RECENT CASES

Affidavit of Merits—Pleading and Practice—Removal of Causes—Plaintiff petitioned for removal of the cause on the grounds of diversity of citizenship from the State to the Federal Court. *Held,* petition dismissed. Although an affidavit of merits had been filed in accordance with demand made pursuant to Rule 77 of this court, N.J.S.A. Title 2, after the expiration of the period limited therefor but before formal answer and within the term appointed for pleading, the petition was not timely under Section 29 of the Federal Judicial Code. *Brooks-Wright, Inc. v. Maryland Casualty Co.,* 126 N.J.L. 32, 17 A. 2d 51 (S. Ct. 1940).

In order to determine whether or not this ruling was correct, it is essential that the nature and effect of both the rules of the Supreme Court and the provisions of the Federal Judicial Code be analyzed in conjunction with each other.

Rule 76 of the Supreme Court provides "The answer or counterclaim shall be filed within twenty days after service of the summons (or capias) and complaint. If further pleadings be necessary, they shall be filed within twenty days, each after the other. Rule 55 Practice Act of 1912."[1]

Rule 77 of the Supreme Court provides "In actions on contract, plaintiff may enter judgment unless the defendant or his agent or attorney shall, within ten days after personal service of the complaint, file an affidavit of merits, stating that the affiant believes that the defendant has a just and legal defense to the action on the merits of the case; provided, a notice be endorsed on the complaint and on the copy served that if defendant intends to make a defense he must file an affidavit of merits within ten days of such service and an answer within twenty days therefrom; and that in default thereof judgment will be entered against him. Lawful service upon a corporation shall be deemed personal service for the purpose of this rule. Rule 56 Practice Act. 1912."[2]

Section 28 of the Judicial Code, 28 U. S. C A., Paragraph 71, pro-

1. Rule 76 N.J.S.A. Title 2.
2. Rule 77 N.J.S.A. Title 2.

vides, among other things that a cause may be removed from a State to a Federal Court.

Section 29 of the Judicial Code, 28 U. S. C. A., Paragraph 72, provides as follows: "Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, ..."

What is meant by the words "answer or plead" has been a troublesome subject to our Federal Courts and has resulted in many conflicting decisions with the majority viewpoint holding that the petition for removal must be filed in the State Court as soon as the defendant is required to make any defense whatsoever in that court.[3] In a leading case, Mr. Justice Gray of the United States Supreme Court said: "Construing the provision now in question, having regard for the natural meaning of its language, and the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the State Court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of

3. Martin's Administrator v. Baltimore & Ohio Railroad Company, 151 U. S. 673, 687, 14 S. Ct. 533, 38 L. Ed. 311, 316 (1893); Powers v. Chesapeake & Ohio Railway Company, 169 U. S. 92, 18 S. Ct. 264, 42 L. Ed. 673 (1898); Kansas City Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 11 S. Ct. 306, 34 L. Ed. 963 (1891); Golding v. Morning News Company, 156 U. S. 518, 15 S. Ct. 559, 38 L. Ed. 517 (1895); Wabash Western Railway Co. v. Brow, 164 U. S. 271, 17 S. Ct. 126, 128, 41 L. Ed. 431 (1898); First National Bank of Garrett v. A. E. Appleyard & Co., 138 F. 939 (C.C.E.D. Pa. 1905). *Contra*: Bankers Security Corporation v. Insurance Equities Corporation, 85 F. (2d) 856 (C.C.A. 3rd 1936); Anthony, Inc. v. National Broadcasting Company, Inc., 8 F. Supp. 346 (S.D. N.Y. 1934). See also 23 R.C.L. 742 and 108 A.L.R. 973 for an interesting discussion of this question.

any and all of his defenses should be tried and determined in the Circuit Court of the United States."[4]

In a later case, the Supreme Court stated that "Undoubtedly when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defense whatever in its courts. . . . The time of filing a petition for removal is not essential to the jurisdiction. The provision on that subject is, ... but 'modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel. . . ." And, referring to Act March 3, 1887, c. 373, as corrected by Act August 13, 1888, c. 866, 25 Stat. 435, 28 U. S. C. A., Section 71 note, "This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity."[5]

