

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NORMAN E. DICKINSON,)	
)	
Plaintiff)	
)	
v.)	Civil No. 00-273-B
)	
KATHERN CICHON, et al.,)	
)	
Defendant)	

RECOMMENDED DECISION DENYING MOTION TO REMAND

Plaintiff, Norman E. Dickinson, filed this action pursuant to 42 U.S.C. § 1983 in state court on November 8, 2000. Defendants Androscoggin County, Ronald Gagnon, John Doe (1), Susan Graham, Stacy Murphy, and Theresa Wadleigh have filed an answer to the complaint in state court and a “Notice of Removal” pursuant to 28 U.S.C. § 1441(a). Dickinson filed a motion to remand (Docket No. 4) asserting that the removal is defective because not all of the co-defendants consented. I now recommend that the Court **DENY** Dickinson’s motion.

Background

Dickinson’s complaint involves jail personnel in Androscoggin County and their allegedly unconstitutional treatment of Dickinson while he was incarcerated at that facility. All of the defendants, with the exception of Jane Doe (2), filed a notice of removal with this court on December 29, 2000. In the original complaint Jane Doe (2) is identified only as a social worker at the Androscoggin Jail. The notice of removal does not purport to represent or identify Jane Doe (2). In his motion to remand Dickinson identified Jane Doe (2) as “Cathy Cichon.” On January 18, 2001, defendant Kathern

Cichon filed an answer in this court providing a corrected spelling of her name and denying liability for any constitutional violation. Separate counsel represents Cichon and has filed written notice she does not object to the removal. (Docket No. 14.)

In response to Dickinson's motion to remand, the removing defendants have filed a "Supplemental Notice of Removal" wherein counsel for the defendants asserts that at the time the notice of removal was filed in state court (December 27, 2000) Jane Doe (2) had not been identified nor, upon information and belief, had she been properly served. Defendants assert that it was therefore impossible to obtain her consent at the time the original notice of removal was filed. However, the state court docket sheets reflect that "Jane Doe (2) (Social Worker) Cathy Cichon" was served on December 12, 2000.

Discussion

As a preliminary matter it should be noted that a motion to remand, under some authority, is viewed as a non-dispositive motion pursuant to 28 U.S.C. § 636(b)(1), subject to determination by the magistrate judge in accordance with Rule 72 of the Federal Rules of Civil Procedure. *Delta Dental v. Blue Cross & Blue Shield*, 942 F. Supp. 740, 745 (D.R.I. 1996); *see also Unauthorized Practice of Law Comm. v. Gordon*, 979 F.2d 11, 12-13 (1st Cir. 1992) (discussing but not deciding the question). *Contra First Union Mortgage Corp. v. Smith*, 229 F.3d 992, 995-96 (10th Cir. 2000); *In re U.S. Healthcare*, 159 F.3d 142, 145-46 (3rd Cir. 1998);. I have chosen to handle this matter as a recommended decision to the District Court Judge.

Pursuant to 28 U.S.C. § 1446(b), the defendants have thirty days from the date of receipt of the complaint to file their notice of removal in this court. Where there are multiple defendants case law has grafted onto 28 U.S.C. § 1446(b) the requirement that

all defendants must join in the petition for removal. *See Gableman v. Peoria, D. & E. Ry. Co.*, 179 U.S. 335, 337 (1900); *accord Bailen v. Deitrick*, 84 F.2d 375, 375-76 (1st Cir. 1936). The thirty-day time limit for removal, however, is a formal requirement that may be waived; it is not a jurisdictional barrier. *See In re Uniroyal Goodrich Tire Co.*, 104 F.3d 322, 324 (11th Cir. 1997)(citing authority from other circuits). Under the provisions of 28 U.S.C. 1447(c) this court is only *required* to remand if it lacks subject matter jurisdiction. *See* 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”); *see also Me. Ass’n of Interdependent Neighborhoods v. Comm’r, Me. Dep’t of Human Servs.*, 876 F.2d 1051, 1053-54 (1st Cir. 1989).

Under the circumstances presented, remanding this case to state court would be inappropriate. I do agree with Dickinson that the removing defendants were in procedural default. Defendants attempt to excuse their default by saying that Cichon was not properly served and was not identified by name in the complaint. They do not have any standing to complain about the sufficiency of the service of process upon Cichon. *See Young Spring & Wire Corp. v. Am. Guarantee & Liab. Ins. Co.*, 220 F. Supp. 222, 227 (D.C. Mo. 1963) (concluding that a defendant has no standing to challenge actual service on co-defendant not joining in petition for removal). In general, it would unnecessarily complicate the removal process to allow co-defendants to argue that one of the other defendants was not properly served. In this case it would be futile since the state court docket clearly reflects that a return of service had been made showing service on December 12, 2000. If the defendants had exercised any diligence at all they would have been able to identify Jane Doe (2) by simply reviewing the state court docket that

listed her name on the return of service. The defendants' arguments as to why they did not obtain Cichon's consent prior to removal are without merit.

On the other hand, Cichon had until January 12, 2001, to remove the case. On January 5, 2001, when Dickinson filed his motion to remand, Cichon would still have been within the prescribed time limit to file her own notice of removal. Her original answer, filed January 17, 2001, was only five days beyond the period for notice of removal. She did not challenge the removal and by subsequent notification has made clear that she is a consenting defendant.

There is no dispute that this court properly has subject matter jurisdiction over the complaint filed pursuant to 42 U.S.C. § 1983. The parties have all been properly joined and are present before this court. To remand this case to state court now would be an unnecessary waste of both state and federal judicial resources. Furthermore, it would increase the length and burden of this litigation as to all the parties, including Dickinson who has already filed two additional motions in this court that are pending decision before me.

Conclusion

I recommend that the Court **DENY** Plaintiff's Motion to Remand for the reasons stated.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated this 29th day of January, 2001.

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-273

DICKINSON v. ANDROSCOGGIN COUNTY, et al Filed: 12/29/00

Assigned to: Judge GEORGE Z. SINGAL Jury demand: Plaintiff

Referred to: MAG. JUDGE MARGARET J. KRAVCHUK

Demand: \$0,000 Nature of Suit: 555

Lead Docket: None Jurisdiction: Federal Question

Dkt # in Androscoggin SC : is CV-00-222

Cause: 42:1983 Prisoner Civil Rights

NORMAN E DICKINSON NORMAN E DICKINSON
plaintiff [COR LD NTC] [PRO SE]
MAINE STATE PRISON
BOX A
THOMASTON, ME 04861-0051

v.

ANDROSCOGGIN COUNTY MICHAEL J. SCHMIDT, ESQ.
defendant [COR LD NTC]
WHEELER & AREY, P.A.

