

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

WILLIAM THOMAS THOMPSON,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
BROWN & WILLIAMSON	:	
TOBACCO CORP, et al.,	:	
Defendants	:	NO. 98-CV-4273

MEMORANDUM AND ORDER

J. M. KELLY, J.

JANUARY 11, 1999

Presently before the Court is Brown & Williamson Tobacco Corporation's Motion For Reconsideration (Document No. 17) of the Court's October 6, 1998, Order, in which the Court remanded this case back to the Court of Common Pleas of Philadelphia County. Brown & Williamson urges the Court to retain jurisdiction over this case based upon an argument not specifically addressed in the October 6 Order. The substance of this argument relates to the merits of Plaintiff's case and his dim prospects of recovery against several members of Pennsylvania state government and the Department of Corrections ("state defendants"). The scope of this argument, however, goes impermissibly beyond the purely jurisdictional inquiry the Court must undertake when considering this motion and Plaintiff's earlier motion to remand. Accordingly, Brown & Williamson's argument is unpersuasive, and the Court will deny its motion for reconsideration.

In its Notice of Removal, Brown & Williamson argued the Court properly could exercise jurisdiction if it would set aside the non-diverse parties temporarily, recognize it had diversity jurisdiction over the other parties, and then exercise supplemental jurisdiction over those parties

whose presence ordinarily would destroy diversity. As an alternative to this argument, which the Court rejected, Brown & Williamson briefly argued that instead of exercising supplemental jurisdiction, the Court should not consider the non-diverse parties altogether on the authority of a case from the District Court for the Southern District of Mississippi. (Notice of Removal at ¶ 18.) Brown & Williamson has expanded significantly on this argument in its Motion for Reconsideration.

It is well recognized that improperly joined parties will not defeat diversity jurisdiction and that improperly joined parties are those from whom a plaintiff has no chance of recovering. See, e.g., Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998); Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir.), cert. denied, 119 S. Ct. 407 (1998); Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460-61 (2d Cir. 1998); Rodriguez v. Sabatino, 120 F.3d 589, 591 (5th Cir. 1996), cert. denied, 118 S. Ct. 1511 (1998); Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4th Cir. 1993); Batoff v. State Farm Ins. Co., 977 F.2d 848, 850 (3d Cir. 1992); Poulos v. Naas Foods, Inc., 959 F.2d 69, 74 (7th Cir. 1992); Anderson v. Home Ins. Co., 724 F.2d 82, 84 (8th Cir. 1984). Brown & Williamson asserts that the state defendants are protected from liability under sovereign immunity. Therefore, Brown & Williamson argues, Plaintiff cannot recover from the state defendants, those parties are improperly joined, and this Court has diversity jurisdiction.

Brown & Williamson's argument fails because it substitutes motion to dismiss analysis for a purely jurisdictional inquiry. Cf. Batoff, 977 F.2d at 852. The state defendants very well may be protected by sovereign immunity, but the Court cannot consider that or any other substantive defense in ruling on the motion to remand. "[W]here there are colorable claims or

defenses asserted 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.” Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085 (1991). A court cannot even peek at the merits of a plaintiff’s claim. This proposition is demonstrated emphatically in Batoff, in which the district court denied a motion to remand after it found the plaintiff failed to state a valid claim against a non-diverse defendant.¹ Batoff, 977 F.2d at 850. The Court of Appeals reversed, holding the district court “convert[ed] its jurisdictional inquiry into a motion to dismiss.” Id.

In addition to this extremely focused investigation, the standard for whether a claim is “colorable” is exceedingly lax: only “wholly insubstantial or frivolous” claims are not colorable. Id. at 852. Moreover, the fact that a claim is vulnerable to a motion to dismiss does not convert the claim into a non-colorable one. Id. Finally, the court must consider only the plaintiff’s complaint and must accept all factual allegations of the complaint as true. Id. at 851-52.

Under this lenient standard (or this exacting one for Brown & Williamson), Plaintiff has stated colorable claims against the state defendants. He has alleged sufficient facts to support his negligence claim against the state defendants, although it appears very unlikely that the Court of Common Pleas will deny a motion to dismiss. Cf. id. at 852-53 (“We are therefore presented with a ‘colorable’ claim, even if it ultimately may not withstand a motion to dismiss in the state court.”). Because Plaintiff has stated a colorable claim, it is not necessary to evaluate his other claims, see id. 852-53, with one exception. Liberally construed, Plaintiff apparently has

¹Significantly, the district court also found the non-diverse defendant was immune from suit. Batoff, 977 F.2d at 850.

attempted to state an Eighth Amendment claim.² In so doing, Plaintiff remarkably has exceeded the limits of the minimal “colorable” standard: there is no constitutional right to an uninterrupted stream of tobacco, and withholding tobacco from an inmate in restrictive housing for one day does not violate the Eighth Amendment. See Whitley v. Albers, 475 U.S. 312, 319-20 (1985) (requiring prisoners to show an unnecessary and wanton infliction of pain to state an Eighth Amendment claim); Rhodes v. Chapman, 452 U.S. 337, 351 (1981) (“In assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries ‘spring from constitutional requirements’ . . .”). This claim, therefore, is frivolous.

Plaintiff generally has stated colorable claims against the state defendants, and those defendants were not improperly joined. Cf. Brown v. Brown & Williamson Tobacco Corp., No. 97-2409, 1998 WL 795179, at *3 (D.D.C. Sept. 28, 1998) (finding the plaintiff had stated colorable claims against the defendant, and granting plaintiff’s motion to remand). Consequently, Brown & Williamson has failed to present a compelling reason for the Court to reconsider its October 6 Order, and the motion for reconsideration is denied.

An Order follows.

²Brown & Williamson never pled this claim provided a basis for federal question jurisdiction, probably because the claim is nonsensical, nearly indecipherable, and does not, in fact, establish federal question jurisdiction because it does not present a substantial question of federal law. This claim therefore does not provide a jurisdictional basis for removal to federal court. See Diaz v. Sheppard, 85 F.3d 1502, 1505-06 (11th Cir. 1996) (finding that a prisoner’s Eighth Amendment claim was contrary to settled law and therefore did not establish federal question jurisdiction), cert. denied, 117 S. Ct. 1349 (1997); see also 14B Charles Alan Wright et al., Federal Practice and Procedure § 3722, at 493 (3d ed. 1998) (stating the mere reference to federal law does not mean the action is removable; a substantial question of law must be stated); 13B id. §3564, at 68-71 (2d ed. 1984) (stating federal courts must dismiss wholly frivolous claims and those contrary to settled Supreme Court jurisprudence for lack of jurisdiction).

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TOBACCO CORP, et al.,	:	
Defendants	:	NO. 98-CV-4273

ORDER

AND NOW, this 11th day of January, 1999, in consideration of Defendant Brown & Williamson's Motion for Reconsideration, it is hereby **ORDERED**:

1. Brown & Williamson's Motion for Reconsideration (Document No. 17) is **DENIED**;
- and
2. The motion to dismiss of Defendants Frank Hall and Press Grooms (Document No. 19) is **DISMISSED** for lack of jurisdiction.

BY THE COURT:

JAMES MCGIRR KELLY, J.