

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

MERLE FLOYD AND DANIEL DEKORNE : CIVIL ACTION
: :
v. : :
: :
TULSA DENTAL PRODUCTS : NO. 97-1990

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

June 24, 1997

Plaintiffs, Merle Floyd ("Floyd") and Daniel Dekorne ("Dekorne"), filed a motion requesting leave to amend their complaint to add Geraldine Donahue ("Donahue") as a defendant. If this amendment is granted, plaintiffs request that the action be remanded to state court for lack of complete diversity. In the alternative, plaintiffs seek to have the action remanded to state court for failure to reach the statutory amount in controversy.

I. FACTS

Plaintiffs filed this action to recover for damages occasioned by Floyd's root canal surgery. Floyd alleges that the manufacturer of dental equipment used in the procedure, Tulsa Dental Products, Inc. ("Tulsa Dental"), and the seller of the equipment, Brasseler, U.S.A., Inc. ("Brasseler") were negligent in the design, manufacture and sale of its equipment. Floyd further alleges that the defendants are strictly liable for manufacturing and selling this defective equipment, and that the defendants breached express and implied warranties. Floyd seeks

to recover damages for permanent injuries resulting from the surgery, pain and suffering. Floyd's husband, Dekorne, claims loss of consortium.

This action was filed in the Court of Common Pleas for Philadelphia County on February 20, 1997, and removed on March 18, 1997. On March 31, counsel for plaintiffs filed an Arbitration Certification that the action exceeded the sum of \$100,000. Plaintiffs also requested a hearing to show cause why the action should not be remanded to Common Pleas Court; remand was denied at the hearing held May 7.

Plaintiffs were granted leave to amend their complaint to join Brasseler, a scheduling order was issued, and a status conference was scheduled; the status conference was postponed to June 17, 1997 at the request of Tulsa Dental. On June 12, plaintiffs moved to amend their complaint to add Donahue as a defendant and to have the action remanded to state court for lack of complete diversity or in the alternative for failure to meet the statutory amount in controversy.

Plaintiffs' motion pursuant to Federal Rule 15(a) to amend their complaint to add Donahue as a defendant and have the action remanded to the Court of Common Pleas for Philadelphia County will be denied.

II. LEAVE TO AMEND UNDER RULE 15

Federal Rule of Civil Procedure 15(a) states: "a party may amend the party's pleading once as a matter of course Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall

be freely given when justice so requires." Granting leave to amend is in the sole discretion of the district court. Gay v. Petsock, 917 F.2d 768, 772 (3d Cir. 1990); Gundlach v. Reinstein, 924 F. Supp. 684, 690 (E.D. Pa. 1996). Nonetheless, the district court's exercise of jurisdiction must be within the law. Adams v. Gould, Inc., 739 F.2d 858, 863-64 (3d Cir. 1984).

Since "leave shall be freely given when justice so requires," courts usually grant leave to amend, but the policy favoring liberal amendments is "not unbounded." Schofield v. Trustees of Univ. of Pa., 894 F. Supp. 194, 196 (E.D. Pa. 1995). Absent any apparent reason such as undue delay, dilatory motive, bad faith, repeated failure to amend by the party, undue prejudice, or futility of the amendment, district courts should grant leave to amend. Forman v. Davis, 371 U.S. 178 (1962); Berkshire Fashions, Inc. v. M.V. Hakusan II, 954 F.2d 874, 886 (3d Cir. 1992).

"Mere delay" is not sufficient to deny leave to amend; the opposing party must prove there will be undue prejudice if the leave to amend is granted. See Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Janney, Montgomery, Scott, Inc., 155 F.R.D. 97, 100 (E.D. Pa. 1994). If a moving party cannot sufficiently explain delay in asking for leave to amend the complaint, leave should be denied. See Fishbein Family Partnership v. PPG Industries, Inc., 871 F. Supp. 764, 768 (D.N.J. 1994).

"Bad faith" is also sufficient reason to deny leave to amend. See Forman, 371 U.S. at 182; Lorenz v. CSX Corp., 1 F.3d

1406, 1413-14 (3d Cir. 1993). Bad faith is "neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Black's Law Dictionary 176 (4th ed. rev. 1968).

