

DISCUSSION¹

A. Standard of Review

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). A court should grant a motion for reconsideration only “if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice.” Drake v. Steamfitters Local Union No. 420, No. 97-585, 1998 U.S. Dist. LEXIS 13791, at *7-8 (E.D. Pa. Sept. 3, 1998) (citing Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994)). “Because federal courts have a strong interest in finality of judgments, motions for reconsideration should be granted sparingly.” Continental Casualty Co. v. Diversified Industries, Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995).

In the present case, J.K. Harris does not set forth the existence of any newly available evidence or intervening change in the controlling law. Thus, the Court assumes that J.K. Harris contends that there is a need to correct a clear error of law or prevent some manifest injustice that would justify reconsideration of the Court’s prior decision.

B. Waiver of Permissive Abstention

J.K. Harris argues that in deciding to permissively abstain from hearing the case, this Court failed to consider whether Ms. Allen waived her right to seek a remand under 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) states that “nothing in this section prevents a district court in

¹ Because the facts of the case were set forth in detail in the Memorandum and Order issued on October 12, 2005, and because this Memorandum is written for the benefit of the parties, the Court sees no need to re-recite the facts here.

the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.” A decision with respect to permissive abstention falls within the discretion of the court. See LaRoche Industries, Inc. v. Orica Nitrogen LLC (In re LaRoche Industries, Inc.), 312 B.R. 249, 256-57 (Bankr. D. Del. 2004) (noting that even where a party has waived its right to seek permissive abstention, a court may grant such relief if, in its discretion, it believes that abstention is appropriate).

In support of its argument, J.K. Harris cites to several cases in which it asserts that courts have found that plaintiffs who have engaged in “affirmative activity” in federal court have been found to have waived their right to seek abstention, either mandatory or permissive. See, e.g., In re Albert N. Moore, 209 U.S. 490, 491-92 (1908) overruled in part on other grounds Ex Parte Harding, 219 U.S. 363 (1911) (refusing to grant a petition for a writ of mandamus directing a district court to rem and a matter to state court where, after plaintiff’s state court matter was removed to federal court, plaintiff filed an amended petition in federal court and entered into several stipulations with defendant); Lanier v. American Board of Endodontics, 843 F.2d 901, 905 (6th Cir. 1988) (finding that plaintiff waived her right to object to procedural irregularities in removal proceedings because before filing her motion to remand, the plaintiff had “entered into stipulations, filed requests for discovery, sought to amend her complaint, filed a new lawsuit against the defendant in the federal court, demanded trial by jury and proceeded with discovery”); Riggs v. Plaid Pantries, Inc., 233 F. Supp. 2d 1260 (D. Or. 2001) (plaintiff’s motion to remand her case to state court was denied after she moved for the entry of default and for default judgment to be entered against one of the defendants); American Home Assurance Co. v. RJR

Nabisco Holdings Corp., 70 F. Supp. 2d 296 (S.D.N.Y. 1999) (denying motion to remand not filed within 30 days of removal).

J.K. Harris specifically relies upon Koehnen v. Herald Fire Ins. Co., 89 F.3d 525, 528 (8th Cir. 1996) in support of its argument. In Koehnen, the plaintiff, after filing a motion to remand his state court claim, moved and “vigorously argued” a motion to amend the complaint in federal court. In affirming the court’s decision to decline to abstain, the Koehnen court noted that the plaintiff only pressed the court on the issue of remand after the motion to amend the complaint was denied. Koehnen, 89 F.3d at 528. J.K. Harris urges the Court to consider all actions taken by Ms. Allen as “affirmative” acts that would effect her consent to jurisdiction in federal court, and appears to suggest that the Court did not fully consider these actions in coming to its October 12, 2005 conclusion. J.K. Harris specifically admonishes the Court not to “borrow from the reasoning it used during its analysis of plaintiff’s request for mandatory abstention” and suggests that the Court only considered actions taken by Ms. Allen before the motion for remand was filed, rather than considering all actions that were taken in federal court. Memorandum Supporting Motion for Reconsideration at 2.

After considering all of the cases cited within the present motion, as well as the protestations and admonitions set forth by J.K. Harris, the Court concludes that there has been no clear error of law that would require reversal of the decision to remand so as to prevent manifest injustice. The circumstances in the present case differ materially from those presented in each of the aforementioned cases such that the Court concludes that the actions taken by Ms. Allen did not act as a waiver of her right to seek permissive abstention. To begin, this case bears a significant difference from all of the cases cited by J.K. Harris because the state court case had

been filed some eight months prior to its removal to the bankruptcy court, and was well on its way at the time J.K. Harris opted to remove it. Although Ms. Allen did move to withdraw the reference from the bankruptcy court, at oral argument counsel for Ms. Allen explained that this motion was initially filed because Ms. Allen believed that any issues decided with respect to the case – whether to remand the case or the summary judgment motion – would be better decided by a federal district court that would, due to a jury demand and the nature of the issues, hear the case. Oral Arg. Trans. at 5:14-15; 6:1-9. Thus, filing a motion to withdraw the reference was a strategically defensive action taken to protect her right to a jury trial in the event that the case were to remain in federal court. Likewise, Ms. Allen filed a response in opposition to the motion for summary judgment to avoid the risk of having the motion appear to be unopposed. Oral Arg. Trans. at 4:17-22. Finally, Ms. Allen’s attempt to use the federal system to subpoena certain individuals merely reflects her desire to avoid further delays in the case, and were not necessarily, even in the context of the strategically defensive actions she had otherwise taken, “affirmative actions” constituting consent to federal jurisdiction. The Court again notes that the issuance of witness subpoena after the motion to remand was filed supports the inference that Ms. Allen presented her motions to withdraw the reference and to remand the case as alternative remedies.²

Additionally, the present case differs factually from the cases cited by J.K. Harris in that up until the time the case was removed to the bankruptcy court, the case had begun and continued in the state court for nearly eight months, with discovery underway. The substance of the actions

² The Court makes this statement at the risk of incurring counsel’s criticism for “borrowing logic” from its previous decision. Notwithstanding counsel’s admonitions, the Court notes that the analyses are inevitably analogous.

taken in state court had to, therefore, be balanced against the actions taken in the federal court in determining whether a waiver of abstention took place. In finding that permissive abstention was appropriate, this Court undertook a careful analysis of twelve factors and concluded that these factors weighed in favor of abstaining. Under the plain text of 28 U.S.C. § 1334(c)(1), this decision was within the scope of the Court's discretion, and there is no manifest injustice or error of law that would cause the Court to reverse its prior decision. The Motion for Reconsideration will, therefore, be denied. An appropriate Order follows.

/S/
Gene E.K. Pratter
United States District Judge

November 2, 2005

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

CONNIE S. ALLEN	:	
Plaintiff,	:	
	:	
v.	:	
	:	
J.K. HARRIS & CO., LLC	:	
Defendant	:	
	:	
v.	:	
	:	
THOMAS J. ALLEN,	:	
CONNIE S. ALLEN,	:	
Debtors- in-Possession	:	05-MC-74

ORDER

AND NOW, this 2nd day of November, 2005, upon consideration of the Motion for Reconsideration filed by J.K. Harris (Docket No. 10), it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

/S/ _____
GENE E.K. PRATTER
United States District Judge