

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY ANNE SPIGONARDO and :
FRANCESCO SPIGONARDO a/k/a/ :
FRANCIS SPIGONARDO a/k/a :
FRANK SPIGONARDO :
 :
 : CIVIL ACTION
v. :
 : NO. 00-1067
K MART CORPORATION, K MART OF :
PENNSYLVANIA, LP, THE BIG K MART :
and GLIMCHER HOLDINGS LIMITED :
PARTNERSHIP :

M E M O R A N D U M

WALDMAN, J.

May 4, 2000

Presently before the court is plaintiffs' Motion for Remand in this personal injury case. Plaintiffs are suing for injuries allegedly sustained when a wooden pallet fell on plaintiff Mary Anne Spigonardo in a retail store on property owned by Glimcher Holdings and leased to or operated by the other defendants.

On December 7, 1999, Plaintiffs filed a Praecipe and Writ of Summons against defendants in the Court of Common Pleas of Delaware County. On February 15, 2000, following service on all defendants, plaintiffs filed a civil action Complaint in the Court of Common Pleas of Delaware County. Citing original diversity jurisdiction, defendant Glimcher Holdings filed a Notice of Removal on February 28, 2000, thirteen days after plaintiffs filed the Complaint in state court.

The Complaint alleges, in relevant part, that defendant K Mart Corporation is a Michigan corporation; that defendant K Mart of Pennsylvania is a "Pennsylvania limited partnership duly authorized to transact business" in Pennsylvania; that defendant

Big K Mart is a "sole proprietorship and/or partnership and/or corporation and/or other business entity transacting business" in Pennsylvania, with a "principal place of business and/or offices" in Clifton Heights, Delaware County, Pennsylvania; and, that defendant Glimcher Holdings is a "Delaware Limited Partnership duly authorized to transact business" in Pennsylvania, with a "principal place of business" in Columbus, Ohio.

In its Notice of Removal, defendant Glimcher Holdings alleges that "defendant K Mart Corporation is the parent corporation and K Mart of Pennsylvania and Big K Mart are corporations, or companies or subsidiaries of K Mart Corporation"; that K Mart Corporation is incorporated in Michigan with a principal place of business there; and, that plaintiffs are citizens of Pennsylvania.¹

No other defendant has either joined in the removal or opposed the motion to remand.

The Notice of Removal is facially defective for failure of all properly served defendants to join in the removal within 30 days of initial service. See Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995); Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994); Doe v. Kerwood, 969 F.2d 165, 168 (5th Cir. 1992); Johnson v. Helmerick & Payne, Inc., 892 F.2d 422, 423 (5th

¹Glimcher Holdings also asserts and the court accepts that it is incorporated in Delaware and maintains its principal place of business in Ohio.

Cir. 1990); Michaels v. State of N.J., 955 F. Supp. 315, 320-21 (D.N.J. 1996); Gibson v. Inhabitants of Town of Brunswick; 899 F. Supp. 720, 721 (D. Me. 1995); Landman v. Borough of Bristol, 896 F. Supp. 406, 409 (E.D. Pa. 1995); Jackson v. Roseman, 878 F. Supp. 820, 826 (D. Md. 1995); Ogletree v. Barnes, 851 F. Supp. 184, 186-87 & n.3 (E.D. Pa. 1994); McManus v. Glassman's Wynnefield, Inc., 710 F. Supp. 1043, 1045 (E.D. Pa. 1989); Collins v. American Red Cross, 724 F. Supp. 353, 359 (E.D. Pa. 1989). Plaintiffs, however, did not specifically assert this procedural defect in their motion for remand and thus appear to have waived it. See Page v. City of Southfield, 45 F.3d 128, 133 (6th Cir. 1995); Balazik, 44 F.3d at 213-14 & n.5; Michaels, 955 F. Supp. at 321.

Plaintiffs have moved for remand for lack of subject matter jurisdiction, and this is something the court would be obligated to assess in any event. "Federal courts have an ever-present obligation to satisfy themselves of their subject matter jurisdiction and to decide the issue sua sponte." Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir. 1995). See also Bregman v. Alderman, 955 F.2d 660, 664 (11th Cir. 1992) (sua sponte remand where diversity of citizenship of parties not apparent from pleadings); Steel Valley Authority v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987) ("lack of

subject matter jurisdiction voids any decree entered in a federal court").

Glimcher Holdings has failed to produce any affidavit or competent evidence from which the court can conscientiously ascertain that there is complete diversity of citizenship. Contrary to the assertion and assumption of Glimcher Holdings, it is the removing party which bears the burden of demonstrating the existence of subject matter jurisdiction. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir.), cert. denied, 516 U.S. 1009 (1995); Warner v. Mutual Life. Ins. Co. of New York, 998 F. Supp. 592, 594 (E.D. Pa. 1998). See also Leiblinger v. Saks Fifth Avenue, 612 F. Supp. 872, 874 (N.D. Ohio 1985) (in meeting this burden, unsupported statements by counsel are not a substitute for competent evidence).

