

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

CLAIR STROZYK, Individually, and as parent of, :
and as Co-Administrator of the ESTATE OF :
CHRISTOPHER STROZYK :
and :
DENISE STROZYK, Individually, and as parent of, :
and as Co-Administratrix of the ESTATE OF :
CHRISTOPHER STROZYK :
Plaintiffs, : CIVIL ACTION
v. : No. 01-CV-1898
NORFOLK SOUTHERN CORPORATION :
Defendant. :

CLAIR STROZYK, Individually, and as parent of, :
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CHRISTOPHER STROZYK :
and :
DENISE STROZYK, Individually, and as parent of, :
and as Co-Administratrix of the ESTATE OF :
CHRISTOPHER STROZYK :
Plaintiffs, : CIVIL ACTION
v. : No. 01-CV-2478
NORFOLK SOUTHERN CORPORATION and :
JOSEPH T. SULLIVAN, :
Defendants. :

MEMORANDUM

BUCKWALTER, J.

July 18, 2001

Presently before this Court are two motions on behalf of Plaintiffs Clair and Denise Strozyk and the Estate of Christopher Strozyk (“Plaintiffs”). The first motion is for voluntary dismissal of Plaintiffs’ complaint (“First Complaint”) under Fed. R. Civ. P. 41(a)(2).

The second motion is one for remand¹ of Plaintiffs' second complaint ("Second Complaint").

The Court will grant Plaintiffs' motion for voluntary dismissal and deny their motion for remand.

I. BACKGROUND

Both complaints arise out of a fatal collision between Plaintiffs' son, Christopher Strozyk, and a Norfolk Southern Inc. ("Norfolk") train driven by Joseph T. Sullivan ("Sullivan"). Following the accident, Plaintiffs filed the First Complaint in the Court of Common Pleas for Philadelphia County alleging common law negligence and tort claims. Norfolk, a resident of Virginia, removed the case to the Eastern District of Pennsylvania under 28 U.S.C. § 1332 citing diversity between itself and Plaintiffs who are residents of Pennsylvania. The case was assigned to this Court under civil action No. 01-CV-1898. Norfolk filed an answer to this claim on May 8, 2001. Two days later, Plaintiffs, allegedly unaware of Norfolk's answer, filed a Notice of Voluntary Dismissal and simultaneously filed the Second Complaint in the Court of Common Pleas for Philadelphia County. This second complaint included the same causes of action raised in the first one, but it also named Joseph T. Sullivan, a resident of Pennsylvania and an employee of Norfolk, as a defendant. Norfolk removed this second complaint to the Eastern District of Pennsylvania where the case was assigned to Judge Van Antwerpen under civil action 01-CV-2478. Subsequently, as the cases are related, they both were brought before this Court.

¹ The Court notes in Defendants' response to Plaintiffs' motion for remand that Defendants suggest this case may be transferred to Allentown for further proceedings. However, without a formal motion to transfer, the Court will not evaluate this issue.

II. DISCUSSION

Norfolk opposes Plaintiffs' motions arguing that Plaintiffs actually seek to destroy diversity rather than to file a genuine claim against Sullivan. In this way, Norfolk claims, Plaintiffs engaged in fraudulent joinder which makes both remand and dismissal inappropriate.² Plaintiffs counter, alleging that Sullivan is an indispensable party and therefore he must be included in the complaint.

A. Motion for Remand

The Court begins its analysis of Plaintiffs' motions with the motion for remand. Although "removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand," remand is nonetheless improper if plaintiffs join a dispensable defendant for the purpose of defeating diversity. Steel Valley Auth. v. Union Switch & Signal Div., et. al., 809 F.2d 1006, 1010 (3d Cir. 1987). Here, in order to determine whether removal was proper and conversely whether joinder was fraudulent under Fed. R. Civ. P. Rule 19, the Court first must decide if Sullivan is an indispensable party. See Steel Valley Auth., 809 F.2d at 1012. If the Court concludes Sullivan, a Pennsylvania resident, is indispensable and to include Sullivan will destroy diversity, then the Second Complaint should be remanded to state court. However, if the Court finds Sullivan is not indispensable and accordingly that joinder was fraudulent or impermissible, then Plaintiffs' motion for remand should be denied and the Second Complaint will remain before this Court.

² Although Plaintiffs technically did not join Sullivan, the Court believes their actions were designed to achieve the same end. Therefore, the Court will apply the joinder analysis to these motions.

To determine whether a party is indispensable, the Court must ascertain whether Sullivan's interest in this litigation is such that "a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Shields v. Barrow, 58 U.S. 130, 139 (1854). Here, the Court finds Sullivan is not an indispensable party. Where an employee is acting within the scope of his employment, the doctrine of *respondeat superior* allows plaintiffs to recover from the employer for the actions of the employee. See Hall v. Nat'l Serv. Indus., 172 F.R.D. 157, 160 (E.D. Pa. 1997) (explaining that "plaintiffs are still able to receive complete relief as they are suing defendant National under the theory of *respondeat superior* for Chapmon's [employee] alleged negligence and directly for its [National's] alleged negligence..."). As explained in Hall, plaintiffs are not required to name an employee separately from his employer, thus an employee is not a necessary party to a suit against his employer. See id. at 159.

Here, Sullivan was an employee of Norfolk and the collision occurred while Sullivan was acting in the scope of his employment. See Second Compl. ¶ 7 (stating that "at all times relevant hereto, Defendant Sullivan was acting as the agent, servant, workman, and/or employee of Defendant Norfolk Southern Corporation."). As an employee, Sullivan is not an indispensable party and therefore Plaintiffs may not join him. For this reason, the motion for remand is denied and Plaintiffs' Second Complaint will remain before this Court.

B. Motion for Voluntary Dismissal

The Court now turns its attention to Plaintiffs' motion for voluntary dismissal and the Court will grant this motion. Plaintiffs filed their motion for dismissal after Norfolk had

submitted its answer. If Plaintiffs had filed this motion two days earlier, before the answer had been filed, Rule 41(a)(1) would have compelled me to grant Plaintiffs' motion. However, because the events transpired as they did, this decision is one for my discretion. See Fed. R. Civ. P. 41(a)(2).

Defendants oppose dismissal alleging that Plaintiffs sought to dismiss the First Complaint so they could file the Second Complaint and add Sullivan as a defendant in order to destroy diversity. Defendants also contend that as Norfolk is a resident of another forum, it would be unfairly prejudiced if the case was remanded to state court. As the Court determined *supra* that joinder was inappropriate and Plaintiffs' Second Complaint had to remain in federal court, Defendants' concerns are moot. Moreover, in light of the temporal proximity of the filings and the fact that the litigation is still in its early stages, I believe dismissal is reasonable and will not unfairly prejudice either party. Finally, the interests of judicial economy are served if only one complaint remains. For these reasons, I have determined that dismissal is appropriate.

III. CONCLUSION

For the foregoing reasons, it is hereby ordered that Plaintiffs' Motion for Remand is Denied and Plaintiffs' Motion for Voluntary Dismissal is Granted.

An appropriate order follows.

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JOSEPH T. SULLIVAN,	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of July, 2001, it is hereby ORDERED as follows:

1. Upon consideration of Plaintiffs' Motion for Voluntary Dismissal (Docket No. 5), Norfolk Southern Corp.'s responses thereto (Docket Nos. 6, 7) and Plaintiffs' reply

(Docket No. 8), it is hereby ORDERED that Plaintiffs' motion is GRANTED and this complaint, filed as Civil Action No. 01-CV-1898, is DISMISSED without prejudice.

2. Upon consideration of Plaintiffs' Motion for Remand (Docket No. 2) and Norfolk Southern Corp. and Joseph T. Sullivan's response thereto (Docket No. 3), it is hereby ORDERED that Plaintiffs' motion is DENIED.

BY THE COURT:

RONALD L. BUCKWALTER, J.