IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KENNETH IRISH, DENISE MARSHALL,
ALLEN MOORE, and SCOTT STILLWELL
on behalf of themselves and all others similarly situated,
a class action,

OPINION and ORDER

Plaintiffs,

08-cv-469-slc[1]

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN SANTA FE RAILWAY CORPORATION, WILLIAM BARBEE, FRANCIS A. WEBER, JOHN DOE #1, JOHN DOE #2, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY,

Defendants.

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This is a civil action in which plaintiffs Kenneth Irish, Denise Marshal, Allen Moore and Scott Stillwell allege that the negligence of defendant railroad and its employees caused a flood in town of Bagley, Wisconsin in 2007. Initially, plaintiffs filed this lawsuit in the Circuit Court for Grant County on behalf of themselves and other similarly situated.

[1]While this court has a judicial vacancy, it is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. For the purpose of issuing this opinion and order only, I am assuming jurisdiction over this case.

Defendants removed it to this court, contending that this court had jurisdiction because the Wisconsin defendants were joined fraudulently or, in the alternative, because this court had jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d). Plaintiffs filed a motion to remand, arguing that this court lacked jurisdiction. On January 5, 2009, Magistrate Judge Stephen Crocker issued a report and recommendation denying plaintiffs' motion because plaintiffs' complaint met the jurisdiction requirements of CAFA, which requires that the case involve a potential class of 100 or more members, more than $5,000,000 in potential damages and minimal diversity. On February 4, 2009, I adopted Judge Crocker's report and recommendation denying plaintiff's motion for remand.

Now before the court are plaintiffs' motions for a protective order and to extend discovery time, leave to amend their original complaint and an implied motion to remand. Because defendants would not agree to discontinue or stay discovery pending plaintiffs' motion for leave to amend, plaintiffs asked this court for a protective order from defendant's discovery request related to plaintiffs' class action allegations. In their proposed amended complaint, plaintiffs have eliminated their class action averments, leaving only the claims of the named plaintiffs. Defendants oppose all of plaintiffs' motions. Defendant asks, however, that in the event that the court does grant plaintiffs' motion to remand, plaintiffs bear the cost of remanding this case and that defendants William Barbee and Francis Weber be dismissed because plaintiffs' complaint fails to state a claim for negligence or nuisance

against those defendants.

Because good cause exists to allow plaintiffs to amend the scheduling order in this case and Rule 15 counsels granting leave to amend when justice so requires, I will grant plaintiff's motion for leave to amend. Because plaintiff's amended complaint contains no class action allegations, this court lacks subject matter jurisdiction under the Class Action Fairness Act. Plaintiff's implied motion to remand this case to the Circuit Court for Grant County will be granted. In addition, I will deny defendants' motion to dismiss as well as their motion for costs and fees. Last, I will deny plaintiffs' motion for a protective order and to extend discovery as moot.

ANALYSIS

A. Motion for Leave to Amend Complaint

1. Rule 16

When a party seeks leave to amend its complaint after the deadlines set by a court's scheduling order, the party must first show "good cause" under Rule 16 to amend the deadliness set in a court's scheduling order before the court may consider whether leave should be granted under Rule 15. Trustmark Ins. Co. v. General & Cologne Life Re of America, 424 F.3d 542, 553 (7th Cir. 2005). "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking amendment." Id. (citing Johnson v. Mammoth

Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992)). Defendants contend that plaintiffs' late motion to amend should be denied because they have failed to show "good cause" for amending the scheduling order. Although plaintiffs' initial motion for leave to amend failed to address the question of "good cause" (or offer any grounds why their motion should be granted), plaintiffs argue in their reply brief that good cause exists because (1) leave to amend should liberally granted under Rule 15a; (2) plaintiffs are not seeking class certification; and (3) defendants will suffer no prejudice.

As an initial matter, plaintiffs are conflating the factors used in determining whether to allow a party to amend under Rule 15(a) into a Rule 16 analysis. Whether Rule 15(a) is to be liberally construed and whether defendants will suffer prejudice have no direct bearing on whether good cause exists under Rule 16; however, these arguments are relevant in deciding whether to allow the amended complaint, a point I address below.

The only relevant question under Rule 16 is whether plaintiffs have "good cause" to amend to dismiss their class action allegations beyond the scheduled deadline for amending. Of their own accord, plaintiffs have chosen to withdraw their class action allegations against defendants. By doing so, plaintiffs have narrowed the boundaries of this lawsuit and clearly identified the parties who have been injured by defendants' alleged negligence. Moreover, they have reduced the amount and period of discovery in this case and eliminated the need for additional motions and rulings for class certifications. If plaintiffs no longer wish to

pursue class action, then dismissing these allegations at this early date benefits all the parties and is "good cause."

Defendants take issue with plaintiffs' delay in filing its amendment but, the delay is not entirely plaintiffs' fault. In its preliminary pre-trial conference order issued on September 10, 2008, this court set December 15, 2008 as the deadline for filing amendments to the pleadings. However, on September 22, 2008, plaintiffs filed a motion to remand this case to state court. A final decision on plaintiffs' motion was not issued until February 2, 2009. Plaintiffs did not file their motion to amend until after this court denied their motion to remand. That decision was not entirely unreasonable because this case was effectively in limbo until the remand issue was resolved. Therefore, I do not fault plaintiffs or accuse them of any duplicitous motives in waiting to file their motion. I find that "good cause" exists to amend the scheduling order.

2. Rule 15

Under Rule 15, leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Defendants' sole basis for opposing plaintiffs' amended complaint is their argument that plaintiffs are engaging in forum manipulation and should not be allowed to defeat federal jurisdiction and undermine the purpose of the Class Action Fairness Act by amending their complaint. Freeman v. Blue Ridge Paper Prods., Inc., 551

F.3d 405, 407-08 (6th Cir. 2008) ("CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction."). This argument is flawed.

Defendants are correct that the general rule is that once federal jurisdiction has been established, a court should deny jurisdiction-defeating amendments. Herremans v. Carrera Designs, Inc., 157 F.3d 1118, 1121 (7th Cir. 1998). However, "like most legal generalizations, . . . the principle that jurisdiction once acquired is not defeated by a change of circumstances is not exceptionless." Walters v. Edgar, 163 F.3d 430, 432 (7th Cir. 1998). In this case, the amendment is not intended expressly to defeat subject matter jurisdiction (even if that is the practical consequence). Plaintiffs' amendment narrows the legal issues and streamlines the litigation. Therefore, plaintiffs' motion for leave to amend will be granted.

B. Motion to Remand

"Once an amended pleading is interposed, the original pleading no longer performs any function in the case.'" Wellness Community-National v. Wellness House, 70 F.3d 46, 49-50 (7th Cir. 1995) (quoting 6 Charles Alan Wright, Arthur Miller, & Mary Kay Kane, Federal Practice and Procedure § 1476 at 556-57, 559 (1990)). Therefore, this court's jurisdictional analysis does not rely on the previous complaint but must focus on plaintiffs' amended complaint because it is the operative pleading. Wellness Community-National, 70

F.3d at 49.

I briefly address defendants' renewed motion to dismiss defendants Barbee and Weber, which is nothing more than a motion to reconsider the denial of defendants' original motion to dismiss on the ground of fraudulent joinder. Defendants have proposed no new arguments why these two defendants owed no duty of care to plaintiffs or why plaintiffs cannot recover as a matter of law, Oshana v. Coca-Cola Co., 472 F.3d 506, 511 (7th Cir. 2006), or any manifest error of law or fact. With no reason for revisiting this decision, defendant's motion will be denied.

By dismissing the class action allegations, plaintiffs have insured that their complaint no longer meets the jurisdictional requirements of CAFA. Without CAFA jurisdiction, this court has no subject matter jurisdiction over the case. Therefore, it should be remanded pursuant to 28 U.S.C. § 1447(c), ("[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded"). Carlsbad Technology, Inc. v. HIF Bio, Inc., No. 07-1437, ___S. Ct.___, 2009 WL 1174837, *3 (May 4, 2009) (under 28 U.S.C. § 1447 district court may remand when it no longer retains subject matter jurisdiction). Although defendants argue that post-removal amendments should not alter federal jurisdiction, this rule is not absolute, as I have noted. In a proposed class action brought into federal court under CAFA, post-removal changes such as the denial of class certification would eliminate a federal court's subject matter jurisdiction. Xiao-Mei

Jin v. Ben Bridge-Jeweler, Inc., No. 07-cv-1587, 2009 W2L 981600, at *1 (E.D.Cal. Apr. 9, 2009); Arabian v. Sony Elecs. Inc., No. 05cv1741, 2007 WL 2701340, at *3 (S.D.Cal. Sept.13, 2007) ("[F]ollowing denial of class certification, no subject matter jurisdiction exist[s] under CAFA . . . "); Salazar v. Avis Budget Group, Inc., No. 07-cv-0064, 2008 WL 5054108, at *5 (S.D. Cal. Nov. 20, 2008) ("When this Court denied class certification, it determined there is not—and never was—CAFA diversity jurisdiction."); McGaughey v. Treistman, No. 05-cv-7069, 2007 WL 24935, at *3 (S.D.N.Y. Jan.4, 2007) ("Because Plaintiff's motion for class certification must be denied, Plaintiff's action is no longer a class action, and this Court cannot retain subject matter jurisdiction in diversity over Plaintiff's action pursuant to the Class Action Fairness Act."). Plaintiffs' dismissal of their class allegations is equivalent to a denial of class certification: it eliminates the limited grant of jurisdiction over non-diverse class actions. As defendants point out, CAFA is intended to reduce forum shopping by class action litigants, but this concern is no longer applicable when plaintiffs are no longer seeking to litigate a class action. Because CAFA jurisdiction is lacking, this court no longer has jurisdiction. Therefore, plaintiffs' motion to remand will be granted. This case will be remanded to the Circuit Court for Grant County. 28 U.S.C. § 1447(c).

C. Motion for Cost

Because this case will be remanded as a result of plaintiffs' amendment of their complaint, defendants request that plaintiffs bear the costs of defending the motions to amend and remand. 28 U.S.C. § 1447(c) ("An order remanding a case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). Generally, an award for costs in removal cases is justified when "the removing party lacked an objectively reasonable basis for seeking removal." Wisconsin v. Amgen, Inc., 516 F.3d 530, 534 (7th Cir. 2008); see also Lott v. Pfizer, Inc., 492 F.3d 789, 793 (7th Cir. 2007) (determining whether award of costs proper if defendant lacked objectively reasonable basis for removal); Sirotzky v. New York Stock Exchange, 347 F.3d 985, 987 (7th Cir. 2003) ("[P]rovided removal was improper, the plaintiff is presumptively entitled to an award of fees."). A party's basis for removal is objectively reasonable if clearly established law did not foreclose defendant's basis for removal. Lott, 492 F.3d 789.

In this case, defendants do not seek costs and fees for improper removal but because plaintiffs allegedly engaged in forum manipulation and abuse of the federal rules. Defendants cite no statute or case law in support of their request. Although it is unclear what standard should govern their request, applying the general standard used in removal cases would be reasonable because it allows for fee shifting when a party engages in a form of forum manipulation, such as by invoking federal jurisdiction improperly.

In applying the fee-shifting rule in this case, the issue is whether plaintiffs had an objectively reasonable basis for opposing removal. Contrary to defendants' contention, it is not clear that plaintiffs engaged in forum manipulation or abused the federal rules by opposing removal. As an initial matter, CAFA is a relatively new jurisdictional statute. Therefore, courts have yet to interpret every section of the statute. In this case, plaintiffs argued that the 100-member requirement of CAFA did not apply to them because they alleged that fewer than 100 members were "affected" by the flood. This interpretation of the statute was not objectively unreasonable. In the absence of clearly established law on the matter, plaintiffs could not anticipate that this court would read the text of the statute broadly. Without any law clearly foreclosing their argument, plaintiffs opposed removal on a good faith basis. Moreover, plaintiffs' actions do not suggest that they abused the rules, but that they weighed the options between continuing as a class action or litigating in federal court and decided to sacrifice their class action claim. Defendants' motion for costs will be denied.

Although defendants have incurred costs in removing this case to federal court and briefing the motion, their brief sojourn in federal court has not been without some modicum of success. By achieving a dismissal of the class action allegations, defendants have reduced substantially the potential cost of defending this action.

D. Motion for a Protective Order and to Extend Discovery

Plaintiffs filed a motion for a protective order on February 8, 2009, in which they requested relief from defendant's written and oral discovery requests. Specifically, defendants sent interrogatories inquiring about the damages of the named plaintiffs and other potential class members as well as requesting depositions with the plaintiffs. Because this case is no longer proceeding as a class action and this case is being remanded, plaintiffs' motion for a protective order and for an extension to respond to discovery is denied as moot.

ORDER

IT IS ORDERED that:

1. The motion for leave to file an amended complaint by plaintiffs Kenneth Irish, Denise Marshall, Hollie Moore and Scott Stillwell, dkt. # 44, is GRANTED;

2. The motion to remand by plaintiffs is GRANTED and this case is REMANDED to the Circuit Court for Grant County, pursuant to 28 U.S.C. § 1447(c); and

3. Defendants' motion for costs and fees and their motion to dismiss defendants William Barbee and Francis Weber are DENIED.

4. Plaintiffs' motions for protective order, dkt. #31, and to extend discovery time, dkt. #32, are DENIED as moot.

The clerk of court is directed to transmit the file to the Circuit Court for Grant County.

Entered this 7th day of May, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge