IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STUART G. WINNICK	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DAVID L. PRATT, ESQ., Curator for the Estate of Anne M. Winnick, Deceased, and BARBARA AMELKIN, Trustee of the Revocable Declaration of Trust created by Anne M. Winnick dated May 25, 1990 and amended and restated December 26, 1995,	:	**No. 03-1612**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **May , 2003**

This is an action for breach of a will contract executed by Charles and Anne Winnick, the parents of Plaintiff Stuart G. Winnick.[1] The two named Defendants are Barbara Amelkin, Charles and Anne Winnick's daughter who has been appointed the personal representative of the estate of Anne Winnick and Trustee of the Revocable Declaration of Trust created by Anne Winnick and David Pratt, Curator for the Estate of Anne Winnick. Presently before the Court is Defendant Barbara Amelkin's Motion to Dismiss and Plaintiff's Motion for Remand. Because of defects in the procedure by which Defendant Barbara Amelkin removed the case to this Court, and for the additional reasons discussed below, I remand this case to the Court of Common Pleas of Lehigh County, Pennsylvania.

[1] In this case, the "will contract" recited an agreement between Charles and Anne Winnick that the last surviving spouse would not change or alter their previously executed individual will in any way nor make a subsequent will after the death of the first spouse and would accept the provisions of the will of the first spouse notwithstanding any statute or legal decision to the contrary.

I. BACKGROUND

In 1972, while residents of Pennsylvania, Charles and Anne Winnick, husband and wife, entered into a contract in which they agreed, among other things, not to modify their individual wills. Charles Winnick died in 1976. In 1995, Anne Winnick executed a new will. Therein, she incorporated a revocable Declaration of Trust and named Defendant Barbara Amelkin, her daughter, as sole personal representative. On August 27, 2002, Anne Winnick died while residing in Palm Beach, Florida. Shortly thereafter Ms. Amelkin filed a petition for administration of the 1995 will in Florida Circuit Court for Palm Beach County. On October 16, 2002, Plaintiff Stuart Winnick filed in the Florida court an objection to the petition for administration, a motion to stay proceedings pending the outcome of a civil action to specifically enforce the will contract, and a motion for appointment of a curator. On November 4, 2002, the Florida court appointed David Pratt, a Florida attorney, curator of Anne Winnick's estate. On February 10, 2003, Plaintiff commenced this action for breach of the will contract in Court of Common Pleas of Lehigh County, Pennsylvania. On February 21, 2003, the Florida court ruled against Plaintiff's objection to the petition for administration. On February 26, 2003, the Florida court issued letters of administration formally appointing Ms. Amelkin as sole personal representative of Anne Winnick's estate. On March 18, 2003, Ms. Amelkin filed a notice of removal of the Pennsylvania breach of contract action without obtaining the consent of David Pratt.

II. STANDARD OF REVIEW

A defendant may remove a civil action filed in state court if the federal court would have had original jurisdiction to hear the matter. 28 U.S.C. § 1441(b); *Boyer v. Snap-On Tools Corp.*, 913 F.2d

108, 111 (3d Cir. 1990). The defendant bears the burden of establishing removal jurisdiction and compliance with all pertinent procedural requirements. *Boyer*, 913 F.2d at 111. Once the case has been removed, the court may remand the case to state court if the removal is procedurally defective or subject matter jurisdiction is lacking. 28 U.S.C. § 1447©). A defendant's right of removal is a statutory one, and the procedures to effect removal must be followed. *See Lewis v. Rego*, 757 F.2d 66, 68 (3d Cir.1985). Removal statutes are to be strictly construed, and all doubts are resolved in favor of remand. *See Landman v. Borough of Bristol*, 896 F.Supp. 406, 408 (E.D.Pa.1995) (*citing Boyer*, 913 F.2d at 111).

III. DISCUSSION

A. Procedurally Defective Removal

Under 28 U.S.C. § 1446, a defendant must remove within thirty days of service of the complaint. The Third Circuit has construed § 1446 to require that all defendants must join in the removal petition. *See Lewis*, 757 F.2d at 68 (*citing Northern Illinois Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 272 (7th Cir.1982)); *Davidson v. National R.R. Passenger Corp.*, Civ. A. No. 00-1226, 2000 U.S. Dist. LEXIS 8707, at *4 (E.D.Pa. June 9, 2000); *Landman v. Borough of Bristol*, 896 F.Supp. 406, 408 (E.D.Pa.1995); *Ogletree v. Barnes*, 851 F.Supp. 184, 186 (E.D.Pa.1994); *Prowell v. West Chem. Prod., Inc.*, 678 F.Supp. 553, 554 (E.D.Pa.1988). The so-called rule of unanimity provides that "all defendants must join in the notice of removal or otherwise consent to the removal." *Ogletree*, 851 F.Supp. at 186.

Defendant acknowledges that she was unable to obtain Mr. Pratt's consent to remove the action, but contends that Ms. Amelkin's February 26, 2003 appointment as personal representative

of the estate rendered his consent unnecessary. In essence, Defendant contends that she has succeeded to Mr. Pratt's interest in the law suit. The Pennsylvania Rules of Civil Procedure provide for a substitution procedure for such a situation. Rule 2352(a) permits a successor to substitute in a pending action by filing of record a statement of the basis for the exercise of the right of substitution. Yet Defendant did not formally substitute herself in this action before filing the notice of removal.