A. The Motion is Dilatory and Untimely.

Plaintiffs were previously granted leave to amend their complaint to add Brasseler as defendant. Plaintiffs claim not to have known Donahue, whom they now wish to add as an additional party defendant, actually performed the surgery at issue. Plaintiffs' counsel maintains that they learned this fact when defendants deposed their own client, Floyd, in June.

Plaintiffs' counsel claim they never knew or asked their client who performed the surgical procedure out of which the cause of action arises. Floyd was not under general anesthesia and presumably knew the person treating her. However, plaintiffs' counsel was aware that Dr. Grosse might not have performed the surgery since the complaint alleges that, "[Floyd] underwent the surgical procedure . . . performed by Dr. Grosse or his agent, servant, workman and/or employees." Amended Complaint, p. 3, ¶ 10 (Filed May 13, 1997) Complaint, p. 2, ¶ 5 (Filed February, 1997).

Plaintiffs' counsel could not have made a reasonable inquiry into the facts of this action. Failure to make a reasonable inquiry is not an adequate explanation for delay in asking for joinder. The person who performed root canal surgery

on their client was peculiarly within their client's knowledge, so the joinder request is untimely.

B. Plaintiffs Motion was Made is "Bad Faith."

Every pleading and other written motion or submission must be signed by at least one attorney of record. Fed. R. Civ. P. 11(a). Subsection (b) of Rule 11 provides:

By presenting to the court . . . a pleading, written motion, or other paper, an attorney is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose . . . (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.

An attorney's signature certifies that the attorney has satisfied three duties: "(1) that he has read the documents; (2) that he has made a reasonable inquiry; and (3) that he is not acting in bad faith." CTC Imports and Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 578 (3d Cir. 1991), cert. denied sub nom., Abam-Neze v. Sohio Supply Co., 112 S. Ct. 1950 (1992). The standard for testing an attorney's conduct is reasonableness under the circumstances. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987). The court "should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading . . . was submitted." Furman & Halpern, P.C. v. Nexgen Software Corp., No. 93-2788, 1994 WL 287795 (E.D. Pa. June 28, 1994).

Both the original and amended complaint were signed and certified by Don S. Ginsburg, Esq. ("Ginsburg"). If he did not

ask his client who performed the surgery out of which the cause of action arose, he did not make a reasonable inquiry and failed to act in good faith when he signed the original and amended pleadings.

A request to add a party made in order to destroy diversity is not made in good faith. See Steel Valley Auth. v. Union Switching Signal Div., 809 F.2d 1006, 1012 (3d. Cir 1987); Abels v. State Farm Firm and Casualty Co., 770 F.2d 26, 32 (3d Cir. 1985). Plaintiffs' previous request, heard and denied on May 7, 1997, makes clear that plaintiff strongly desires to have this action remanded to state court. In the circumstances, the court finds counsel was acting in bad faith in seeking leave to amend to add Donahue as a party, in order to have the action remanded for lack of complete diversity. The motion for leave to amend to add Donahue will be denied.

III. REMAND FOR LACK OF COMPLETE DIVERSITY

A. Diversity may not be Destroyed.

Plaintiffs' counsel asserts in footnote 3 of their Memorandum to Amend that "[t]he record is incomplete at this time regarding the issue of whether Plaintiffs' domicile is New Jersey or Pennsylvania." Plaintiffs' counsel states that "citizenship for purposes of diversity is the same as domicile," see Last v. Elwyn, 935 F. Supp. 594, 596 (E.D. Pa. 1996), but failed to make adequate inquiry as to their clients' domicile.

Domicile requires both physical presence and an "intent to remain there." Juvelis v. Snider, 68 F.3d 648, 654 (3d Cir.

1995). Plaintiffs recently purchased a house in New Jersey where they now live. They have retained a purchase money mortgage in their former house in Pennsylvania where Floyd may still be employed.

It is singularly within the knowledge of the plaintiffs where they vote, are licensed to drive, and whether they intend to remain in New Jersey. It is remarkable that plaintiffs' counsel lack knowledge of their clients' domicile. If plaintiffs' domicile is later challenged by defendants, the court will hold an evidentiary hearing to determine the issue.

