for appointment of counsel is denied [docket no. 4-1]. The Court grants the defendants' motion to remand the case for the reasons stated above [docket no. 7-1]. The Clerk is directed to remand this case to the Circuit Court for the Nineteenth Judicial Circuit (Lake County, Illinois).

N.D.Ill.,2006.
People of State of Illinois v. Tarkowski
Not Reported in F.Supp.2d, 2006 WL 18916
(N.D.Ill.)

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Not Reported in F.Supp.
 Not Reported in F.Supp., 1992 WL 186068 (N.D.Ill.)
 (Cite as: 1992 WL 186068 (N.D.Ill.))

COnly the Westlaw citation is currently available.
 United States District Court, N.D. Illinois, Eastern
 Division.
 Duane v. BARCENA, Plaintiff,
 v.
 STATE OF ILLINOIS, DEPARTMENT OF
 INSURANCE, James W. Schacht, Acting Director of
 Illinois Department of Insurance in his official
 capacity, Illinois Automobile Insurance Plan, Richard
 T. Carson, Manager, agent, servant of Illinois
 Automobile Insurance Plan, in his official capacity,
 Defendants.
No. 92 C 2568.

July 27, 1992.

MEMORANDUM OPINION AND ORDER

ZAGEL, District Judge.

*1 Plaintiff Duane Barcena moves the court to remand this case to the Circuit Court of Cook County, pursuant to [28 U.S.C. § 1447\(c\)\(4\)](#) and to sanction C. Joseph Yast and Joseph P. Beckman, counsel for the Illinois Automobile Insurance Plan (hereinafter “the Plan”), and Richard T. Carson, for improperly removing this case to federal court. Plaintiff’s motion for remand to state court is granted, but its motion for sanctions is denied.

BACKGROUND

On March 19, 1992, Barcena filed suit in the Circuit Court of Cook County, Illinois, against the Illinois Department of Insurance (hereinafter “the DOI”), the Plan and their respective administrators, James W. Schacht and Carson.^{EN1} Barcena sought declaratory and injunctive relief as well as compensatory and punitive damages from the defendants for their alleged failure to provide a hearing on his insurance producer’s license within 30 days of a court-ordered hearing.

On April 16, 1992, the Plan and Carson filed a petition for removal of Barcena’s state court suit to this Court pursuant to [28 U.S.C. § 1441\(b\)](#) and [28 U.S.C. § 1331](#). Plaintiff then filed a petition to remand the case and moved for sanctions against

Yast and Beckman. The Plan and Carson noted in their sur-reply brief that they filed for removal only after consulting with and obtaining the consent of co-defendants, the DOI and Schacht. In the petition for removal, however, the DOI did not sign the notice of removal; nor for that matter, was the DOI mentioned at all. It was not until May 18, 1992 that the DOI gave written notice to the court of its consent to removal.

DISCUSSION

We begin by addressing the propriety of removal to federal court. First, all defendants must join in the notice of removal:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution 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](#)....

(b) The notice of removal of a civil action or proceeding shall be filed within thirty 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, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

[28 U.S.C. § 1446\(a\) & \(b\)](#). In addition, Congress amended [28 U.S.C. § 1447\(c\)](#) to specify that, “[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under [section 1446\(a\)](#).”

In this case, the plaintiff filed his complaint on March 19, 1992. The Plan and the DOI were served with the complaint on April 3, 1992. The Plan filed a notice of removal on April 16, 1992. Although the Plan filed the notice within 30 days of its receipt of the complaint, the DOI did not consent to removal until

May 18, 1992, more than 30 days after it received notice of the lawsuit. This flaw is a noncurable defect that prevents defendants from removing the case. "As a general rule, all defendants must join in a removal petition in order to effect removal." Northern Illinois Gas. Co. v. Airco Indus. Gases, 676 F.2d 270, 272 (7th Cir.1982); see also Fields v. Reichenberg, 643 F.Supp. 777 (N.D.Ill.1986) (failure to have all defendants join in removal petition a noncurable defect); Hardesty v. General Foods Corp., 608 F.Supp. 992 (N.D.Ill.1985) (improper removal because no explanation why only two of four codefendants filed petition for removal).

*2 The Plan's claim that it filed for removal only after consulting with and obtaining the consent of the DOI is unavailing. As the court in Fellhauer v. City of Geneva, 673 F.Supp. 1445, 1448 (N.D.Ill.1987) (emphasis in original) emphasized, "[t]he removal statutes require that all defendants communicate their consent to the court not to one another." There are only two exceptions to the rule that all defendants must join in the removal petition. The first exception is that nominal parties "need not join in the petition." Northern Illinois Gas Co., 676 F.2d at 272. Nominal parties are generally formal parties like representatives and administrators who are ignored for purposes of determining diversity or for purposes of joining in a removal petition. In The First National Bank of Chicago v. Mottola, 302 F.Supp. 785, 793 (1969), residual legatees were not "considered anything more than nominal or formal parties." Furthermore, according to Black's Law Dictionary, 946 (5th ed. 1979), a nominal defendant is "... a person who is joined as defendant in an action, not because he is immediately liable in damages or because any specific relief is demanded as against him ..." In this case, specific relief is demanded against the DOI and it is not a residual legatee, a representative or an administrator. Thus, the exception relating to nominal parties is inapplicable here.

The second exception is that when a party takes affirmative action following removal that advances the litigation in the district court, that party may waive its right to object to procedural irregularities in the removal proceedings. In Lanier v. American Bd. of Endodontics, 843 F.2d 901 (6th Cir.1988), the plaintiff waived its right to object to removal by engaging in the following affirmative activity: "...

plaintiff entered into stipulations, filed requests for discovery, sought to amend her complaint, filed a new lawsuit against the defendant in the federal court demanded trial by jury, and proceeded with discovery." Id. at 905; see also Wade v. Fireman's Fund Ins. Co., 716 F.Supp. 226, 232 (M.D.La.1989) (plaintiff waived right to object to removal by allowing case to remain on district court's docket for six months, attended status conferences, and participated in discovery). In this case, the Court finds that plaintiff has not waived his right to seek remand by seeking to impose sanctions against the Plan's attorneys. Plaintiff made the motion for sanctions in conjunction with the motion to remand. The sanctions motion related to the conduct of defendants' counsel in seeking remand. Furthermore, plaintiff made his motion for remand within thirty days of the notice of removal and did not conduct discovery or engage in other such affirmative conduct during the 30-day period. In short, the filing of a sanctions motion in conjunction with a motion for remand is an insufficient basis upon which to rest a finding of waiver.

*3 That Barcena waited to introduce his lack of consent argument until his reply brief is irrelevant. What is relevant is that plaintiff did make a motion for remand within thirty days of the notice of removal, even if he initially relied upon other arguments in support of remand.

Finally, sanctions are not appropriate here. The Plan attempted in good faith to remove this case to federal court. Its procedural errors in seeking removal do not warrant the imposition of sanctions.

FN1. The Plan, when mentioned hereafter, includes its Manager, Richard T. Carson; references to the DOI include its Acting Director, James W. Schacht.

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