

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

IN RE: ASBESTOS PRODUCTS : MDL DOCKET NO. 875
LIABILITY LITIGATION (No. VI) :
:
DANIEL HOLMES, Personal :
Representative for the Estate : Case No. 09-93729
of GERALD HOLMES :
:
v. : Transferred from the District
: of Oregon
A.W. CHESTERTON CO., et al. :

FILED

JUN -2 2011

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

O R D E R

AND NOW, this **1st** day of **June 2011** it is hereby **ORDERED**
that Plaintiffs' Motion to Sever and Remand (doc. no. 5) filed on
January 24, 2011 is **DENIED**.¹

¹ Plaintiff, Daniel Holmes, Representative of the Estate of Gerald Holmes, filed the instant action in Multnomah County, Oregon on October 27, 2008. (Pl.'s Mot to remand, doc. no. 5, at 4.) A second amended complaint was filed on May 14, 2009. (Def.'s Resp., doc. no. 6, at 2.) Defendant Leslie Controls, Incorporated ("Leslie Controls") filed a timely notice of removal on June 17, 2009 under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and the case was removed to the District Court of Oregon. (Id. at 4.) The case was transferred to the Eastern District of Pennsylvania as part of MDL 875 In Re: Asbestos on December 16, 2009. (Id. at 5.)

On July 12, 2010, removing Defendant, Leslie Controls, filed for bankruptcy protection. Id. On January 24, 2011, Plaintiff filed the instant motion to sever Leslie Controls from the case and remand the remaining claims to Oregon state court. Defendant General Electric Company ("GE") filed a response on February 7, 2011.

As a threshold matter, Plaintiff argues that GE's Response to his Motion to Remand was untimely. Plaintiff's timeliness argument is based on the fact that GE had notice of his motion to remand as early as November 12, 2010, when Plaintiff filed the motion on the District Court of Oregon's docket. Additionally, the Motion to Remand was filed in the

Eastern District of Pennsylvania on January 6, 2011, but was filed under the incorrect number. Plaintiff notes that GE filed its response "exactly fourteen days after the same motion had been re-filed using the new case number, but nearly three months after Defendant first received notice of Plaintiff's motion." (doc. no. 9 at 3.) While the apparent confusion over filing the instant motion is regrettable, the only record that is relevant for purposes of timing is the correct Eastern District of Pennsylvania docket. According to that docket, as Plaintiff notes, GE's response was timely filed.

Next, Plaintiff asserts two grounds for remand. First, Plaintiff asserts that his claims against Leslie Controls should be severed from the case, and that all remaining claims should be remanded. The Court has discretion to sever claims under Federal Rule of Civil Procedure 21. Plaintiff's rationale for severing his claims is that "[i]t would certainly be most efficient to allow Plaintiff's claims against the other defendants to go forward, rather than staying them pending Leslie Controls' bankruptcy proceeding." (doc. no. 5, at 6.) However, cases in MDL 875 with both bankrupt defendants and viable defendants (which constitute most of the cases in MDL 875) proceed against the viable defendants, while claims against bankrupt defendants are stayed. As Plaintiff's stated reason for severing these claims is inapplicable to cases in MDL 875, and his claims against viable Defendants will proceed, the Court declines to sever the claims.

Second, Plaintiff asserts that, because the only removing Defendant is now in bankruptcy, "federal jurisdiction is lacking and therefore, the remaining claims must be remanded to state court." (doc. no. 5 at 7.) Indeed, 28 U.S.C. § 1447(c) provides that, "[i]f any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

However, in Leslie Controls's absence, remand is not automatic. Rather, the Court can determine that there is an independent basis for federal jurisdiction or the Court can exercise its discretion to exercise supplemental jurisdiction over remaining claims under 28 U.S.C. § 1367(a). See New Rock Asset Partners, L.P. v. Preferred Entity Advancements, 101 F.3d 1492, 1506 (3d Cir. 1996) ("[W]here the jurisdiction-conferring party drops out and the federal court retains jurisdiction over what becomes a state law claim between non-diverse parties, the bounds of Article III have not been crossed."). In determining

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

whether to maintain jurisdiction in the absence of the jurisdiction-conferring party, the court weighs the considerations of "judicial economy, convenience and fairness to litigants." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); see also Alm v. A.P.I. Inc., No. 09-66581, doc. no. 10 (Feb. 12, 2010) (Robreno, J.) (denying plaintiffs' motion to remand when the removing defendant had been dismissed from the case).

In the instant case, GE urges the Court to exercise supplemental jurisdiction over the claims against it. Plaintiff has alleged the same causes of action (strict liability and negligence) and the same source of exposure (employment on vessels at the Oregon Shipyard/Swan Island Shipyard) against all Defendants. (doc. no. 6, at 7.) Moreover, GE asserts that the government contractor defense is potentially available to all Defendants, as the alleged exposure occurred on Naval vessels, and all equipment manufacturers were subject to the same military specifications with respect to those vessels. (Id.)

The Court finds that the interests of "judicial economy, convenience and fairness to the litigants" weigh heavily in favor of exercising supplemental jurisdiction over the remaining claims. Particularly with respect to judicial economy, a remand at this juncture would most certainly result in a notice of removal being filed by one or more of the eleven (11) remaining manufacturing defendants. This notice of removal would be nearly identical to the one filed by Leslie Controls, and would require the Court to re-address the basis for subject matter jurisdiction, which has already been presented and adjudicated in this case.

Furthermore, this case has been part of MDL 875 for two and half years, and Plaintiff waited for five (5) months after Leslie Controls's declaration of bankruptcy to seek remand. Under these circumstances, a remand at this juncture would not serve the interests of judicial economy, convenience, or fairness.