

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

-----

EDMUND LEE WEBSTER,  
BARBARA M. WEBSTER  
and CHURCH MUTUAL INSURANCE  
COMPANY,

Plaintiffs,

v.

BLACK & DECKER, INC. and FLEET  
WHOLESALE SUPPLY COMPANY, INC.,

Defendant.

-----

OPINION AND ORDER

05-C-549-C

This is a civil action for monetary relief in which plaintiffs Edmund Lee Webster, Barbara M. Webster and Church Mutual Insurance Co. contend that defendants Black & Decker, Inc. and Fleet Wholesale Supply Co., Inc., negligently manufactured and distributed a toaster that malfunctioned, causing damage to property owned by plaintiffs Edmund and Barbara Webster. The case is before the court on plaintiffs' motion to remand. Because complete diversity does not exist between the parties, the motion will be granted.

I draw the following facts from plaintiff's amended complaint, defendants' notice of removal, plaintiffs' brief in support of their motion to remand and defendants' brief in

opposition to plaintiffs' motion.

## FACTS

Plaintiffs Edmund Lee Webster and Barbara M. Webster are citizens Wisconsin, residing in Marathon County. Plaintiff Church Mutual Insurance Company is a Wisconsin corporation that has its primary place of business in Lincoln County, Wisconsin. (Because plaintiff Church Mutual Insurance Company does not play a role in the underlying facts of this case, all reference to "plaintiffs" in this section of the opinion will be to plaintiffs Edmund and Barbara Webster.)

Defendant Black & Decker, Inc. is a Maryland corporation, with its primary place of business in Towson, Maryland. Defendant Fleet Wholesale Supply Company, Inc. is a Wisconsin corporation with its primary place of business in Appleton, Wisconsin.

Some time prior to June 16, 2000, plaintiffs purchased a Black & Decker Model 223, Type 1 toaster at Mills Fleet Farm in Wausau, Wisconsin. On the morning of June 16, 2000, plaintiff Barbara Webster placed a piece of bread in the toaster and depressed the handle. Plaintiffs allege that the toaster severely malfunctioned, causing a fire that destroyed their home and personal belongings, resulting in damage in excess of \$465,000.

On July 28, 2005, plaintiffs commenced this lawsuit in the Circuit Court for Lincoln County, naming as defendants Black & Decker, Inc. and Mills Fleet Farm, Inc. (Mills Fleet

Farm is a Minnesota corporation, with its primary place of business located in Brainerd, Minnesota.) On September 13, 2005, defendants removed the case to this court, alleging complete diversity jurisdiction under 28 U.S.C. §1332(a)(1).

Some time after filing suit, plaintiffs discovered that defendant Fleet Wholesale Supply Company, Inc. was the legal entity responsible for the Mills Fleet Farm Store at which the allegedly defective toaster was sold. On October 18, 2005, plaintiffs moved to amend their complaint, substituting defendant Fleet Wholesale Supply Company, Inc. for Mills Fleet Farm, Inc. The motion was granted on October 19, 2005.<sup>1</sup>

## OPINION

This case involves no issue of federal law. Therefore, federal jurisdiction can exist only if the parties are completely diverse. Strawbridge v. Curtiss, 2 U.S. 267 (1806). On September 13, 2005, the original defendants in this suit, Black & Decker, Inc. and Mills

---

<sup>1</sup>On October 21, 2005, plaintiffs filed a letter brief seeking to withdraw its motion to amend the complaint. As grounds for withdrawing the already granted motion, plaintiffs noted that the court's scheduling order permitted amendment without leave of the court prior to October 28, 2005. Because the amendment has been granted already, I need not address whether plaintiff was required to seek the court's permission before amending the complaint under 28 U.S.C. § 1447(e) to add a defendant who would defeat diversity jurisdiction. See, e.g., Bevels v. American States Ins. Co., 100 F. Supp. 2d 1309, 1312-1313 (M.D. Ala. 2000). Despite moving to withdraw their motion, plaintiffs continue to assert that Fleet Wholesale Supply Company has been properly joined as a defendant in this case.

Fleet Farm, Inc., removed the case to federal court, properly invoking the court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1) because plaintiffs were Wisconsin citizens and defendants were citizens of Minnesota and Maryland. However, on October 19, when the court permitted plaintiff to join defendant Fleet Wholesale Supply Company, Inc. and dismiss defendant Mills Fleet Farm, Inc., complete diversity was destroyed. Therefore, plaintiffs have moved to remand the case back to the Circuit Court for Lincoln County, Wisconsin.

Defendants do not deny that complete diversity is lacking. Rather, they suggest that if this court were to view defendant Fleet Wholesale Supply Company, Inc. as a dispensable party to the litigation, the substitution of Fleet Wholesale Supply Company, Inc. for former defendant Mills Fleet Farm, Inc. need not defeat this court's jurisdiction. In support of its position, defendants rely on a single case: Domke v. Siempelkamp, 598 F. Supp. 1119 (E.D. Wis. 1984). In Domke, the plaintiffs originally filed suit in the Circuit Court for Winnebago County, Wisconsin, contending that defendants were responsible for the defective design and manufacture of certain press machinery. Id. at 1120. Soon thereafter, the defendants removed the case to federal court on the basis of diversity jurisdiction. Id. Approximately nine months later, the district court permitted the plaintiffs to amend their complaint under Fed. R. Civ. P. 15 and join an additional defendant. Id. The court did not inquire about the citizenship of the new defendant. Id. Three months later, the new

defendant brought a motion to remand the case to state court under the then-operative version of 28 U.S.C. § 1447(c), contending that as a Wisconsin corporation its joinder defeated the court's diversity jurisdiction. Id. The court held that when a case had been properly removed, the later joinder of a non-diverse defendant (who was not an indispensable party to the suit) would not necessarily destroy federal jurisdiction. Id. at 1123.

Although there are factual similarities between Domke and the present case, defendants' reliance on it is misplaced. In 1988, four years after the Domke decision, Congress enacted 28 U.S.C. § 1447(e), which states:

If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the state court.

Although prior to the adoption of § 1447(e) courts had some discretion to retain diversity jurisdiction upon the joinder of a dispensable party, in the wake of § 1447(e), courts deciding a motion to join a non-diverse party have two clear choices: either deny the joinder or permit it and remand the case to state court. Cobb v. Delta Exports, Inc., 186 F.3d 675, 677 (5th Cir. 1999) (post-removal joinder of non-diverse defendants destroys diversity for jurisdictional purposes and requires remand even when newly joined defendants are not indispensable); Perez v. Arcobaleno Pasta Machines, Inc., 261 F. Supp. 997, 1001 (N.D. Ill. 2003) ("Although permitting joinder is discretionary, once the court has done so,

allowing diversity to be destroyed, it must remand the case to the state court.”); Wyant v. National R.R. Passenger Corp., 881 F. Supp. 919, 924 (S.D.N.Y. 1995) (§ 1447(e) explicitly requires court to remand when joinder of non-diverse defendant is permitted); but see Massaro v. Bard Access Systems, Inc., 209 F.R.D. 363, 366 (E.D. Pa. 2002) (holding that § 1447(e) permits courts to balance original defendant’s interests in maintaining federal forum with competing interest of not having parallel lawsuits when complaint is amended to add non-diverse dispensable defendant).

On October 19, I permitted plaintiffs to amend their complaint and join defendant Fleet Wholesale Supply Company. Although the Court of Appeals for the Seventh Circuit has not articulated the factors that must be considered when deciding whether to permit joinder of a non-diverse defendant, other courts have considered factors such as the plaintiffs’ motivation in seeking to join the additional party, the timeliness of the request, the potential prejudice to the parties and the defendant’s interest in a federal forum. See, e.g., Perez, 261 F. Supp. 2d at 1001; Clinco v. Roberts, 41 F. Supp. 2d 1080, 1082 (C.D. Cal. 1999). In the present case, plaintiffs made their motion to amend within three months of filing suit and within weeks of removal. Plaintiff’s substitution of a non-diverse defendant for a diverse defendant was made as a result of new information regarding the legal entity responsible for management of the store at which the allegedly defective product was purchased. Because the name of the original defendant was identical to the name of the

store at which the product was purchased, plaintiff's error was understandable. Furthermore, this case did not proceed far in this court and defendant has offered no reason why it would be prejudiced by a remand at this stage in the proceedings. Therefore, joinder was permissible. Now, because it is indisputable that defendant Fleet Wholesale Supply Company's presence in this lawsuit defeats diversity jurisdiction, I will grant plaintiff's motion to remand this case to the Circuit Court for Lincoln County.

#### ORDER

IT IS ORDERED that

1. Plaintiffs' motion to remand is GRANTED;
2. This case is REMANDED to the Circuit Court for Lincoln County, Wisconsin.

The clerk of court is directed to transmit the record to the Circuit Court for Lincoln County.

Entered this 6th day of December, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge