

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

MICHAEL PLATTON and : CIVIL ACTION
ELAINE PLATTON, :
Plaintiffs, :
 :
v. :
 :
KRAFTMAID CABINETRY, INC., :
et al., :
Defendants. : No. 03-3304

MEMORANDUM AND ORDER

J. M. KELLY, J. FEBRUARY , 2004

Presently before the Court are a Motion to Remand filed by Plaintiffs Michael Platton and Elaine Platton, husband and wife ("Plaintiffs"), and a Joint Motion for Permission to File a Joint Supplemental Notice of Removal Nunc Pro Tunc filed by Defendants Kraftmaid Cabinetry, Inc. and Kraftmaid Sales and Distribution, Inc. (together, "Kraftmaid") and Lowe's Home Centers, Inc. ("Lowe's") (collectively, "Defendants") and Plaintiffs' response thereto. Plaintiffs contend that this action, having been removed to this Court by Defendant Kraftmaid with the averred consent of Lowe's, must be remanded to the Court of Common Pleas of Philadelphia County because Lowe's did not file an actual timely joinder in the suit's removal. In response, Defendants filed a Joint Supplemental Notice of Removal Nunc Pro Tunc to cure the technical defect. For the following reasons, Plaintiff's Motion for Remand is **DENIED** and Defendants' Motion for Permission to File a Joint Supplemental Notice of Removal is

GRANTED.

I. BACKGROUND

On April 24, 2003, Plaintiffs initiated this product liability action in the Court of Common Pleas of Philadelphia County alleging that they suffered personal injuries as a result of exposure to toxic fumes that they claim emanated from kitchen cabinets designed and manufactured by Kraftmaid. The Complaint was served on Defendant Kraftmaid by certified mail. The Complaint was also served on Defendant Lowe's at its place of business in Plymouth Meeting by the Sheriff of Montgomery County on May 2, 2003.

On May 23, 2003, Kraftmaid filed a timely Notice of Removal, invoking this Court's subject-matter jurisdiction based on diversity of citizenship of the parties. The Notice of Removal, which, on its face, was filed on behalf of Kraftmaid, alleged that all Defendants, including Lowe's, consented to removal. The Notice of Removal did not otherwise contain any details relating to Kraftmaid's communications with Lowe's, the form of Lowe's purported consent, or the identity or authority of the person giving such consent on behalf of Lowe's.

On June 20, 2003, Plaintiffs filed a Motion to Remand based on the lack of evidence of unanimity among all Defendants to removal, which 28 U.S.C. § 1446 requires and which must be

evidenced by a written joinder filed with the Court.

Defendants responded by filing a Joint Motion for Permission to File a Joint Supplemental Notice of Removal Nunc Pro Tunc, stating that this technical omission is waivable and should not affect this Court's properly-established jurisdiction in the first instance.

Plaintiffs have previously agreed to extensions of time to answer the Complaint for all Defendants, and all Defendants have since filed Answers to Plaintiffs' Complaint.

II. DISCUSSION

Plaintiffs contend that Lowe's should have filed its joinder in the removal action by June 1, 2003, and that Lowe's failure to do so is a fatal defect which requires remand of this matter to state court. Defendants respond that, for several reasons, this Court should not be divested of jurisdiction. First, Defendants contend that it was not necessary to acquire consent from Lowe's because Lowe's, as a retailer, is a nominal party to this product liability action against the cabinet manufacturer, Kraftmaid. Second, Defendants contend that, even if consent was required, counsel for Kraftmaid actually obtained consent from Lowe's and did so specifically state in the original timely-filed Notice of Removal. Third, Defendants argue that Lowe's consent to removal was effectively expressed to the Court, within the prescribed

thirty-day period, in the form of a stipulation extending the time within which all Defendants were to answer the Complaint. Finally, Defendants claim that Lowe's has restated its consent to removal by joining in the instant Joint Supplemental Notice. In response, Plaintiffs argue only that Lowe's is not a nominal party to this action, as Plaintiffs did not have a relationship with Kraftmaid prior to delivery of the kitchen cabinets they purchased through retailer Lowe's Home Center in Plymouth Meeting.

Preliminarily, Plaintiffs do not dispute that jurisdiction has properly been established pursuant to 28 U.S.C. § 1441, specifically, that diversity of citizenship exists between Plaintiffs and Defendants, and that the matter in controversy exceeds \$75,000.00. Plaintiffs also do not challenge that Kraftmaid actually secured consent from Lowe's, or that such consent was communicated to the Court in the original, timely-filed Notice of Removal. Plaintiffs' entire argument is that Lowe's did not file its own paper with the Court specifically stating that it was joining in removal, as is typically required in a notice of removal pursuant to 28 U.S.C. § 1446(b). As discussed below, this technical omission is curable, and since this Court has subject-matter jurisdiction in the first instance, we shall retain jurisdiction over this matter.

The removal statute provides that a defendant must file a

notice of removal within thirty days of receipt of the Complaint:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b). Generally, there must be unanimity among all the defendants to the suit's removal. See id.; Hanrick v. Hanrick, 153 U.S. 192 (1894). Since the right of removal is jointly held by all the defendants, there must be timely written notice by each served defendant that the defendant has actually consented to removal. 16 James Wm. Moore et al., Moore's Federal Practice ¶ 107.11 (3d ed. 2003). In this matter, Plaintiffs' argument against removal rests on the technical omission of a written joinder from Lowe's to the Notice of Removal filed by Kraftmaid. There is no dispute, however, that Kraftmaid actually obtained Lowe's consent for removal prior to Kraftmaid making such averments in the initial Notice for Removal.

Our Court has recently revisited the issue of whether a defect in an initial notice of removal could be amended to correct a technical omission. See Miller v. Principal Life Insurance Co., 189 F. Supp. 2d 254 (E.D. Pa. 2002). In Miller, our Court noted that the United States Supreme Court has recognized the right to amend a removal petition to include

relevant information previously omitted. Id. at 257, citing Willingham v. Morgan, 395 U.S. 402, 408 n.3 (1969)(declaring that, “for purposes of this review it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits”). Relying on Willingham and finding that jurisdiction was otherwise proper, the Court in Miller denied the plaintiff’s motion to remand for defendant’s failure to identify another defendant as a nominal party, and permitted the defendants to supplement the original notice of removal, even after the expiration of the prescribed thirty day period, to identify the other defendant as a nominal party. Id. at 258. The Court concluded, “[e]ven if there was a defect in [defendant’s] initial notice of removal, Willingham would permit the amended notice filed here to remedy any error, particularly since the amendment did not affect the court’s subject matter jurisdiction but simply corrected a technical omission.” Miller, 189 F. Supp. 2d at 258.

Similarly, in this case, Defendants’ jointly filed Supplemental Notice of Removal does not affect this Court’s subject-matter jurisdiction, which is proper in the first instance, and is being filed merely to correct the technical omission raised by Plaintiffs.¹ Moreover, Kraftmaid averred in

¹ Even if there was a failure by all the defendants to consent to removal, which there is not in this matter, that defect is waivable and would not deprive this Court of subject-

the Notice of Removal that Lowe's was contacted and had consented to the suit's removal.

Since we are satisfied that all Defendants have indeed consented to removal and, therefore, grant Defendants' Joint Motion for Permission to File a Supplemental Notice of Removal Nunc Pro Tunc, we need not address the issue of whether Defendant Lowe's is a nominal party to this matter.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Remand is **DENIED**, and Defendants' Joint Motion for Permission to File a Joint Supplemental Notice of Removal Nunc Pro Tunc is **GRANTED**.

matter jurisdiction. Ayers v. Watson, 113 U.S. 594, 598-99 (1885); In re FMC Corp. Packaging Sys. Div., 208 F.3d 445, 451 (3d Cir. 2000).

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O R D E R

AND NOW, this day of February, 2004, in consideration of the Motion to Remand filed by Plaintiffs Michael Platton and Elaine Platton, husband and wife ("Plaintiffs") (Doc. No. 3), and the Joint Motion for Permission to File a Joint Supplemental Notice of Removal Nunc Pro Tunc filed by Defendants Kraftmaid Cabinetry, Inc., Kraftmaid Sales and Distribution, Inc. and Lowe's Home Centers, Inc. (collectively, "Defendants")(Doc. No. 10) and the Plaintiffs' response thereto (Doc. No. 11), **IT IS ORDERED** that Plaintiffs' Motion for Remand is **DENIED** and Defendants' Joint Motion for Permission is **GRANTED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.