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LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
YOSSEF KAHLON a/k/a Jossef Kahlon and
ATLAS SOLAR HOLDINGS LLC,

Plaintiffs,

-against-

ERICA T. YITZHAK, THE LAW OFFICES OF
ERICA T. YITZHAK, and ERICA T. YITZHAK
ESQ. P.C.,

Defendants.

-----X
ERICA T. YITZHAK, THE LAW OFFICES OF
ERICA T. YITZHAK, and ERICA T. YITZHAK
ESQ. P.C.,

Third Party Plaintiffs,

-against-

TROY LAMBE and SUNRAY SOLAR INC.,

Third Party Defendants.

-----X
APPEARANCES:

LAW OFFICE OF ELIAS C. SCHWARTZ, PLLC
By: Jennifer J. Bock, Esq. and Keri Ann Joeckel, Esq.
343 Great Neck Road
Great Neck, New York 11021
Attorneys for Plaintiffs

VERNER SIMON
By: Paul W. Verner, Esq.
30 Wall Street, 8th Floor
New York, New York 10005
Attorney for Defendants/Third Party Plaintiffs & Third Party Defendants

WEXLER, District Judge:

MEMORANDUM & ORDER

16-CV-3364
(Wexler, J.)

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Plaintiffs Yossef Kahlon (“Kahlon”) and Atlas Solar Holdings LLC (“Atlas”) (collectively “plaintiffs” or “Kahlon/Atlas”) commenced a legal malpractice action in New York Supreme Court, Nassau County, against defendants Erika T. Yitzhak and her firms, the Law Offices of Erica T. Yitzhak, and Erika T. Yitzhak, Esq., P.C. (collectively “Yitzhak”). Yitzhak filed a third-party action against Troy Lambe and Sunray Solar Inc. (collectively, “third-party defendants” or “Lambe/Sunray”). Defendants Yitzhak and/or third-party defendants Lambe/Sunray (collectively, the “removing parties”) jointly removed the action to this Court. Plaintiffs have moved to remand the matter to state court and for attorneys’ fees. Motion, Docket Entry (“DE”) [12]. For the reasons set forth below, the motion is granted and the case remanded.

I. BACKGROUND

A. General Litigation History

This case is one of several involving the same parties. Familiarity with the general factual history is assumed and the background set forth here is limited matters pertaining to this litigation. The cases arise from the collapse of a business relationship between plaintiffs Kahlon/Atlas and third-party defendants Lambe/Sunray. As that relationship deteriorated, plaintiffs retained Yitzhak to pursue claims against Lambe/Sunray. Plaintiffs and Yitzhak are all residents of New York, while third-party defendants Lambe/Sunray are New Jersey residents.

Plaintiffs claim that Yitzhak took various actions “at their own behest” including filing UCC liens against Lambe/Sunray, and writing potential investors in Lambe/Sunray to advise them of the pending litigation. On or about October 22, 2012, Yitzhak filed and served a summons with notice on behalf of Atlas against Lambe/Sunray in New York Supreme Court,

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Nassau County. According to plaintiffs, Yitzhak made numerous errors in that litigation which ultimately resulted in its dismissal for lack of personal jurisdiction.

On or about May 24, 2013, Lambe/Sunray filed an action in the Eastern District of New York against Kahlon/Atlas and Yitzhak. *See* 13-cv-3126 (the “federal case”). During the trial, Lambe/Sunray and Yitzhak agreed to a settlement pursuant to which Lambe/Sunray agreed to release its claims against Yitzhak in exchange for the Yitzhak’s payment of the remaining policy limits on her professional liability policy, up to \$650,000. Furthermore, Yitzhak accepted a “hold harmless” from Lambe/Sunray providing that, *inter alia*, in the event Yitzhak were to be sued by her former client, Kahlon/Atlas, her defense would be assumed by Lambe/Sunray and specifically by their counsel, Paul Verner. At the parties’ request, the settlement was placed on the record. *See* Trial Transcript of 1/29/16 (“Tr.”), 13-cv-3126, DE [155-5]. At Mr. Verner’s request, the Court asked the parties if they agreed with their attorneys’ representations about the settlement terms, which they did. Tr. 908-09. The parties did not ask the Court to retain jurisdiction over the settlement agreement.

