IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IMPACT GEL CORPORATION

and

MATTHEW KRIESL,

Plaintiffs,

and

STEVE GLAZIK, GARY GLAZIK,
MARK DECKER and
PLASTIC DESIGNS, INC.,

Involuntary Plaintiffs,

v.

GERALD R. RODEEN,

Defendant.

OPINION AND ORDER

05-C-223-C

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This is a civil action for declaratory relief under Wis. Stat. § 806.04 in which plaintiffs Impact Gel Corporation and Matthew Kriesl are seeking a declaration that they did not enter into an enforceable contract with involuntary plaintiffs Steve Glazik, Gary Glazik, Mark Decker and Plastic Designs, Inc. and defendant Gerald Rodeen. Plaintiffs filed the

case in the Circuit Court for Jackson County. On April 13, 2005, defendant removed it to this court, alleging diversity jurisdiction under 28 U.S.C. §1332(a)(1). The case is before the court on plaintiffs' motion to remand. Also before the court is defendant's motion to strike affidavits filed by plaintiffs in support of their motion to remand.

Plaintiffs' motion to remand will be granted because complete diversity of citizenship does not exist between the parties. Defendant's motion to strike will be denied as unnecessary because I did not consider the disputed affidavits when deciding plaintiffs' motion. Plaintiffs' request for an award of costs and fees will be granted because removal was improper.

I find the following facts from defendant's notice of removal and attached exhibits, plaintiffs' motion to remand, defendant's brief in opposition to plaintiffs' motion to remand, plaintiffs' brief in support of plaintiffs' motion to remand and the excerpts of Steve Glazik's deposition testimony that both sides attached to their briefs.

FACTS

Plaintiff Matthew Kriesl is a citizen of Jackson County, Wisconsin. Plaintiff Impact Gel Corporation is incorporated under Wisconsin law and has its primary place of business in Jackson County, Wisconsin. Involuntary plaintiffs Steve Glazik, Gary Glazik, and Mark Decker are all citizens of Ford County, Illinois. Involuntary plaintiff Plastic Designs, Inc.

is incorporated under Illinois law and has its primary place of business in Ford County, Illinois. Defendant Gerald Rodeen is a citizen of Ford County, Illinois.

In August 2003, plaintiffs Matthew Kriesl and Impact Gel Corporation, involuntary plaintiffs Steve Glazik, Gary Glazik, Mark Decker and Plastic Designs, Inc. and defendant Gerald Rodeen engaged in a series of business-related discussions. At the time, defendant was chairman of the board of Sportscope, a company that developed and manufactured safety helmets and other products. Involuntary plaintiffs were owners of Plastic Designs, Inc., a company with experience in the design and manufacture of helmets and helmet components. Plaintiff Matthew Kriesel was the owner of Impact Gel Corporation, a company that controlled the manufacture and distribution of Impact Gel, a product invented by Kriesl that absorbs the force of impact.

The parties contemplated an arrangement in which defendant and involuntary plaintiffs would form Paxton Recreational, a new company that would design and manufacture products using Impact Gel technology. Various documents were drafted regarding the details of this proposed arrangement and were exchanged among the parties through November 2004.

In March 2005, plaintiffs filed this action in the Circuit Court for Jackson County, naming Steve Glazik, Gary Glazik, Mark Decker and Plastic Designs, Inc. as co-plaintiffs and Gerald Rodeen as defendant. After plaintiffs filed the complaint, Steve Glazik, Gary Glazik,

Decker and Plastic Designs, Inc. contacted plaintiffs' counsel and asked to be dismissed from the lawsuit. Plaintiffs amended their original complaint and named Steve Glazik, Gary Glazik, Decker and Plastic Designs, Inc. as involuntary plaintiffs. (Involuntary plaintiffs have not entered an appearance in this case or filed any responsive pleadings or motions.)

Involuntary plaintiff Steve Glazik was deposed on June 1, 2005. He testified that when he signed the documents at issue in this lawsuit, he believed their written terms were binding on him and on the other parties. He testified also that the terms of the agreement were incomplete and in need of amendment. Glazik stated that he has not formed Paxton Recreational and does not intend to do so. However, Glazik testified that he would be willing to form Paxton Recreational "if things were worked out and everybody was satisfied on all the ends." Aff. of Jeffrey A. Simmons, dkt. #15, Exh. A, at 66. When asked whether there was "any real conflict" between Glazik and defendant, Glazik answered, "No, I wouldn't say so." Id. at 65.

OPINION

On April 13, 2005, defendant removed the case to federal court, invoking the court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1). In his notice of removal, defendant contended that involuntary plaintiffs have no real dispute with defendant and have therefore been aligned improperly with plaintiffs. If defendant is correct, complete diversity will exist,

giving this court subject matter jurisdiction over the case.

As a general principle, plaintiffs are free to select any proper forum when filing an action. Their choice should not be set aside lightly. Chicago, Rock Island & Pac. R.R. Co. v. Igoe, 220 F.2d 299, 302 (7th Cir. 1955). A defendant seeking to remove a case from state to federal court bears the burden of showing by a preponderance of the evidence that federal subject matter jurisdiction exists. NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 237 (7th Cir. 1995). Because federal jurisdiction is limited, courts interpret the removal statute narrowly and resolve any doubts in favor of state jurisdiction. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993).

This case involves no issue of federal law. Therefore, removal is appropriate only if diversity jurisdiction is present. The citizenship of the parties is not in dispute. Because involuntary plaintiffs and defendant are Illinois citizens, complete diversity can exist only if involuntary plaintiffs are realigned as defendants.

Defendant suggests that realignment is appropriate in this case because involuntary plaintiffs have no actual, substantial controversy with defendant. American Motorists Ins. Co. v. Trane Co., 657 F.2d 146, 149 (7th Cir. 1981). In support of this assertion, defendant emphasizes three facts: (1) involuntary plaintiffs did not file this suit or authorize its filing; (2) involuntary plaintiff Steve Glazik has not expressed hostility to defendant, has stated

that he would be willing to form Paxton Recreational if "everybody was satisfied on all the ends" and has indicated that enforcement of the documents in question may provide him with some benefits; and (3) all of the involuntary plaintiffs signed an affidavit stating that they "join in defendant Gerald P. Rodeen's Notice of Removal and agree to the removal of this lawsuit to federal court." Notice of Removal, dkt. # 2, Exh. B at 1.

A. Joinder of Involuntary Plaintiffs

If an person or entity necessary to the just resolution of a lawsuit is not joined as a party in the suit, the case is subject to discretionary dismissal. Fed. R. Civ. P. 19(b). Therefore, in order to ensure adjudication of their claims plaintiffs must ensure whenever possible that all necessary parties have been joined. There is "no procedural principle . . . more deeply embedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." United States ex rel. Hall v. Tribal Development Corp., 100 F.3d 476 (7th Cir. 1996) (quoting Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975)). Neither plaintiffs nor defendant dispute the indispensability of the involuntary plaintiffs to this suit. They acknowledge that the parties must be joined if at all feasible under Federal Rule of Civil Procedure 19(a). Their only disagreement is whether Steve Glazik, Gary

Glazik, Mark Decker and Plastic Designs, Inc. should be treated as defendants or involuntary plaintiffs.

According to Federal Rule of Civil Procedure 19(a), when an indispensable party refuses to join as plaintiff in a suit, the party may "be made a defendant, or, in a proper case, an involuntary plaintiff." Although no limitations are placed on the ability to add an indispensable party as a defendant, Rule 19(a) limits the naming of involuntary plaintiffs to "proper case[s]" only. 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. Cf. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U.S. 459, 472 (1926)(cited in the notes to Fed. R. Civ. P. 19(a) as "a proper case for [joining an] involuntary plaintiff"); Sheldon v. West Bend Equip. Co., 718 F.2d 603, 606 (3d Cir. 1983); Eikel v. States Marine Lines, Inc., 473 F.2d 959, 962 (5th Cir. 1973); See also 20 A.L.R. Fed 193 § 2; Charles Alan Wright, et al., Federal Practice & Procedure § 1606, at 72 (3d ed. 2001). The designation of a party as an involuntary plaintiff has generally been limited to cases involving patent and copyright licensees. Id.

In this case, involuntary plaintiffs were not outside the jurisdiction of the state court. Therefore, defendant is technically correct in stating that Steve Glazik, Gary Glazik, Decker and Plastic Designs, Inc. should have been named as defendants rather than involuntary plaintiffs in this suit. However, deciding whether a party should be named as defendant or

involuntary plaintiff under Rule 19(a) is distinct from deciding whether the parties are aligned properly for the purpose of diversity jurisdiction. Cf. Eikel, 473 F.2d at 963; 20 A.L.R. Fed. 193 § 3[b]. The dispositive question in this case is whether diversity exists, not whether the technicalities of Rule 19(a) have been followed. Therefore, the fact that Steve Glazik, Gary Glazik, Mark Decker and Plastic Designs, Inc. have been labeled "involuntary plaintiffs" rather than "defendants" in the caption of the lawsuit has no effect on this court's jurisdiction.

