

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

WILLIAM KIMMET	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
MANNESMANN DEMATIC RAPISTAN	:	NO. 00-1247
SYSTEMS CORPORATION, et al.	:	
Defendants	:	

MEMORANDUM AND ORDER

YOHN, J. June , 2000

Plaintiff William Kimmet was injured by a roller conveyor on February 2, 1998. As a result, he filed suit in state court in Philadelphia, Pennsylvania, against those entities he claims were responsible for the roller conveyor’s design, manufacture, supply, or sale, naming as defendants Mannesmann Dematic Rapistan Systems Corporation [“Mannesmann”], Rapistan Demag Corporation, L.S.D.H.C. Corporation [“LSDHC”], Rapistan Corporation, Rapistan Division of Lear Siegler, Inc., Portec, Inc. [“Portec”], and J. Richards Industries, L.P. [“JRILP”]. The defendants removed the case, claiming that complete diversity of citizenship existed among the parties. Pending before the court is the plaintiff’s motion to remand the case due to the notice of removal’s failure to establish complete diversity of citizenship. Because the notice of removal is defective and amendment improper, the court will grant the plaintiff’s motion.

I. Background

The plaintiff’s complaint contains the following allegations. The plaintiff, a Pennsylvania citizen, was injured at work on February 2, 1998, by a defective roller conveyor designed,

manufactured, supplied, or sold by the defendants. *See* Notice of Removal of Defs. Mannesmann Dematic Rapistan Corp. and LSDHC Corp. (Doc. No. 1) [“Notice”] Ex. A [“Compl.”] ¶¶ 1, 9-16, 18. The complaint states that all defendants are corporations and describes them as follows: Mannesmann and Rapistan Demag Corp. are citizens of both New York and Michigan; LSDHC and Rapistan Corp. are citizens of both Delaware and New Jersey; Rapistan Division of Lear Siegler, Inc. is a citizen of both Delaware and California; Portec is a citizen of both Delaware and Ohio; and JRILP is a citizen of Ohio. *See id.* ¶¶ 2-8.

Within thirty days of being served with the complaint, and after securing the consent of Portec and JRILP, Mannesmann and LSDHC filed a notice of removal. *See* Notice ¶¶ 10, 12. In the notice of removal, Mannesmann and LSDHC claim that several of the defendants do not exist or are misnamed. For example, although the complaint names Mannesmann Dematic Rapistan Systems Corp. and L.S.D.H.C. Corp. as defendants, the companies’ actual names are Mannesmann Dematic Rapistan Corp. and LSDHC Corp., respectively.¹ *See id.* ¶¶ 3-4. Additionally, Rapistan Demag Corp. and Rapistan Corp. are nothing more than former names of Mannesmann and LSDHC. *See id.* Moreover, Rapistan Division of Lear Siegler, Inc. was once an unincorporated unit of Lear Siegler, Inc., but that unit is no longer in existence and was not when the plaintiff filed his complaint.² *See id.* ¶ 5. Thus, Mannesmann and LSDHC assert that the defendants named in the plaintiff’s complaint are correctly identified as Mannesmann Dematic Rapistan Corp., LSDHC Corp., Portec, Inc., and J. Richard Industries, L.P. *See id.* ¶¶ 3-

¹For simplicity, I will continue to refer to these defendants as “Mannesmann” and “LSDHC.”

²LSDHC is the successor by merger to Lear Siegler, Inc. *See id.* ¶ 4.

7. Mannesmann and LSDHC describe these defendants as follows: Mannesmann is a corporation and a citizen of both New York and Michigan; LSDHC is a corporation and a citizen of both Delaware and New Jersey; Portec is a corporation and a citizen of both Delaware and Ohio; and JRILP is a limited partnership formed in Delaware with its principal place of business in Ohio. *See id.* ¶¶ 3-7. Based on these assertions, they claim that complete diversity of citizenship exists among all of the parties. *See id.* ¶ 9.

