

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

PRINCOAIS LEWIS,	:	CIVIL ACTION
	:	
Plaintiff,	:	04-6102
	:	
v.	:	
	:	
CONSOLIDATED FREIGHTWAYS CORP.	:	
OF DELAWARE, a/k/a and d/b/a	:	
CONSOLIDATED FREIGHTWAYS CORP.,	:	
REDWOOD SYSTEMS, INC.,	:	
CF AIRFREIGHT CORP., LELAND JAMES	:	
SERVICE CORP., CF MOVESU.COM, INC.,	:	
CFCD 2002, LLC, CFCD 2002A, LLC,	:	
CFCD 2002 MEMBER LLC,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

JOYNER, J.

February 28, 2005

Presently before the Court are Plaintiff's Motion to Remand this action to the Philadelphia Court of Common Pleas, and Defendant Consolidated Freightways Corporation of Delaware's Motion for Leave to File an Amended Notice of Removal. For the reasons which follow, we will grant Defendant leave to amend the Notice of Removal, and will deny without prejudice Plaintiff's Motion to Remand.

Factual Background

This personal injury action arises from a fall Plaintiff suffered on September 2, 2002 while working on premises owned and operated by one or more of the Defendants. After Defendants filed petitions for Chapter 11 Bankruptcy Relief, Plaintiff submitted a Proof of Claim form to the United States Bankruptcy

Court, Central District of California, on March 11, 2003, asserting a claim in the amount of \$500,000.

Plaintiff filed this personal injury action before the Philadelphia Court of Common Pleas on December 2, 2004. On December 30, 2004, Defendant Consolidated Freightways Corporation of Delaware ("Consolidated Freightways") filed a Notice of Removal on the basis of diversity of citizenship between the parties. None of the seven other named Defendants joined in the Notice. Plaintiff now moves to remand this action to the Philadelphia Court of Common Pleas, offering four arguments as to why removal was improper and remand is now appropriate.

Discussion

A defendant may remove a civil action filed in state court to federal district court if the federal court would have had original jurisdiction to hear the matter. 28 U.S.C. § 1441(b). The notice of removal must be filed within thirty days after the removing defendant receives the initial pleading setting forth the claim for relief and basis for removal. 28 U.S.C. § 1446(b). If the removing defendant does not meet his burden of establishing federal jurisdiction and complying with all procedural requirements for removal, the district court may remand the action to state court. 28 U.S.C. § 1447(c); Winnick v. Pratt, No. 03-1612, 2003 U.S. Dist. LEXIS 8523 at 3, 2003 WL 21204467 (E.D. Pa. 2003). As the removal statutes are strictly

construed, all doubts should be resolved in favor of remand.
Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3rd Cir. 1990).

1. Defendant's Failure to Establish Diversity

Plaintiff first alleges that the Notice of Removal was defective because it failed to provide proof of the Defendants' citizenship sufficient to establish diversity jurisdiction. The Notice indicated that Defendant Consolidated Freightways is not a citizen of Pennsylvania, but a Delaware corporation with its principal place of business in Washington. The Notice further asserted, upon information and belief, that the co-Defendants are Delaware corporations and not Pennsylvania citizens.

Where federal jurisdiction is based on 28 U.S.C. § 1332, the party seeking federal jurisdiction must affirmatively plead the "essential elements" of diversity, including allegations of citizenship. Wiacek v. Hammermill Paper Co., No. 88-6178, 1989 U.S. Dist. LEXIS 3094 at 2, 1989 WL 29256 (E.D. Pa. 1989) (citing McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 188-89 (1936)). Neither allegations of residence alone nor negative statements that a party is not a citizen of particular state are sufficient to establish jurisdiction. McCracken v. Murphy, 328 F. Supp. 2d 530, 532 (E.D. Pa. 2004). Defective allegations of jurisdiction may be freely amended, however, where such amendment is in the interests of justice. 28 U.S.C. § 1653; See also Horowitz v. Federal Kemper Life Assur. Co., 861 F. Supp. 1252,

1256 (E.D. Pa. 1994) (citing Kinney v. Columbia Savings & Loan Ass'n., 191 U.S. 78 (1903)).

Inasmuch as the Notice of Removal failed to allege with specificity the citizenship of each of the Defendants, we will grant Defendant leave to amend the Notice pursuant to 28 U.S.C. § 1653. In the event of further jurisdictional challenges, this Court will consider the full record in determining whether Defendant has established jurisdiction by a preponderance of evidence. See Coggins v. Carpenter, 468 F. Supp. 270, 276 (E.D. Pa. 1979) (citing McNutt, 298 U.S. at 189).

2. Lack of Unanimous Consent to Removal

Plaintiff further contends that the Notice of Removal was defective because the removing Defendant failed to obtain unanimous consent to removal from the remaining co-Defendants.

In order for removal to be proper, all defendants must unanimously join or consent to the removal through a timely-filed, express written indication of consent. See Shepard v. City of Philadelphia, No. 00-6076, 2001 U.S. Dist. LEXIS 783 at 4, 2001 WL 92300 (E.D. Pa. 2001); Ogletree v. Barnes, 851 F. Supp. 184, 188 (E.D. Pa. 1994). This general requirement of unanimity may be disregarded only where (1) the non-joining defendant is a nominal party; (2) a defendant been fraudulently joined; or (3) a non-resident defendant has not been served at the time the removing defendants filed their petition. Shepard,

2001 U.S. Dist. LEXIS 783 at 4, n. 1; Lewis v. Rego Co., 757 F.2d 66, 68 (3rd Cir. 1985). To avail himself of one of these exceptions, the removing defendant must set forth in the removal petition an explanation for the absence of the co-defendant's joinder. Knowles v. American Tempering Inc., 629 F. Supp. 832, 835 (E.D. Pa. 1985)(citing Lewis, 757 F.2d at 68). However, the removing defendant's failure to include such an explanation is merely a technical omission, rather than a jurisdictional defect, and may be cured by filing an amended petition if the state court record provides grounds therefor. See Miller v. Principal Life Ins. Co., 189 F. Supp. 2d 254, 258 (E.D. Pa. 2002) (an amended removal notice may be filed to explain that co-defendant was merely nominal, where the state court record put the parties on notice of this fact); Showell v. Boddie-Noell Enterprises, Inc., No. 91-2386, 1991 U.S. Dist. LEXIS 8535 at 2, 1991 WL 114669 (E.D. Pa. 1991) (granting leave to amend a petition of removal to indicate that co-defendants has not been served, where this fact was evidenced by the state court docket); Knowles, 629 F. Supp. At 835 (if the state court file reveals a jurisdictional fact relating to a co-defendant's absence that was omitted from the removal petition itself, a court may grant leave to amend).

In this action, Defendant alleges that the rule of unanimity is inapplicable both because the co-Defendants have not yet been served, and because they are merely nominal parties. However,

neither of these allegations were set forth in the Notice of Removal which was filed on December 30, 2004.

Initially, there appears to be some dispute among the parties as to whether the co-Defendants have been properly served with a summons and a copy of the Complaint.¹ However, Plaintiff has made no efforts to contest Defendant's position that the co-Defendants who did not join the Notice of Removal are merely nominal. A nominal party is one who, in a genuine legal sense, has no interest in the result of the suit, or no actual interest or control over the subject matter of the litigation. American Soc. for Testing & Materials v. Corrpro Companies, Inc., 292 F. Supp. 2d 713, 718, n. 5 (E.D. Pa. 2003); Bumberger v. Insurance Co. of North America, 952 F.2d 764, 767 (3rd Cir 1991); see also Thorn v. Amalgamated Transit Union, 305 F.3d 826, 833 (8th Cir. 2002) (nominal defendants are those against whom no real relief is sought). The remaining Defendants have been identified in a

¹ Service of the Summons and Complaint was effectuated by certified mail upon Kim Mingo at "Consolidated Freightways, Corporate Legal, 805 Broadway, Suite 205, Vancouver, WA 98660." While an Affidavit of Kim Mingo indicates that she is authorized to accept service on behalf of Consolidated Freightways Corporation, Redwood Systems Inc., CF Airfreight Corporation, Leland James Service Corp. and CF MovesU.Com, Inc., she admits only to receiving service of process directed at Consolidated Freightways Corporation of Delaware. Plaintiff, on the other hand, contends that the Summons and Complaint were directed at "Defendant, Consolidated Freightways Corporation of Delaware, a/k/a and d/b/a Consolidated Freightways, et al.," and that service was accepted on behalf of all defendants by Kim Mingo.

bankruptcy proceeding before the United States Bankruptcy Court, Central District of California, as the "affiliated debtors" of Defendant Consolidated Freightways, and Defendant seems to allege that these co-Defendants are merely aliases or "doing business as" entities. Defendant further alleges that no real relief is sought from these alternate entities because the Bankruptcy Court's order permits Plaintiff to prosecute his action against Defendants only to the extent of available insurance proceeds. We will grant Defendant leave to amend the notice of removal to explain why the co-Defendants did not join, and will consider Plaintiff's objections to the nominality and service claims upon further motion.

3. Timeliness of the Notice of Removal

Plaintiff further contends that the Notice of Removal was procedurally defective because it was filed more than thirty days after the date of service of the initial pleading indicating a basis for removal. The Summons was served upon Defendant on September 7, 2004. The Complaint itself was filed on December 2, 2004 and served on December 3, 2004. Defendant filed the Notice of Removal on December 30, 2004.

Pursuant to 28 U.S.C. § 1446(b), a notice of removal must be filed within thirty days after the defendant receives the first "amended pleading, motion, order, or other paper" from which it

may be ascertained that the case is removable. See also Foster v. Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48, 50-51 (3rd Cir. 1993). The Third Circuit in Foster, in considering the kinds of documents which will trigger § 1446(b), established that, at a minimum, the documents must be "something of the type filed with a court," such as a writ of summons, praecipe, or complaint. Foster, 986 F.2d at 54 (citing Rowe v. Marder, 750 F. Supp. 718, 721, n.1. (W.D. Pa. 1990)). The inquiry into whether a document constitutes notice of grounds for removal is succinct, and "begins and ends within the four corners of the pleading." Foster, 986 F.2d at 53 (citing Rowe, 750 F. Supp. at 721).

The Summons which was served on Defendant on September 7, 2004 indicated the address, but not the citizenship, of Defendants; the civil cover sheet indicated that the amount in controversy is greater than \$50,000. Plaintiff contends that the Summons was sufficient to put Defendant on notice that the action was removable, because a Proof of Claim had already been filed before the United States Bankruptcy Court indicating a claim by Plaintiff in the amount of \$500,000. While a Proof of Claim is "something of the type filed with a court" and thus falls within technical bounds of the Third Circuit's definition, the discussion in Foster did not consider whether § 1446(b) might be triggered by documents filed before a different court in a separate proceeding. Indeed, the Third Circuit's analysis in

Foster seems limited to documents filed (or potentially filed) before the state court where the action was originally brought. This Court is not in a position to extend the Third Circuit's holding in Foster to allow § 1446(b) removal of an action before the Philadelphia Court of Common Pleas to be triggered by a document filed with the United States Bankruptcy Court in the Central District of California. As the Complaint, the first pleading setting forth the jurisdictional basis for removal of this action, was filed on December 2, 2004, we find that Defendant's Notice of Removal was timely filed.

4. Implications of the Bankruptcy Stipulation

Finally, Plaintiff moves to remand on the grounds that Defendant improperly reneged on an agreement to allow the action to proceed in state court. Plaintiff suggests that, by filing a Stipulation for Relief from the Bankruptcy Stay permitting the Plaintiff to file an action before the Philadelphia Court of Common Pleas, Defendants' counsel in some way agreed to continuing the action in that forum. As the Stipulation in question is permissive rather than exclusive, and by no means forecloses the possibility of removal if appropriate, we find Plaintiff's argument to be without merit.

An appropriate Order follows.

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	:	
Plaintiff,	:	04-6102
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v.	:	
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CONSOLIDATED FREIGHTWAYS CORP.	:	
OF DELAWARE, a/k/a and d/b/a	:	
CONSOLIDATED FREIGHTWAYS CORP.,	:	
REDWOOD SYSTEMS, INC.,	:	
CF AIRFREIGHT CORP., LELAND JAMES	:	
SERVICE CORP., CF MOVESU.COM, INC.,	:	
CFCD 2002, LLC, CFCD 2002A, LLC,	:	
CFCD 2002 MEMBER LLC,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 28th day of February, 2005, upon consideration of Plaintiff's Motion For Remand (Doc. No. 3), Defendant's Opposition to Plaintiff's Motion For Remand and Motion for Leave to File Amended Notice of Removal (Docs. No. 5, 6), and Plaintiff's reply thereto (Doc. No. 7), it is hereby ORDERED that Plaintiff's Motion For Remand is DENIED WITHOUT PREJUDICE. It is FURTHER ORDERED that Defendant's Motion For Leave to File Amended Notice of Removal is GRANTED and the Clerk of Court is directed to file and docket the attached Amended Notice of Removal.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.