UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-120

LOGAN CAMPBELL, JR. PLAINTIFF,

VS: **ORDER**

J. I. CASE, INC. DEFENDANT.

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In accordance with the Court's Memorandum Opinion the motion of the Plaintiff to remand the above action to the state court is **GRANTED** and

IT IS ORDERED that this action is **REMANDED** TO THE Wolfe Circuit Court and is **STRICKEN** from the docket.

This 16th day of August, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-120

LOGAN CAMPBELL, JR. PLAINTIFF,

VS: **MEMORANDUM OPINION**

J. I. CASE, INC. DEFENDANT.

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This action is pending on motion of the Plaintiff to remand to the Wolfe Circuit Court on the alleged ground that the plaintiff did not voluntarily dismiss the resident defendant from this action.

The petition for removal was filed on April 9, 1983, being less than thirty (30) days from entry of the summary judgment dismissing the complaint against the resident defendant, Lillian Church, etc.

This action was originally filed in the Wolfe Circuit Court on July 27, 1981, against the defendants, J. I. Case, Inc., alleged to be a non-resident of Kentucky and Elgin Church Case Dealership, located in Owingsville, Kentucky.

On the October 9, 1981, a motion and answer was filed on behalf of Elgin Church Case Dealership alleging it was a proprietorship and that Elgin Church had died on September 12, 1981.

On September 8, 1982, an Order was entered by Wolfe Circuit Court sustaining motion to revive the action and substitute Lillian A. Church, Executrix of Estate of Elgin Church as a defendant in this action.

On September 10, 1982, plaintiff filed an amended complaint substituting name of Lillian A. Church, Executrix of the Estate of Elgin Church for Elgin Church Case Dealership.

On March 11, 1983, the Wolfe Circuit Court sustained motion of Lillian Church, etc., and entered a summary judgment dismissing complaint against her but retaining the action againt J. I. Case, Inc. The record reflects that the plaintiff did not file a response to or make any written objections to the motion for summary judgment. The record is silent as to whether the plaintiff made any oral objections.

On September 27, 1983, the plaintiff filed a motion to remand since the dismissal was by order of the state court and involuntary and not a voluntary dismissal of the resident defendant by the plaintiff.

The pertinent portion of 28 U.S.C. Sec. 1446(b) provides:

> "If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty (30) 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."

It is stated in 1A Moore Federal Practice, Sec. 157(12) at page 189:

> "Removability of an action is to be determined as of the time the removal petition is filed and as of the commencement of the state action (or, in the event of amendment of the plaintiff's initial pleading or other voluntary act which made the action removable, at the time federal jurisdiction first existed)." (emphasis added).

The question for determination is whether the dismissal of Ellen Church as a defendant was the voluntary act of the plaintiff and, if not, was her dismissal by the court such an act or event which created diversity.

The defendant argues that by reason of the failure of the plaintiff to respond to the motion of the resident defendant for a judgment of dismissal, the plaintiff acquiesced to such dismissal being thus in effect a voluntary act on the part of the plaintiff; and further that the diversity was created by acts or events which were not the result of the defendant's activity.

In support of his contentions, the defendant is relying, in part, upon the cases of Parkhill Produce Co. v. Pecos Valley S. Ry. Co., 186 F. Supp. 404 (S.D. Tex.) which held that the order which creates diversity need not be the result of voluntary act on the

part of the plaintiff; and Lyons v. Illinois Central Railroad, 228 F. Supp. 810 (S.D. Miss. 1964), which held removal was proper where motion to dismiss was sustained, even though plaintiff objected to it. Unfortunately for the defendant, it cannot take comfort in these two cases, both of which were decided by District Courts in the Fifth Circuit. The Fifth Circuit, in the case of Weems v. Louis Dreyfus Corp., 380 F.2d 545, in effect overruled both cases by holding that a directed order of dismissal, at the close of all evidence, of the resident defendant did not create diversity, saying: "We are of the firm conviction, however, that the view expressed in Lyons and applied by the court below in this case is clearly wrong . . . . ."

The Fifth Circuit further noted that the voluntary-involuntary rule originated in the cases of Powers v. Chesapeake & Ohio Ry., 169 U.S. 92 (1898) which held that a case did not become removable where plaintiff voluntarily dismissed complaint against resident defendant after time period for removal on the pleading had expired; and the case of Whitcomb v. Smithson, 175 U.S. 635 (1900) which held that the dismissal of resident defendant by a directed verdict did not make the case removable. Id. 380 F.2d at 547.

The Ninth Circuit Court, in the case of Self v. General Motors Corp., 588 F.2d 655 (1978), had for its consideration the removability of an action where the trial court, by judgment, dismissed the resident defendant from the case. The Court held that the case was not removable, saying:

> "That only a voluntary act of the plaintiff could bring about removal to federal court became the established rule in later cases."

The Ninth Circuit in Self, supra, quoted from the case of Great Northern Ry. v. Alexander, 246 U.S. 276 (1918) as follows:

> "It is also settled that a case, arising under the laws of the United States, non-removable on the complaint when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant. . . .(w)hether such a case non-removable when commended shall afterwards become removable depends not upon what the defendant may allege or prove

or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion." Id. 588 F.2d at 659.

In the case of Erdy v. American Honda Co., Inc., 96 FRD 953 (M.D. La., 1982) the court, after stating that ". . . . the jurisprudence is long and uniform to the effect that a case may become removable only by the voluntary action of the plaintiff," also quoted from Great Northern Railway Co. v. Alexander, supra, and then held that when the plaintiff dismissed his complaint as to one resident defendant and then entered into settlement agreements with the remaining resident defendants, he made the case removable under 28 U.S.C. Sec. 1446(b).

Here, while the plaintiff did not file any response to the plaintiff's motion for summary judgment, and in the absence of any evidence of any affirmative action on his part to secure the entry of such order, the order of the court sustaining same cannot be construed to be a voluntary act of the plaintiff or that it was entered by reason of his volition or that he initiated such action. The overwhelming authority prohibits the creation of diversity under such circumstances so as to permit removal of the action to a federal court.

In its memorandum the defendant suggests diversity was created on the death of Elgin Church in September 1981, resulting in the substitution of Lillian Church in September, 1982. Assumming this to be correct, the failure to remove within thirty (30) days after the death of Elgin Church would bar any subsequent attempt at removal.

In accordance with the foregoing memorandum, an order remanding this action to the state court shall be entered.

This 16th day of August, 1984.

G. Wix Unthank

G. WIX UNTHANK, JUDGE