

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

SARATOGA LIQUOR CO. and
GENERAL BEVERAGE SALES CO.-OSHKOSH,

Plaintiffs,

v.

MEMORANDUM AND ORDER
06-C-14-S

PERNOD RICARD SA, PERNOT RICARD USA,
ALLIED DOMEQ NORTH AMERICA CORP.,
BADGER LIQUOR CO., INC. and
BADGER WINE & SPIRITS LLC,

Defendants.

Plaintiffs Saratoga Liquor Co. and General Beverage Sales Co.-Oshkosh commenced this action in the Circuit court for Douglas County, Wisconsin for declaratory and injunctive relief alleging that their termination as liquor distributors by defendants Pernod Ricard SA, Pernod Ricard USA and Allied Domecq North America Corp. (collectively "Pernod defendants") violated the Wisconsin Fair Dealership Law. Plaintiffs also named as defendants Badger Liquor Co., Inc. and Badger Wine and Spirits LLC. (Collectively "Badger defendants") who were appointed to replace plaintiffs as exclusive dealers. Defendants removed the matter to this Court on the basis of diversity of citizenship. The matter is presently before the Court on plaintiffs' motion to remand for lack of subject matter jurisdiction.

Following is a summary of the allegations of the complaint and undisputed facts relevant to the jurisdictional issue.

FACTS

Plaintiffs are related Wisconsin wholesale liquor distributors. The Pernod defendants are related entities, none of which is a Wisconsin resident, and are one of the world's largest liquor producers and sellers. The Badger defendants are related Wisconsin corporations in the business of liquor distribution. Prior to 2005 plaintiffs were the exclusive wholesale distributors of Pernod brands including Malibu Rum, Beefeaters Gin, Stolichnay Vodka and other famous liquor brands in a territory that included 50 Wisconsin counties.

On November 22, 2005 the Pernod Ricard, LLC and the Badger Liquor Co, Inc. entered into an agreement whereby Pernod agreed to terminate plaintiffs and appoint the Badger defendants as exclusive distributors in the Wisconsin territory. Pursuant to the agreement Badger agreed to indemnify Pernod against suits for wrongful termination for up to \$14,000,000 in damages and \$250,000 in expenses. Badger had the right to control the litigation. In the event Badger decided not to defend the claims Pernod could terminate Badger's distributorship rights.

On December 19, 2005 Pernod sent letters to plaintiffs terminating their exclusive distributorship. Pernod assigned the exclusive distributorship rights to the Badger defendants.

Plaintiffs filed this action in Douglas County circuit court alleging that the termination violated the WFDL. Plaintiffs also

seek declaratory judgment that they are entitled to remain exclusive dealers and a temporary and permanent injunction prohibiting Pernod from appointing the Badger defendants as distributors in plaintiffs' territory.

Defendants filed a petition for removal on January 9, 2006 based solely on diversity of citizenship, 28 U.S.C. § 1332. Paragraph 4 of that petition provides:

With regard to the inclusion of Badger Liquor Co., Inc. and Badger Wine & Spirits, LLC as Defendants, neither is a proper or indispensable party to this litigation. No claim has been alleged against either. They specifically deny that they are necessary for a complete adjudication of this matter. As they have no rights or interests with respect to this action they are therefore fraudulently joined.

MEMORANDUM

The complaint on its face lacks diversity jurisdiction because plaintiffs and the Badger defendants are Wisconsin residents. Accordingly, to sustain the removal the facts must establish that the Badger defendants were fraudulently joined.

An out of state defendant who wants to remove must bear a heavy burden to establish fraudulent joinder. The defendant must show that, after resolving all issues of fact and law in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant.

Poulos v. NAAS Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992).

Plaintiffs' declaratory judgment claim properly includes the

Badger defendants if they have "any interest which would be affected by the declaration." Wis. Stat. § 806.04(11). The broad scope of appropriate parties is to assure that the declaration will terminate the controversy. Annoye v. Sister Bay Resort Condominium Assoc., Inc., 2002 WI App 218, ¶ 11, 256 Wis. 2d 1040, 652 N.W.2d 653. Defendants' allegation in the removal petition that the Badger defendants have "no right or interest in this litigation" and their position in opposition to remand that the Badger defendants lack sufficient interest is patently false. The Badger defendants have perhaps the greatest interest of any party in the outcome of the litigation. From the record it appears that they instigated the termination which triggered the litigation and assumed liability and control of the litigation which inevitable resulted. They stand to gain an apparently lucrative exclusive territory if they are successful in defending against plaintiffs' claims.

Alternatively, defendants argue that the declaratory judgment claim is unnecessary and inappropriate because plaintiffs can obtain all necessary relief under its WFDL claim against Pernod. The issue before the Court is not the wisdom or necessity of the declaratory judgment claim but whether there is any reasonable possibility that the state court would deny the Badger defendant's motion to dismiss it. Poulos, 939 F.2d at 73. There is a substantial likelihood that the state court would permit the claim to proceed. This is not a case where the replacement dealer was a

mere bystander whose appointment was a decision independent of the termination. The facts support the inference that Badger had significant influence in assuring their appointment prior to the termination decision and that the termination attempt was a joint venture by all defendants. There is also the potential that Pernod will withdraw the present termination notice, thereby mooting the present WFDL action, only to attempt a later termination. The declaratory judgment claim protects plaintiffs against such a tactic. Additionally, the declaratory judgment claim might resolve the Badger defendants' rights to distribute in the disputed territory and their rights against the Perod defendants which would not necessarily be accomplished in the WFDL claim alone.

The Badger defendants have a significant stake in and control over the present litigation. Their joinder in the action is not fraudulent or a sham to defeat diversity. It seems probable that they will remain parties to this litigation in the state court. Accordingly, the Court lacks diversity jurisdiction and the matter must be remanded to state court.

ORDER

IT IS ORDERED that Plaintiffs' motion to remand is GRANTED.

IT IS FURTHER ORDERED that the matter be remanded to the Circuit Court for Douglas County, Wisconsin.

Entered this 24th day of January, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge