WESTERN NEW YORK
THE DAILY RECORD
YOUR TRUSTED SOURCE FOR LEGAL AND REAL ESTATE NEWS

Advocate's View: Pre-action discovery in New York does not create path for removal to federal court

By: Mary Jo S. Korona November 15, 2021 0

Mary Jo Korona

In a past Advocate's View article, I wrote about efforts to obtain pre-action discovery pursuant to CPLR 3201(c). To recap, pre-action discovery is available to aid in bringing an action or arbitration as well as to preserve information, but only by court order. Efforts to obtain pre-action discovery will be denied if the applicant is aware of the relevant parties and possesses sufficient information to draft a complaint. Pre-action discovery is not available to determine alternative theories of liability arising out of the same incident. The applicant must make an evidentiary showing to justify pre-action discovery to "prevent the initiation of troublesome and expensive procedures, based upon mere suspicion, which may annoy and intrude upon an innocent party." *Barash v. Waldorf-Astoria,* 2003 WL 1793065 (Sup. Ct. N.Y. Cnty. Mar. 26, 2003).

Notwithstanding that CPLR 3201(c) discovery has been dubbed "pre-action discovery," some cautious or enterprising attorneys have responded to an application for pre-action discovery with a removal petition. Decisions on such applications have resulted in differing conclusions based on consideration of whether CPLR 3201(c) applications were "ancillary to an existing cause of action" or were "premature and improper because no action was commenced, and no pleadings or summons were served." An excellent summary of the decisions with divergent conclusions on the issue can be found in *Johnson v County of Suffolk,* 280 F. Supp.3d 356, 361 (E.D.N.Y. 2017). At least one court has granted removal on the grounds that pre-action discovery falls within the purview of the removal statutes. *Malave v. Costco Wholesale Corp.*, 2002 WL 31016663 (S.D.N.Y. Sept. 9,

2002) (granting removal petition because CPLR 3201(c) falls within the ambit of 28 U.S.C. 1446 (b) and thus, also within the ambit of 28 U.S.C. § 1441).

Ultimately, the Second Circuit Court of Appeals resolved this removal issue in *Teamsters Local 404 Health Services & Insurance Plan v. King Pharmaceuticals, Inc.*, 906 F.3d 260 (2d Cir. 2018) ("Teamsters Local 404"), a decision that provides practitioners with a useful analysis of removal issues.

In Teamsters Local 404, the petitioner initiated a special proceeding under CPLR 3102(c) to obtain a settlement agreement that concluded a prior patent dispute. The respondents filed a notice of removal to the Southern District of New York and moved that court to dismiss the Petition for failure to state a claim.

In resolving the removal issue, the Second Circuit held that a petition filed in New York State Supreme Court under CPLR 3102(c) is not a "civil action" removable under 28 U.S.C. §§ 1441(a) (limiting removal to "any civil action") and 1446(b) (which refers to a "notice of removal of a civil action or *proceeding*") (emphasis added).

The Second Circuit's analysis rested on its determination that CPLR 3102 is not itself a substantive cause of action but rather is "simply a procedural device," and the premise that a decision on removability requires assessment of the competing arguments arising from the language of Sections 1441 and 1446, which relate to the procedure for removing a civil action or "proceeding" but does not define the types of proceedings that are removable. "Accordingly, we are not persuaded by the conclusion in *Christian, Klein & Cogburn v. Nat'l Ass'n of Sec. Dealers, Inc.,* 970 F. Supp. 276 (S.D.N.Y. 1997) to the effect that § 1446 broadens the meaning of 'civil action' for removal purposes."

The Second Circuit further reasoned that because CPLR 3201(c) is limited to those instances in which an action has not been commenced, a 3201(c) petition does not institute a "civil action" under § 1441. "Were we to hold

otherwise, we would force the district courts to decide if they have subject matter jurisdiction before a complaint has been filed or a cause of action stated."

Finally, the Court observed that its conclusion "is consistent with our mandate to construe the removal statute narrowly and 'resolve any doubts against removability.'" In other words, "statutory procedures for removal are to strictly construed."

In closing, the parameters of pre-action discovery as defined by CPLR 3201(c) and decisional law limit the circumstances under which pre-action discovery will be granted. These limitations, coupled with the premise that federal statutory procedures for removal are to be strictly construed, resulted in a definitive conclusion against removal. This conclusion was, as twice noted by the Second Circuit Court, contrary to that of then Federal District Court Judge Sonia Sotomayor, the author of the opinion in *Christian, Klein & Cogburn*.

Mary Jo S. Korona is a founding partner of Adams Leclair, LLP currently serving as Senior Counsel. Her litigation practice concentrates on business and employment disputes arising in cases filed in state and federal courts and the defense of Article 78 proceedings brought against municipalities.

YOU MIGHT ALSO LIKE

Survey results: Law firm resiliency increased during the remote work transition

November 11, 2021

MCBA President's Message: Let's include everyone when we connect

November 11, 2021

IP Frontiers: Proposed rules for the Copyright Claims Board

November 9, 2021