Court: United States District Court, Southern District of Ohio
Case Title: Swiger v. Kohls Department Stores Inc et al
Docket Number: 3:08CV00159
Expert(s):

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DISTRICT, AT DAYTON

Carmela Swiger,	:	Civil Action No. 3:08 cv 0159
Plaintiff,	:	(Hon. Walter Herbert Rice)
v.	:	(Magistrate Judge Michael R. Merz)
Kohlôs Department Stores, Inc., et al.,	:	
Defendants.	:	

OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE OVERRULING MOTION TO REMAND TO STATE COURT

Plaintiff, Carmela Swiger, hereby submits her objections to the Report and Recommendation of the Magistrate Judge filed herein on July 7, 2008.

Introduction

This is a rather uncomplicated tort case resulting from a fall at a retail store. It was filed on the last day of the two-year statute of limitations. The demand complies with Ohio law and asks for damages in excess of $25,000.00. It does not state how much in excess of $25,000.00. It was filed to protect all potential injury claims and to avoid the running of the statute of limitations as to unidentified wrongdoers, with the actual name to be substituted for these real

parties in interest pursuant to Civ. R. 15(D), Ohio R. Civ. P. Little was known of the extent of injury at the time of filing.

Defendant, Kohlôs, has filed a petition for removal to this Court and, presumably with no more knowledge than plaintiffôs counsel, asserts that Carmela Swigerôs damages exceed $75,000.00. This jurisdictional assertion places counsel for plaintiff and counsel for defendant in a curious adverse role with the defendant arguing her damages are more than she has alleged in state court and plaintiff is to argue, her injuries are not so bad, both based on nothing but conjecture. Should plaintiffôs counsel know that plaintiffôs injuries are similar to the usual slip and fall injuries and given the nature of the jury verdicts in Montgomery County, Ohio, in such cases, he might be tempted to stipulate to damages of $75,100.00 on the condition that Kohlôs will pay that amount within the week. Of course, counsel cannot do that and doubts that Kohlôs would pay. But, such is the absurdity of the speculations because Kohlôs has removed before it knew anything about the injuries, except the allegations covering all potential damage claims.

It would make more sense for Kohlôs to wait until there is evidence that shows that the amount is ñmore likely than notò in excess of $75,000.00, or is ñmore likely than notò less than $75,000.00, and its effort to change the forum could be avoided. Nevertheless, the Magistrate Judge has not required Kohlôs to have any evidence and has recommended denial of Carmela Swigerôs motion to remand. The report concocts a ñmethodò for calculating the ñamount in controversyò without the slightest evidentiary support and questionable projections of damages based simply on the categories of injuries pled in the complaint. Without recognizing that it is unreasonable to agree to something that is unknown, similar to agreeing in early 2002 that the U.S. war in Iraq would last a few months at the most, the report even infers Carmela Swigerôs damages are larger because her counsel did not stipulate to the contrary. Report, at 3.

OBJECTIONS TO THE REPORT

Jurisdiction Based on Diversity of Citizenship for more than $75,000

First, Carmela Swiger objects that the Magistrate Judge has not followed the established requirement that all doubts and reservations should be construed in favor of remand to the plaintiffôs chosen forum. *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100 (1941); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 405 (6th Cir. 2007). *Samuel-Bassett v. Kia Motors America, Inc.*, 357 F.3d 392 (3d Cir. 2004)[ñ28 U.S.C. §1441 is to be strictly construed against removal, Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), so that Congressional intent to restrict federal diversity jurisdiction is honored.ò].

Second, she objects that the Magistrate Judge has effectively reduced the burden of proof that is on the removing defendant, Kohlôs, to one akin to an inverted ñlegal certaintyò standard effectively requiring plaintiff to prove the amount is below the statutory minimum.

With respect to this objection, the Report references the United States Court of Appeals for the Sixth Circuit decision in *Gafford v. General Electric Co.*, 997 F.3d 150 (6th Cir. 1993), relied on by plaintiff in her motion to remand. The Report asserts that, ñIn *Gafford,* the Sixth Circuit distinguished *St. Paul* [*St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938)] as applying to original filings in federal court from removal situations.ò Report, at 3 n.2. In fact, the *Gafford* court did assess the burden of disputing the amount in controversy in the two situations: first, where the plaintiff has chosen the federal forum based on diversity of citizenship and asserts damages in excess of the statutory minimum; and second, where the defendant is choosing to change the state forum selected by the plaintiff and is asserting that the plaintiffôs damages prayer actually exceed the statutory minimum in 28 U.S.C. §1332. However, it is respectfully submitted that the Reportôs apparent conclusion that a plaintiff has a greater burden

of proof in the latter situation rather than the former, misreads *Gafford* and conflicts with the federalism policies underlying the removal statute. See *contra Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 680 (9th Cir. 2006).[ñCases removed from state court under §1441 are ordinarily subject to a stricter diversity standard than applies where original federal jurisdiction is invokedò]. Although the *Gafford* courtôs discussion, perhaps, could be of finer clarity, it recognizes that the plaintiff is ñthe master of the claimò and the amount of the claim as alleged is presumed to be in good faith. 997 F.2d at 157. It reads the *St. Paul* ñlegal certaintyò standard as clearly applying to a removed case where the prayer exceeds the federal minimum and, after removal, the plaintiff then takes the opposite position that it is below the minimum. Id. The Court of Appeals states, ñGenerally, since the plaintiff is master of the claim, a claim specifically less than the federal requirement should preclude removal.ò Id., then it quoted *St. Paul*, 303 U.S. at 294: ñIf [the plaintiff] does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.ò

Of course, in this case, the prayer is below the statutory minimum. Thus, the general rule is the case cannot be removed and should be remanded. *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 273-74 (2d Cir. 1992). See 14C Wright, Miller, and Cooper, Federal Prac. & Proc., §3725, 84-85. The Magistrate Judgeôs report disregards this general rule.

The essential question should be whether the general rule should not be applied simply because the demand is not for a specific amount of money. The concern in *St. Paul* was that such a prayer could be interposed for the purpose of preventing removal. There is no presumption that that was done. Defendant has not presented any evidence that the demand was made in bad faith or a result of collusion. See *St. Paul, supra*, 303 U.S. at 290. In fact, the report notes that the

demand conforms to Ohio practice. It was not made with an intention of defeating removal. Thus, there is no reason not to apply the general rule and remand.

Moreover, the *Gafford* court discusses a state prayer for an unspecified amount ñthat is not self-evidently greater or less than the federal amount-in-controversy requirementò. 997 F.2d at 158. Arguably, that is the type of prayer in this case. It is this category where the *Gafford* court decided to adopt the ñpreponderance of the evidenceò standard. Id. The Sixth Circuit reasoned, ñthat this test best balances the competing intentions of protecting a defendantôs right to remove and limiting diversity jurisdiction.ò Id.

The Sixth Circuit notes that removal is designed to protect from local bias. Id. (Arguably, the international and interstate nature of businesses now has greatly reduced this fear of local bias. This would reinforce the basic rule set forth in the first objection that all doubts should be resolved in favor of remand.) In any event, the Sixth Circuit held that the defendant bears the burden of proof by a preponderance of the evidence that the amount in controversy exceeds the amount of $75,000.00. This is not a preponderance of speculation, but of evidence. It is also not merely showing that it is *no*t ñlegally certainò that the amount is below the federal minimum. See *St. Paul* where the plaintiff changed his tune about the amount after removal.

As indicated, this action was filed on the last day of the two-year statute of limitations in R.C. 2305.10 for a personal injury claim. Thus, the assertions of the potential types of damages based on the extent and nature of injury is largely protective and not based on a factual investigation. In *Gafford,* there was evidence. 997 F.2d at 160. Here, there is not. While counsel for Carmela Swiger did not know the extent of injury, peculiarly, counsel for Kohlôs purportedly does, and so does the Magistrate Judge ï not based on evidence, but selective recollection of other actions (independent appraisal). Report, at 3. Such speculation conflicts with the rule in

Gafford that placed the burden on Kohlôs as a preponderance of the evidence ï of which, there is none except the allegations sufficient for notice pleading. Civ. R. 8, Ohio R. Civ. P.

Courts have generally recognized that ñwhen the damages are unliquidated, . . . there is no exact yardstick to measure recovery even when most, if not all the operative facts are known.ò *Wade v. Rogala,* 270 F.2d 280 (3d Cir. 1959). See also *Nelson v. Keefer,* 451 F.2d 289 (3d Cir. 1971), applying the ñlegal certaintyò test to a plaintiffôs personal injury action filed in federal court, based on pretrial evidence of just over $1300.00 in specials, noting congressional intent in raising the jurisdictional amount to $10,000.00 in 1958, should not ñbe thwarted by the simple expedient of inflating the complaintôs *ad damnum* clause.ò

The Court must reject the report for engaging in the same inflation without evidentiary support and before the operative facts are known.

The Defendants Designated as John Doe

The Magistrate Judgeôs report dismisses the two requirements of diversity of citizenship and unanimity in removal based on the language in 28 U.S.C. §1441(a) added in 1988 that for purposes of citizenship defendants sued under fictitious names should be disregarded. This conclusion ignores the careful description of these employees or agents of Kohlôs. Moreover, as indicated in the on-line record of service from the state court, copy attached, Kohlôs accepted service of process for these known, but unidentified (by plaintiff), defendants. At this juncture, their identity is solely within the knowledge of Kohlôs. It could produce the names in short order. It is unreasonable to assume that Kohlôs has no knowledge of the employees/agents responsible for the maintenance of the surface where Carmela Swiger fell.

Contrary to the reportôs assumption that the 1988 language addresses the ñJohn Doeò defendants here, it is much more likely that Congress used ñfictitiousò in its historical sense of

not a real party in interest. Given the history of the federal removal statute and its use of ñterms of artò rather than modern dictionary meanings, see *Murphy Bros. v. Michetti Pipe Stringing,* 526 U.S. 344 (1997), the Court must question the reportôs assumption that the language added to 28 U.S.C. §1441(a) in 1988, means unidentified defendants whose names would be substituted later under Ohio Civ. R. 15. Plaintiff submits that the report makes the same error made by the Circuit court in *Murphy Bros.* of applying a current dictionary definition rather than an historical meaning to the terms in the removal statute, under the rubric of interpreting ñplain meaning.ò[1]

In the history of the statute, the use of ñfictitiousò parties or ñfictitious namesò of persons alleged to be of non-diverse citizenship, has been a well recognized method of attempting to avoid the complete diversity required since *Strawbridge v. Curtiss,* 3 Cranch 267, 2 L.E. 435 (1806). Thus, where the fictitious, non-diverse citizen defendant is named, Congress finally expressly included language that the courts should disregard that person for purposes of diversity. Congress was trying to address a plaintiffôs manipulation of the action *for the purpose* of defeating removal based on diversity of citizenship. In other words, the defendant is fictitious by not being a real party in interest.

There is no question that Congress knew about the use of ñJohn Doeò defendants in state procedure. Professor Wrightôs 1983 edition states, ñThe practice, popular in some states and notably in California, of naming various ñJohn Doeò defendants has created jurisdictional problems.ò Wright, *supra,* at 173. In fact, the text references the United States Supreme Court decision in *Pullman Co. v. Jenkins,* 305 U.S. 534, 540 (1938) where the high court placed the burden on the removing party to prove that the known, but unidentified John Doe defendant, (the

[1] This observation was made in Wright, Law of Federal Courts §31, ñDevices to Create or Defeat Diversity,ò 166 (4th ed. 1983) with respect to a Third Circuit decision, stating, ñUnfortunately the court, in laying down what was to be for nearly a decade the authoritative construction of §1359, turned to Websterôs New International Dictionary, rather than to the purpose or history of the statute, to determine its meaning.ò

porter) ñwas a nonresident of plaintiffôs state.ò Id. Professor Wright stated the Ninth Circuit then developed the rule disregarding the ñJohn Doeò defendants in determining diversity if it was apparent from the complaint that they were ñmere nominal and disinterested parties, who ódive not and are accused of nothing,ô . . . .ò Id, quoting from *Grigg v. Southern Pac. Co.*, 246 F.2d 613, 620 (9th Cir. 1957).

This is akin to the phrase ñfraudulent joinder.ò Wright, *supra.* Fraudulent joinder is a device to defeat diversity jurisdiction. Cf. 14 Wright, Miller, and Cooper, *supra,* §3641 (3d ed. Supp. 2007); See e.g., *Illinois Central R.R. v. Sheegog,* 215 U.S. 308 (1909). It means ñthe resident defendant was joined solely, and without legal basis, for the purpose of defeating removal.ò *Eckhart v. Depuy Orthopaedics, Inc.,* Case No. 2:03-cv-1063, S.D. Ohio, 2004 WL 524916 (S.D.Ohio). The technique includes joinder of nominal parties or fictitious non-diverse defendants or those resident of the forum state. See *Schwartz v. State Farm Mut. Auto Ins. Co.,* 174 F.3d 875, 878 (7th Cir. 1999). Where the removing defendant is making this assertion, ñThe burden of persuasion placed on those who cry ófraudulent joinderô is indeed a heavy one.ò Id, quoting from *B., Inc. v. Miller Brewing Co.,* 663 F.2d 545, 549 (5th Cir. 1981). Professor Wright states, ñThe joinder is not fraudulent within this rule, however, where plaintiff does have a claim against the co-citizen thus joined, even though this defendant may have no means with which to satisfy a judgment and may have been joined solely to prevent removal of the action.ò Wright, *supra,* at 173. In other words, a defendant is fraudulently joined when ñthere is no possibility that a plaintiff can state a cause of action against [the] nondiverse defendant[] in state court, ...ò*Gottlieb v. Westin Hotel Co.,* 990 F.2d 323, 327 (7th Cir. 1993).

The aim of the 1988 amending language is consistent with this case law ï to prevent joinder of fictitiously named parties (not real parties in interest) to defeat removal based on

diversity. The accepted test that the Magistrate Judge should have assessed as the primary question presented is whether plaintiff can potentially state a cognizable claim against the defendants. Clearly, these unidentified defendants would be primarily liable for the negligence causing plaintiffôs injury. See *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993). See also *Pack v. Rich Terminal Co.*, 502 F. Supp. 58 (S.D. Ohio 1980).

The Court should also note that other district courts have analyzed the issue of ñfictitious namesò in more detail. ñ[W]hen a plaintiffôs allegations give a definite clue about the identity of the fictitious defendant by specifically referring to an individual who acted as a companyôs agent, the court should consider the citizenship of the fictitious defendant.ò *Brown v. Transouth Fin. Corp.*, 897 F. Supp.2d 1398, 1401 (N.D. Ala. 1995), referencing *Tompkins v. Lowe's Home Ctr., Inc.*, 847 F.Supp. 462, 464 (E.D. La. 1994) and *Green v. Mutual of Omaha*, 550 F. Supp. 815, 818 (N.D. Cal. 1982) and *Wright v. Sterling Investors Life Ins. Co.*, 747 F. Supp. 653, 655 (N.D. Ala. 1990). As the Court in *Brown* explains, ñIt would be unfair to force the plaintiffs from their state court forum into federal court by allowing Transouth to plead ignorance about the defendant-employeesô identity and citizenship when Transouth was in a position to know that information.ò 897 F. Supp 2d at 402.

Moreover, Carmela Swiger should not be penalized for following the procedure expressly authorized by Ohio R. Civ. P. 15 to avoid a statute of limitations defense. The Magistrate Judgeôs report allows Kohlôs to benefit from Carmela Swigerôs lack of knowledge about the unidentified employees/agents, when Kohlôs should have that knowledge itself. It is reasonable to conclude that Kohlôs could have easily gone to these employee/agents about the lawsuit. The fact that it did not disclose any such information should raise an adverse inference that the information is

not favorable to its position for removal. However, the report holds that lack of identification against the plaintiff as ñdispositive of Plaintiffôs first two arguments for remandò. Report, at 2.

The proper analysis emphasizes the importance of the plaintiffôs intentions and assesses those intentions. Here, Carmela Swiger identified the Kohlôs employees/agents the best she could, without knowing their true names. This is the type of ñgood faithò referenced in *St. Paul, supra*, 303 U.S. at 288-89. One court stated it had observed that in the usual case the fact that a plaintiff includes such a ñfictitious defendantò in the state court pleading before removal ñwould tend to belie an inference that the plaintiffôs motivation for seeking to amend post-removal to substitute a real party for the one previously identified only as a fictitious party is to defeat diversity jurisdiction.ò *Smith v. Catosouth, LLC*, 432 F. Supp. 679, 681 (S.D. Miss. 2006).

The Court must reject the Magistrate Judgeôs report that the described John Doe defendants cannot be considered for purposes of diversity or lack of diversity.

Unanimity for Removal

As far as the unanimity requirement, the Magistrate Judgeôs conclusion should not be accepted. It simply states, ñobviously a fictitious defendant cannot joint in a notice of removal because a named defendant cannot find the fictitious co-defendant to solicit agreement.ò Report, at 2. This conclusion is based on the fallacious assumption that these defendants are not known. However, as indicated above, they are merely not identified by the plaintiff.

Likewise, there is no reason why these defendants could not have been consulted about consenting to the removal petition, except, that in all likelihood, they are citizens of the forum state of Ohio, who would preclude removal. 28 U.S.C. §1441(b). (Plaintiff has sent discovery requesting the identity of these employee and/or agents.) See *Collins v. Kohl's Dept. Stores, Inc.*, No. Civ. 304CV557MRK, D. Conn., 2004 WL 1944027(D. Conn.) (post-removal joinder of

defendant resident of the forum destroying jurisdiction, proper). Unanimity of all defendants is a settled requirement. *Chicago R. I. & P.R. Co. v. Martin,* 178 U.S. 245, 248 (1900); *Wisconsin Dept. of Corrections v. Shacht,* 524 U.S. 381, 393 (1998)(Kennedy, J., concurring) (ñ[r]emoval requires the consent of all of the defendantsò). The burden is on the removing party to obtain such consent or explain valid reasons for not obtaining the consents. See *Codapro Corp. v. Wilson,* 997 F. Supp. 322, 326 (S.D.N.Y. 1998).

Although Kohlôs describes the John Doe defendants as unknown, it does not specifically assert that it has not or cannot identify them. It merely argues that the Court should not presume they reside in Ohio near the department store. Kohlôs Mem. at 2-3. It does acknowledge the Sixth Circuit decision in *Curry v. U.S. Bulk Transport, Inc.,* 426 F.3d 536 (6th Cir. 2006) where the identification of these unidentified defendants defeated diversity and supported remand. Id., at 3. Kohlôs failure to assert that the described John Doe defendants are persons totally unknown to it is significant, although not acknowledged by the Magistrate Judgeôs report. As indicated above, there is no assertion that they were added for the purpose of defeating diversity. In other words, these unidentified defendants are not ñfictitiousò in the sense that word is used in removal jurisprudence.

Furthermore, Kohlôs bows to the logic that Carmela Swiger may be correct about the Ohio residency of these John Doe employees/agents working at this retail store, but argues that even so, ñdiversity would still exist because Kohlôs would be the real party in interest under the doctrine of respondeat superior.ò Kohlôs Mem., at 3. It provides no authority to support this conciliatory argument that directly conflicts with the requirement of ñcomplete diversityò as well as the tort notions of primary and secondary liability. Nevertheless, the argument is not tested

because the Magistrate Judge completely dismisses any consideration that these unidentified, but described, defendants could defeat diversity or be available to consent to removal. Report, at 2.

Moreover, other courts, like the Third Circuit in *Balazik v. County of Dauphin*, 44 F.3d 209, 213 n.4, have listed only three exceptions to the unanimity rule. They are (1) nominal or unknown parties, (2) defendants fraudulently joined, and (3) a non-resident defendant that was not served. In this case, the John Doe defendants are not nominal parties and they are known to Kohlôs. See *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005). There is a claim against these defendants. Also, Kohlôs should not be able to avoid the unanimity rule by ignoring these known defendants, and change the forum because plaintiff cannot yet identify them.

The Court must reject the Magistrate Judgeôs conclusion that unanimity is not required because the John Doe defendants are unknown.

CONCLUSION

Accordingly, the Court must reject the Magistrate Judgeôs report and recommendation because it fails to follow the rule requiring that all doubts be resolved in favor of remand; it fails to hold the defendant to its burden of proving by a preponderance of the evidence that the amount in controversy exceeds $75,000.00; it erroneously assumes the types of damages pled in the complaint filed on the last day before the statute of limitations would run, are ñevidenceò for which an amount of damages can be allotted that, when added together, would total more than $75,000.00; it fails to see that the John Doe defendants in this case are not ñfictitiousò but are merely unidentified and their names will be substituted under Ohio Civ. R. 15(D) and that Congress did not intend that they be disregarded; it fails to require unanimity for the removal even though Kohlôs accepted service for the John Doe defendants, they are known to Kohlôs, and they are real parties in interest against whom plaintiff can state a claim for relief; and, it fails to

make the practical presumption that these employees or agents are more likely than not residents of the forum state in which they work, and relieves Kohlôs from its burden to prove otherwise even though that knowledge is solely within the control of defendant and it should bear the burden of proof.

For the foregoing reasons, this Court should reject the report and recommendation of the Magistrate Judge, review the filings independently and grant the motion to remand this matter to state court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that as July 21, 2008, the foregoing was filed electronically with the Clerk of Courts. Notification of this filing will be sent to the following by operation of this Court's CM/ECF system. Copies will be mailed via U.S. Mail to those parties to whom electronic notice has not been sent. Parties may access this filing through PACER.

/s/ Richard W. Schulte