IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DENNIS PIERRE BOULET, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

NATIONAL PRESTO INDUSTRIES, INC., a Wisconsin Corporation,

Defendant.

OPINION AND ORDER

11-cv-840-slc

Before the court is plaintiff Dennis Boulet's third attempt to have his consumer fraud case against National Presto Industries, Inc. certified as a class action. The procedural history of this case is set forth in detail in this court's August 6, 2013 order, dkt. 98, at 1-3, which I incorporated herein by reference. In the court's most recent order, it denied as futile Boulet's motion to amend his complaint to allege a Florida-only class, on the ground that the amended complaint did not satisfy the requirements for federal jurisdiction under CAFA. Dkt. 98. Now Boulet asks for leave to file a different amended complaint, this time retaining the nationwide class allegations and request for certification of a nationwide class from his original complaint, but with the addition of a proposed *alternative* Florida Sub-class "*if* the Court does not certify a nationwide class." Dkt. 100 (emphasis added).

I agree with Presto that Boulet's latest pleading maneuver is akin to fraudulent joinder and verges on chicanery because it is premised on jurisdictional allegations that are DOA. The "*if*" occurred quite some time ago when court considered and rejected Boulet's contention that certification of a nationwide class was appropriate. Whatever may have been the circumstances at the time Boulet filed his complaint, he cannot in good faith claim *now* that he has any reason to believe that this court might certify a nationwide class or that over $5 million is actually "in

controversy." (As discussed in the previous order, Boulet has not disputed Presto's contention that only about $1.7 million would be at stake if Boulet was allowed to proceed on behalf of a Florida-only class.) Boulet's proposed jurisdictional facts in his newest proposed complaint, having previously been asserted and rejected, are "so feeble as to be essentially fictitious." *Morrison v. YTB Int'l, Inc.*, 649 F.3d 533, 536 (7th Cir. 2011). His renewed motion for leave to file an amended complaint must therefore be denied.

In the alternative, Boulet asks the court to reconsider its conclusion that, by proposing a Florida-only, sub-$5 million class in his proposed first amended complaint, Boulet voluntarily amended away jurisdiction under CAFA. Boulet acknowledges that an exception to the usual "time of filing" test for jurisdiction exists when "a plaintiff files a complaint in federal court and then voluntarily amends the complaint," *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007), but now he denies that his proposed amended complaint was filed voluntarily. According to Boulet, his proposed amended complaint was "not a voluntary abandonment of a claim but a result of an involuntary denial of class certification." Plt.'s Renewed Mot. to Amend, dkt. 100, at 5.

The problem for Boulet at this juncture is that he never raised this argument during briefing on his motion to file his amended complaint; therefore, he has waived it. It is well-settled that "a motion for reconsideration is an improper vehicle to introduce evidence previously available or to tender new legal theories." *Bally Exp. Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (7th Cir. 1986). Although Boulet argues that he should not be found to have waived the voluntary/involuntary argument because Presto did not cite *Rockwell* until its reply brief in support of its motion to dismiss, his argument is not persuasive. In support of its motion to

dismiss, Presto argued that "[b]y choosing to limit the class in his Amended Complaint to Florida-only product sales, Mr. Boulet has pleaded himself out of this court." Dkt. 91, at 5. Boulet then responded by insisting that all that mattered for jurisdictional purposes was whether his original complaint met CAFA's requirements, noting that the "seminal case" that established this proposition was *Cunningham Charter Corp v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010). At the very same page of that opinion, however, the *Cunningham* court expressly noted, with a citation to *Rockwell*, that the general rule that "once jurisdiction, always jurisdiction" did *not* apply "if the plaintiff amends away jurisdiction in a subsequent pleading." *Id*. The court of appeals referred to *Rockwell* yet again in *In re Burlington N. Santa Fe R.R. Co.*, 606 F.3d 379, 381 (7th Cir. 2010), another case cited by Boulet, noting that "it is sometimes possible for a plaintiff who sues in federal court to amend away jurisdiction." Given that Boulet was aware that Presto was contending just that—that Boulet had "amended away" jurisdiction—it is disingenuous for him to now claim that he had no reason to address *Rockwell* in his response brief. Presto may not have cited *Rockwell*, but Boulet's own authorities did. His failure to address their caveats amounts to waiver.

For the sake of completeness, I note that even if Boulet did not waive his opportunity to argue that his amended complaint was not "voluntary" as contemplated by *Rockwell*, I would reject the argument. This court never dismissed Boulet's original complaint, it never ordered him to file a new one, and it never directed that this case proceed as a class action limited to a Florida class. All the court did was reject Boulet's request for certification of a nationwide class. What Boulet did in the face of that ruling was entirely up to him and his lawyers. Further, Boulet's suggestion that this court is "forcing" him to "travel under a complaint that has been rendered

moot by court order" is difficult to reconcile with his statement that he can pursue his Florida-only class action suit in Florida. Dkt. 93, at n.3. While I empathize with Boulet's desire to proceed on his Florida class action in this court, none of the authorities cited in his brief persuade me that this court may exercise jurisdiction over such an action.

"[P]leading is not like playing darts: a plaintiff can't keep throwing claims at the board until []he gets one that hits the mark." *Doe v. Howe Military Sch.*, 227 F.3d 981, 990 (7th Cir. 2000). It is time for Boulet to accept the consequences of this court's denial of class certification and decide whether he wants to proceed on his individual claim against Presto.

ORDER

IT IS ORDERED that plaintiff Dennis Boulet's renewed motion to amend his complaint, or in the alternative, for reconsideration of the court's August 6, 2013 order, dkt. 100, is DENIED.

A telephonic scheduling conference is set for October 4, 2013 at 10:00 a.m. to recalendar this case for trial. Plaintiff's counsel is responsible for arranging the conference call to chambers.

Entered this 13th day of September, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge