

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

LEROY HOLMBERG,

Plaintiff,

v.

POLARIS INDUSTRIES INC.,

Defendant.

MEMORANDUM AND ORDER
05-C-140-S

Plaintiff Larry Holmberg commenced this personal injury action against defendant Polaris Industries Inc. in the circuit court for Douglas County Wisconsin. The matter was removed on the basis of diversity of citizenship and is presently before the Court on plaintiff's motion to remand. The following are undisputed relevant facts.

FACTS

Plaintiff is a Wisconsin resident. Defendant is a Delaware corporation with its principal place of business in Minnesota. Defendant is in the business of manufacturing all terrain vehicles.

On January 29, 2004 plaintiff's counsel wrote a letter to defendant which stated in part:

I am writing at this time to provide you with some background and our demand for injuries sustained by Larry Holmberg in a July 21, 2002 ATV accident....

Mr. Holmberg has incurred medical expenses and there will be future medical expenses as Mr. Holmberg continues to treat for his leg and for his ongoing problems. We believe his current medical expenses are approximately \$50,000....

As a result of this accident and the severe injuries and medical bills, Mr. Holmberg demands \$700,000.

On February 3, 2005 plaintiff filed a complaint in the circuit court for Douglas County Wisconsin alleging negligence, strict liability and breach of warranty claims based on the alleged defective condition of the ATV manufactured by defendant. The complaint alleged that "plaintiff was severely injured." No specific amount of money is sought in the complaint.

Defendant removed the case pursuant to 28 U.S.C. §§ 1332, 1441 and 1446. In its notice of removal plaintiff identified the complaint's allegation that plaintiff was severely injured and plaintiff's pre-filing demand of \$700,000.

MEMORANDUM

It is undisputed that the parties are of diverse citizenship. Plaintiff seeks remand solely on the basis that the amount in controversy has not been shown to exceed \$75,000. As the removing party, defendant bears the burden to demonstrate the jurisdictional amount to a reasonable probability. Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997). Removal is only supported by evidence available at the time of removal.

Id. at 428. There is little question that at least \$75,000 is in dispute demonstrated by plaintiff's representation in his settlement letter that he has sustained severe injuries, has incurred \$50,000 in medical expenses to date and seeks \$700,000 in settlement of his claim. Such a settlement offer is persuasive evidence of the amount in controversy. See Id. at 428. Indeed, such a pretrial demand typically provides a right to remove by definition at the outset of litigation. Shaw v. Dow Brands, Inc., 994 F.2d 364, 376 at n. 6 (7th Cir. 1993) (Shadur, J., commenting in dissent)

Plaintiff, however, argues that the Court cannot consider the settlement letter because the settlement letter itself was not appended to the notice of removal and because Rule 408 of the Federal Rules of Evidence precludes its consideration. Neither argument has merit. The court is not bound to consider only those matters contained in the complaint and notice of removal but must also consider affidavits presented with the motion for remand as the settlement letter. Jadair, Inc. v. Walt Keeler Co., Inc., 679 F.2d 131, 132 (7th Cir. 1982). Rule 408 is inapplicable when a settlement is offered solely for the jurisdictional purpose of establishing the amount in controversy. Cohn v. Petsmart, Inc., 281 F.3d 837, 840 n. 3. (9th Cir. 2002) (citing Chase v. Shop 'n Save Warehouse Foods, Inc., 110 F.3d at 428-30).

Defendant has established by a preponderance of the evidence that the amount in controversy exceeds the \$75,000 jurisdictional amount. Accordingly,

ORDER

IT IS ORDERED that plaintiff's motion to remand this action to the circuit court for Douglas County, Wisconsin is DENIED.

Entered this 16th day of May, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge