

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

IN RE: DIET DRUGS :
(PHENTERMINE, FENFLURAMINE, : MDL DOCKET NO. 1203
DEXFENFLURAMINE) PRODUCTS :
LIABILITY LITIGATION :
: :
: :
THIS DOCUMENT RELATES TO: :
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: :
KAREN BELLAH, SUSAN ELAINE MCHAM, :
RACHEL MARIE MEDFORD :
: :
: :
v. : CIV. NO. 98-20560
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AMERICAN HOME PRODUCTS CORP., :
et al. :
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MEMORANDUM AND PRETRIAL ORDER NO. _____
STATE COURT REMAND

BECHTLE, J.

MARCH , 1999

Presently before the court are plaintiff Karen Bellah's and intervenors Susan Elaine McHam's and Rachel Marie Medford's (collectively "Plaintiffs") motion to remand, defendant Sheila K. Horsley, M.D.'s motion to remand, defendant Robert M. Miller, M.D.'s motion to remand and defendants American Home Products Corp.'s, A.H. Robins Co., Inc.'s and Wyeth-Ayerst Laboratories Division of American Home Products Corp.'s responses thereto. For the reasons set forth below, the court will grant the motions to remand.

I. BACKGROUND

This is an action brought to recover damages for personal injuries sustained by the ingestion of two diet drugs, commonly known as "Fen-Phen." On January 29, 1998, plaintiff Karen Bellah

filed her Complaint in the 249th District Court of Johnson County, Texas (the "state court"). Respectively, on March 30 and April 1, 1998, Susan McHam and Rachel Medford ("Intervenors") filed their Pleas in Intervention. Plaintiffs are citizens of Texas.

Eight defendants were sued in the state court action. Defendants Loius M. Caldwell d/b/a Joshua Pharmacy, West Pharmacy, Robert M. Miller, M.D. and Sheila K. Horsley, M.D. (the "non-diverse defendants") are citizens of Texas. Defendants A.H. Robins Company, Inc., Wyeth-Ayerst Laboratories Division of American Home Products Corp., American Home Products Corporation ("Removing Defendants") and Wal-Mart Stores, Inc. are citizens of Delaware.¹

On February 16, 1998, defendant Joshua Pharmacy was served with the Complaint. On April 2, 1998, defendant Sheila K. Horsley, M.D. was served. Also on April 2, 1998, Plaintiffs requested that trial be set for May, 18, 1998. On April 9, 1998, defendant West Pharmacy was served. On April 13, 1998, Removing Defendants made a request for a jury trial. On April 16, 1998, the Removing Defendants filed their Notice of Removal in the United States District Court for the Northern District of Texas, Dallas Division. After the case was removed, defendant Robert M. Miller, M.D. was served. On April 3, 1998, the case was

¹ Although corporations may have dual citizenship for purposes of jurisdiction, the parties do not dispute that Removing Defendants are neither incorporated under the laws of Texas nor do they have a principal place of business in Texas.

transferred to this court as part of MDL No. 1203.

II. DISCUSSION

Removing Defendants assert that their removal of the case to federal court was proper because Plaintiffs voluntarily abandoned their claims against the non-diverse defendants, and thus, federal jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. Because the court finds that Plaintiffs did not voluntarily abandon their claims against the non-diverse defendants, it will remand the case back to state court. First, the court will discuss the legal standard and relevant case law concerning the voluntary abandonment of claims against non-diverse defendants. Second, the court will address the effect of certain local and state rules as they apply to the question of whether Plaintiffs voluntarily abandoned their claims against the non-diverse defendants. Last, the court will analyze Plaintiffs' conduct and explain why it does not indicate a definite intent to abandon their claims against the non-diverse defendants.

A. Voluntary Abandonment of Claims Against Non-Diverse Defendants

A state court plaintiff who voluntarily abandons claims against non-diverse defendants may render a case removable if federal jurisdiction could then be based on diversity of citizenship under 28 U.S.C. § 1332. "Where plaintiff, by his voluntary act has definitely indicated his intention to discontinue the action as to the non-diverse defendant, plaintiff

has indicated that he no longer desires to dictate the forum and the case then becomes removable under 28 U.S.C. § 1446(b)."

Erdey v. American Honda Co., Inc., 96 F.R.D. 593, 599 (M.D. La. 1983) (citing Powers v. Chesapeake & O. Ry. Co., 169 U.S. 92 (1898)). "The technicality of how plaintiff's intention is expressed is of no moment--it is the expression of the intent by plaintiff which makes the case removable." Id.

In support of their argument that Plaintiffs voluntarily abandoned their claims against the non-diverse defendants, Removing Defendants cite Southern Pacific Co. v. Haight, 126 F.2d 900 (9th Cir. 1942). In Southern Pacific, the plaintiff, a California citizen, filed an action for personal injuries against Southern Pacific Company, a Kentucky citizen, and two fictitiously named employees of the company, who were California citizens. Id. at 902. Southern Pacific Company removed the case when, on the date the case was called for trial, the plaintiff stated that she was ready to proceed with the trial, even though she had not yet served the two fictitiously named non-diverse defendants in the complaint. Id. The Ninth Circuit found that the case was properly removed to federal court. The court held:

[T]he plaintiff in the instant case having petitioned the court to set the case for trial and having announced that she was ready to proceed with the trial against Southern Pacific Company, each at a time when only the latter defendant had been brought into court, had abandoned the joint character of her action, and rendered the cause immediately removable to the District Court.

Id. at 904.

Other courts have held that an action was properly removed to a federal court where the plaintiff clearly expressed an intent to voluntarily abandon claims against non-diverse defendants. See Rawlings v. Prater, 981 F. Supp. 988, 990 (S.D. Miss. 1997) (holding that defendant's removal was proper where plaintiff's act in entering into final and binding settlement with non-diverse defendant--even though release document had not yet been finalized--constituted voluntary abandonment of claims against non-diverse defendant); Leshner v. Andreozzi, 647 F. Supp. 920, 921-22 (M.D. Pa. 1986) (holding that removal was proper where plaintiff's act of entering into settlement agreement with non-diverse defendant--even though non-diverse defendant had not yet been formally dismissed from the action--constituted voluntary abandonment of claims against non-diverse defendant); Erdey, 96 F.R.D. at 599 (holding that removal was proper where plaintiff's act of entering into settlement agreement with non-diverse defendant--even though formal judgment of dismissal had not yet been entered--constituted voluntary abandonment of claims against non-diverse defendant); Heniford v. American Motors Sales Corp., 471 F. Supp. 328, 336-37 (D.S.C. 1979) (holding that removal was proper where plaintiff's act, during closing argument, of explicitly instructing jury not to return verdict against non-diverse defendant constituted definite expression of plaintiff's intent to extinguish claim against that non-diverse defendant).

On the other hand, one federal court has held removal to be

improper, and thus, remanded a case back to state court where a plaintiff's act did not clearly express an intent to voluntarily abandon claims against a non-diverse defendant. In Aydell v. Sterns, 677 F. Supp. 877 (M.D. La. 1988), the plaintiff, a Louisiana citizen, brought an action for personal injuries against two corporations that were citizens of New York and Pennsylvania, and several employees of those corporations who were citizens of Louisiana. Id. at 878-79. Plaintiff indicated that "service be withheld" as to the individual Louisiana defendants. Id. at 878. The corporate defendants then removed the case to federal court, alleging that diversity jurisdiction existed. Id. at 879. The court held that removal was not proper, and thus granted the plaintiff's motion to remand. In finding that the plaintiff did not voluntarily abandon his claims against the non-diverse defendants by withholding service, the court stated that "the instruction, 'withhold service,' without more, is not a clear and definitive expression by the plaintiff that he desires to terminate or extinguish the action against the nondiverse defendants." Id. at 881. Instead, the court found that the direction to "withhold service" was "equivocal at best." Id. The court stated that "plaintiff's expression is both informal and uncertain. The plaintiff has simply not clearly indicated his intention to voluntarily abandon his action against the nondiverse defendants." Id.

B. Effect of Local and State Rules on Plaintiff's Request for a Trial Setting

Removing Defendants assert that Plaintiffs voluntarily abandoned their claims against the non-diverse defendants by requesting, on April 2, 1998, that trial be set for May 18, 1998, although: (1) the non-diverse defendants had not yet appeared in the action; (2) the non-diverse defendants had not yet been served with discovery; (3) the non-diverse defendants had not yet been deposed; and (4) one of the non-diverse defendants, Joshua Pharmacy, had been in default as of the time of removal, yet Plaintiffs took no action against this defendant. Removing Defendants further assert that, when viewed in light of Johnson County Local Rule 12(C) and Texas Rule of Civil Procedure 245, Plaintiffs' trial setting request clearly indicates their intent to abandon their claims against the non-diverse defendants. The court will review Plaintiffs' trial setting request in light of each rule separately and conclude that with respect to Plaintiffs' conduct in requesting a trial setting, Johnson County Local Rule 12(C) does not apply and that Texas Rule of Civil Procedure 245 does apply.

1. Johnson County Local Rule 12(C)

The state court local rules provide that:

Any party requesting a jury trial is expected to have all affirmative pleadings in their final form, subject to exclusions and motions which may be directed toward the pleadings, and to have completed pre-trial discovery, depositions, and admissions prior to requesting a jury trial.

Johnson County Local Rule 12(C) (emphasis added). Removing Defendants argue that, when viewed through this rule, Plaintiffs'

trial setting request constituted a representation to the state court that discovery was completed. Removing Defendants further assert that because no discovery had been conducted with respect to the non-diverse defendants, Plaintiffs had abandoned their claims against the non-diverse defendants.

The court disagrees. Instead, it finds that Plaintiffs cannot be held to the representations to the state court which are contemplated by Local Rule 12(C). A review of the submissions to the court reveals that Plaintiffs' request for a trial setting was for a non-jury, rather than a jury trial. Three reasons support this conclusion. First, the letter requesting the May 18, 1998 trial setting does not indicate a request for a jury trial. (Pls.' Mot. Ex. H.) Second, Plaintiffs did not pay the jury fee in the case. (Aff. of Daniel W. McDonald, Pls.' Mot. Ex. H.) Last, when the state court coordinator contacted Plaintiffs' attorney and asked him if he was aware that the jury fee had not been paid in the case, Plaintiffs' attorney responded that he "was aware that the jury fee had not been paid and [he] specifically requested that this case . . . be set as a non-jury trial." Id.

Removing Defendants point out that at the time of Plaintiffs' trial setting request, both Intervenor had "demanded a trial by jury." (Removing Defs.' Opp. at 6.) They also indicate that on April 13, 1998, they requested a jury trial themselves, and that Plaintiffs refused to withdraw their trial setting even after Removing Defendants requested a jury trial.

(Removing Defs.' Opp. at 6-7.) However, these facts do not aid Removing Defendants' argument that Local Rule 12(c) applies to Plaintiffs' conduct, and thus, that Plaintiffs represented that they had completed discovery. First, the Intervenors' initial demand for a jury trial is wholly irrelevant to the question of whether they actually made a request that a jury trial be set for a certain date. Thus, Intervenors' jury demand cannot attribute to Plaintiffs the representation contemplated by Local Rule 12(C) that they had completed pre-trial discovery. In addition, Removing Defendants' conduct in requesting a jury trial eleven days after Plaintiffs made their request for a non-jury trial cannot cause Local Rule 12(C) to apply to Plaintiffs' request, even if Plaintiffs refused to withdraw their request once removing Defendants asked for a jury.

In sum, the representation contemplated by Johnson County Local Rule 12(C)--that a party requesting a jury trial has completed pre-trial discovery--can only be attributed to the party who requests that a jury trial be set. Despite Removing Defendants' contentions, Plaintiffs' April 2, 1998 request that trial be set for May 18, 1998 constituted a request for a non-jury trial. Thus, Rule 12(C) and the representations contemplated by it cannot be fairly held to apply to Plaintiffs' conduct here. Consequently, the court will not consider Plaintiffs' conduct in light of this rule in determining the question of whether Plaintiffs indicated an intent to voluntarily abandon their claims against the non-diverse defendants.

2. Texas Rule of Civil Procedure 245

The Texas Rules of Civil Procedure provide that:

A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

Tex. R. Civ. P. 245. Unlike Johnson County Local Rule 12(C), Texas Rule of Civil Procedure 245 applies to a request for any trial setting, not just one for a jury trial. Thus, this Rule does apply to Plaintiffs' trial setting request.

Consequently, the court will consider Plaintiffs' conduct in light of Texas Rule of Civil Procedure 245 in determining whether Plaintiffs indicated an intent to voluntarily abandon their claims against the non-diverse defendants. In considering this question, the court notes the following relevant facts: (1) Plaintiffs have served the non-diverse defendants with their Complaint; (2) the non-diverse defendants have not yet appeared in this action; (3) the non-diverse defendants have neither been served with discovery nor deposed; and (4) although one non-diverse defendant, Joshua Pharmacy, has been in default since this case was removed, Plaintiffs have taken no action with respect to this defendant. Because the court does not find an intent by Plaintiffs to abandon their claims against the non-diverse defendants, it will remand the case back to state court due to lack of federal jurisdiction.

By requesting a May 18, 1998 trial setting, Plaintiffs have

simply not indicated a definite intent to proceed to trial against Removing Defendants while abandoning their claims against the non-diverse defendants. Plaintiffs' trial setting request did not amount to a representation by them that they had

completed pretrial discovery or that they were ready for trial when they made their request. See Tex. R. Civ. P. 245 (stating that "no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case"). In this way, Plaintiffs' request for a trial setting differs from the plaintiff's statement of readiness for trial in Southern Pacific. In Southern Pacific, the court held that the plaintiff abandoned her claim against a non-diverse defendant because, immediately before the trial was about to begin, she stated that she was ready to proceed, even though she had not yet brought the non-diverse defendants into court by serving them. 126 F.2d at 902-04. Here, Plaintiffs represented that they would be ready to proceed in a month and a half, rather than immediately. Furthermore, unlike the plaintiff in Southern Pacific, Plaintiffs have brought the non-diverse defendants into court by serving them. The fact that they have not yet appeared in the action does not affect their status as parties in the case.

At most, Plaintiffs' April 2, 1998 request for a trial setting on May 18, 1998 amounted to a representation by them that

they would be ready for trial by the date they requested. This representation by Plaintiffs is not a clear indication that they intended to abandon their claims against the non-diverse defendants. More likely, it indicates Plaintiffs' intent to be ready with their claims against all defendants by the trial date requested. In this way, Plaintiffs' trial setting request is more like the plaintiff's "withhold service" direction in Aydell, 677 F. Supp. at 878-81. Plaintiffs' trial setting request, which constituted a representation that they would be ready for trial in a month and a half, without more, is not a clear and definitive expression by Plaintiffs that they desire to terminate or extinguish the action against the nondiverse defendants. See id. at 881.

Removing Defendants question Plaintiffs ability to prepare for trial against the non-diverse defendants in a month and a half: "How could there be 'preparation and trial strategy' for pursuing claims against defendants who had not appeared one month before the trial setting?" (Removing Defs.' Opp. at 7.) However, the court refuses to speculate as to what Plaintiffs' trial strategy is, or how long it will need to prepare for trial. The question here is whether Plaintiffs expressed a definite intent to voluntarily abandon their claims against the non-diverse defendants. Upon consideration of the parties' submissions with regard to this question, the court finds that no such intent can be attributed to Plaintiffs.

As a result, the non-diverse defendants remain in the case,

and the court finds that Removing Defendants basis for removal was faulty. Because complete diversity of citizenship does not exist between the parties in this action, the court is without jurisdiction to hear this case, and will remand it back to the state court.

III. CONCLUSION

For the foregoing reasons, the court will grant the motions to remand the case back to the 249th District Court of Johnson County, Texas.

An appropriate Pretrial Order follows.

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PRETRIAL ORDER NO.

AND NOW, TO WIT, this day of March, 1999, upon
consideration of plaintiff Karen Bellah's and intervenors Susan
Elaine McHam's and Rachel Marie Medford's motion to remand,
defendant Sheila K. Horsley, M.D.'s motion to remand, defendant
Robert M. Miller, M.D.'s motion to remand and defendants American
Home Products Corp.'s, A.H. Robins Co., Inc.'s and Wyeth-Ayerst
Laboratories Division of American Home Products Corp.'s responses
thereto, IT IS ORDERED that said motions are GRANTED.

IT IS FURTHER ORDERED that the action is REMANDED back to
the 249th District Court of Johnson County, Texas.

BY THE COURT:

LOUIS C. BECHTLE, J.