Defendant similarly argues that Mr. Pratt was a "nominal" defendant whose consent was not required for removal. Merely nominal parties may be disregarded for removal purposes and need not join the notice of removal or otherwise consent to removal. *Ogletree*, 851 F. Supp. at 187. By letter to the Court on April 23, 2003, Jami Huber, an attorney in Mr. Pratt's firm, represents that "David Pratt and our firm performed significant legal, as well as administrative services for this estate." (Huber Letter of April 23, 2003 at 1.) Mr. Huber also represented that "at this juncture, David Pratt, Esq., individually, is no longer serving as Curator and has no administrative or financial responsibilities to the Estate." (*Id*. at 2.) Additionally, Mr. Huber indicates that Mr. Pratt's firm has petitioned the Florida court for an order of formal discharge and substitution of Barbara Amelkin, as personal representative, for David Pratt as curator "in the Florida case and in any other cases relating to this estate in any jurisdiction." (*Id*.) At oral argument, defense counsel represented that, during the period when defense counsel were trying to obtain his consent to remove the action, Mr. Pratt had taken the position that he was "out" of the litigation.

Nominal parties are those who are neither necessary nor indispensable. *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen and Assistants' Local 349, Int'l Printing Pressmen & Assistant Union of N.A.*, 427 F.2d 325, 327 (5th Cir.1970)). Here, his law firm's statements and

Ms. Amelkin's status notwithstanding, Mr. Pratt remains a real party in interest in the litigation until he is discharged. *See* 4 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1548 (2d ed. 1995) ("Once the executor or administrator is discharged, he is no longer the real party in interest. However, until that occurs the actions of the beneficiary cannot affect the executor's or administrator's status as a real party in interest") (*citing Boeing Airplane Co. v. Perry, 322 F.2d 589* (10th Cir. 1963)).[2]

I therefore conclude that, because Mr. Pratt was not a nominal party at the time of removal and Ms. Amelkin neither obtained his consent to remove the Pennsylvania action nor substituted herself for Mr. Pratt in the action, Ms. Amelkin failed to comply with the requirements of 28 U.S.C. § 1446, as interpreted by the Third Circuit. *See Lewis*, 757 F.2d at 68.

B. Jurisdiction Over the Action

Defendant argues that the Court must, following *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939), dismiss the action, "as it lacks jurisdiction to grant Plaintiff the relief he has requested." (Def.'s Mem. of Law at 3). Princess Lida establishes the "mechanical rule" that a court may not exercise jurisdiction over an *in rem* or *quasi in rem* action when a court in a previously filed *in rem* or *quasi in rem* action is exercising control over the property at issue and the second court must exercise control over the same property in order to grant the relief sought. *Dailey v. National Hockey League*, 987 F.2d 172, 176 (1993). At oral argument, counsel for Defendant adopted the position that *Princess Lida* is a doctrine of abstention, rather than of jurisdiction.

[2] Because the determination of whether a party is necessary or indispensable to a proceeding is dispositive of the existence of federal jurisdiction, the question of the status of a particular party must be decided by applying federal law. *Glenmede Trust Co. v. Dow Chemical Co.* 384 F.Supp. 423, 430 (E.D. Pa. 1974) (*citing Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969)).

Counsel contended, accordingly, that the Court has jurisdiction over the action on diversity grounds, but once it exercises that jurisdiction, it must abstain.

Princess Lida, by its own terms, applies with equal force in federal and state courts. *See Princess Lida*, 305 U.S. at 466. Yet if *Princess Lida*'s clear command applies here, the sole purpose for removal is to act as a conduit for dismissal. Defendant is thus asking the Court to perform a useless act, which I regard as an improper use of judicial resources. As a different court wrote in *Baas v. Eliot*, 71 F.R.D. 693, 694 (E.D.N.Y. 1976), where the defendant conceded that the reason for removal was to have the federal court dismiss the case for lack of jurisdiction, "such a frivolous, self-defeating invocation of federal procedure cannot be countenanced."

The same relief is available in Lehigh County Court. Despite counsel's suggestion to the contrary, this Court is no more likely to be "familiar" than the Lehigh County Court with the *Dailey* case, which was decided more than ten years ago. I will leave the vigorously contested issue of *Princess Lida's* application to this case to the sound determination of the Lehigh County Court.

III. CONCLUSION

As explained above, I conclude that Defendant Barbara Amelkin's removal of this action was procedurally defective. Accordingly, bearing in mind that all doubts are to be resolved in favor of remand, *See Landman*, 896 F.Supp. at 408, I remand the action to the Court of Common Pleas for Lehigh County, Pennsylvania. An appropriate Order follows.

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Defendants.	:	**No. 03-1612**

ORDER

AND NOW, this day of **May, 2003**, upon review of Defendant Barbara Amelkin's Motion to Dismiss and the response thereto and Plaintiff's Motion to Remand and the response thereto, and following oral argument on April 29, 2003, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant Barbara Amelkin's Motion to Dismiss (document no. 6) is **DENIED**.
2. Plaintiff's Motion to Remand (document no. 8) is **GRANTED**. This case is remanded to the Court of Common Pleas of Lehigh County, Pennsylvania.
3. The Clerk of Court is directed to close this case for statistical purposes.

BY THE COURT:

_____
Berle M. Schiller, J.