

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

GEORGE BECK and RUTH BECK, h/w	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 05 - 5064
v.	:	
	:	
ALBERTSONS, INC., doing business as	:	
ACME MARKETS, INC., and	:	
PAUL MORAN,	:	
	:	
Defendants.	:	

DuBOIS, J.

NOVEMBER 18, 2005

MEMORANDUM

Presently before the Court are a Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) of Defendants Albertsons, Inc. and Paul Moran (Document No. 3, filed September 28, 2005), and Plaintiffs’ Motion for Remand to Philadelphia County Court of Common Pleas (Document No. 6, filed October 6, 2005). Included in plaintiffs’ motion for remand is a motion for reimbursement of costs and attorneys fees. For the reasons set forth below, the Court grants plaintiffs’ motion to remand, denies plaintiffs’ motion for costs and attorneys fees, and denies without prejudice defendants’ motion to dismiss.

I. INTRODUCTION

Plaintiffs, George Beck and Ruth Beck, husband and wife, filed a personal injury action against Albertsons, Inc., doing business as Acme Markets, Inc. (collectively, “Acme”), and Paul

Moran in the Court of Common Pleas of Philadelphia County on August 19, 2005. The case arises out of Mrs. Beck's slip-and-fall at the Acme Market located at 920 Red Lion Road, Philadelphia, Pennsylvania, on December 6, 2003. Moran was the manager at that market.

Defendants filed a timely notice of removal pursuant to 28 U.S.C. § 1441(a) on September 22, 2005, based on claimed diversity jurisdiction under 28 U.S.C. § 1332. Defendants argue that plaintiffs fraudulently joined a Pennsylvania resident, Moran, as a defendant in order to defeat diversity jurisdiction. In support of this claim, defendants argue that Moran cannot be held liable to plaintiffs because (1) he was not working on the date of the accident; and (2) he is an employee who cannot be viewed as a legal entity independent from the corporate defendant, Acme. Defendants contend that, but for the fraudulent joinder of Moran, there is diversity jurisdiction.

With respect to diversity jurisdiction, plaintiffs are citizens of Pennsylvania. Defendant Moran is a citizen of Pennsylvania. The citizenship of Acme is disputed. Defendants claim that Acme is incorporated in Delaware, and has its principal place of business in Boise, Idaho. Plaintiffs allege to the contrary that Acme has its principal place of business in Pennsylvania.

Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on September 28, 2005. In the motion, defendants seek dismissal of plaintiffs' claims against Moran based on the alleged fraudulent joinder, and dismissal of the claims of reckless, willful, and wanton misconduct against Acme.

On October 6, 2005, plaintiffs filed a motion for remand to the Court of Common Pleas of Philadelphia County. Plaintiffs argue: (1) their claims against non-diverse defendant Paul Moran is colorable, so remand is proper; and (2) alternatively, even if Moran is removed from the case, complete diversity of citizenship is absent because Acme has its principal place of business

in Pennsylvania. Plaintiffs' motion also seeks reimbursement of attorneys fees and other costs.

On October 6, 2005, plaintiffs also responded to the motion to dismiss. In their response, plaintiffs concede that the claims of reckless, willful, and wanton conduct against Acme and Moran should be dismissed, but they deny that Moran was fraudulently joined as a defendant.

On October 7, 2005, the Court ordered supplemental briefing. Plaintiffs were directed to explain why it was necessary to name Moran as a defendant. Defendants were ordered to provide additional information about the corporate structure of Albertsons, Inc., and Acme Markets, Inc. Those supplemental submissions were received on October 17, 2005, and on October 31, 2005, respectively.

II. MOTION FOR REMAND

Two contested issues are presented in the motion for remand: (1) whether the plaintiffs fraudulently joined Moran, and (2) whether Acme's principal place of business is in Pennsylvania. For the reasons set forth below, the Court concludes that the defendants have not met their burden of proving that plaintiffs fraudulently joined Moran and that, as a result, there is no diversity jurisdiction under 28 U.S.C. § 1332. Accordingly, the Court grants plaintiffs' motion for remand.¹

A. Removal and Fraudulent Joinder

“When a non-diverse party has been joined as a defendant, then in the absence of a substantial federal question the removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined.” Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992). The removing party carries a “heavy burden of persuasion” in making this

¹ In view of that decision, the Court need not reach the second question of whether Acme's principal place of business is in Pennsylvania.

showing. Id.; see also Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085 (1991); Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1012 n.6 (3d. 1987), cert. dismissed, 484 U.S. 1021 (1988). The provisions of the removal statute “are to be strictly construed against removal and all doubts should be resolved in favor of remand.” Batoff, 977 F.2d at 851 (internal quotations and citations omitted).

Joinder is fraudulent “where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment.” Id. (internal citations and quotations omitted). But, “if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.” Id. (internal citations and quotations omitted). In the Third Circuit, “[w]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses.” Id. (internal citations and quotations omitted). In evaluating the alleged fraud, the Court must “focus on the plaintiff’s complaint at the time the petition for removal was filed [and the Court] must assume as true all factual allegations of the complaint.” Steel Valley, 809 F.2d at 1010 (citation omitted).

Plaintiffs plead claims against Moran under theories of negligence. That issue is governed by Pennsylvania law. Thus, the Court turns to an analysis of the applicable Pennsylvania law.

B. Pennsylvania Law

The first question this Court must address is whether Moran breached a duty of care owed to plaintiffs. Under Pennsylvania law, “[i]t is unquestionable that a store owner owes a duty of care to the patrons of the store.” Myers v. The Penn Traffic Co., 606 A.2d 926, 928 (emphasis

added). In slip-and-fall cases at grocery stores, Pennsylvania courts routinely examine the potential negligence of store owners and their agents. See e.g., id. at 928-932 (providing an overview of the negligence standards and conclusions in these cases).

Based on this authority, this Court concludes that plaintiffs have stated a colorable claim against Moran. In reaching this conclusion, the Court assumes that Moran was working on the date of the incident because it accepts “as true all factual allegations of the complaint.” Steel Valley, 809 F.2d at 1010. However, even without this assumption, plaintiffs have stated a colorable claim against Moran under the allegations of negligence in the complaint which do not require Moran’s presence at the time of the accident.²

In Wilson v. Acme Markets, 2005 U.S. Dist. Lexis 9655 (E.D. Pa. May 19, 2005) (Fullam, J.), a slip-and-fall case with virtually identical facts, the Court granted a motion to remand to state court because both plaintiff and the alleged Acme store manager were Pennsylvania citizens. In that case, like the instant case, Acme argued that the store manager was fraudulently joined to defeat diversity jurisdiction. The Wilson Court rejected the claim of fraudulent joinder and concluded that the complaint “undeniably alleges potentially valid claims against the individual defendant” store manager. Id. at *2. This Court reaches the same conclusion.³

² These allegations include the failure to adequately protect against slippery floors by, for example, providing floor matting and keeping shopping carts free of precipitation; the failure to level the floor to prevent excess water from accumulating in one area; the failure to properly implement a system for protecting interior walking surfaces during inclement weather; and the failure to properly train and supervise employees in the safe maintenance of the supermarket floor. Complaint at ¶ 13.

³ An analysis of cases outside the specific context of claims against a store manager also compels the conclusion that plaintiffs have stated colorable claims against defendant Moran. For example, in a removed case involving fraudulent joinder issues arising out of negligence and other claims, this Court recognized that, under Pennsylvania law, “a corporate employee may be

Defendants argue that Moran should not be viewed as a separate legal entity from the corporate defendant Acme. The premise of this argument appears to be that plaintiffs can recover the damages they seek from Acme alone, without joining Moran. Assuming *arguendo* that defendants are correct, that does not satisfy defendants' heavy burden of proving fraudulent joinder. The plaintiffs chose to name both Moran and Acme and, although there "may [be] repercussions for purposes of diversity jurisdiction, there is no reason for the court to interfere with this inevitable consequence" Boyer, 913 F.2d at 110. Indeed, this Court has granted remands to state court in analogous situations. Compare Wilson v. Acme Markets, 2005 U.S. Dist. Lexis 9655 (E.D. Pa. May 19, 2005) (granting remand to state court although plaintiff could have recovered from Acme alone without naming a resident store manager as a defendant); Dailey v. Progressive Corp., 2003 U.S. Dist. Lexis 21109 (E.D. Pa. Nov. 12, 2003) (Dalzell, J.) (granting remand to state court although plaintiff could have recovered from the corporation alone without naming a resident manager as a defendant); Harris v. NGK Metals Corp., 2003 U.S. Dist. Lexis 7622 (E.D. Pa. May 5, 2003) (Bartle, J.) (granting remand to state court although plaintiff could have recovered from two corporations without naming a resident corporate officer as a defendant).

Defendants have failed to sustain their heavy burden of demonstrating that plaintiffs fraudulently joined Moran. Because Moran could be found liable under Pennsylvania law, the Court must remand. See Boyer, 913 F.2d at 111. The Court's decision is not a reflection of the merits of plaintiffs' case against defendants, but rather a determination that the Court does not

held personally liable if the corporate employee participated in the commission of a tort." Peterson v. McNeill-PPC, 1996 U.S. Dist. Lexis 5361, *12 (E.D. Pa. Apr. 17, 1996) (internal citations omitted) (VanArtsdalen, J.). On that basis, the Peterson Court concluded that plaintiffs had stated a colorable claim against the corporate employee, who was a resident defendant, and remanded the case to state court.

have jurisdiction over the case.⁴ See Batoff, 977 F.2d at 854; Boyer, 913 F.2d at 113.

III. MOTION FOR COSTS AND ATTORNEYS FEES

Under 28 U.S.C. § 1447(c), the Court may require payment of “just costs and any actual expenses, including attorneys fees, incurred as a result of the removal.” See also Mints v. Educational Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996). The Court declines to do so in this case. Imposition of such a penalty is unwarranted because it does not appear that the defendants’ removal petition was made in bad faith. Id. 1260-31; see also Yellow Cab Company of Pittsburgh v. Gasper, 994 F. Supp. 344, 349-50 (W.D. Pa. 1998). Accordingly, plaintiffs are not entitled to any relief under 28 U.S.C. § 1447(c).

IV. MOTION TO DISMISS UNDER RULE 12(b)(6)

Because the Court grants the motion for remand, it lacks jurisdiction over the case. Accordingly, the Court denies defendants’ motion to dismiss under Rule 12(b)(6) without prejudice.

V. CONCLUSION

For the foregoing reasons, the Court grants plaintiffs’ motion to remand, denies plaintiffs’ motion for costs and attorneys fees, and denies without prejudice defendants’ motion to dismiss. An appropriate order follows.

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⁴ Indeed, the state court may ultimately find that the claims against Moran must be dismissed because “it is possible that a party is not fraudulently joined, but that the claim against that party ultimately is dismissed for failure to state a claim upon which relief may be granted.” Batoff, 977 F.2d at 852.

GEORGE BECK and RUTH BECK, h/w : **CIVIL ACTION**
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v. :
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ALBERTSONS, INC., doing business as :
ACME MARKETS, INC., and :
PAUL MORAN, :
:
Defendants. :

DuBOIS, J.

NOVEMBER 18, 2005

ORDER

And now, this 18th day of November 2005, upon consideration of the Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) of Defendants Albertsons, Inc. And Paul Moran (Document No. 3, filed September 28, 2005), Plaintiffs' Response To The Motion To Dismiss Pursuant To Federal Rule Of Civil Procedure 12(b)(6) Filed By Defendants (Document

No. 5, filed October 6, 2005), Plaintiffs' Motion For Remand To Philadelphia County Court of Common Pleas (Document No. 6, filed October 6, 2005), Plaintiff's Supplemental Submission in Response to Court Order of October 7, 2005 (Document No. 10, filed October 17, 2005), and Response of Defendants Acme Markets, Inc., Albertsons Inc. And Paul Moran To Plaintiffs' Motion To Remand To Philadelphia County Court of Common Pleas (Document No. 12, filed October 31, 2005), **IT IS ORDERED** that Plaintiffs' Motion For Remand To Philadelphia County Court of Common Pleas is **GRANTED**.

IT IS FURTHER ORDERED that plaintiffs' motion for reimbursement of costs and attorneys fees, which is included in Plaintiffs' Motion For Remand To Philadelphia County Court of Common Pleas, is **DENIED**.

IT IS FURTHER ORDERED that the Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) of Defendants Albertsons, Inc. And Paul Moran is **DENIED WITHOUT PREJUDICE**.

The Clerk of the Court shall **MARK** this case **CLOSED** for **STATISTICAL PURPOSES**.

BY THE COURT:

/s/ Honorable Jan E. DuBois

JAN E. DUBOIS, J.