

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 7:01-CV-00164
)	
v.)	<u>Memorandum Opinion</u>
)	
GLADYS PATE,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Defendant.)	

Plaintiff, the United States of America, removed this case to federal court pursuant to 28 U.S.C. § 1441. On November 26, 2001, the court found that the United States had failed to establish removal jurisdiction under section 1441, and granted the United States 10 days to show why this action should not be remanded to state court. In its response to that order, the United States maintains that removal of the case was proper pursuant to 28 U.S.C. § 1441(a), § 1441(c) or § 1442(a)(1). For the reasons that follow, the court concludes that removal was not authorized by these statutes. Consequently, the court lacks jurisdiction and will remand this case to state court.

I.

This action originated in Virginia state court as an equitable property dispute between claimants James Roland Harris, Jr. and Lane Norman Harris (collectively “the Harrises”) and respondent/cross-claimant Gladys Pate (“Pate”). The Harrises sought, in part, to enjoin Pate from using a septic draining system that encroached upon the Harrises’ property. Pate answered and filed a cross-complaint claiming that she had acquired title by adverse possession to a parcel of the Harrises’ property that contained the septic system. While the litigation was pending, the Harrises

conveyed their property to the National Park Service. Pate then moved to substitute the United States as a party to the proceedings in place of the Harrises, citing 28 U.S.C. § 2410 as enabling her adverse possession claim against the United States. The state court granted the motion, substituting the United States for the Harrises pursuant to Rule 3:15 of the Supreme Court of Virginia and 28 U.S.C. § 2410.

II.

The primary statute authorizing removal of actions from state to federal courts, 28 U.S.C. § 1441, provides that removal may be had by the “defendant.” A court determines which party is a defendant and entitled to remove as a matter of federal law. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941). The removal statutes are to be strictly construed to reflect the congressional intent to restrict removal. Sheets, 313 U.S. at 108-09; Fire and Casualty Co. v. Finn, 341 U.S. 6, 10 (1951). Thus, “in considering the propriety of removal, the court is bound to confine its jurisdiction to that conferred by the terms of the statute.” Fleet Bank–NH v. Engleiter, 753 F. Supp. 417, 419 (D.N.H. 1991) (citing Sheets, 313 U.S. at 108-09). The removing party has the burden of establishing that the statutory requirements have been met, Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921), and doubts as to federal jurisdiction will be resolved against removal. Richardson v. Phillip Morris Inc., 950 F. Supp 700, 702 (D. Md. 1997).¹

The United States asserts three grounds for removal jurisdiction: (1) removal jurisdiction

¹“If removal jurisdiction is doubtful,” a court that refrains from asserting jurisdiction “spares both the courts and the parties the burdens of a litigation that may turn out to have been an exercise in futility, when years later, an appellate court determines that subject matter jurisdiction was lacking Ab initio.” Irving Trust Co. v. Century Export & Import, S.A., 464 F. Supp. 1232, 1236 n.8 (S.D.N.Y. 1979) (citing Finn, 341 U.S. at 71).

exists under section 1441(a) because the United States should be considered a “defendant” under the statute; (2) 1441(c) provides removal jurisdiction because the court should consider the United States a counter-claim defendant that is not the original plaintiff in the action; (3) 1442(a)(1) provides removal jurisdiction based on a plain reading of the statute. The court will consider these arguments in turn.

First, the United States argues that section 1441(a)² provides removal jurisdiction because the court should consider the United States a defendant under the statute. The United States has not cited any case that considers whether a party substituted for the original plaintiff by motion of the original defendant may remove the case to federal court. Instead, the United States simply argues that it should be considered a defendant under section 1441(a) because it was ordered into the action pursuant to the original defendant’s motion and, thus, unlike a typical plaintiff, it did not voluntarily enter the action. Although it might make sense for parties who are involuntarily substituted for the original plaintiffs by the original defendants to be allowed to remove, a plain reading of the statute simply does not allow for it. Thus, mindful of the principle that removal statutes must be strictly construed, the court finds that the United States has failed to establish that it is a defendant under section 1441(a) and, accordingly, may not remove the case under that subsection.

²28 U.S.C. § 1441(a) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Next, the United States argues that removal was proper under section 1441(c)³ because the court should consider the United States a third-party/counter-claim defendant. In support of its position the United States relies on a Fifth Circuit decision, State of Texas Board of Regents v. Walker, 142 F.3d 813 (5th Cir. 1998), cert. denied, 525 U.S. 1102 (1999). In Walker, the State of Texas sued the defendant Walker in state court for breach of contract and conversion. Id. at 815. Walker counter-claimed against the State of Texas and joined additional defendants, alleging state tort and breach of contract claims, as well as equal protection and substantive due process claims under 42 U.S.C. § 1983. Id. at 815-816. Based on the counterclaims, the third-party/counter-claim defendants removed the case to federal court pursuant to 28 U.S.C. § 1441(c). Addressing whether removal was proper, the Fifth Circuit held that a counterclaim defendant that is not the original plaintiff can remove a case to federal court pursuant to section 1441(c). The court finds the United States position distinct from the third-party/counter-claim defendants in Walker, because the United States was not impleaded as a third-party defendant, but was substituted to the proceedings in place of the original plaintiffs. Thus, Walker does not apply.

Even if the court were to consider the United States a third-party defendant so that Walker would be applicable to this case, the court would not be inclined to follow it. There is a sharp division among courts as to whether a third-party defendant may remove a case pursuant to section 1441(c). The Fifth Circuit's decision in Walker represents the minority view. See Galen-

³28 U.S.C. § 1441(c) provides:

Whenever a separate and independent claim or cause of action with the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein.

Med, Inc. v. Owens, 41 F. Supp.2d 611, 615 (W.D.Va. 1999) (noting that a prior Fifth Circuit holding that third party defendants may remove under section 1441(c) is the minority view). The prevailing view among courts is that a third-party is not authorized to remove under section 1441(c). See, e.g., Lewis v. Windsor Door Co., 926 F.2d 729, 733 (8th Cir. 1991); Thomas v. Shelton, 740 F.2d 478, 481 (7th Cir. 1984); Jefferson ex rel. Coren v. Cardoza, 139 F.R.D. 561, 564 (D. Mass 1991) (agreeing with majority position and citing authorities); Kaye Assocs. v. Board of Chosen Freeholders, 757 F. Supp. 486, 488 (D.N.J. 1991) (same). The leading commentators on federal practice and procedure also agree that third party defendants have no right to removal under section 1441. James W. Moore, Moore's Federal Practice § 107.11[1][b][iv], (3d ed. 1998); 14C Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3731 (3d ed. 1998) (“The limitations in the statute have been interpreted strictly by the federal courts, who often speak of the right of removal being limited to “true” defendants. Thus, the plaintiffs cannot remove, even when they are in the position of a defendant with regard to a counterclaim asserted against them.”). Within the Fourth Circuit, district courts disagree as to whether third-party defendants may remove the case to federal court. Compare Folts v. City of Richmond, 480 F. Supp 621, 615 (E.D. Va. 1979) (supporting majority position); Continental Resources & Mineral Corp. v. Continental Ins. Co., 546 F. Supp. 850 (S.D.W. Va. 1982) (same); with Galen-Med, Inc., v. Owens, 41 F. Supp. 2d 611, 615 (W.D. Va. 1999) (allowing the third-party defendant to assert removal after discussing “the doubts cast by the Seventh and Eighth Circuits, and the inconsistencies within the Fourth Circuit”); Soper v. Kahn, 568 F. Supp. 398 (D. Md. 1983) (following minority rule). The court agrees with the majority position, and finds that the better reasoned cases deny a third-party the right to removal under section 1441(c). In

revising the removal statute, Congress intended to narrow the right of removal when it deleted “either party or any one or more of the plaintiffs” from those who were authorized to petition for removal. Sheets, 313 U.S. at 106-108 (1941). Thus, the court will not expand the statute to include third-party defendants, since the statute does not even mention them. Thomas, 740 F.2d at 486.⁴

Finally, the United States asserts that removal of this case was proper under 28 U.S.C. § 1442(a)(1) based on a plain reading of the statute.

28 U.S.C. § 1442 (a)(1) provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

The purpose of section 1442 is to protect government officials enforcing federal laws. See Mesa v. California, 489 U.S.121, 126 (1989). Congress enacted section 1442(a)(1) to address the concern that “state governments hostile to duly enacted federal laws would be able to frustrate the implementation of [federal] laws by bringing (or allowing to be brought) civil or criminal actions in state court against the federal officials responsible for their implementation.” Brown & Williamson Tobacco Corp. v. Wigand, 913 F. Supp. 530, 533 (W.D. Ky. 1996). Pate’s claim

⁴Even if the court granted third-party defendant removal, Pate’s claim against the United States to quiet title in the parcel of property containing Pate’s septic system does not seem to be so unrelated to the original plaintiff’s claim to enjoin Pate from using that system as to constitute a “separate and independent claim or cause of action” within the meaning of section 1441(c).

against the United States is not based on the implementation of any federal law against her. Rather, she claims to have acquired by adverse possession a parcel of property to which the United States currently holds legal title. Congress simply did not enact the federal officer removal statute to authorize removal in the present case. Thus, the United States may not remove pursuant to section 1442(a)(1).⁵

Having determined that there was no statutory basis for removing this case, the court concludes that it lacks subject matter jurisdiction. Therefore, the court must decide whether to remand the case pursuant to 28 U.S.C. § 1447, or, as the United States contends, dismiss the case because the state court also lacks subject matter jurisdiction. The court finds that it must remand.

Remand to state court following removal is governed by 28 U.S.C. § 1447, and “the statute is clear and unambiguous.” Roach v. West Virginia Reg’l Jail and Corr. Facility Auth., 74 F.3d 46, 48 (4th Cir. 1996). “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, *the case shall be remanded.*” 28 U.S.C. § 1447(c) (emphasis added). “The plain language of § 1447(c) gives ‘no discretion to dismiss rather than remand an action removed from state court over which the court lacks subject-matter jurisdiction.’ Roach,

⁵The United States points out that the term “[t]he United States” was added to subsection (1) in the 1996 amendments to the statute, and apparently contends that, as a result, subsection (1) should be read to separate “[t]he United States” from the remainder of the sentence. Such a severance would imply that “[t]he United States” may remove any proceeding commenced against it in state court, while “any agency thereof or any officer” may only remove state court proceedings for their acts purporting to enforce federal law. The United States has offered no credible support for this awkward reading. The Senator introducing the bill made no comment on the addition of the term “[t]he United States” in the congressional record. 142 Cong. Rec. S6517-04, *S6518-20. The court finds that if Congress had intended to create such a sweeping change to the statute, it would have mentioned the change. Thus, the court declines to adopt the United States interpretation of section 1442(a)(1).

74 F.3d at 48 (quoting International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72, 89 (1991)).

Applying these principles, it is clear that, since the court lacks subject matter jurisdiction, its only option is to remand. However, the United States moves the court to consider this case under CSX Transportation, Inc. v. Shives, 151 F.3d 164, 171 (4th Cir. 1998), in which the Fourth Circuit vacated a district court's remand order and instructed the district court to dismiss a case because neither the state court nor the district court had jurisdiction over the case. The court finds Shives distinguishable.

In Shives, the plaintiff, an employee of CSX Transportation, Inc., was injured on the job at the Seagirt Marine Terminal in Baltimore, Maryland. Id. at 166. Following his injury, the plaintiff filed a claim in state court under the Federal Employee's Liability Act ("FELA") and a worker's compensation claim with the Department of Labor under the Longshore and Harbor Workers Compensation Act ("LHWCA"). Id. When filed in state court, a FELA claim may not be removed. Id. The defendant claimed that the state court claim was not really a FELA claim, but a claim under the LHWCA, and, therefore removed the case to federal court based on federal question jurisdiction. Id. at 166-67. The district court disagreed with the defendant's construal of the claim, and remanded to state court so that plaintiff could pursue his FELA claim. Id. On appeal, the Fourth Circuit concluded that Shives only had an LHWCA claim, and not an FELA claim. Accordingly, the court found itself in a "procedural conundrum": since LHWCA claims must be filed with the Department of Labor, both the state court and the federal district court lacked original jurisdiction over the claim. Id. The Fourth Circuit noted that "[w]hile the only intuitive remedy might nevertheless be to remand this case to state court to decide the coverage

question, if we were to do so, we would be committing the federal question of LHWCA coverage to the state court when Congress intended that it be decided exclusively in federal court.” Id. As the court had previously discussed, “whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve.” Id. at 167 (citing 33 U.S.C. § 921; Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 258 (4th Cir. 1991) (noting that interpretation of the LHWCA is a matter for the federal executive and federal appeals courts)). Based on its finding that the Department of Labor and Federal appellate courts possess exclusive jurisdiction over questions concerning the applicability of the LHWCA, the Fourth Circuit remanded the case to the district court with instructions to dismiss the case for lack of subject matter jurisdiction.

Unlike the LHWCA, Congress did not intend that only federal courts should determine whether the jurisdictional statutes implicated in this case provide the state court with jurisdiction over the United States. Indeed, state courts routinely consider such questions. Thus, notwithstanding the very narrow exception articulated in Shives, whether the state court has jurisdiction over Pate’s claim against the United States has no bearing on whether this court should remand. Absent congressional intent to the contrary, it is up to the state court to determine its jurisdiction. Accordingly, since removal was improper, this court must remand for lack of subject matter jurisdiction.⁶

⁶The court’s decision to remand for lack of subject matter jurisdiction is not dependant on whether the state court has original jurisdiction over Pate’s claim against the United States. 28 U.S.C. § 1441(e). However, it is apparent to the court that the state court does indeed lack jurisdiction. The statute upon which the state court substituted the United States as a party to the proceedings, 28 U.S.C. § 2410, is inapplicable because the United States does not claim a mortgage or lien on the disputed property. Id. The applicable statute, rather, is 28 U.S.C. § 2409a, which governs actions affecting property in which the United States claims an interest. 28

III.

For the reasons stated, the court concludes that it lacks subject matter jurisdiction because there was no statutory basis to remove this case. Accordingly, the court will remand this case to the state court pursuant to 28 U.S.C. § 1447(c).

ENTER: this ___ day of January, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

U.S.C. § 1346(f) vests federal district courts with exclusive original jurisdiction over such actions. However, even federal district courts lack jurisdiction over Pate's claim because a private party may not seek title from the United States by adverse possession. 28 U.S.C. § 2409a(n); United States v. California, 332 U.S. 19, 39-40 (1947); Dunbar Corp. v. Lindsey, 905 F.2d 754, 760 (4th Cir. 1990) (citations omitted). If, in fact, Pate has some compensable property interest, the proper remedy is just compensation for a taking which Pate may seek in the Court of Federal Claims. See Wisconsin Valley Improvement Co. v. Fed. Energy Regulatory Comm'n, 236 F.3d 738, 742 (D.C.Cir. 2001).

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Plaintiff,)	Civil Action No. 7:01-CV-00164
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v.)	<u>FINAL ORDER</u>
)	
GLADYS PATE,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Defendant.)	

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that this case is **REMANDED** to the state court because removal was improper and, consequently, this court lacks jurisdiction. It is further **ORDERED** that this case be stricken from the docket of this court.

ENTER: this ___ day of January, 2002.

CHIEF UNITED STATES DISTRICT JUDGE