II. Discussion

Removal of a case from state court to federal court is governed by 28 U.S.C. §§ 1441-1452. Pursuant to 28 U.S.C. § 1441, a case may be removed if the diversity of citizenship and amount in controversy requirements of 28 U.S.C. § 1332 are met. *See* 28 U.S.C. §§ 1332, 1441. The burden of establishing removal jurisdiction, however, is borne by the defendant, and failure to meet this burden results in remand of the removed case. *See McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 358 (3d Cir. 1995); *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985). Moreover, courts have recognized that the defendant must demonstrate that removal is proper based on the allegations in the complaint and the notice of removal. *See, e.g., Kerstetter v. Ohio Cas. Ins. Co.*, 496 F. Supp. 1305, 1307 (E.D. Pa. 1980). In determining whether a defendant has established removal jurisdiction, the Third Circuit has cautioned that “the removal statutes are to be strictly construed against removal and [that] all doubts should be resolved in favor of remand.” *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987).

The defendants based the removal of this case on the complete diversity of citizenship of the parties. *See* Notice ¶ 9. The notice of removal does not, however, establish that all parties to this action are diverse. The citizenship of a partnership is based on the citizenship of the partnership's partners, both limited and general. *See Knop v. McMahan*, 872 F.2d 1132, 1137 n.11 (3d Cir. 1989). Thus, the citizenship of JRILP, which the notice of removal describes as a limited partnership, is dictated by the citizenship of its partners. *See* Notice ¶ 6, Ex. C. The notice of removal does not contain any information about the citizenship of JRILP's partners, nor does the complaint. *See* Notice; Compl. As a result, the defendants cannot have established removal jurisdiction based on these documents, and the notice of removal is at least procedurally defective.

Pursuant to 28 U.S.C. § 1447(c), within thirty days of the filing of the notice of removal, the plaintiff filed a motion to remand the case due to the defect in the notice of removal. *See* Pl.'s Mot. to Remand (Doc. No. 5) ["Pl.'s Mot."] ¶¶ 15-16. Specifically, the plaintiff argues that the case should be remanded because the defendants' failure to establish JRILP's citizenship constitutes a failure to meet their burden of establishing the court's removal jurisdiction. *See* Mem. in Supp. of Pl.'s Mot. (Doc. No. 5) ["Pl.'s Mem."] at 3-4.

Apparently conceding that complete diversity of citizenship among the parties does not exist, Portec and JRILP argue that JRILP's citizenship is irrelevant because JRILP was fraudulently joined. *See* Defs. Portec & JRILP's Mem. of Points & Auths. in Opp'n to Pl.'s Mot. (Doc. No. 9) ["Defs.' Resp."] at 1-8. If a non-diverse party is fraudulently joined in order to defeat a federal court's diversity jurisdiction, then the non-diverse party may be dismissed and its citizenship ignored for the purposes of determining removal jurisdiction. *See Cook v. Pep*

Boys–Mannie, Moe & Jack, Inc., 641 F. Supp. 43, 46 (E.D. Pa. 1985) (Pollak, J.). As the plaintiff points out, however, the defendants do not establish in their notice of removal the existence of removal jurisdiction due to the fraudulent joinder of a non-diverse party. *See* Pl.’s Resp. to Defs.’ Resp. (Doc. No. 14) [“Pl.’s Reply”] at 3-6; *see also* Notice. Fraudulent joinder is first asserted in Portec and JRILP’s response to the plaintiff’s motion. *See* Defs.’ Resp. at 1-8.

In order to remove a case to federal court, a defendant must file a notice of removal establishing removal jurisdiction within thirty days of either receiving the complaint or, if the complaint does not reveal the case’s removability, learning that the case is removable. *See* 28 U.S.C. § 1446(c); *Menefee v. General Foam Plastics Corp.*, Civ. A. No. 99-751, 1999 WL 153715, at *2 (E.D. Pa. Mar. 19, 1999) (stating that a notice of removal must be filed by the defendants within thirty days of their learning that diversity jurisdiction exists due to the fraudulent joinder of a non-diverse party). This thirty-day period may not be extended by a court. *See Balestrieri v. Bell Asbestos Mines, Ltd.*, 544 F. Supp. 528, 529 (E.D. Pa. 1982). Under certain circumstances, however, a defendant may amend a defective notice of removal after the expiration of this thirty-day period. *See* 28 U.S.C. § 1653; *Ellerbee v. Union Zinc, Inc.*, 881 F. Supp. 162, 164-65 (E.D. Pa. 1995) (allowing amendment to cure a “‘technical’ pleading deficiency”); Charles A. Wright et al., *Fed. Prac. & Proc.: Jurisdiction 3d* § 3733 (1998) (stating that in amending a defective notice of removal, “[c]ompletely new grounds for removal jurisdiction may not be added and missing allegations may not be furnished”).

