UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski, Plaintiff, vs. JACKIE GARNER, Director, Illinois Department of Public Aid, Defendant.	)	No. 01 C 9551 Judge John W. Darrah

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND

Statement of Facts

This is the second time this case has reached federal court. On September 1, 2000 Donna Radaszewski, the mother of Eric Radaszewski, filed suit in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief on his behalf. Eric is presently 22 years of age and is extremely medically fragile suffering from a number of medical conditions that resulted from his enduring brain cancer in 1992 and suffering a mid-brain stroke in 1993. Since those medical events, Eric has required constant, round-the-clock, private duty nursing services without which he will likely die.

Until he reached the age of 21 on August 5, 2000, the defendant's[1] agency, the Illinois Department of Public Aid, ("IDPA") provided funding for 16 hours a day of private duty nursing

[1] The term "defendant" refers to Jackie Garner, the present Director of the Illinois Department of Public Aid. At the time this suit was filed the Director was Ann Patla. Pursuant to Rule 25(d)(1), Ms. Garner was automatically substituted for Ms. Patla and the term includes the actions of each.

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in Eric's home under the federal Medicaid program. As defendant has acknowledged, Eric would be in danger if he were placed in a nursing home because a nursing home's staffing could not provide the level of care that he requires. Through a combination of Medicaid assistance and their own efforts, Eric's parents were able to provide him with the necessary medical services. In August 2000 when Eric reached the age of 21, IDPA reduced its reimbursement to the equivalent of five hours a day of private duty nursing. This created a medical crisis for Eric and his family.

On September 1, 2000, suit was brought claiming that defendant's act of reducing Eric's private duty nursing violated specific provisions of the federal Medicaid statute, 42 U.S.C. §1396 et seq., and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Ms. Radaszewski sought a temporary restraining order which was granted on September 1, 2000. From the outset, defendant's defense to this lawsuit was that this case did not belong in federal court. Defendant argued that Ms. Radaszewski possessed no private right of action under 42 U.S.C §1983 to challenge alleged violations of provisions of the Medicaid statute or the United States Constitution.

When the district court denied Ms. Radaszewski's motion for a preliminary injunction on November 16, 2000, based upon defendant's section 1983 argument and the Court of Appeals for the Seventh Circuit denied her motion for an injunction pending appeal, Ms. Radaszewski brought the present suit in the Circuit Court of the Eighteenth Judicial Circuit in DuPage County, Illinois, seeking an injunction to maintain the level of private duty nursing at 16 hours a day. The DuPage suit was based solely on claims made under Illinois law: that defendant had violated provisions of the Illinois Administrative Procedures Act, 5 ILCS 100/1 *et seq.*, its State Medicaid Plan, Illinois Regulation 89 Ill.Adm.Code §140.35 regarding private duty nursing, and that Eric

was the intended beneficiary of the Illinois Medicaid Plan, a contract which was breached when IDPA reduced Eric's hours of medical assistance from 16 to five hours a day. The circuit court granted Ms. Radaszewski's motion for a temporary restraining order on December 19, 2000, reestablishing Eric's hours of private duty nursing to a level of 16 hours a day. That injunction is presently in effect.

On September 7, 2001, defendant filed in state court a motion to vacate the temporary restraining order and dismiss the case as moot. Defendant argued that her act of promulgating a new rule abolishing private duty nursing for all persons over 21 mooted each of plaintiff's claims made under state law. In response to defendant's motion, Ms. Radaszewski filed on October 15, 2001, a Motion to Extend the Temporary Restraining Order, a Memorandum in Support of Motion to Extend Temporary Restraining Order and in Opposition to Defendant's Motion to Vacate and Dismiss, and a Supplemental Complaint for Injunctive Relief attached hereto as Attachment A. The Supplemental Complaint repeated the four counts of the original complaint filed in December 2000 and added three new counts: a count alleging an additional violation of the Illinois Administrative Procedure Act; a count alleging violation of 42 U.S.C. §12132, Title II of The Americans with Disabilities Act and its implementing regulation, 28 CFR §35.130 (ADA); and a count alleging a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and its implementing regulation, 28 CFR §41.51(d) (Rehabilitation Act).

On November 8, 2001, defendant filed a reply memorandum in support of its pending motion to vacate and dismiss (attached hereto as Attachment B). In that memorandum defendant argued that with respect to Ms. Radaszewski's new count pertaining to the Illinois Administrative Procedure Act that the court had not yet granted plaintiff leave to file its

Supplemental Complaint and that on the merits plaintiff's arguments regarding the state statute were not supportable. (Attachment B at pp. 2 - 7) As to the Supplemental Complaint's counts regarding the ADA and the Rehabilitation Act, defendant in its reply argued only that leave to file the Supplemental Complaint had not been granted and made no arguments regarding the merits. However, on November 14, 2001, defendant filed an additional memorandum entitled, "Defendant's Objections to Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order." (Attached as Attachment C). In that memorandum defendant argued that if leave to file the Supplemental Complaint was granted, then it objected to extending the injunction and proceeded to argue on the merits the inapplicability of the ADA and the Rehabilitation Act and the application of the Eleventh Amendment as a bar to these claims. (Attachment C, at pages 3 - 6).

On November 15, 2001, the DuPage County Circuit Court granted plaintiff leave to file its supplemental complaint, extended the temporary restraining order, and found that plaintiff had a probability of success on the merits of her claims. (See Attachment D). On December 10, 2001, defendant filed her answer to plaintiff's Supplemental Complaint. (See Attachment E.) In that answer defendant alleged several affirmative defenses, including that plaintiff's count regarding the ADA was barred by the Eleventh Amendment and could not be brought against defendant Director of IDPA. On December 14, 2001, defendant filed a Notice of Removal of the state court case to this Court. Ms. Radaszewski has moved on January 14, 2002, pursuant to 42 U.S.C. §1447(c) that this case be remanded to the state court.

Discussion

Defendant's act of removing this case to federal court is her latest attempt to avoid any decision on the merits regarding its actions of reducing Eric Radaszewski's hours of private duty nursing from 16 to five hours a day. When this case was previously in federal court, defendant argued that there was no right of action for a federal court to consider plaintiff's federal and constitutional claims. While this issue was pending before the Seventh Circuit Court of Appeals, defendant submitted and obtained approval from the United States Department of Health and Human Services of a modification of its State Medicaid Plan which eliminated private duty nursing for persons aged 21 and over. The Seventh Circuit, therefore, never reached the merits of plaintiff's appeal and the case was dismissed as moot without prejudice. (See Attachment F). Defendant sought to moot plaintiff's claims based upon state law by purportedly following the notice and comment provisions of the Illinois Administrative Procedures Act. 5 ILCS 100/1 *et seq*. It is plaintiff's contention that defendant's actions to comply with statutory requirements failed as stated in Count V of her Supplemental Complaint.

In addition to a new count based upon the Illinois Administrative Code, Ms. Radaszewski added two counts to her state court action under the ADA and the Rehabilitation Act. Both counts allege that defendant's attempts to eliminate private duty nursing for all adults taken while this matter was pending in state court were violations of the ADA and the Rehabilitation Act. Defendant responded to these two claims asserting the Eleventh Amendment in its Objections to extending the existing state court injunction. When defendant's motion to vacate was denied and plaintiff was permitted to file her supplemental complaint, defendant filed an answer in state court including affirmative defenses based upon the Eleventh Amendment. By her actions defendant

submitted the merits of plaintiff's claims including defendant's affirmative defenses to the state court. Subsequently defendant removed this case to federal court. Since she has already asserted the Eleventh Amendment regarding plaintiff's federal claims and since, as argued *infra*, plaintiff's claims based upon state law are barred from consideration by this Court under the Eleventh Amendment, see *Pennhurst v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d. 67 (1984), this act of removal is her latest attempt at avoiding the merits of Ms. Radaszewski's claim that defendant acted unlawfully in reducing Eric's hours of private duty nursing simply because he reached the age of 21.

Defendant's attempt to remove is flawed. The actions she has taken in the state court in defending this case constitute a bar to removal. Moreover, defendant seeks to remove to this Court claims that are not removable under 42 U.S.C. §1441. Accordingly, plaintiff respectfully requests that this Court remand this case to the DuPage County Circuit Court.

I. Removal Is Improper Because Defendant Filed Her Notice of Removal After the Statutorily Required Thirty Day Period.

Defendant waited too long to remove this case to federal court. The plaintiff served on the defendant her Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order on October 15, 2001. She also served on defendant her Supplemental Complaint on October 15, 2001, and then filed the Supplemental Complaint on October 16, 2001. Defendant's Notice of Removal is dated January 14, 2002. The applicable federal statute, 28 U.S.C.§1446(b), provides that in a case where the initial pleading is not removable, the notice of removal must be filed by the state court defendant "within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other

paper from which it may first be ascertained that the case is one which is or has become removable . . . ." [emphasis added.] In the present case, it is clear that the defendant was served with a copy of the amended pleading and motion for leave to file the amended pleading on or about October 15, 2001. The defendant's notice of removal was filed considerably later than 30 days after she received the amended pleading and motion.

Although there is a split among the courts, several decisions have determined that the 30 days period commences to run when the defendant is put on notice that a plaintiff is asserting a claim based upon federal law and the fact that the state court has not ruled on the validity of the federal claim does not toll the 30 day period. See, *Webster v. Sunnyside Corp.*, 836 F. Supp. 629, 630 (S.D. Iowa 1993)(30 day period commenced on date of filing of amended complaint not when motion to amend was granted based upon clear language of the statute); *Jackson v. Brooke*, 626 F. Supp. 1215, 1217 (D. Colorado 1986)(30 day period commenced on date plaintiff filed a response to defendant's motion for summary judgment even though court had not ruled on summary judgment since defendants were apprized that plaintiff was pursuing a federal claim); *Harriman v. Liberian Maritime Corp.*, 204 F. Supp. 205, 206 (D. Mass. 1962)(filing of Motion to Increase Damages began then 20 day period in which to file for removal even though court had not ruled on motion because defendant was put on notice of removability).

In a case strikingly similar to the present case, *Butts v. Hansen*, 650 F.Supp. 996 (D.Minn. 1987), the district court decided that the filing of a motion for temporary restraining order which stated plaintiff's claim for relief under federal law was sufficient notice to defendant of removability to trigger the 30 day time period under 28 U.S.C.§1446(b). In *Butts* the plaintiff had not even filed its complaint at the time that removal took place. The court reasoned that the

pending state case was initiated by the temporary restraining order motion and not necessarily by the complaint because otherwise defendant would have been deprived of a federal forum in the TRO proceedings. See also *Bezy v. Floyd County Plan Commission*, 199 F.R.D. 308 (S.D.Ind. 2001), which ratifies the reasoning of *Butts* and states: "When a TRO seeks redress for federal rights, the defendant's opportunity to present or defend those rights commences with the filing of that motion."

In the present case the plaintiff filed her motion to extend temporary restraining order and supporting memorandum on October 16, 2001. (See Attachment G.) In those documents plaintiff clearly set out her claims based on 42 U.S.C. §§12131-12136 (ADA claim) and Sec. 504 of the Rehabilitation Act, 29 U.S.C. §794. In fact, six pages of the above memorandum were devoted to these two federal claims. On November 14, 2001, the defendant filed objections to the plaintiff's motion to extend temporary restraining order in which she argued against the TRO, including a discussion of the merits of the federal claim. See Attachment C , pp. 4-6.

Thus, the defendant was put on notice of the plaintiff's federal claims as early as October 16, 2001, and the defendant litigated these issues in the proceedings on the motion for extension of TRO. Judge Mehling held oral arguments on this motion on November 15, 2001. At that hearing Judge Mehling decided to extend the TRO and indicated that plaintiff had a probability of succeeding on the merits of her claims, including the federal law claims. It is after losing on the motion for extension of the TRO that defendant sought removal to federal court. Prior to Judge Mehling's ruling on November 15, 2001, defendant was content to litigate the federal law issues in state court. Because defendant had unequivocal notice of plaintiff's federal law claims on or around October 16, 2001, and had litigated those claims in the motion for extension of TRO, her

notice of removal on January 14, 2002, is untimely.

II. Defendant's Actions Taken in State Court Bar Her From Removing This Case to Federal Court

A. Defendant Filed an Answer to Plaintiff's Supplemental Complaint

Recently, in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 390, 118 S.Ct. 2047 (1998), the United States Supreme Court in a case involving the propriety of a removal, explained that in examining whether the federal court would have jurisdiction to proceed with a removed case the court must examine the status of the case and if the defendant had answered in the state proceeding before removal then the defendant lost his right to remove:

> The status of the case as disclosed by the plaintiff's complaint is controlling in the case of removal, since the defendant must file his petition before the time for answer or forever lose his right to remove.

[Citing with approval, *St. Paul Mercury Indemnity Co. v. Red Cab Co.* 303 U.S. 283, 58 S.Ct. 586 (1938). See also *Texas Wool & Mohair Marketing Ass'n v. Standard Acc. Ins. Co.*, 175 F.2d 835, 838 (5th Cir. 1949)(removal waived where third party defendant answered cross claim before seeking removal). In this case, defendant filed her answer to plaintiff's supplemental case in state court and then sought removal to this court. By so acting she lost her right to remove.

B. By Her Actions Defendant Has Submitted the Merits of Plaintiff's Claims to the State Court and Is Therefore Barred From Removing This Case.

The Seventh Circuit Court of Appeals has articulated that when questions as to propriety of removal arise, any doubts should be construed against removal. *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994), citing *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 108-09, 61 S. Ct. 868 (1941), and *Healy v. Ratta*, 292 U.S. 263, 270, 54 S. Ct. 700 (1934). Courts have found that if an examination of a defendant's actions taken in a state proceeding indicate an intent to

litigate the case in the state court, then those actions are deemed to have waived the right to remove. See *Fate v. Buckeye State Mutual Insurance Co.*, 2001 U.S. Dist. Lexis 20855 (N.D. Ind., December 12, 2001); *Chavez v. Kincaid*, 15 F. Supp.2d 1118, 1125 (D. N.M. 1998). The basis for courts finding that a defendant in a state court action waived its right to remove are affirmative defensive actions taken in the state court regarding the merits of the state court claims. See *Acqualon v. Mac Equipment Incorporated*, 149 F.3d 262, 264 (4th Cir. 1998). Thus, in *Chavez v. Kincaid*, 15 F. Supp 2d at 1125 the defendant in state court filed a motion to dismiss and commenced discovery. In *Westwood v. Fronk*, 2001 U.S. Dist. Lexis 18418 (N.D. W Va., November 7, 2001) defendant had responded to plaintiff's state court complaint by filing cross claims. Some courts have noted the distinction between a defendant's action in state court of maintaining the status quo versus affirmatively seeking to dispose of the matter. See *Scholz v. RDV Sports, Inc.*, 821 F. Supp 1469, 1470 (M.D. Fla. 1993).

The actions taken by the defendant in this case indicate her initial choice to litigate this case in the Du Page County Circuit Court and not merely maintain the status quo. When Ms. Radaszewski filed a Supplemental Complaint rasing new claims, defendant did not remove but continued to seek dismissal of the case and the vacating of the existing injunction, arguing the merits of plaintiff's new claims and asserting the Eleventh Amendment as a bar to plaintiff's federal claims in state court. (See Attachment C). Previously, defendant had submitted eight pages of detailed arguments regarding plaintiff's Count V of the Supplemental Complaint alleging further violations of the Illinois APA. Then, when the court permitted plaintiff to file her Supplemental Complaint and continued the injunction, defendant, rather than seeking removal to this Court, filed her answer raising as affirmative defenses the applicability of the Eleventh

Amendment to plaintiff's ADA claim. Affirmative defenses are not dissimilar to motions to dismiss and defendants actions indicate her initial intent to litigate the merits of Ms. Radaszewski's federal claims in state court.

C. *Wisconsin Department of Corrections v. Schacht* Does Not Require Removal.

The U.S. Supreme Court's decision in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998), does not provide support for the position that defendant may remove this case to federal court and then assert Eleventh Amendment immunity as a defense. In *Schacht*, the Court held that a State defendant's removal of a suit involving federal claims, some of which may be barred by the Eleventh Amendment, does not destroy removal jurisdiction that would otherwise exist. *Schacht*, 524 U.S. at 386. The court concluded that the Eleventh Amendment does not automatically destroy jurisdiction, "rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense." *Id.*

Key to the Court's decision was that the State could possibly waive the immunity defense and that the State had not done so at the time of the removal. Neither of these factors applies in the present case. First, to waive sovereign immunity, state officials must have specific authority under a state statute, constitutional provision, or decision. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945). The Seventh Circuit has held that the Attorney General of Illinois is not authorized under Illinois law to waive Illinois' Eleventh Amendment immunity in the course of litigation. *In re Estate of Porter v. James*, F.3d 684, 691 (1994), citing *People v. Patrick J. Gorman Consultants, Inc.*, 111 Ill.App.3d 729, 444 N.E.2d 776, 778 (1st Dist.1982). And more recently, in *Power v. Summers*, 226 F.3d 815, 819 (2000) the Seventh Circuit clarified

that a state agency defendant cannot remove to federal court "and thus consent to suit in the federal court" in the absence of a statutory waiver of sovereign immunity.

Secondly, prior to the removal, defendant already asserted Eleventh Amendment defenses to plaintiff's federal claims. In her Answer to the Supplemental Complaint she stated as her defenses to the ADA claim, Count VI, that the Eleventh Amendment bars consideration of this claim. See Defendant's Answer to Supplemental Complaint for Injunctive Relief, Second and Third Defenses, attached to this Memorandum as Attachment E. She also stated Eleventh Amendment defenses against both plaintiff's federal claims in her state court filing objecting to extension of the court's temporary restraining order. See "Objections to Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order", Attachment C, p.5. [2]

This assertion of the Eleventh Amendment bar before the removal is a key distinguishing factor between this case and *Schacht*. The *Schacht* Court looked at the case at the time of the removal and found that "Here...at the time of the removal, this case fell within the 'original jurisdiction' of the federal courts. The State's later invocation [meaning, after removal] of the Eleventh Amendment placed the particular claim beyond the power of the federal courts to decide, but it did not destroy removal jurisdiction over the entire case." *Schacht*, 524 U.S. at 374.

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[2] Although under *Pennhurst*, private plaintiffs may not sue a state official for claims arising under state law for any type of relief, the Supreme Court's doctrine stated in *Ex parte Young*, 209 U.S. 123 (1908) has long authorized private plaintiffs to sue state officials in their official capacities in order to enjoin prospectively violations of federal laws. Otherwise under the Eleventh Amendment's prohibitions, plaintiffs may not sue states for violations of federal statutes unless Congress has validly abrogated Eleventh Amendment immunity or the state has consented to suit. *College Savings Bank v. Florida Prepaid Post-secondary Education Expense Bd.*, 527 U.S. 666 (1999).

In the present case the defendant had already invoked the Eleventh Amendment defense at the time of the removal; therefore, removal was inappropriate.

III. This Action Is Not Removable Because a Federal Court May Not Decide State Court Claims Against State Officials

In addition to the waiver arguments described above, this Court may not hear claims against the defendant based on the five state law causes of action contained in plaintiff's Supplemental Complaint, due to the Eleventh Amendment's bar prohibiting federal courts from affording any type of relief against state officials based on violations of state law.

The Supreme Court made clear in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), that the Eleventh Amendment prohibits federal courts from affording private plaintiffs any relief, even prospective injunctive relief, against state officials like defendant for violations of state law. The *Pennhurst* plaintiffs sued various state and county officials for violations of both federal and state law. After lengthy litigation in the trial and appellate courts, the case returned to the Supreme Court for the second time after the Third Circuit affirmed injunctive relief against the state officials based on a pendant state law claim alone. The Supreme Court reversed the injunction, concluding that there could be no greater intrusion on state sovereignty than "when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U.S. at 106.

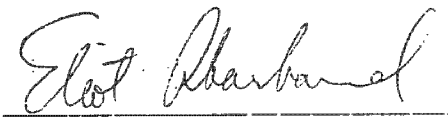
As described above, Counts I through V of the Supplemental Complaint state claims against the defendant Director of Public Aid for violations of state law. Accordingly, under *Pennhurst*, this Court cannot afford plaintiff relief on any of these claims. See also *Powers v.*

Summer, 226 F.3d 815 (7th Cir. 2000)(enforcement of a state law against a state official by a federal court is not permitted under the Eleventh Amendment).

Conclusion

For all the foregoing reasons plaintiff respectfully requests that this Court remand this cause to the Circuit Court of the Eighteenth Judicial Circuit for full disposition of all of plaintiff's claims in her Supplemental Complaint.

Respectfully submitted,



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