B. Court's Discretion to Join Parties

Section 1447(e) of Title 28 states: "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder or may permit joinder and remand the action to the state court." See Hensgens v. Deere & Company, 833 F.2d 1179, 1181 (5th Cir. 1987)(establishes four part test for § 1447(e)); Lehigh Mechanical, Inc. v. Bell Atlantic Tricon Leasing Corp., 1993 WL 298439, at *2 (E.D. Pa. Aug. 2, 1993).

The court has discretion to determine if the nondiverse party ought to be joined, by balancing equities in the circumstances. The balancing is of the "danger of parallel federal/state proceedings" and "interests in the federal forum." Hensgens, 833 F.3d at 1181. The factors to be considered include: (1) extent to which the purpose of the amendment is to defeat jurisdiction; (2) whether the plaintiff has been dilatory;

(3) whether the plaintiff will be significantly injured if it is not allowed; and (4) any other factors. See Carter v. Dover Corp., Rotary Lift Div., 753 F. Supp. 577, 579 (E.D. Pa. 1991).

The first factor clearly weighs against granting plaintiffs leave to amend. Previous requests for remand and a lack of reasonable investigation establish that the purpose of plaintiffs' counsel is to defeat jurisdiction.

The second factor, also weighs against the plaintiffs. Plaintiffs' counsel claim they first learned Donahue performed the surgical procedure at Floyd's deposition, but this fact was previously known to their client, Floyd. Plaintiffs' counsel should have asked who performed the procedure prior to filing the original and amended complaints, a second amendment now will delay the proceedings. Plaintiff's request is untimely.

If joining Donahue will destroy diversity, plaintiffs are denied leave to join Donahue by the exercise of the court's discretion under § 1447(e).

IV. REMAND FOR FAILURE TO REACH AMOUNT IN CONTROVERSY

Plaintiffs now claim the amount in controversy is not sufficient for federal diversity jurisdiction. Title 28, § 1332 provides: "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 exclusive of interest and costs and is between (1) citizens of different states" 28 U.S.C.A. § 1332(a)(1).

The parties have already stated that the amount in controversy exceeds \$100,000: (1) Case Management Conference Memorandum of December 2, 1996 filed in state court, signed by Ginsburg, valued the action at \$325,000; (2) the Arbitration Certificate filed in federal court, signed by Ginsburg on March 31, 1997 certifies that the claim is over \$100,000 (3) Paragraph 6 of the amended complaint, filed on May 13, 1997, signed by Ginsburg, states the amount in controversy exceeds \$100,000; and (4) the answer by Tulsa Dental, signed by John C. Farrell, Esq., admits this amount as correct at ¶ 6. Only in the pending motion, by affidavit of Jonathan J. Sobel, Esq., does plaintiffs' counsel assert that the actual amount is less than \$75,000.

Plaintiffs claim they only discovered the amount is much less than anticipated when Floyd was deposed on June 3 with "poignant questions by defense counsel." Memorandum of Law of Plaintiffs in Support of Motion to Amend, at 16. If true, failure of plaintiffs' counsel to make a reasonable inquiry is indefensible. This would have been knowledge their client obviously had and plaintiffs' counsel might not have made adequate inquiry. Jurisdiction is determined by the facts when the action was filed and is not defeated by subsequent developments. The court cannot find that, at the time the action was filed, the amount in controversy would not exceed \$75,000 to a legal certainty.

Plaintiffs' counsel is now attempting anything and everything to have the action remanded to state court; the attempt will not succeed.

An appropriate order follows.

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ORDER

AND NOW, this 24th day of June, upon consideration of the Plaintiffs' Memorandum in Support of their Motion to Amend their Complaint to Add Geraldine Donahue as a Defendant and to Remand the Instant Action to the Court of Common Pleas, Philadelphia County or Alternatively to Remand the Instant Action due to the Failure to Breach the Statutory Amount in Controversy Requirements, it is **ORDERED** that the Motion is **DENIED**.

J.