

11-189-cv  
Pietrangelo v. Alvas Corp.

1  
2 UNITED STATES COURT OF APPEALS  
3  
4 FOR THE SECOND CIRCUIT  
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7  
8 August Term, 2011  
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10 (Submitted: February 10, 2012 Decided: July 9, 2012)

11  
12 Docket No. 11-189-cv  
13

14  
15 JAMES E. PIETRANGELO, II,  
16

17 *Plaintiff-Appellant,*  
18

19 -v.-  
20

21 ALVAS CORPORATION, DBA PINE STREET DELI, GEORGE ALVANOS, CHRISTINE  
22 ALVANOS, EVAN ALVANOS, JOHN DOE, CITY OF BURLINGTON, EMMETT B. HELRICH,  
23 in his personal and official capacities, WADE LABRECQUE, in  
24 his personal and official capacities, WILLIAM SORRELL, in his  
25 official capacity,  
26

27 *Defendants-Appellees.\**  
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30  
31 Before:

32 WESLEY, CARNEY, *Circuit Judges*, and MAUSKOPF, *District Judge.\*\**  
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34 Appeal from a judgment of the United States District  
35 Court for the District of Vermont (Reiss, J.), dismissing  
36 all of Plaintiff's federal and state law claims brought  
37 against Defendants. Plaintiff filed his complaint in

\_\_\_\_\_  
\* The Clerk of Court is respectfully instructed to amend the caption as set forth above.

\*\* The Honorable Roslynn R. Mauskopf, of the United States District Court for the Eastern District of New York, sitting by designation.

1 Vermont state court, and Defendants removed the action to  
2 federal district court. Plaintiff contends that the  
3 district court erred in denying his motion to remand to  
4 state court because Defendants' notice of removal and  
5 consent thereto were untimely under 28 U.S.C. § 1446(b). We  
6 conclude that the thirty-day removal period began to run  
7 when the City Defendants received service, and not when the  
8 first-served defendant received service. Accordingly, the  
9 City Defendants' notice and the remaining Defendants'  
10 subsequent consent to removal were timely.

11  
12 **AFFIRMED.**

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James E. Pietrangelo, II, *pro se*, Avon, OH, for  
17 *Plaintiff-Appellant.*

18  
19 Robin Ober Cooley, Pierson Wadhams Quinn Yates &  
20 Coffrin, Burlington, VT, for *Defendants-*  
21 *Appellees Alvas Corporation, DBA Pine Street*  
22 *Deli, George Alvanos, Christine Alvanos, Evan*  
23 *Alvanos.*

24  
25 Pietro J. Lynn, Lynn, Lynn & Blackman, P.C.,  
26 Burlington, VT, for *Defendants-Appellees City*  
27 *of Burlington, Emmett B. Helrich, Wade*  
28 *Labrecque.*

29  
30 David R. Groff, Assistant Attorney General, for  
31 William H. Sorrell, Attorney General of the  
32 State of Vermont, Montpelier, VT, for  
33 *Defendant-Appellee William H. Sorrell.*

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PER CURIAM:

38 Plaintiff-Appellant James E. Pietrangelo, II,<sup>1</sup> appeals  
39 from a December 15, 2010 judgment of the United States

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<sup>1</sup>We note, as the district court recognized, that Pietrangelo is an attorney with substantial litigation experience. Thus he "cannot claim the special consideration which the courts customarily grant to *pro se* parties." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 82 n.4 (2d Cir. 2001) (internal quotation marks omitted).

1 District Court for the District of Vermont (Reiss, J.),  
2 granting Defendants' motions for summary judgment and  
3 dismissing all of Pietrangelo's federal and state law claims  
4 brought against Defendants. Pietrangelo filed his complaint  
5 in Vermont state court, and Defendants removed the action to  
6 federal district court pursuant to 28 U.S.C. § 1441.  
7 Pietrangelo contends that the district court erred in  
8 denying his motion to remand to state court because, by his  
9 calculation, Defendants' notice of removal and consent  
10 thereto were untimely under 28 U.S.C. § 1446(b).  
11 Specifically, he argues that the thirty-day removal period  
12 began when service was effected on the first defendant,  
13 Attorney General William H. Sorrell, and that later-served  
14 defendants were untimely when they filed their notice of  
15 removal well beyond that time. We disagree and conclude  
16 that Defendants City of Burlington, Emmett B. Helrich, and  
17 Wade Labrecque (the "City Defendants") timely filed their  
18 notice of removal because their filing occurred within  
19 thirty days from when they received service and that all  
20 earlier-served defendants properly consented to removal.  
21 Accordingly, we affirm the denial of Pietrangelo's motion to  
22 remand the action to state court.<sup>2</sup>

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<sup>2</sup> We also conclude in a separate Summary Order that the district court did not err in (1) denying Pietrangelo's motion to

1 We recite only the limited procedural history relevant  
2 to our discussion. Pietrangelo filed his complaint in state  
3 court on July 31, 2008. Attorney General Sorrell waived  
4 service of process on August 21, 2008. However, the  
5 remaining defendants—Alvas Corporation, George Alvanos,  
6 Christine Alvanos, and Evan Alvanos (the “Alvas Defendants”)  
7 and the City Defendants—did not waive service of process.  
8 On February 24, 2009, Pietrangelo served the Alvas  
9 Defendants with a summons and complaint. On February 24 and  
10 25, 2009, Pietrangelo served the City Defendants.