On February 1, 2016, the jury rendered a verdict in favor of Lambe/Sunray on several causes of action including, *inter alia*, claims for tortious interference with contract and with prospective economic relations, abuse of process, and wrongful filing of a UCC-1 Statement, and awarded \$750,000 in compensatory damages and \$250,000 in punitive damages against Kahlon/Atlas. *See* 13-cv-3126, DE [133]; Compl. ¶73.¹

B. The Current Case

On or about March 9, 2016, Kahlon/Atlas commenced an action against Yitzhak in New York Supreme Court, Nassau County, alleging causes of action for legal malpractice, breach of

¹ Kahlon/Atlas subsequently sued Yitzhak’s insurance carrier for indemnification and defense costs. *See* 16-cv-2239 *Kahlon v. CNA Fin. Corp.* That case was removed by defendant to this Court and was dismissed. *See* 2017 WL 2633517.

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contract, breach of fiduciary duty, breach of quasi-contract, and unjust enrichment. According to the affidavits, service on Yitzhak was effected March 28, 2016. Yitzhak's answer was filed on May 3, 2016.

On April 28, 2016, Yitzhak issued a Third Party Summons and Complaint against Lambe/Sunray. There is no indication as to when, if ever, the third-party complaint was served. It contains a single cause of action seeking an order that Yitzhak should be indemnified and defended under the terms of the settlement agreement in the federal case, and that third-party defendants should be compelled to "specifically perform" the settlement agreement.

A notice of removal was filed "jointly" by Yitzhak and Lambe/Sunray on June 22, 2016. Notice of Removal ("Notice"), DE [1]. In the Notice, they state that there is "complete diversity of citizenship between the third party plaintiff and the third party defendants" and represent that it is filed within thirty days of the receipt of the third-party complaint by Lambe/Sunray. The Notice characterizes the third party action as "seeking damages and specific performance of an indemnification in a settlement agreement" made before this Court. Notice, ¶3.

Yitzhak's answer, and the third-party summons and complaint were all filed in New York Supreme Court by Mr. Verner as attorney for the Yitzhak entities as defendants/third-party plaintiffs. All filings in this Court on behalf of both Yitzhak and Lambe/Sunray have been made by Mr. Verner.

II. MOTION TO REMAND

Removability of civil actions brought in state courts is governed by 28 U.S.C. §1441, "which permits a case to be removed to federal court only if it 'originally could have been filed in federal court.'" *Weinrauch v. N.Y. Life Ins. Co.*, No. 12 Civ. 5010, 2013 WL 165018, at * 3 (S.D.N.Y. Jan. 15, 2013) (quoting *Vera v. Saks Co.*, 335 F.3d 109, 113 (2d Cir. 2003)). In

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considering a motion to remand, the removal statutes are strictly construed and any doubts are resolved in favor of remand. *See, e.g., Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 274 (2d Cir. 1994); *Atanasio v. O'Neill*, 235 F. Supp. 3d 422, 424 (E.D.N.Y. 2017). Moreover, the “party seeking removal bears the burden of showing that federal jurisdiction is proper.” *Montefiore Med. Ctr. v. Teamsters Local 272*, 642 F.3d 321, 327 (2d Cir. 2011).

The removal statute is subject to procedural requirements. Under the statute, the notice of removal “shall be filed within 30 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 30 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(b)(1).

The Notice purports to be filed “jointly” by Yitzhak and Lambe/Sunray. It is clear, however, that there is no basis for removal of the primary action between Kahlon/Atlas and Yitzhak. That complaint alleges only state law causes of action, and as all parties are New York residents, there is no diversity of citizenship. Thus, the only arguable basis for removal is the third-party action between Yitzhak and Lambe/Sunray.

A. Timeliness

Plaintiffs argue that any notice of removal was untimely.² The third-party summons and complaint are dated April 28, 2016, and according to plaintiffs, the complaint was filed on May 4, 2016. *See* Mem. of Law in Support at 7, DE [13]. The Notice states that the removal was filed within 30 days “after receipt by petitioners [Lambe/Sunray] of the summons and complaint

² Notwithstanding the lack of subject matter jurisdiction over the primary action between Kahlon/Atlas and Yitzhak, any attempt at removal by Yitzhak is clearly time-barred. The Yitzhak defendants were served on March 28, 2016, and the notice of removal was not filed until June 22, 2016, well past the 30-day limit.

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