

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

ROSEANNE GAUL,	:	
Plaintiff	:	
	:	
v.	:	02-CV-2135
	:	
	:	
NEUROCARE DIAGNOSTIC, INC.,	:	
LEWIS M. FREDANE, M.D., and	:	
PURDUE PHARMA L.P.	:	
Defendants	:	

AMENDED MEMORANDUM AND ORDER

Anita B. Brody, J.

January , 2003

This matter originated as an action in state court. It arises from the following facts: Beginning in 1990, plaintiff Roseanne Gaul sought medical care from defendant Lewis M. Fredane, M.D. (“Dr. Fredane”) as a result of injuries sustained in a car accident. At all relevant times, defendant Neurocare Diagnostic, Inc. (“Neurocare Diagnostic”) employed Dr. Fredane. In or about June 1996, Dr. Fredane began prescribing Oxycontin, a pain relief medication manufactured by defendant Purdue Pharma L.P. (“Purdue Pharma”), for plaintiff’s complaints of pain. Over the next few months, Dr. Fredane increased plaintiff’s dosage. During this period, plaintiff expressed concerns about the risk of becoming addicted to the drug. Dr. Fredane allegedly assured plaintiff that the drug was safe and increased her dosage further. As Dr. Fredane continued to increase her dosage over the years, plaintiff repeatedly articulated worries about addiction to the drug. Dr. Fredane allegedly responded by encouraging plaintiff to continue using Oxycontin at the levels he prescribed. In July 2001, despite Dr. Fredane’s alleged

attempts to dissuade her from making the decision, plaintiff sought treatment for her addiction to Oxycontin. Plaintiff was in rehabilitation for approximately two months and claims to experience ongoing injuries related to her addiction and subsequent withdrawal.

On March 6, 2002, plaintiff filed a complaint against defendants Neurocare Diagnostic, Dr. Fredane, and Purdue Pharma in the Philadelphia County Court of Common Pleas. Plaintiff alleged negligence against Neurocare Diagnostic and Dr. Fredane and fraudulent concealment, breach of implied warranty, breach of express warranty, and common law tort against Purdue Pharma. On April 15, 2002, the defendants removed the action to federal court.

Plaintiff has since filed a motion to remand, alleging that the federal court lacks jurisdiction over this matter. Defendants raise two arguments in favor of federal subject matter jurisdiction over this case. First, they assert that, based on the doctrine of fraudulent joinder, diversity jurisdiction exists because Neurocare Diagnostic and Dr. Fredane, the only non-diverse defendants, are fraudulently joined. Second, they argue that, because the litigation involves federal statutes, federal question jurisdiction exists.¹ After reviewing the parties' submissions and the relevant law, I conclude that the federal court lacks jurisdiction to hear this case. Accordingly, I shall grant plaintiff's motion and remand this action to state court.

¹Although the parties have also briefed the issue of whether plaintiff's case should be dismissed, the threshold question is whether the federal court has subject matter jurisdiction over this dispute.

STANDARD OF REVIEW

The Third Circuit Court of Appeals has held that “[i]t is settled that the removal statutes [28 U.S.C. §§ 1441-1452] are to be strictly construed against removal and 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), *cert. dismissed*, 484 U.S. 1021, 108 S.Ct. 739, 98 L.Ed.2d 756 (1988) (citing Abels v. State Farm Fir & Casualty Co., 770 F.2d 26, 29 (3d Cir. 1985)).

When deciding whether to remand, a district court must review the plaintiff’s complaint as it stood when defendants sought to remove the case to federal court. *Id.* The district court must also “assume as true all factual allegations of the complaint.” *Id.* (citing Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039, 104 S.Ct. 701, 79 L.Ed.2d 166 (1984)).