11 On March 16, 2009, the City Defendants filed a notice  
12 of removal, in which counsel for the City Defendants  
13 represented that the other defendants had consented to  
14 removal and would formally notify the court of their  
15 consent. On March 17, 2009 and March 24, 2009,  
16 respectively, the Alvas Defendants and Attorney General  
17 Sorrell submitted letters to the district court confirming  
18 their consent to the City Defendants’ removal motion. The  
19 Clerk’s Office, however, returned each letter for failing to  
20 comply with the format requirements of Local Rule 5.1. The  
21 Alvas Defendants and Attorney General Sorrell then

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compel discovery and for leave to conduct additional discovery;  
(2) granting Defendants’ summary judgment motions; and (3)  
denying Pietrangelo’s motion for reconsideration of a decision  
granting summary judgment to certain defendants.

1 reiterated their consent to the City Defendants' removal in  
2 submissions that were accepted by the court on April 1, 2009  
3 and April 3, 2009, respectively.

4 On April 3, 2009, Pietrangelo filed a motion to remand  
5 his action to state court; the district court denied the  
6 motion on October 7, 2009. We review a district court's  
7 denial of a motion to remand *de novo*. *Whitaker v. Am.*  
8 *Telecasting, Inc.*, 261 F.3d 196, 201 (2d Cir. 2001).

9 The statute in question, 28 U.S.C. § 1446(b), requires  
10 a defendant seeking to remove an action from state to  
11 federal court to file a notice of removal within thirty days  
12 of receiving service of the initial pleading. The City  
13 Defendants filed a notice of removal less than thirty days  
14 after they were served with the complaint. Pietrangelo  
15 contends that the notice was untimely, however, because it  
16 was filed nearly seven months after the *first* defendant  
17 waived service of process, an equivalent (for purposes of  
18 § 1446(b)) to receiving service. Thus we must decide an  
19 issue over which several circuits have disagreed prior to  
20 the December 7, 2011 amendment of § 1446: "Does the first-  
21 served defendant's thirty-day clock run for all subsequently  
22 served defendants (the first-served rule), or does each

1 defendant get his own thirty days to remove after being  
2 served (the later-served rule)?" *Destfino v. Reiswig*, 630  
3 F.3d 952, 955 (9th Cir. 2011).

4 Had this case originated after December 7, 2011, when  
5 § 1446 was amended, the City Defendants' notice of removal  
6 would indisputably have been timely-the current statute  
7 codifies the later-served rule. See 28 U.S.C. § 1446(b).<sup>3</sup>  
8 In construing the thirty-day period of the pre-amendment  
9 § 1446(b), the majority of the circuits have adopted the  
10 later-served rule. See, e.g., *Delalla v. Hanover Ins.*, 660  
11 F.3d 180, 189 (3d Cir. 2011); *Destfino*, 630 F.3d at 956;  
12 *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1209

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<sup>3</sup> 28 U.S.C § 1446(b) was amended in relevant part by adding paragraph 2:

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

**(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.**

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

Pub. L. No. 112-63, § 103(b)(3)(B), 125 Stat. 760, 762 (2011) (codified as amended at 28 U.S.C. § 1446(b)) (emphasis added).

1 (11th Cir. 2008); *Marano Enters. of Kan. v. Z-Teca Rests.,*  
2 *L.P.*, 254 F.3d 753, 756-57 (8th Cir. 2001); *Brierly v.*  
3 *Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th  
4 Cir. 1999). Two circuits have adopted variations of the  
5 first-served rule. See *Barbour v. Int'l Union*, 640 F.3d  
6 599, 613 (4th Cir. 2011) (*en banc*); *Getty Oil Corp. v. Ins.*  
7 *Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988).

8 We agree with the majority of our sister circuits and  
9 adopt the later-served rule "for reasons grounded in  
10 statutory construction, equity and common sense." *Destfino*,  
11 630 F.3d at 955. It would appear that Congress addressed  
12 the shortcomings of the statute that necessitated judicial  
13 stitchery. In addition, we agree with the thorough  
14 reasoning of those circuits that share our view.

15 The plain text of the statute supports the later-served  
16 rule because "[g]iven that § 1446(a) explicitly affirms the  
17 possibility of multiple notices of removal, the only  
18 reasonable reading of § 1446(b) is that the subsection  
19 applies individually to *each* notice of removal that might  
20 potentially be filed by *each* removing 'defendant.'"<sup>4</sup>

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<sup>4</sup> We read the phrase "defendant or defendants" in § 1446(a) to indicate that multiple defendants may attempt to remove an action by filing a notice of removal. See *Delalla*, 660 F.3d at 186.