Based on the reasons given by Portec and JRILP for JRILP’s joinder being fraudulent, the fraudulent nature of JRILP’s joinder should have been apparent to JRILP and Portec when they were served with the complaint. *See* Defs.’ Resp. at 3-6 (asserting that JRILP merely owns

Portec's stock and, therefore, arguing that JRILP cannot be held liable under Pennsylvania law as a successor to Portec). Thus, in order to avoid having to amend the defective notice of removal, Portec and JRILP must have filed a notice of removal establishing diversity jurisdiction due to the fraudulent joinder of a non-diverse party—i.e., JRILP—within thirty days of being served with the complaint.

The court concludes that the defendants are late in making the fraudulent joinder argument. The complaint was served on the defendants by February 11, 2000. *See* Notice ¶¶ 10-11. Thus, a notice of removal establishing removal jurisdiction due to the fraudulent joinder of JRILP must have been filed by March 13, 2000. By March 13, 2000, the defendants had filed a notice of removal. *See* Notice at 1. In that notice of removal, however, the defendants claim (but do not establish) that complete diversity of citizenship exists among all parties, not that JRILP's lack of diversity is moot due to its fraudulent joinder. *See* Notice ¶ 9. Assuming the truth of Portec and JRILP's fraudulent joinder argument, removal jurisdiction was not properly established until April 17, 2000, five weeks late. *See* Defs.' Resp. at 1.

If the defendants can amend the notice of removal to reflect their assertion of fraudulent joinder, then the defective notice of removal can be remedied.³ The defendants cannot, however, amend the notice of removal to reflect the assertion of fraudulent joinder. As I have already recognized, a notice of removal may not be amended to add new allegations that are necessary to establish removal jurisdiction. *See Ellerbee*, 881 F. Supp. at 164-65 (E.D. Pa. 1995); Wright, *Fed. Prac. & Proc.: Jurisdiction 3d* § 3733. Thus, a notice of removal may not be amended to

³The defendants have not expressly asked that the notice of removal be amended, but amending the defective notice of removal to assert fraudulent joinder is the only way they can keep this case in a federal court.

add a missing allegation that a non-diverse party has been fraudulently joined in order to defeat diversity jurisdiction. *See Castle v. Laurel Creek Co.*, 848 F. Supp. 62, 66 (S.D. W. Va. 1994).

Addressing exactly this issue, a district court in West Virginia explained:

In the instant case, the defendants failed to allege [that the non-diverse] defendant Gergely had been fraudulently joined to the complaint. They contend such failure was immaterial. . . . The proposed amendment [that Gergely was fraudulently joined] is neither minor nor technical in nature; it is both substantial and material. Therefore, this Court is of the opinion that the motion for leave to amend the notice of removal should be denied.

Id. I agree with this reasoning. As a result, the court will not allow the defect in the notice of removal to be remedied by amending the notice to reflect the assertion of fraudulent joinder.

For the foregoing reasons, the court will grant the plaintiff's motion.

III. Conclusion

The court concludes that the defendants' notice of removal is defective and that it may not be amended to reflect the assertion of fraudulent joinder. *See Steel Valley Auth.*, 809 F.2d at 1010. Therefore, I will grant the plaintiff's motion to remand this case. An appropriate order follows.

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WILLIAM KIMMET	:	
Plaintiff	:	CIVIL ACTION
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v.	:	
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MANNESMANN DEMATIC RAPISTAN	:	NO. 00-1247
SYSTEMS CORPORATION, et al.	:	
Defendants	:	

ORDER

YOHN, J.

AND NOW this day of June, 2000, upon consideration of the plaintiff's motion to remand (Doc. No. 5), the defendants' response thereto (Doc. No. 9), and the plaintiff's reply thereto (Doc. No. 14), IT IS HEREBY ORDERED that the plaintiff's motion is GRANTED, and the action is REMANDED to the Court of Common Pleas of Philadelphia County, Pennsylvania.

William H. Yohn, Jr.