

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA
CASE NO: 04 80316 CIV PAINE

WILLIAM A. CABANA
Plaintiff

v.

SHARON ANN MAYO, et al
Defendants

MOTION TO QUASH ATTEMPTED SERVICE, MOTION TO DISMISS FOR LACK OF JURISDICTION AND REMAND OF DEFENDANT SHARON ANN MAYO

Defendant, Sharon Ann Mayo, thorough her undersigned counsel, makes this special appearance to attack jurisdiction, and moves to quash any claimed service upon this Defendant and to dismiss the Complaint of William A. Cabana, for lack of jurisdiction over Defendants regarding the Verified Complaint, for failure to prosecute within 3 months and failure to serve Defendant within 120 days and says:

1. No summons on the Verified Complaint has ever been issued and served upon this Defendant or any other Defendant within the 120 day time required by FRCP 4. A Notice of Removal's only effect is to remove whatever state court action exists to Federal Court. It does not confer jurisdiction over claims not made in the state court action or separate claims made in Federal Court that are not part of the state court Supplemental Petition for Modification of Alimony filed by Plaintiff or the motion for contempt by this Defendant to enforce the orders of the state court. The Plaintiff's failure to serve a summons with the Verified Complaint upon this defendant results in this court not obtaining jurisdiction over this Defendant regarding the claims of the Verified Complaint through removal.

2. The record should reflect that Plaintiff did not raise any federal question in state

court. Plaintiff has not pled nor does the state court pleadings reveal that he ever sought to raise any constitutional issues covered by the Verified Complaint in state court. He did not file or seek to file an amended petition, complaint or any other responsive pleading in state court to raise a federal question and never sought permission of the state court to file or serve the Verified Complaint as a pleading in state court. The Verified Complaint was filed, not as a permissive or permitted pleading in the state court action, but instead was filed in this court and not served with appropriate process on this Defendant or any other Defendant. Merely attaching a copy of the Verified Complaint to a notice of removal is not service of process as alleged., even if it had been attached to the Notice of Removal.

3. The Plaintiff's own certificates of service are obviously incorrect. This court should review the Notice of Removal and Notice of Filing Notice of Removal which both have certificates of service dated 4/2/04 which are before this action was even filed. This action was not filed until 4/6/04 (some 30 years after these claimed constitutional issues could or should have been asserted), so no copy of the Verified Complaint with this court's case number could have been served with a Notice of Removal and Notice of Filing Notice of Removal.

4. The pleadings on file show that Plaintiff was aware of the need to have a summons issued as his proposed order attached to his Application to Proceed without Payment of Fees and Affidavit dated 4/7/04 shows that he was requesting the court to grant his motion and order the clerk to issue summons and serve the complaint at the cost of the United States. (p3 of DE 2). This court denied this application (DE 3). The record reflects that Plaintiff did not thereafter request summons be issued by the Clerk and Plaintiff failed to have any summons with the complaint served upon this Defendant or any other Defendant..

5. After no activity for more than 3 months this court ordered Plaintiff to show cause

why the case should not be dismissed for lack of prosecution. However, rather than respond to this court's order, it appears from review of the court file that Plaintiff moved for Default over all the Defendants he had not served with summons and complaint.

6. Upon the above, this Defendant has not been served with a summons and complaint with notice of the time for response as required by F.R.C.P. 4. Therefore, as a result of the removal, this court only has jurisdiction over the issues in the State Court pleadings which are not Federal questions over which this court should continue to assert jurisdiction when dismissed for failure to serve the complaint within 120 days and failed to prosecute for more than 3 months.

7. Further, the Plaintiff's own pleadings show, on their face, that more than 30 days passed after permanent alimony was awarded to the wife (30 years) and after the motion for contempt was served upon him by this Defendant in the state court action. Therefore, the state court action should immediately be remanded back to the state court. Plaintiff also can not remove the action from state court because he is a Plaintiff below and only Defendants can remove.

Wherefore, this Defendant, requests this matter be dismissed and the state court action remanded back to the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida.

MEMORANDUM OF LAW

Federal Rules of Civil Procedure Rule 4 governs issuance of Summons and in FRCP 4c(1) provides that a summons shall be served together with a copy of the Complaint. The summons appraises a party of when a Defendant has to respond to a Complaint. No obligation to respond to a complaint arises until both the summons and complaint have been properly served on a Defendant. Service is not effective until the complaint has first been filed with the court.

J.O. Alvarez, Inc. v Rainbow Textiles, Inc., 168 F.R.D. 201 (SD Tex 1996). Actual or constructive notice of a lawsuit does not satisfy the Rule 4 service requirement and Plaintiff has failed to have summons issued or served within the time required by FRCP 4 (m).

Rule 4 provides

(a) **Form.** The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. *It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint.* The court may allow a summons to be amended.

(b) **Issuance.** Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. ...

(c) **Service with Complaint; by Whom Made.** (1) *A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint* (emphasis added)

Service of a notice of removal upon counsel for this Defendant in the state court action does not constitute service of a summons and complaint as required by F.R.C.P 4. There is no state court rule or statute pled authorizing service by mail. There has been no waiver of service. The mailing of a Notice of Removal to state court counsel for this Defendant, who is not admitted in Federal Court, does not confer jurisdiction over this Defendant in Federal Court as to anything but what is pled in state court.. The initial Notice of Removal did not contain a copy of the Verified Complaint and only consisted of a 4 page Notice of Removal with no case number dated April 2, 2004 and Notice of Filing of Notice of Removal with no case number dated April 2, 2004.

Failure to make service of process within the time provided by the rules warrants dismissal. *Campbell v U.S.*, 496 F. Supp. 36 (DC Tenn 1980). This is particularly true when the

Plaintiff was aware of the need to serve a summons with the complaint as reflected by his own proposed order included with his in pauperis application. Failure to serve a summons not signed by the clerk and not accompanied with a copy of the complaint was insufficient to establish jurisdiction over a defendant in *Macaluso v New York State Dept of Environ. Conserv.*, 115 F.R.D 16 (DC NY 1986).

The Verified Complaint is a nullity in the state court action. It was not a pleading filed therein under Fla. R.C.P. requirements for amended pleadings which provides:

RULE 1.190. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. *Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party.* If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. Leave of court shall be given freely when justice so requires. A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders. (emphasis added)

Herein, the Plaintiff did not seek leave in the state court action to amend his pleadings to assert a constitutional question and then seek removal. Plaintiff instead served a notice of removal and then filed his Verified Complaint in this court. Even if Plaintiff mailed a copy of the complaint to state court counsel for this Defendant as claimed, this would not constitute service of the verified complaint under Florida State court rules that would require a response by this Defendant. Likewise, under the most favorable view for Plaintiff that he mailed a copy, sending this Defendant a copy of a complaint that he intends to file and failing to serve the complaint with a summons is not compliance with Rule 4 to give this court jurisdiction over this Defendant regarding the allegations of the Verified Complaint as in *J.O. Alvarez, Inc., supra*.

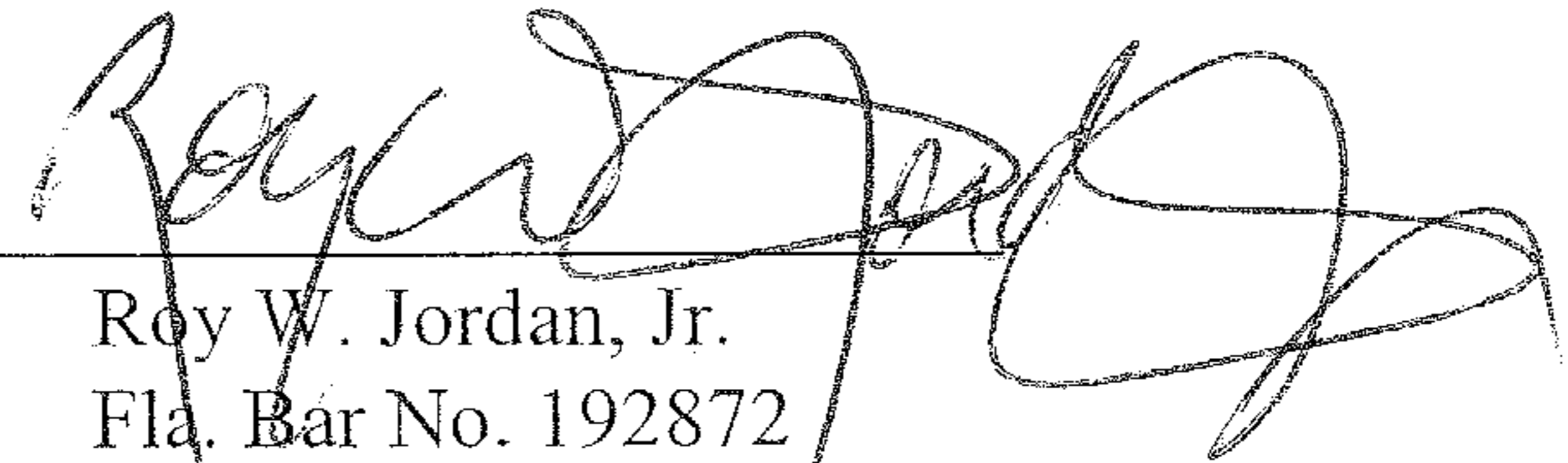
Only a defendant may remove. *Chicago, Rock Island & Pacific Railroad Co. v Stude*, 346 U.S. 574, 74 S.Ct. 290, 98 L.Ed. 317 (1954). The Plaintiff's own pleadings show he was the Plaintiff below. The Supplemental Petition for Modification attached to the affidavit of Cathy L.

Kamber also shows that Plaintiff was not a Defendant below but a Petitioner. A counter-defendant is never a defendant within the meaning of the general removal statute. *Federal Deposit Insurance Corp. v S & I 85-1, Ltd.*, 22 F.3d 1070, 1072 (11th Cir. 1994). See also, *Persoff v Aran*, 792 F.Supp 803, 804 (S.D. Fla. 1992).

I HEREBY CERTIFY that a copy of the foregoing has been served by mail upon William A. Cabana, 1050 Capri Isles Blvd. Apt F 105, Venice, FL 33492 this 3rd day of December 2004.

ROY W. JORDAN, JR., P.A.
1675 Palm Beach Lakes Blvd, Suite 700
West Palm Beach, FL 33401
561-471-5505; 561-478-1498 fax

By



Roy W. Jordan, Jr.
Fla. Bar No. 192872
Attorney for Defendant, Sharon Ann Mayo