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

GEORGE GULDNER AND PHYLLIS A. GULDNER	:	CIVIL ACTION
v.	:	
BRUSH WELLMAN INC., et. al.	:	NO. 01-0176

MEMORANDUM AND ORDER

HUTTON, J. July 25, 2001

Presently before the Court are the Plaintiffs' Motion for Leave to File Amended Pleading and Motion for Remand (Docket No. 6), the Defendant NGK Metals Corporation's Opposition to Plaintiffs' Motion for Leave to File Amended Pleading and Motion for Remand (Docket No. 11), the Defendant Brush Wellman Inc.'s Opposition to Plaintiffs' Motion for Leave to File Amended Pleading and Motion for Remand (Docket No. 12), the Defendant Cabot Corporation's Response to Plaintiffs' Motion for Leave to File Amended Pleading and Motion for Remand (Docket Nos. 18 and 19), the Plaintiffs' Reply Brief in Support of Their Motion (Docket No. 15), the Defendant Brush Wellman Inc.'s Motion to Dismiss (Docket No. 2), the Plaintiff's Response to Defendant Brush Wellman Inc.'s Motion to Dismiss (Docket No. 9), the Reply Memorandum of Brush Wellman Inc. in Support of Motion to Dismiss (Docket No. 17), the Defendant Cabot Corporation's Motion to Dismiss and to Strike (Docket No. 8), the Plaintiff's Response to Cabot Corporation's

Motion to Dismiss and to Strike (Docket No. 16), and the Reply Brief in Support of Defendant Cabot Corporation's Motion to Dismiss and to Strike (Docket No. 21).

I. BACKGROUND

On December 8, 2000, the Plaintiffs, George and Phyllis Guldner, filed suit in the Court of Common Pleas of Philadelphia County against the Defendants, Brush Wellman, Inc., Cabot Corporation, NGK Metals Corporation (NGK), Carl Harris, Lynn Woodside, and Len Velke. The complaint contained allegations of injuries to the Plaintiffs caused by exposure to beryllium while employed at an NGK plant. The complaint further alleged that Defendants Harris, Woodside, and Velke were responsible for enforcing NGK plant safety policies during the time period of the Plaintiffs' beryllium exposure. In addition, those Defendants were accused of making fraudulent misrepresentations to the Plaintiffs which caused the Plaintiffs further injury. On January 8, 2001, the Defendants removed the case to this Court. In their notice of removal, the Defendants asserted that the Court should ignore the Pennsylvania citizenship of Defendants Harris, Woodside, and Velke when examining subject matter jurisdiction because they were fraudulently joined for the purpose of destroying diversity.

On January 26, 2001, the Plaintiffs made a motion for voluntarily dismissal of Defendants Harris, Woodside, and Velke and also filed a motion for leave to amend their complaint to add

Pennsylvania resident Gerald White as a defendant. The proposed First Amended Complaint essentially substitutes Gerald White for Defendants Harris, Woodside, and Velke as the party who was responsible for enforcing plant safety policies at NGK. In addition, the First Amended Complaint alleges that Gerald White is actually the party who made fraudulent misrepresentations to the Plaintiffs. On February 20, 2001, the Court granted the Plaintiffs' motion for voluntarily dismissal of Defendants Harris, Woodside, and Velke. The Court now addresses the Plaintiffs' motion for leave to amend their complaint.

II. DISCUSSION

A. Motion for Leave to File Amended Pleading and Remand

The Plaintiffs' seek leave to amend their complaint to add a non-diverse defendant. A motion for leave to amend a complaint will usually be measured under the liberal standards of Rule 15 of the Federal Rules of Civil Procedure. However, because the proposed amendment in this case would defeat diversity jurisdiction and require this Court to remand the case back to the Court of Common Pleas of Philadelphia County, we view the proposed amendment with a more cautious eye. See Hensgen v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987). The Court will review the motion to amend and remand under the provisions of 28 U.S.C.A § 1447(e).

Prior to the amendments of 1988, motions to amend the complaint to add non-diverse defendants were decided under §

1447(c). The Third Circuit interpreted that provision strictly ruling that the only time the court could allow amendment of the complaint to add a diversity-destroying defendant was when that defendant would be considered an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure. See Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1012 n.6 (3d Cir. 1987). Other circuits gave the district courts more discretion by enumerating factors which should be considered in attempting to balance "the defendant's interests in maintaining the federal forum with the competing interests of not having parallel lawsuits." Hensgens, 833 F.2d at 1182. In 1988, Congress responded to the contrasting approaches by passing § 1447(e) which adopted the more liberal approach giving the district court broad discretion in deciding whether to join non-diverse defendants after removal.

The wide latitude given to the district court under § 1447(e) is clear from the language of that provision: "[i]f after removal the plaintiff seek to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." § 1447(e). Because the Third Circuit has not yet announced a standard to be used when applying § 1447(e), the courts within the circuit have exercised that discretion by considering a variety of factors. See Gilberg v. Stepan Co., 24 F.Supp.2d 355,

356-57 (D.N.J. 1998); see also Hensgens, 833 F.2d at 1182. The factors courts have looked at to determine the propriety of post-removal joinder of nondiverse parties are: (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction, (2) whether the plaintiff has been dilatory in asking for amendment, (3) whether the plaintiff will be significantly injured if amendment is not allowed, and (4) any other factors bearing on the equities. See Hensgens, 833 F.2d at 1182. The Court will use these factors to determine if joinder is appropriate in this case.

The Defendants object to the Plaintiffs' motion to amend primarily on the basis that the purpose of the amendment is to defeat federal jurisdiction. In this regard the Defendants assert that the Plaintiffs' motive is clear from the fact that they voluntarily dismissed previous nondiverse defendants who were fraudulently joined to defeat jurisdiction and now seek to add Gerald White to fill the void left by the voluntarily dismissed defendants. As a preliminary matter, the Defendants argument presupposes that the original nondiverse defendants were fraudulently joined. The Plaintiffs, on the other hand, assert that they mistakenly claimed that the previously joined defendants were responsible for the fraudulent misrepresentations only to find out upon further investigation that Gerald White was actually the responsible party. It would be improper for the Court to adopt the assumption that the originally joined defendants were fraudulently

joined and that the substitution of Gerald White was done in bad

faith. Nothing in the record, other than speculation, supports that position.

In addition, the Defendants claim that the amended complaint does not set forth a colorable claim against Gerald White. The Defendants main contention, in this regard, is that the Plaintiffs have not adequately alleged a claim against Gerald White which would allow them to avoid the immunity provided to co-employees by the Workman's Compensation Act (the "WCA"). The WCA provides that

> [i]f disability or death is compensable under this act, a person shall not be liable to anyone at common law or otherwise on account of such disability or death for any act or omission occurring while such person was in the same employ as the person disabled or killed, except for intentional wrong.

See 77 P.S. § 72. This language makes clear, however, that a worker who is injured in the course of employment can hold a co-employee liable for injuries resulting from intentional acts. See 77 P.S. § 72. The question in the case is whether Gerald White's acts qualify as intentional under the WCA.

An employee who intentionally misrepresents or conceals material information has committed an intentional wrong under the Pennsylvania WCA and a fellow employee is not barred from bringing that action at common law. See Martin v. Lancaster Battery Co., Inc., 606 A.2d 444, 446 n.5 (Pa. 1992)(affirming Superior Court ruling that employee was not barred from charging co-employee with willfully and intentionally withholding test results); see also McGinn v. Vallotti, 525 A.2d 732, 735 (Pa. Super. Ct.

1987)(concluding that intentional fraudulent misrepresentation is an intentional wrong not normally expected to occur in the workplace). In Count Three of Plaintiffs' First Amended Complaint, the Plaintiffs allege fraudulent misrepresentation aggravating existing injury by Defendant NGK and Gerald White. See First Am. Compl. ¶¶ 31-36. To state a claim for fraudulent misrepresentation, a plaintiff must prove (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient as the proximate cause. See Woodward v. Dietrich, 548 A.2d 301 (Pa. Super. 1988). The Plaintiffs' amended complaint alleges the utterance of an array of misrepresentations intended to induce action by the Plaintiffs. See First Am. Compl. ¶ 33. In addition, the Plaintiffs allege reliance on the misrepresentations and proximate cause of their injuries based upon that reliance. See First Am. Compl. ¶¶ 34, 35. Viewing the factual allegations in Plaintiffs' First Amended Complaint as true, this Court finds that Plaintiffs have stated a colorable claim against the Defendants.

At this stage of the proceedings, the Court should not engage in a deeper analysis of the documents or facts. See Batoff v. State Farm Ins. Co., 977 F.2d 848, 852 (3d Cir. 1992)(analyzing the term colorable claim in the context of fraudulent joinder).

Otherwise, the analysis would be akin to that of a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See id. Instead, the Court will stop with a determination that the facts alleged in the amended complaint could support a conclusion that the claims against the defendants were not wholly insubstantial and frivolous. See id. As discussed above, this Court finds that Plaintiffs' claims are colorable and therefore, the Court concludes that Gerald White is not being joined solely to defeat diversity jurisdiction.

The remaining considerations, the extent to which the Plaintiffs have been dilatory in seeking amendment, any potential injury the Plaintiffs will incur if amendment is not allowed, and any other factors bearing on the equities, also weigh in favor of allowing amendment. In this context, dilatory means that any delay in seeking the amendment was done to prolong the litigation. See In Re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). There is nothing to suggest that the Plaintiffs have been dilatory in this case. In addition, absent an amendment to the complaint, the Plaintiffs will not be allowed to pursue their claim against Gerald White in this litigation. Therefore, they will be forced to choose either duplicative litigation in the state court or foregoing their claims entirely. As a result, there will be some harm if the Plaintiffs are not allowed to amend their complaint. Finally, the parties have not pointed to any other

factors which bear on the equities.

As a result of this analysis and a balancing of the above discussed factors, the Court grants the Plaintiffs motion for leave to amend. In addition, because the amendment destroys subject matter jurisdiction, the Court must remand this case back to the Court of Common Pleas of Philadelphia County. See § 1447(e).

B. The Two Remaining Motions

Because the Court has remanded this case back to the Court of Common Pleas of Philadelphia County, the motions of the Defendant Brush Wellman to Dismiss and the Defendant Cabot Corporation to Dismiss and to Strike have been rendered moot.

An appropriate Order follows.

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O R D E R

AND NOW, this 25th day of July, 2001, upon consideration of the Plaintiffs' Motion for Leave to File Amended Pleading and Motion for Remand (Docket No. 6), the Defendant NGK Metals Corporation's Opposition to Plaintiffs' Motion for Leave to File Amended Pleading and Motion for Remand (Docket No. 11), the Defendant Brush Wellman Inc.'s Opposition to Plaintiffs' Motion for Leave to File Amended Pleading and Motion for Remand (Docket No. 12), the Defendant Cabot Corporation's Response to Plaintiffs' Motion for Leave to File Amended Pleading and Motion for Remand (Docket Nos. 18 and 19), the Plaintiffs' Reply Brief in Support of Their Motion (Docket No. 15), the Defendant Brush Wellman Inc.'s Motion to Dismiss (Docket No. 2), the Plaintiff's Response to Defendant Brush Wellman Inc.'s Motion to Dismiss (Docket No. 9), the Reply Memorandum of Brush Wellman Inc. in Support of Motion to Dismiss (Docket No. 17), the Defendant Cabot Corporation's Motion to Dismiss and to Strike (Docket No. 8), the Plaintiff's Response to Cabot Corporation's Motion to Dismiss and to Strike (Docket No. 16), and the Reply Brief in Support of Defendant Cabot

Corporation's Motion to Dismiss and to Strike (Docket No. 21), IT IS HEREBY ORDERED that the Plaintiff's Motion for Leave to File Amended Pleading and Motion for Remand is **GRANTED**;

IT IS HEREBY FURTHER ORDERED that the Plaintiff's First Amended Complaint is considered **FILED** with the Court;

IT IS HEREBY FURTHER ORDERED that the above captioned case is **REMANDED** to the Court of Common Pleas of Philadelphia County;

IT IS HEREBY FURTHER ORDERED that the Defendant Brush Wellman Inc.'s Motion to Dismiss is **DENIED AS MOOT**; and

IT IS HEREBY FURTHER ORDERED that the Defendant Cabot Corporation's Motion to Dismiss and to Strike is **DENIED AS MOOT**.

BY THE COURT:

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HERBERT J. HUTTON, J.