1 *Delalla*, 660 F.3d at 186. Moreover, § 1446(b) omits any  
2 reference to "first defendant" or "initial defendant." See  
3 *id.* at 187; *Destfino*, 630 F.3d at 955. We also agree that  
4 the later-served rule is more equitable, as "[a] contrary  
5 rule could deprive some defendants of their right to a  
6 federal forum because they were served too late to exercise  
7 that right, and encourage plaintiffs to engage in unfair  
8 manipulation by delaying service on defendants most likely  
9 to remove." *Destfino*, 630 F.3d at 955-56.

10 Finally, we reject the rationale for adopting the  
11 first-served rule for substantially the same reasons stated  
12 by the Third and Ninth Circuits. See *Delalla*, 660 F.3d at  
13 187-89; *Destfino*, 630 F.3d at 956. Most notably, the last-  
14 served rule is not inconsistent with the requirement that  
15 defendants unanimously join in a removal notice because we  
16 do not construe a defendant's failure to file a notice of  
17 removal as an affirmative decision not to join another  
18 defendant's removal request in the future. See *Delalla*, 660  
19 F.3d at 188; *Destfino*, 630 F.3d at 956. Moreover, we agree  
20 that the Supreme Court's holding in *Murphy Bros., Inc. v.*  
21 *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48  
22 (1999)—that the thirty-day removal period begins upon formal

1 service of process—"cuts against binding later-served  
2 defendants to decisions made before they were joined."<sup>5</sup>  
3 *Destfino*, 630 F.3d at 956.

4 For the purpose of applying the pre-amended removal  
5 statute, we adopt the later-served rule and hold that each  
6 defendant has thirty days from when he received service to  
7 file a notice of removal. Accordingly, the City Defendants'  
8 notice of removal was timely.

9 Pietrangelo also contends that even under the later-  
10 served rule, the remaining Defendants' consent to removal  
11 was untimely. We disagree for substantially the same  
12 reasons stated by the district court in its October 7, 2009  
13 Opinion and Order. The pre-amendment § 1446(b) speaks only  
14 of the "requirements for filing a notice of removal; it does  
15 not speak to joinder in another defendant's notice of  
16 removal."<sup>6</sup> *Delalla*, 660 F.3d at 188. District courts  
17 within this Circuit, however, have consistently interpreted

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<sup>5</sup> Since *Murphy Brothers*, district courts in this Circuit have generally applied the later-served rule. See, e.g., *Barnhart v. Federated Dep't Stores, Inc.*, No. 04 Civ. 3668, 2005 WL 549712, at \*6 (S.D.N.Y. Mar. 8, 2005); *Fernandez v. Hale Trailer Brake & Wheel*, 332 F. Supp. 2d 621, 622-24 (S.D.N.Y. 2004); *Piacente v. State Univ. of N.Y. at Buffalo*, 362 F. Supp. 2d 383, 390 (W.D.N.Y. 2004); *Varela v. Flintlock Constr., Inc.*, 148 F. Supp. 2d 297, 300 (S.D.N.Y. 2001).

<sup>6</sup> We recognize that the current version of § 1446(b) does address joinder and consent to removal. See *supra* note 3. Accordingly, we note that our discussion here pertains only to the pre-amendment statute.

1 the statute "as requiring that all defendants consent to  
2 removal within the statutory thirty-day period, a  
3 requirement known as the 'rule of unanimity.'" *Beatie &*  
4 *Osborn LLP v. Patriot Scientific Corp.*, 431 F. Supp. 2d 367,  
5 383 (S.D.N.Y. 2006). Although we have not yet advised what  
6 form a consent to removal must take, we agree with the  
7 district court that the remaining defendants must  
8 independently express their consent to removal. See  
9 *Ricciardi v. Kone, Inc.*, 215 F.R.D. 455, 458 (E.D.N.Y.  
10 2003); *Codapro Corp. v. Wilson*, 997 F. Supp. 322, 325  
11 (E.D.N.Y. 1998). We conclude that the Alvas Defendants and  
12 Attorney General Sorrell satisfied this requirement when  
13 they submitted letters to the court within the thirty-day  
14 removal period. Moreover, we find no error in the district  
15 court's decision to consider those letters of consent timely  
16 despite their noncompliance with the format requirements of  
17 Local Rule 5.1. See *Contino v. United States*, 535 F.3d 124,  
18 126-27 (2d Cir. 2008).

19 We have considered Pietrangelo's remaining arguments  
20 pertaining to the denial of his motion to remand and find  
21 them to be without merit. For the foregoing reasons, and  
22 the reasons set forth in the Summary Order accompanying this  
23 Opinion, the judgment of the district court is hereby

24 **AFFIRMED.**