In *Wayt v. Standard Nitrogen Company,*[6] the Circuit Court of the Northern District of Georgia, holding that a stipulation between the parties, approved by the Court, that no default should be entered until a certain date, did not extend to that time the period within which a petition for removal might be filed, although under the decisions of the State Supreme Court, answers might be filed at any time before default was entered, said: "While it is true that under the State practice defenses may be entered if, by order of the Court, stipulations of the parties, or probably if by inadvertence of the judge, default has not been entered, this does not alter the fact that the defense was due when the appearance docket was called. The very fact that a stipulation of the parties was necessary shows that the defense was due. The ruling of the courts of the United States therefore, that neither order of the Court nor stipulation of the parties can extend the time within which removal proceedings may be brought, must control, and that ruling, as I understand it, is to the effect that the application for removal must be made at or before the time defenses are due, and not

4. Martin's Administrator v. Baltimore & Ohio Railroad Company, *supra* note 3.

5. Powers v. Chesapeake & Ohio Railway Company, *supra*, note 3.

6. 189 F. 231, 108 A.L.R. 975, 976 (C.C.N.D. 1911).

when, by reason of some extension of time, or failure to enter default in the State Court, defenses might still there be filed."

But a petition for removal filed as soon as the case became a removable one is filed in time, although it is after the time when the defendant was required to answer.[7]

Under the New Jersey practice as laid down by Rule 77 of the Supreme Court, the affidavit of merits is an integral part of the procedure laid down for the interposition of a defense, and is "required in order to set in motion a 'course of pleading' in the true sense of the word." This requirement was first made by passage of Sections 114 and 115 of the Practice Act of 1874 and has remained as originally enacted an integral part of the Practice Act.[8]

In an early case, Mr. Justice Garrison said that the effect of the provision was two-fold, first, that it deprived the defendant of the right to plead unless he has, within the ten day period, filed his affidavit of merits; and, second, that it authorized the entry of judgment at the end of ten days unless the defendant should have filed such an affidavit.[9]

That there is no substitute for an affidavit of merits and that it must be filed within the time fixed by Rule 77 has been definitely decided by the courts of New Jersey.[10] In speaking of the affidavit of merits in a recently decided case, Mr. Justice Parker reviewed the history of the rule and concluded that "It seems plain, therefore, that the filing of an affidavit of merits became and remained a prerequisite to the right to plead or demur; in other words, unless there was an affidavit of merits, there was no right to plead or demur."[11]

In another recent case, Mr. Justice Case summed up the matter

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7. Powers v. Chesapeake & Ohio Railway Company, *supra*, note 4.

8. See Rev. Stat. 1877, page 866, Pamph. L. 1889, page 334; Sec. 97 Practice Act of 1903, Pamph. L. 1903, pages 537, 565; 3 Comp. Stat. 1910, page 4080, Sec. 97; Rule 56 Supp. to Practice Act 1912, Pamph. L. 1912, pages 377, 394; Rule 77 N.J.S.A. Title 2.

9. Van Dyke v. Oliphant, 13 N.J.L.J. 45, 92, (S. Ct. 1890). Accord: Laufman & Co. v. Hope Mfg. Co., 54 N.J.L. 70, 23 A. 305 (S. Ct. 1892).

10. Pilgrim v. Aetna Life Insurance Co., 234 F. 958, 959 (D.C. N.J. 1916); Morris Plan Co. of N. Y. v. Lorber *et al*, 165 A. 76, 11 N.J.Misc. 67 (S. Ct. 1933); Blum v. Jersey City Lumber Co., 112 N.J.L. 65, 169 A. 809 (E. & A. 1934).

succinctly in these words: "The plain purpose of an affidavit of merits, as required by our rule, is to prevent the defendant from delaying judgment by recourse to pleadings or proceedings incidental thereto unless the situation is such that he, or his agent or attorney, may truthfully swear to a belief in the existence of a just and legal defense to the action on the merits, and unless an affidavit of that content be speedily filed. It is to prevent pettifogging delay. Resort to a demand for a bill of particulars as a means of procuring delay in the taking of judgment in an action to which there is no meritorious defense is quite as opposite to the spirit and the letter of the rule as would be the filing of an answer for that purpose."[12]

The District Court for the Federal District of New Jersey has held, in accord with other Federal Courts, that the time referred to in Section 29 is "fixed and not fluctuating. It is the time designed by statute or rule which applies indiscriminately to all suits of a like character, and not a time that may vary in length fixed by an order of court as the exigencies of a particular case may appear to require. The language is not that the plaintiff petition for removal before he is 'required' to plead, but at or before the time he is 'required by the laws of the

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11. Blum v. Jersey City Lumber Co., *supra*, note 10. "It seems to be assumed by the appellants that the service of that notice of motion (to strike out the complaint) relieved them of any obligation to file an affidavit of merits; but that is not the law," said Justice Parker.

"Affidavits of a meritorious defense seem to have originated in this state in 1855 (P. L. at page 297, Sec. 35). Until 1889, it was merely required that they be filed with the plea or demurrer, which could be treated as a nullity in the absence of such affidavit. Revision 1877, 'Practice', p. 866, Sec. 114. But the act of 1889 P. L. p. 234, repeated as Sec. 97 of the Practice Act of 1903 (3 Comp. Stat. 1910, p. 4080) specifically provides that in actions on contract the plaintiff shall be 'entitled to judgment' unless an affidavit of merits is filed within ten days after service of the declaration or within such further time as the court or a judge may grant; provided a notice requiring such affidavit is endorsed on and served with the declaration, and that in case such affidavit is filed, the defendant shall have twenty days from service of the declaration in which to plead or demur. . . . The Practice Act of 1912 repealing this section (Sec. 34 Comp. Stat. Supp. Sec. 163-310) substitutes a rule to the same effect rule 56, now rule 77."

12. Morris Plan Co. of N. Y. v. Lorber, *supra*, note 10.

State or the rule of the State Court . . . to answer or plead.' "[13]

It has also been held that a petition for removal filed after the time for filing specifications of defenses was not filed in time.[14]

Since the Supreme Court of New Jersey is in harmony with the District Court of the Federal District of New Jersey[15] and the Supreme Court of the United States,[16] it is apparent that an affidavit of merits, to be within time to permit the filing of a petition for removal to the Federal Court, *must* be filed within ten days after personal service of the complaint has been made upon the defendant.[17]

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13. Pilgrim v. Aetna Life Ins. Co., *supra*, note 10; Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (D.C. N.J. 1940) citing with approval Muir v. Preferred Accident Insurance Company of N. Y., 203 Pa. 238, 53 A. 158 (1902).

14. Ruby Canyon Gold Mining Co. v. Hunter, 60 F. 305 (C.C. S.D. 1894) in which the Court said:

"It was not within any time that a defendant might procure to be given him by the court or his opponent, but within the time fixed by the statute that Congress intended the petition should be filed."

Accord: Spangler v. Atchison T. & S. F. R. Co., 42 F. 305 (C.C.W.D. Mo. 1890); Dixon v. Western Union Telegraph Co., 38 F. 37 (C.C. Cal. 1889); Delbanco v. Singletary, 40 F. 177 (C.C. Nev. 1889); Rock Island National Bank v. Keator Lumber Co., 52 F. 897 (C.C.N.D. Ill. 1892); Kansas City Ft. S. & M. R. Co. v. Daughtry, *supra*, note 3; Kansas City So. Ry. Co. v. McGinty, 76 Ark. 356, 88 S. W. 1001 (1905); Midland Valley Ry. Co. v. Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380 (1909); Southern Pacific Co. v. Stewart, 245 U. S. 355, 38 S. Ct. 203, 62 L. Ed. 472 (1917); Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 N. W. 348, 14 Ann. Cas. 266 (1907); A. Overholt & Co. v. German American Insurance Company, 155 F. 488 (C.C.W.D. Pa. 1907). See also 23 R.C.L. 742, 108 A.L.R. 973.

15. See note 13.

16. Ricciardi v. Lazzara Baking Corp., *supra*, note 13; Muir v. Preferred Accident Insurance Company of N. Y., *supra*, note 13.

17. See *supra* notes 9, 10, 12, 13, 14, 3, 4, 5. See also Elms v. Crane, 105 A. 385, 118 Maine 18 (1919); Rexford v. Brunswick-Balke-Collender Co., 228 U. S. 339, 33 S. Ct. 515, 57 L. Ed. 864 (1913); Halsey v. Minnesota-South Carolina Land & Timber Co., 54 F. 2d 933, (D.C.S.C. 1932); McDonnell v. Jordan, 178 U. S. 229, 20 S. Ct. 886, 44 L. Ed. 1048 (1900).