Assuming K Mart of Pennsylvania is a limited partnership as alleged, there has been no showing or even suggestion that each of the partners are citizens of states other than Pennsylvania. See Carden v. Arkoma Assoc., 494 U.S. 185, 195-96 (1990) (citizenship of all general and limited partners attributed to limited partnership for purpose of diversity jurisdiction). Insofar as it is suggested that K Mart of Pennsylvania and Big K Mart may be corporations, there has been no showing or suggestion that either is incorporated outside of

Pennsylvania. A corporation is a citizen of the state in which it is incorporated and the state in which it maintains its principal place of business. See Midlantic Nat'l Bank v. E.F. Hansen, 48 F.3d 693, 696 (3d Cir.), cert. dismissed, 515 U.S. 1184 (1995); Rodriguez v. SK & F Co., 833 F.2d 8, 9 (1st Cir. 1987); Wisconsin Knife Works, 781 F.2d at 1282; Wymard v. McCloskey & Co., 342 F.2d 495, 497 (3d Cir.), cert. denied, 382 U.S. 823 (1965).

Even accepting that K Mart of Pennsylvania and Big K Mart are subsidiaries of K Mart Corporation, the citizenship of one corporation is not attributed to the other merely because of a parent-subsidiary relationship. See Mennen Co. v. Atlantic Mut. Ins. Co., 147 F.3d 287, 293 n.7 (3d Cir. 1998); Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp., 461 F.2d 1140, 1142 (3d Cir. 1972); Carnera v. Lancaster Chemical Corp., 387 F.2d 946, 947 & n.2 (3d Cir. 1967), cert. denied, 390 U.S. 1027 (1968). Insofar as Big K Mart, as also suggested, may be a proprietorship, partnership or other unincorporated business entity with its principal place of business in Pennsylvania, there has been no showing that the owners or members of such artificial entity are all citizens of states other than Pennsylvania. See Carden, 494 U.S. at 195-96.

All doubts as to the existence of federal jurisdiction must be resolved in favor of remand. See Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993); Boyer v. Snap-On Tools corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498

U.S. 1085 (1991). K Mart of Pennsylvania and Big K Mart appear to be citizens of Pennsylvania.² In any event, the removing defendant has not remotely shown that complete diversity of citizenship exists among the parties and this case clearly does not involve a federal question. No basis has been provided for the court to exercise subject matter jurisdiction in this case.

Consistent with 28 U.S.C. § 1447(c), this case will be remanded.³ An appropriate order will be entered.

²The removing defendant appears to accept that K Mart of Pennsylvania is a citizen of this state in asserting that it "was fraudulently joined in an attempt to defeat diversity." Plaintiffs have pled a facially valid claim against this defendant. A party who possesses, controls or manages business premises may be liable to an invitee whether or not that party is a lessee, agent of the lessee or otherwise licensed or engaged to operate a business on the premises. Defendant has not shown that the claim against this co-defendant is "wholly insubstantial or frivolous." See Batoff v. state Farm Ins. Co., 977 F.2d 848, 852 (3d cir. 1992).

³Plaintiffs also ask for attorney fees and costs. The court has "broad discretion" in determining whether to award such expenses. Mints v. Educ. Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996). While not required, a removing party's bad faith or improper purpose are factors which courts consider. Id. at 1261; Moorco Int'l. V. Elsaq Bailey Process Automation, 881 F. Supp. 1000, 1007 (E.D. Pa. 1995); Robinson v. Computer Learning Centers, 1999 WL 817745, *3 (E.D. Pa. Oct. 12, 1999). The rule that a removing party bears the burden of demonstrating subject matter jurisdiction is rather basic. On the other hand, it appears that the removing defendant was on the verge of stipulating to the remand and thus with some forbearance by plaintiffs, there may have been no need to file a motion. There is no time limit on motions to remand on jurisdictional grounds. In any event, plaintiffs' motion and brief are rather terse, basic and to the point, and they have documented no fees or costs incurred in connection with them. The court will not award expenses in the circumstances.

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O R D E R

AND NOW, this day of May, 2000, upon consideration of plaintiffs' Motion for Remand (Doc. #2), the response of defendant Glimcher Holdings and in the absence of a response from any other defendant, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and, pursuant to 28 U.S.C. § 1447(c), this case is **REMANDED** to the Court of Common Pleas of Delaware County.

BY THE COURT:

JAY C. WALDMAN, J.