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

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (No. VI)	:	Consolidated Under MDL DOCKET NO. 875
CAROL DURBIN	:	Transferred from the Central District of Illinois
v.	:	
VARIOUS DEFENDANTS	:	E.D. PA CIVIL ACTION NO. 2:08-92211

O R D E R

AND NOW, this **4th** day of **February, 2011**, it is hereby **ORDERED** that Plaintiffs' Motion to Remand the case to the Circuit Court of McClean County, Illinois (doc. no. 7) filed on April 14, 2010, is **GRANTED**.[1]

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[1] Plaintiff filed the instant Motion to Remand arguing that the Court has no subject matter jurisdiction because Defendant Illinois Central Railroad Company ("Illinois Central") is a non-diverse Defendant. Defendant Illinois Central avers that they have been fraudulently joined to this action in order to defeat diversity jurisdiction, and should be dismissed from the case so that federal jurisdiction can be maintained.

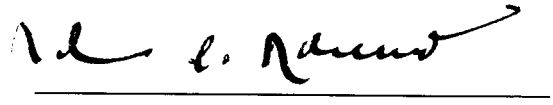
In matters where federal jurisdiction is based on diversity of citizenship, the court applies the substantive law of the state in which the action was brought, and federal procedural law. Erie R.R. v. Tompkins 304 U.S. 64, 78 (1938). The doctrine of fraudulent joinder is a matter of federal procedural law, and this Court will apply the doctrine as interpreted by the Third Circuit. See In Re Asbestos Prods. Liab. Litig. (Oil Field Cases), 673 F.Supp. 2d 358, 365 (E.D. Pa. 2009)(Robreno, J.); see also In Re Korean Air Lines Disaster, 829 F.2d 1171, 1174 (D.C. Cir. 1987)(holding that in multidistrict transfers, "the transferee court should be free to decide a federal claim in the manner it views as correct without deferring to the interpretations of the transferor circuit.")

A party asserting that they have been fraudulently joined bears the burden of persuasion, and a court should resolve any doubt in favor of remand. Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990)(internal citations omitted). Under the fraudulent joinder doctrine, a Court may dismiss a non-diverse defendant from a case and assert federal subject matter jurisdiction only if "there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant." In Re Briscoe, 448 F.3d 201, 216 (3d Cir. 2006)(internal citations omitted).

The threshold for showing a "colorable" claim is low; any claim that is not "wholly insubstantial and frivolous" will suffice to defeat jurisdiction. Batoff v. State Farm Ins. Co., 977 F.2d 848, 852 (3d Cir. 1992). A court's review of Plaintiff's claim for fraudulent joinder purposes is less "searching" than the review conduct at the motion to dismiss stage, and therefore "it is possible that a party is not fraudulently joined, but that the claim against that party [will] ultimately [be] dismissed for failure to state a claim upon which relief may be granted." Id.; see In Re Asbestos Prods. Liab. Litig., 673 F.Supp. 2d at 369 (granting Plaintiff's motion to remand because there was "some factual and legal basis" to Plaintiff's claims, notwithstanding Defendant's potential "innocent seller" defense under Mississippi law).

In the instant case, Plaintiff has asserted a claim against Defendant Illinois Central for transporting asbestos to and from the plant where Plaintiff Dewey Durbin was employed, and failing to warn Dewey Durbin of the hazardous nature of asbestos. (Def.'s Opp., doc. no. 8., at 1.) Defendant avers that Plaintiff has no claim against it because, as a common carrier, they have "no duty to examine [] cargo, identify any dangerous conditions inherent to the cargo, [or] notify the consignee and its employees of such conditions." (Id. at 1.) Defendant cites numerous cases for the proposition that common carriers are not generally liable for injuries caused by cargo. See, e.g., Conway v. the Belt Ry. Co. of Chicago, 232 N.E.2d 283, 288 (Ill. App. 1967)(finding that a common carrier is not liable "when injuries occur in the process of unloading damaged lading, in the absence of proof of a defect in the car itself."). Plaintiffs, in response, point to eight decisions rendered by various judges of the Circuit Court of McLean County denying Defendant Illinois Central's Motions to Dismiss under similar factual circumstances. (See doc. no. 7 at 3, Ex. 1.)

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

Defendant has not met its "heavy burden" of showing that Plaintiffs' claim is "wholly insubstantial and frivolous." In Re Briscoe, 448 F.3d 217. The fact that Illinois state courts have rejected Defendant's motions to dismiss on similar grounds shows that Plaintiffs have at least a "colorable" claim against Defendant. Indeed, even if Defendant's claims are eventually dismissed the Court is not permitted to adjudicate the merits of the defense at this juncture. See id. at 218. Just as in In Re Absestos Prods. Liab. Litig., 673 F.Supp. 2d 538, the assertion of a potential defense to liability based on a lack of duty is insufficient to support a finding that Plaintiff has joined Illinois Central in this action for the sole purpose of defeating federal jurisdiction. See also Vandegraft v. Pneumo Abex Corp., No. 08-92213, doc. no. 10 (June 22, 2009)(granting Plaintiffs' unopposed motion to remand on a finding that Illinois Central was not fraudulently joined).

Under these circumstances, Plaintiffs' Motion to Remand is granted.