DISCUSSION

A defendant may remove any civil action brought in state court “of which the district courts of the United States have original jurisdiction.” 28 U.S.C. § 1441(a). There are two types of original jurisdiction: diversity and subject matter. Diversity jurisdiction arises when the amount in controversy exceeds \$75,000 and there is complete diversity between the opposing parties. 28 U.S.C. §1332. Federal question jurisdiction exists when the civil action arises “under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Defendants contend that federal jurisdiction is appropriate because both types of subject matter jurisdiction exist.

1. Diversity Jurisdiction

Neurocare Diagnostic and Dr. Fredane, like the plaintiff, are Pennsylvania residents. Ordinarily, this commonality would defeat the complete diversity needed for federal diversity jurisdiction. See 28 U.S.C. § 1332(a)(1). In certain circumstances, however, the federal courts will find diversity jurisdiction if the defendant can prove that joinder was fraudulent. See 14 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3731 (3d ed. 1999). Defendants make this argument in their briefs, maintaining that plaintiff’s sole motive in filing against Neurocare Diagnostic and Dr. Fredane was to frustrate Purdue Pharma’s efforts to remove the action to federal court.² Def. Purdue Pharma’s Opp’n Br. at 4.

The Third Circuit has held that joinder is fraudulent “where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.” Boyer v. Snap-On Tools Corp., 913 F.2d 108, (3d Cir. 1990), *cert. denied*, 498 U.S. 1085, 111 S.Ct. 959, 112 L.Ed.2d 1046 (1991) (quoting Abels, 770 F.2d at 32). In evaluating allegations of fraudulent joinder, the district court must “resolve all contested issues of substantive fact in favor

²Defendants do not, however, make the argument that joinder of the non-diverse parties was impermissible under Rule 20 of the Federal Rules of Civil Procedure. Joinder of the claim made against Neurocare Diagnostic and Dr. Fredane with those made against Purdue Pharma is permissible so long as the two sets of claims arise from or relate to “the same transactions or occurrences, [or] any question of law or fact common to all defendants.” Fed. R. Civ. P. 20(a). Since plaintiff argues that Purdue Pharma’s alleged negligence contributed to Dr. Fredane’s alleged failure to prevent or treat plaintiff’s addiction, a common nexus of fact exists between the two sets of claims. I will therefore not consider whether diversity jurisdiction exists on the basis of impermissible joinder under Rule 20.

of the plaintiff and must resolve any uncertainties as to the current state of controlling state law in favor of the plaintiff.” Id. (citations omitted). This permissive standard of review is heavily weighted in favor of the plaintiff; the Boyer court went so far as to hold that “even a possibility” of a state court finding that plaintiff’s complaint stated a claim against a resident-defendant was enough to justify joinder and thus defeat removal. Id. (quoting Coker v. Amoco Oil Co., 709 F.2d 1433, 1440-41 (11th Cir. 1983)). Moreover, the Third Circuit has held “the inquiry into the validity of a complaint triggered by a motion to dismiss under Rule 12(b)(6) is more searching than that permissible when a party makes a claim of fraudulent joinder.” Batoff v. State Farm Insurance Co., 977 F.2d 848, 852 (3d Cir. 1992). Thus, even if plaintiff’s case is dismissed in state court it does not follow that defendants were fraudulently joined. Id. Rather, fraudulent joinder occurs only when the complaint is “wholly insubstantial and frivolous.” Id. at 853. Accordingly, if plaintiff possibly stated a state-law claim upon which relief can be granted against Dr. Fredane or Neurocare Diagnostic, joinder is proper and the case should be remanded.

The permissibility of plaintiff’s decision to name Dr. Fredane and Neurocare Diagnostic as defendants depends on whether there is colorable ground for her malpractice suit against these two defendants. The Pennsylvania Supreme Court has “described malpractice as consisting of ‘a negligent or unskillful performance by a physician of the duties which are devolved incumbent upon him on account of his relations with his patients, or of a want of proper care and skill in the performance of a professional act.’” Mutual Benefit Ins. Co. v. Haver, 725 A.2d 743, 746 (Pa. 1999) (quoting Hodgson v. Bigelow, 7 A.2d 338, 342 (Pa. 1939)). Plaintiff maintains that Dr. Fredane exhibited such negligence insofar as he breached his duty of care by overprescribing Oxycontin and by not treating those injuries that resulted from her

ensuing addiction. Mutual Benefit thus establishes the legal basis for plaintiff's claim against the non-diverse defendants.

Defendants respond that plaintiff's malpractice claim is barred by the state statute of limitations. It is unclear whether, under the law of the Third Circuit, a federal court, when considering a motion to remand, should allow an affirmative defense like the statute of limitations to prove that no colorable basis exists for plaintiff's claim. As noted earlier, the district court may ask whether a claim is frivolous. See Batoff, 977 F.2d at 852. Presumably, if a statute of limitations unquestionably precludes the possibility of relief, then the claim may be frivolous and removal may be proper. To make such a determination, the court would need to look beyond the pleadings. For this reason, it is prudent to consider defendants' argument.

Medical malpractice claims are governed by Pennsylvania's two-year statute of limitations. 42 Pa. Cons. Stat. § 5524(2); see also Bohus v. Beloff, 950 F.2d 919 (3d Cir. 1991) ("state tolling principles are generally to be used by a federal court when it is applying a state limitations period") (quoting Vernau v. Vic's Market, Inc., 896 F.2d 43, 45 (3d Cir. 1990)). Under § 5524(2), any of plaintiff's claims arising from events prior to March 6, 2000 are barred unless an exception to the statute applies. Although the events surrounding plaintiff's decision to seek treatment for her addiction in July 2001 might fall within the permissible period, plaintiff still cites two exceptions to § 5524(2): the "discovery rule" and the doctrine of fraudulent concealment. The discovery rule is an exception to the general rule that a plaintiff cannot bring suit once the statutory period expires. Murphy v. Saavedra, 746 A.2d 92, 94 (Pa. 2000). It provides that where the existence of the injury is not known to the plaintiff, and such knowledge cannot reasonably be ascertained within the statutory period, the limitations period does not

begin to run until the discovery of the injury is reasonably possible. *Id.* Under this rule, the statute of limitations begins to run when “the plaintiff knows, or reasonably should know: (1) that he has been injured, and (2) that his injury has been caused by another party’s conduct.” Haggart v. Cho, 703 A.2d 522, 526 (Pa. Super. 1997).

The doctrine of fraudulent concealment also tolls the statute of limitations. When the defendant, through fraud or concealment, causes the plaintiff to relax her vigilance or deviate from her right of inquiry, the defendant cannot invoke the statute of limitations to bar plaintiff’s claim. Shaffer v. Larzelere, 189 A.2d 267, 269 (Pa. 1963). The fraud or concealment need not be intentional, i.e. the defendant need not have intended to deceive the plaintiff. Colonna v. Rice, 664 A.2d 979, 982 (Pa. Super. 1995). Mere mistake, misunderstanding, or lack of knowledge, however, is insufficient to toll the statute. *Id.* In the context of medical malpractice claims, the Pennsylvania courts have offered somewhat ambiguous guidance: When a plaintiff discovers an injury, but does not appreciate it as such because of a physician’s assurances, the statute of limitations is tolled. Stein v. Richardson, 448 A.2d 558, 563 (Pa. Super. 1982). However, reliance upon the word of one physician is unreasonable when common sense should lead to a different conclusion. DeMartino v. Albert Einstein Med. Ctr., 460 A.2d 295, 302 (Pa. Super. 1983).

The question of whether one of these two exceptions applies to the case at hand is not properly before this court. Rather, what must be determined is whether there is a *possibility* that one or both of the exceptions apply. In making this determination, one must remember that “[a] claim which can be dismissed only after an intricate analysis of state law is not so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction.”

Batoff, 977 F.2d at 853. Without delving deeply into the caselaw surrounding the parties' claims, I find that either of the two exceptions to the statutory period *could* apply: prior to seeking treatment for addiction, plaintiff might have justifiably relied on the assurances of her doctor and thereby failed to discover the nature of her injury through no fault of her own. In making this finding, I do not presume to instruct the state court or its jury as to what did occur. Rather, I find only that a colorable basis for plaintiff's claim exists. Joinder of Dr. Fredane and Neurocare Diagnostic was therefore not fraudulent and diversity jurisdiction therefore does not exist.

2. Federal Question Jurisdiction

Defendants argue that in addition to diversity jurisdiction, this court has federal question jurisdiction over plaintiff's complaint. Def. Purdue Pharma's Opp'n Br. at 15. Although plaintiff's complaint makes no federal claims, defendants still assert that federal question jurisdiction exists. Defendants argue that plaintiff's state law claims require an interpretation of the federal Food, Drug and Cosmetic Act ("FDCA") and related federal regulations and, therefore, that these claims serve as a basis for federal question jurisdiction.³ Id. at 15-16. For the reasons articulated below, I disagree.

³Plaintiff has filed five state claims against Purdue Pharma: Count II, Negligence; Count III, Fraudulent Concealment; Count IV, Breach of Implied Warranty and Breach of Express Warranty; Count V, Strict Liability in Tort Based Upon Violation of a Statute; Count VI, Strict Liability in Tort. Pl.'s Compl. at 7-16.

Federal courts “have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Generally, the well-pleaded complaint rule determines whether a civil action arises under federal law. Under this rule, “a cause of action arises under federal law only when the plaintiff’s well-pleaded complaint raises issues of federal law.” Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987) (citations omitted). In such circumstances, a federal question must be presented on the face of plaintiff’s properly-pleaded complaint. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-12, 103 S.Ct. 2841, 2846-48, 77 L.Ed.2d 420 (1983). Typically, a federal defense to a state-law claim does not appear on the face of the plaintiff’s complaint and thus does not satisfy either the rule or the requirements for removal. Gully v. First Nat’l Bank, 299 U.S. 109, 115-18, 57 S.Ct. 96, 98-100, 81 L.Ed. 70 (1936). For this reason, the defense of preemption is usually insufficient justification to permit removal to federal court. Caterpillar, Inc. v. Williams, 482 U.S. 386, 398, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987).

There are, however, two possible exceptions to the well-pleaded complaint rule: complete preemption and the “necessary element” test. These exceptions encompass all those situations where a federal court may find “arising under federal law” jurisdiction, even though the plaintiff’s complaint makes no federal claims. The two exceptions are sometimes referred to collectively as the “artful pleading doctrine.” 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 3722 (3d ed. 1999).

The doctrine of complete preemption applies when a court finds that Congress intended for a federal statute to preempt an area of state law. Under this doctrine, any complaint

that alleges the preempted area of state law is presumed to make a claim arising under federal law and may thus be removed to federal court. Caterpillar, 482 U.S. at 398. The Third Circuit, following the Supreme Court's example, has so far found complete preemption with regard to only two federal statutes: § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and § 502(a) of the Employee Retirement Income Security Act. Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 354 (3d Cir. 1995). Neither of these statutes are at issue in this case.

The “necessary element” test asks whether a state claim necessarily involves a substantial question of federal law. 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 3722 (3d ed. 1999). Defendant Purdue Pharma alleges that provisions of the FDCA and related federal statutes are necessarily involved in resolution of plaintiff's state claims. Purdue Pharma made a similar argument about the federal nature of a set of state claims in an earlier Oxycontin case. See McCallister v. Purdue Pharma L.P., 164 F.Supp.2d 783, 793 (S.D. W. Va. 2001). In McCallister, Purdue Pharma argued that plaintiffs' claims required “resolution of substantial questions of federal law, including proper interpretation of both the FDCA and Controlled Substances Act.” Id. The West Virginia district court disagreed. The court's reasons and analysis regarding defendant's argument in the present case remain sound, leading me to adopt a similar position on this question of federal civil procedure.

As the McCallister court noted, the Supreme Court has held that federal question jurisdiction may be appropriate when “it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims.” Franchise Tax Bd., 463 U.S. at 13, 103 S.Ct. at 2841. A few years after Franchise Tax Board, the Court clarified the

meaning of its decision. In Merrell Dow Pharmaceuticals, Inc. v. Thompson, the Court held that when violations of a federal statute lack a federal remedy “[it] is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.” 478 U.S. 804, 814, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986).

Defendant Purdue Pharma has provided no evidence of a private, federal cause of action under the FDCA and related regulations. Rather, Purdue Pharma argues that two administrative remedies “exclusively” govern plaintiff’s claims. Def. Purdue Pharma’s Opp’n Br. at 19. This argument is unpersuasive. Defendant argues that either Section 10 of the Administrative Procedures Acts (“APA”) or a citizen’s petition filed with the Food and Drug Administration (“FDA”) under 21 C.F.R. § 10.30 is the proper legal remedy for determining whether it acted negligently with regard to its labeling of Oxycontin. Id. In an earlier decision within this district, however, the court held that an “administrative remedy provided in [the 1992 Cable Act] does not fulfill the requirement of a private federal remedy under Merrell Dow.” Pennsylvania v. Comcast Corp., No. 94 Civ. 4142, 1994 WL 568479, at *1 (E.D. Pa. 1994); see also Willy v. Coastal Corp., 855 F.2d 1160, 1169 (5th Cir. 1988) (holding that it would “flout congressional intent” to give the federal court original jurisdiction “based on statutes that limit the federal remedy to an administrative action”). Moreover, the language of Merrell Dow stands in stark opposition to defendant’s argument. Justice Stevens, writing for the majority, noted “that there is no federal cause of action for FDCA violations.” Merrell Dow, 478 U.S. at 810. Based on this fact, he concluded that the plaintiffs’ claims of negligence against the drug manufacturer should have been remanded to state court. “We conclude that a complaint alleging

a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim [under § 1331].” *Id.* at 817 (quotation omitted).

Defendants have failed to prove that a federal remedy exclusively governs state actions that involve violations of the FDCA. Nor have defendants offered evidence of a private, federal cause of action for any related statute. Plaintiff, meanwhile, alleges only state-law claims. These factors, taken together, militate against my finding that plaintiff’s claims involve a necessarily federal element. I therefore conclude that defendant has failed to establish an exception to the well-pleaded complaint rule and that this court lacks federal question jurisdiction.⁴

CONCLUSION

The Third Circuit Court of Appeals has held that motions to remand should be viewed in the most favorable light possible. Applying the standard established by this court, I find no evidence of either diversity or federal question jurisdiction over this matter. Absent such

⁴Nor am I dissuaded from this conclusion by Purdue Pharma’s fears of how this decision might undermine the authority of the FDA’s administration of the FDCA. The Supreme Court, when considering the consequences of preemption for the FDA’s administration of the Medical Device Amendments, held that “due care” in the context of negligent manufacturing and failure to warn claims was legally indistinguishable from any general duty addressed by state tort law. “These general obligations are no more a threat to federal requirements than would be a state-law duty to comply with local fire prevention regulations and zoning codes.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 501-02, 116 S.Ct. 2240, 2258, 135 L.Ed.2d 700 (1996).

evidence, I cannot retain subject matter jurisdiction over this case. For these reasons, I will grant plaintiff's motion and remand this matter to state court.

ORDER

AND NOW, this _____ day of January, 2003, plaintiff's Motion to Remand (Docket #14) is **GRANTED**. This matter is to be remanded to Philadelphia County's Court of Common Pleas.

ANITA B. BRODY, J.

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