B. Alignment of the Parties

When determining whether federal jurisdiction exists, this court has an independent duty to look beyond the pleadings and to arrange the parties according to their true sides in the dispute. City of Indianapolis v. Chase National Bank, 314 U.S. 63, 69 (1941). Realignment is proper when the court finds that no actual, substantial controversy exists between parties on one side of the dispute and their named opponents. American Motorists Ins. Co., 657 F.2d at 149. Therefore, I look to the parties' real interests in this matter and not to their placement in the caption of the pleadings to determine whether complete diversity of citizenship exists.

In support of his contention that involuntary plaintiffs have been improperly aligned,

defendant relies primarily on the deposition testimony of involuntary plaintiff Steve Glazik. In his deposition, Glazik denied having any "real conflict" with defendant. In addition, Glazik testified that when he signed the documents at issue in this case he believed that their terms were binding. Defendant argues that involuntary plaintiffs have a valuable interest in enforcing the agreement and should be realigned with defendants. Defendant has not indicated whether the other three involuntary plaintiffs have any intention of forming Paxton Recreational as outlined in the agreement or whether they believe themselves to be contractually bound by the terms of that agreement.

In support of the position that involuntary plaintiffs should remain aligned with plaintiffs, plaintiffs assert that involuntary plaintiffs have not formed Paxton Recreational. Plaintiffs point to Glazik's statement that he does not intend to form Paxton Recreational unless "things were fully worked out and everybody was satisfied on all the ends." Plaintiffs state that involuntary plaintiffs believe the proposed contract is incomplete and non-binding and that they share a common interest with plaintiffs in the outcome of this case.

The key to aligning involuntary plaintiffs in this suit properly is identifying their interests. If involuntary plaintiffs wish to avoid forming Paxton Recreational, they are properly aligned with plaintiffs. If they wish to form the new company and obtain certain rights to Impact Gel technology, they should be aligned with defendants. Involuntary

plaintiffs apparently do not wish to participate actively in the prosecution of this action. They have not retained an attorney in this matter or filed any responsive pleadings or motions. That is their right. The result of their omission is that the facts pleaded by the plaintiff will be imputed to them.

Defendant complains that plaintiff has "offered no evidence" that involuntary plaintiffs do not wish to enforce the terms of the documents in dispute. However, it is his burden to demonstrate that this court has subject matter jurisdiction. In order to show that complete diversity exists on each side of this lawsuit, defendant must demonstrate that involuntary plaintiffs' interests are aligned with his own. If they are not, then Illinois citizens are located on both sides of this lawsuit and jurisdiction does not exist under 28 U.S.C. § 1332(a)(1).

The deposition testimony of Steve Glazik is equivocal at best. The contention that Glazik has no "real conflict" with defendant is as likely a personal statement as a legal one. Although Glazik testified that he believed the written documents to be binding, he testified that he has not taken any action required by those documents and does not plan to take any. Furthermore, although he and the other involuntary plaintiffs "agreed to" the removal of this case to federal court, the question of jurisdiction is a matter of law, not of stipulation. None of the facts cited by defendant constitute "proof to a reasonable probability" that the

parties are improperly aligned in this action. Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993). I conclude that defendant has not shown complete diversity of citizenship. Therefore, this court lacks subject matter jurisdiction over the suit.

C. Costs and Fees

Plaintiff has asked for an award of attorney fees and costs incurred in seeking remand of this action. In this circuit, a party that succeeds in showing that removal is improper is presumptively entitled to an award of fees. Garbie v. Daimler Chrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000) ("§ 1447 is not a sanctions rule; it is a fee-shifting statute, entitling the district court to make whole the victorious party."). Plaintiffs need not show that removal was undertaken in bad faith. Id. at 987.

Since I have found that defendant is not entitled to removal, it is necessary to consider whether there is any reason to deny plaintiffs their fees and costs. Defendant asked the court to realign the non-diverse parties to trump plaintiff's chosen forum and create diversity jurisdiction. As a basis for this request, he has pointed only to fragments of equivocal testimony from one of the four involuntary plaintiffs named in this lawsuit. Nothing about the nature or facts of this case rebuts the presumption in favor of awarding plaintiffs the costs they have incurred. In light of that presumption, I conclude that

plaintiffs are entitled to reimbursement for their reasonable fees and costs.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion to remand is GRANTED;

2. This case is REMANDED to the Circuit Court for Jackson County, Wisconsin. The clerk of court is directed to transmit the record to the Circuit Court for Jackson County.

3. Plaintiffs' request for payment of costs is GRANTED. Plaintiffs may have until September 13, 2005, in which to submit an itemization of the actual expenses, including costs and attorney fees, it incurred in responding to defendant's removal. Defendant may have until September 27, 2005, to file an objection to any itemized costs and fees.

4. Defendant's motion to strike plaintiffs' affidavits is DENIED as unnecessary.

Entered this 1st day of September, 2005.

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