IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

STEVEN J. PAULSON and JANE PAULSON,

Plaintiffs,

ACUITY,

Involuntary Plaintiff,

v.

WISCONSIN CENTRAL, LTD,

Defendant.

OPINION AND ORDER

11-cv-303-bbc

- -

Plaintiffs Steven J. Paulson and Jane Paulson are suing Wisconsin Central, Ltd for injuries sustained after Steven was hit by one of defendant's trains. Plaintiffs are asserting a claim for negligence, alleging that defendant failed to exercise due care in operating the train and the safety equipment at the intersection where the accident occurred. Plaintiffs allege that Acuity "may have" paid for some of plaintiffs' medical expenses.

Plaintiffs filed the case in the Circuit Court for Taylor County, Wisconsin, and defendant removed the case pursuant to 28 U.S.C. §§ 1441 and 1446. Now before the court are motions by plaintiffs for leave to amend the complaint to add BadgerCare Plus Managed

Care Program as an "involuntary plaintiff" and then to remand the case because the addition of BadgerCare would destroy diversity jurisdiction. I am denying both motions.

There is no dispute that diversity jurisdiction existed under 28 U.S.C. § 1332 at the time defendant removed it. In its notice of removal, defendant alleges that all of the plaintiffs (including Acuity) are citizens of Wisconsin and that defendant is a citizen of Illinois. None of the parties specifically discuss the amount in controversy, but it is reasonable to infer that plaintiff Steven Paulson has sustained more than $75,000 in damages in a case involving a train accident. Although the worth of the claims of the other two plaintiffs is less clear, this does not create a jurisdictional problem. Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 558-59 (2005)("When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim.").

One potential red flag is raised by plaintiff's labeling of Acuity as an "involuntary plaintiff." The use of "involuntary plaintiffs" in federal court is governed by Fed. R. Civ. P. 19. Under Rule 19(a)(2), "[a] person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff." I have noted that "[t]he use of Rule 19 in a federal case to join an involuntary plaintiff is rare." Elborough v. Evansville Community School District, 636 F. Supp. 2d 812, 826 (W.D. Wis.2009). This is because

a party who wishes to name an involuntary plaintiff must show that the absent party has refused to be joined as a plaintiff and is outside the court's jurisdiction. 7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 1606, at 73 (3d ed. 2001) ("A party may be made an involuntary plaintiff only if the person is beyond the jurisdiction of the court, and is notified of the action, but refuses to join."). See also Murray v. Mississippi Farm Bureau Casualty Insurance Co., 251 F.R.D. 361, 364 (W.D. Wis.2008) ("Traditionally, a 'proper case' is one in which the involuntary plaintiff is outside the court's jurisdiction and is under some obligation to join the plaintiff's lawsuit but has refused to do so."). Plaintiffs do not suggest that either of these possibilities applies to Acuity.

Although Acuity may have the wrong designation, this is not a jurisdictional problem unless Acuity should be realigned as a defendant. That is not the case. "[I]nsurers generally have litigation interests aligned with their insured's interests: the insurer either must indemnify its insured (the defendant) or has subrogation rights to any judgment secured by its insured (the plaintiff)." In re Novak, 932 F.2d 1397, 1408 (11th Cir. 1991). In other words, because it is in both the Paulsons' and Acuity's interests for the Paulsons to prevail, it makes sense to put them on the same side. If plaintiffs were asserting a cross claim against Acuity, it might make sense to realign Acuity as a defendant, e.g., Murray, 251 F. Supp. 2d at 364-65, but plaintiffs state expressly in their complaint that they are asserting "no claim

for affirmative relief" against Acuity. Cpt. ¶ 5, dkt. #1-3. Accordingly, I conclude that the removal was proper.

Although plaintiffs do not challenge the initial removal, they ask for leave to amend the complaint to add BadgerCare Plus Managed Care Program as another "involuntary plaintiff." Further, they argue that BadgerCare is an arm of the state of Wisconsin, which means that it does not have citizenship under § 1332. Indiana Port Commission v. Bethlehem Steel Corp., 702 F.2d 107, 109 (7th Cir. 1983). Thus, plaintiffs say, if BadgerCare becomes a plaintiff, the case must be remanded to state court because jurisdiction would no longer be present under § 1332. Adden v. Middlebrooks, 688 F.2d 1147, 1150 (7th Cir. 1982) ("States are not 'citizens' within the meaning of section 1332 and, therefore, are not within the reach of the diversity statute.").

I am denying plaintiffs leave to amend their complaint. Generally, courts are reluctant to allow plaintiffs to "amend away" jurisdiction after a case was removed properly. In re Burlington Northern Santa Fe Ry. Co., 606 F.3d 379, 380-81 (7th Cir. 2010) ("[R]emoval cases present concerns about forum manipulation that counsel against allowing a plaintiff's post-removal amendments to affect jurisdiction."). Further, courts have authority to preserve their jurisdiction by controlling the parties in the lawsuit. E.g., Dexia Credit Local v. Rogan, 602 F.3d 879, 883 (7th Cir. 2010) ("[T]he district court properly dismissed the nondiverse parties under Federal Rule of Civil Procedure 21 and preserved its

jurisdiction.").

In this case, it makes little sense to remand the case to state court just so that plaintiffs may include BadgerCare as a party. Plaintiffs do not suggest that BadgerCare is a necessary party and they do not wish to assert a claim for relief against it. Rather, their sole purpose in seeking to add BadgerCare is to address the possibility that BadgerCare may wish to be reimbursed for expenses it paid out on plaintiffs' behalf. This is a peripheral issue that does not need to be addressed in the context of this lawsuit. In fact, plaintiffs question in their reply brief whether BadgerCare is "truly subrogated" and whether it is "entitled to costs if plaintiff[s] [are] not made whole." Dkt. #13, at 17. It would be a waste of judicial resources to remand a properly removed case simply to add such a tangential and speculative claim.

ORDER

IT IS ORDERED that

1. The motions filed by plaintiffs Steven J. Paulson and Jane Paulson for leave to amend their complaint and to remand the case to state court, dkt. ##3 and 5, are DENIED.

2. Plaintiffs Steven J. Paulson and Jane Paulson may have until August 22, 2011, to (a) file an amended complaint that names Acuity as a voluntary plaintiff; or (b) serve Acuity with the complaint as a defendant and seek realignment. If plaintiffs do not take either of

these actions by August 22, I will drop Acuity from the case.

Entered this 19th day of July, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge