

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

BARRY LEE SMALLEY,

Petitioner,

v.

THE PROCTER & GAMBLE
COMPANY¹, R.E. McKNIGHT, et. al,

Respondents.

OPINION AND
ORDER

06-C-0295-C

In this proposed civil action for monetary relief petitioner Barry Lee Smalley contends that respondent The Procter & Gamble Company was negligent when it failed to warn that its “Joy Dish Soap” should not be used for bathing. Petitioner, who is detained as a patient at Sand Ridge Secure Treatment Center in Mauston, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. He seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner’s proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting

¹ I have corrected the spelling of respondent’s name.

this lawsuit. Because he is a patient and not a prisoner, petitioner is not subject to the 1996 Prison Litigation Reform Act.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, pursuant to 28 U.S.C. § 1915(e)(2), if a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Barry Lee Smalley is a patient at Sand Ridge Secure Treatment Center in Mauston, Wisconsin. Respondent The Procter & Gamble Company is a corporation located in Cincinnati, Ohio.

Respondent Procter & Gamble manufactures a product called Joy Dish Soap. Petitioner applied this product to his skin and on several occasions experienced severe burns, blisters and peeling in his lower body including his inner legs and genitals. Petitioner was examined by two doctors, who determined that the dish soap had caused his burns.

Respondent Procter & Gamble knew about the side effects associated with using Joy Dish Soap, including the risk of burns that petitioner suffered, but did not warn consumers.

DISCUSSION

A. Respondent McKnight

Petitioner included “R.E. McKnight, et al.” in the caption of his complaint but did not identify this party in the body of the complaint or allege any facts regarding this party. In fact, it is unclear whether petitioner intended to name R.E. McKnight as an additional respondent or whether “R.E. McKnight, et al.” is part of Procter & Gamble’s address. If petitioner intended to include R.E. McKnight as a respondent, I will dismiss R.E. McKnight from this lawsuit because petitioner did not allege any facts suggesting that this party was in any way involved in the wrongdoing alleged in the complaint. Petitioner’s use of “et al.” suggests that he believes there may be other respondents implicated in the alleged actions. However, to proceed against a party, a petitioner must specifically name the party and describe the party’s involvement in the alleged acts. The only respondent that petitioner has properly named and implicated in the alleged tort is Procter & Gamble. The term “respondent” in the remainder of this opinion will refer to Procter & Gamble.

B. Diversity Jurisdiction

Petitioner’s sole claim in this case is a state law claim of negligence. This court can entertain this claim only if it has diversity jurisdiction over it pursuant to 28 U.S.C. § 1332. For diversity jurisdiction to exist, petitioner and respondent must be citizens of different

states and the amount in controversy must exceed \$75,000. Petitioner has asked for damages in an amount exceeding \$75,000. However, he has not alleged facts that would allow a determination whether the parties are of diverse citizenship. District courts have an independent obligation to insure that jurisdiction exists over the cases it hears. Wild v. Subscription Plus, Inc., 292 F.3d 526 (7th Cir. 2002).

Petitioner alleges that respondent is “located” in Ohio, and public records reveal that respondent is in fact a citizen of Ohio (it is incorporated and has its principal place of business in that state). However, petitioner has not alleged any facts regarding his state of citizenship. An individual is a citizen of the state in which he is domiciled. Dausch v. Rykse, 9 F.3d 1244, 1245 (7th Cir. 1993). To be domiciled in a state, an individual must be physically present in that state and intend to remain there indefinitely. Perry v. Pogemiller, 16 F.3d 138, 140 (7th Cir. 1993). Petitioner was physically present in Wisconsin when he filed his complaint in this case. However, to establish citizenship for jurisdictional purposes, petitioner must also intend to remain in Wisconsin indefinitely. In determining where an individual intends to remain, courts look for objective manifestations of intent such as where the individual is employed and registered to vote; where he pays taxes; the location of his bank accounts, personal property and any land he owns; and whether the individual belongs to any clubs or organizations. 15 Moore’s Federal Practice § 102.36[1] (3d ed. 2005). Also, an individual’s statement that he intends to remain

indefinitely in a particular state is given some weight.

Every individual acquires a domicile at birth; his domicile is the state in which his parents or guardian are domiciled. That domicile continues until the individual adopts a new domicile by moving to another state and demonstrating his intent to remain in that new state indefinitely. Kaiser v. Loomis, 391 F.2d 1007, 1009 (6th Cir. 1968). Because it is petitioner's burden to establish that this court has jurisdiction over his claim, I will give him a short amount of time to submit an affidavit listing answers to the following questions:

1. Before being committed to Sand Ridge, in what state did you live? How long did you live in that state?
2. Have you ever held a job? If so, provide the name and city and state of your employer and the dates of your employment.
3. Have you ever been registered to vote? If so, when and in what state?
4. Have you ever filed an income tax return? If so, in what state did you file and when did you file?
5. Have you ever owned a home? If so, when and in what state?
6. Have you ever opened a bank account? If so, when and in what state?
7. Have you ever had a driver's license? If so, in what state were you licensed?
8. Have you ever owned an automobile? If so, when and in what state was the automobile registered?

C. Negligence

To establish a negligence claim, petitioner must allege (1) the existence of a duty of care on the part of the respondent; (2) a breach of that duty of care; (3) a causal connection between the respondent's breach of the duty of care and petitioner's injury; and (4) actual loss or damage resulting from the injury. Kessel v. Stansfield Vending, Inc., 2006 WI App. 68 ¶ 15, 714 N.W.2d 206 (Ct. App.). If petitioner can establish that he is a citizen of Wisconsin so that this court may exercise diversity jurisdiction over his claim, I will grant him leave to proceed in forma pauperis against respondent.

Manufacturers have a duty to warn of dangers that they know or should know are associated with the proper use of their products. Strasser v. Tanstech Mobile Fleet Service, Inc., 236 Wis. 2d 435, 459, 613 N.W.2d 142, 154 (2000) (citing Restatement (Second) of Torts § 388 (1965)). "Proper use" means a use that is intended by the manufacturer. Id. Moreover, a manufacturer has the duty to warn of dangers inherent in a use *not* intended by the manufacturer if such unintended use is reasonably foreseeable by the manufacturer. Id. However, it is well established that manufacturers are not required to warn about commonly known dangers. Id. As Professor Prosser puts it, there is no duty to warn that "a knife or an ax will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger." W. Prosser, Handbook of the Law of Torts 649 (4th ed. 1971).

Although respondent may not have intended Joy Dish Soap to be used for bathing,

such a use might have been reasonably foreseeable. If dish soap is clearly safe enough to come into frequent contact with one's hands, it may be reasonable for a consumer to assume that it is safe enough to use as a body scrub. Because petitioner has alleged sufficient facts to make out a negligence claim (respondent had a duty to warn and failed to do so; and because of respondent's failure to warn petitioner used the product and suffered actual damage as a result), I will allow him to proceed if he submits an affidavit to satisfy the jurisdictional requirement. However, petitioner should note that being granted leave to proceed does not necessarily mean he will prevail on his claim. To prevail, he will have to prove both that using Joy dish soap for bathing posed risks and that respondent actually knew or should have known about the risks.

ORDER

IT IS ORDERED that

1. Petitioner Barry Lee Smalley may have until June 27, 2006, to submit an affidavit answering the questions set out above concerning diversity jurisdiction. If, by June 27, 2006, petitioner fails to submit an affidavit establishing diversity jurisdiction, this case will be dismissed for lack of jurisdiction. If, however, petitioner satisfies the court that diversity jurisdiction exists, I will grant him leave to proceed on his state law claim of negligence against respondent.

2. Respondent R.E. McKnight is dismissed from this lawsuit.

Entered this 16th day of June, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge