

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

IN RE: ASBESTOS PRODUCTS : Consolidated Under  
LIABILITY LITIGATION (No. VI) : MDL DOCKET NO. 875  
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:  
OBEDIAH WALKER, III : Case No. 2:16-cv-05349  
as Executor of the Estate of :  
Obediah Walker, Jr. :  
:  
v. :  
:  
BLACKMER PUMP CO., et al. :

**ORDER**

**AND NOW**, this **21st** day of **December, 2016**, upon consideration of Plaintiff's motion to remand (ECF No. 7) and General Electric Company's response (ECF No. 10), it is hereby **ORDERED** that the motion is **DENIED**.<sup>1</sup>

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<sup>1</sup> Plaintiff initially filed this case in the Court of Common Pleas, Philadelphia County on February 5, 2014. Plaintiff alleges that the Decedent was diagnosed with mesothelioma after exposure to asbestos-laden products aboard the USS Plymouth Rock where he served as an electrical repairman from 1969-1971.

On October 12, 2016 and October 13, 2016, Defendants General Electric Company and Buffalo Pumps, Inc. filed notices of removal in this Court pursuant to the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1). They contend that removal is now appropriate since Plaintiff, for the first time, alleged with the requisite specificity that the Decedent worked with their federal officer controlled products in his September 12, 2016 responses to their summary judgment motions.

On November 8, 2016, Plaintiff filed this motion for remand arguing only that Defendants' removal was untimely (on page seven of the brief, Plaintiff also states that "[a]lternatively, remand is required because the district court lacks subject-matter jurisdiction over this action," however,

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Plaintiff neither raises nor supports this theory anywhere else in the motion). Plaintiff contends that the initial complaint, amended complaint, and deposition testimony, all served more than thirty days before Defendants filed their notices of removal, provided the necessary knowledge to alert them that the federal officer defense might be implicated. GE filed a response to Plaintiff's motion, but Buffalo Pumps did not, leaving the motion for remand unopposed as to that defendant. Loc. R. Civ. P. 7.1(c).

The timeliness of removal is an issue of federal law. In re Asbestos Prods. Liab. Litig. (No. VI) (Barnes), 770 F. Supp.2d 736, 739 (E.D. Pa. 2011); 28 U.S.C. § 1442(a). In the context of a Multidistrict Litigation case, issues of federal law are governed by the law of the circuit in which the MDL court sits. In Re Asbestos Prods. Liab. Litig. (Oil Field Cases), 673 F. Supp.2d 358, 362 (E.D. Pa. 2009). Therefore, Third Circuit law applies to this issue.

The Federal Officer Removal Statute provides that a notice of removal must be filed within thirty days of a defendant's receipt of the initial pleading or, "[i]f the case stated by the initial pleading is not removable," within thirty days after defendant's receipt of "an amended pleading, motion, order or other paper from which it may be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). Unlike general removal under 28 U.S.C. § 1441, "the presumption under the federal officer removal statute favors removal" and "is to be 'broadly' construed in order to liberally grant federal officers access to a federal forum." Barnes, 770 F. Supp.2d at 741 (citing Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1261 (3d Cir. 1994)); see also Hagen v. Benjamin Foster Co., 739 F. Supp.2d 770, 783 (E.D. Pa. 2010) (holding that the record supporting removal should be viewed in the light most favorable to the removing defendant).

In analyzing the timing of removal under Section 1446, the removal window "is only triggered when 'the four corners of the [operative document(s)] . . . informs the reader, to a substantial degree of specificity, [that] all the elements of federal jurisdiction are present.'" Bouchard v. CBS Corp., No. 11-00458, 2012 WL 1344388, at \*5-6 (E.D. Pa. Apr. 17, 2012) (quoting Foster v. Mut. Fire, Marine & Inland Ins. Co., 986 F.2d 48, 53 (3d Cir. 1993) rev'd on other grounds, Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999)). The analysis for determining whether the four corners of the

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documents are sufficient is an objective one: "the issue is not what the defendant knew, but what the relevant document said." Foster, 986 F.2d at 53.

In order to invoke the Federal Officer Removal Statute, a defendant must establish four elements: (1) it is a "person" within the meaning of the statute; (2) the conduct at issue occurred while defendant was "acting under" the direction of a federal office; (3) it has a colorable federal defense; and (4) there is a causal nexus between plaintiff's claims and acts performed under color of federal office. Feidt v. Owens Corning Fiberglas Corp., 153 F.3d 124, 127 (3d Cir. 1998). Thus, before a defendant may file a notice of removal, the plaintiff must first allege facts regarding it that, with a substantial degree of specificity, could support these elements.

In that Buffalo Pumps did not oppose the motion for remand and since removal is proper as long as one of the Defendants' notices is timely, the Court will analyze only GE's notice of removal. 14C Fed. Prac. & Proc. Juris. § 3726 (4th ed.) (providing that "Section 1442(a)(1) authorizes removal of the entire case even if only one of the controversies it raises involves a federal officer or agency").

As stated, GE asserts that Plaintiff's September 12, 2016 response to its motion for summary judgment was the first time that he asserted that "turbines manufactured . . . by GE . . . exposed Mr. Walker to asbestos . . . aboard the USS Plymouth Rock." (ECF No. 1 p. 9). Thus, it argues that its October 12, 2016 notice of removal was timely as this was the first clear indication that it had a colorable federal defense.

Plaintiff first argues in response that the work history attached to the original and amended complaints contains all of the elements for federal officer removal and that, therefore, those pleadings triggered the thirty day countdown. Specifically, the work history provides in relevant part that the Deceased was "[e]xposed to products manufactured by or placed upon equipment manufactured by defendants named in this complaint, including but not limited to General Electric Corporation, while serving on active duty aboard . . . the USS Plymouth Rock." (ECF No. 7 Exhs. A to Exhs. B & C ).

Second, Plaintiff contends that, if the work history itself was insufficient, the addition of the Deceased's testimony that he worked near turbines with asbestos insulation

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that generated breathable dust, created the required nexus between Plaintiff's claims and GE's actions. In his testimony, the Decedent did not assert that the turbines were made by GE, however. See (ECF No. 7 Exh. A at 22-29).

The Court disagrees with Plaintiff and concludes that these statements, even taken together, did not sufficiently inform GE, with the requisite substantial specificity, that all of the elements of federal jurisdiction and the federal officer defense were present. Essentially, in the context of naval exposure, proper notice requires a plaintiff to allege in pleadings or "other paper[s]" that: (1) the plaintiff served on a naval ship and on that ship; (2) he or she was exposed to asbestos; (3) from a specific type of product; (4) that was made by the Defendant at issue. See Barnes, 770 F. Supp.2d at 740 (asserting that the "the nexus between Plaintiffs' claims and actions allegedly taken by Defendant under the direction of a federal officer" was not established until the plaintiff served an interrogatory answer contending that the defendant "'sold, supplied, marketed, and distributed asbestos containing products to which Decedent was exposed while in the U.S. Navy . . . including: . . . Marine Steam Turbines'" (alteration in original)).

In this case, while Plaintiff has alleged that the Decedent worked on a naval ship, was exposed to asbestos from GE's products, and that he worked generally on turbines, he has not alleged specifically that he was exposed to GE turbines, a product created under color of federal office. While the inference that the turbines at issue were manufactured by GE may be obvious, that fact is not objectively and specifically apparent from the operative papers. See Foster, 986 F.2d at 53.

After construing the facts in the light most favorable to GE, the Court finds that GE's removal was timely. See Hagen, 739 F. Supp.2d at 783. Looking solely at the four corners of the papers, GE was not informed that the Decedent was exposed to a product it created under the direction of a federal officer until Plaintiff filed his summary judgment response. While Plaintiff specifically alleged that he was exposed to asbestos bearing GE products on the USS Plymouth Rock, the papers did not facially indicate that the products at issue were products that were created under the color of federal office. Anything less requires the Court to delve into what GE reasonably knew or what can be reasonably inferred about which GE products, to which the Decedent was exposed on the USS Plymouth Rock, were controlled

AND IT IS SO ORDERED.

/s/ Eduardo Robreno  
EDUARDO C. ROBRENO, J.

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by a federal officer.

Plaintiff also contends that a variety of other evidence establishes GE's knowledge that the Decedent was exposed to its turbines on the USS Plymouth Rock. Specifically, Plaintiff asserts that: (1) GE admitted in its notice of removal that it supplied turbines to the Navy for use on the USS Plymouth Rock, (ECF No. 1 at ¶ 8); (2) an affidavit attached to Buffalo Pump's notice of removal from Roger Horne, a retired Rear Admiral, provides that all equipment use aboard Navy vessels was manufactured pursuant to Navy specification (ECF No. 2 Exh. D); and that the publication, Jane's Fighting Ships, mentioned that the USS Plymouth Rock specifically had GE-manufactured steam turbines. (ECF No. 7 Exh. D). None of these pieces of evidence is relevant to our inquiry as they are outside of the four corners of the operative documents and go solely to what GE knew. See Foster, 986 F.2d at 53 (providing that "the issue is not what the defendant knew, but what the relevant document said").

Here neither the four corners of the pleadings nor any "other paper[s]" provided, with the necessary substantial specificity, allegations "from which it may be ascertained that the case is one which" was removable until Plaintiff filed his September 12, 2016 response to GE's motion for summary judgment. In that response, Plaintiff specifically alleged that the Decedent was exposed to asbestos associated with GE turbines while stationed on the USS Plymouth Rock. Thus, GE's October 12, 2016 notice of removal was timely and Plaintiff's motion to remand is denied.