IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY WEST,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO: 02-CV-546
ZURICH AMERICAN INSURANCE COMPANY,	:	
Defendant.	:	

GREEN, S.J. **JUNE _____, 2002**

MEMORANDUM/ORDER

Presently before the Court are: 1) Plaintiff's Motion to Remand and for Fees and Costs, Defendant's Response, and Plaintiff's Reply; 2) Plaintiff's Motion to Dismiss Defendant's Counterclaim, and Defendant's Response; and, 3) Defendant's Motion for Summary Judgment. For the following reasons, Plaintiff's motion to remand will be granted, and the remaining motions will be dismissed as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

In April, 1993, Plaintiff Timothy West ("West") was involved in a motor vehicle accident.[1] After collecting the policy limits from and settling with the tortfeasor, West requested Underinsured Motorists ("UIM") benefits under a policy of insurance issued to West's employer by Defendant Zurich American Insurance Company ("Zurich"). In February, 1997, West demanded arbitration of the UIM claim and appointed an arbitrator. In response, Zurich appointed an arbitrator and in April, 1998, filed a Petition to Compel Arbitration ("petition to compel arbitration") in the Court of Common Pleas of Montgomery County, Pennsylvania. In an order dated September 6, 2000, the state court appointed the third arbitrator. The arbitration was

[1] Zurich, as the removing party invoking federal court jurisdiction, bears the burden of demonstrating compliance with the removal requirements.

held in October, 2001, and the arbitration award was issued on December 4, 2001. West was awarded $130,000.00 in UIM benefits.

On January 3, 2002, West filed a Petition to Vacate and/or Modify the Arbitration Award ("petition to vacate"). In response to this petition, Zurich filed a Notice of Removal with this Court, citing this Court's diversity jurisdiction.[2] West then filed the instant motion to remand, arguing that Zurich's notice of removal was unauthorized because the petition to vacate was not an "initial pleading," and untimely because it was not filed within 30 days of receipt of the "initial pleading" in the action. See 28 U.S.C. § 1446(b).

West argues that his petition to vacate cannot form the basis of removal, as it was not the "initial" pleading in this action. West bases his argument on the belief that the "initial pleading" in this action was the petition to compel arbitration filed in state court by Zurich in April, 1998. West argues that when Zurich filed its petition to compel, it initiated a legal proceeding which could only terminate when the dispute between the parties ended, and was not terminated when the state court granted Zurich's petition. West further argues that his petition to vacate was directly related to and part of a continuing controversy which was initiated when Zurich filed its petition to compel arbitration in state court. Therefore, West continues, the time period in which to remove this matter lapsed some time in May, 1998. West also argues that Zurich cannot remove this matter, because Zurich should be considered the "plaintiff" in this continuing controversy, since Zurich is the party that first availed itself of court intervention by filing the

[2] In its Notice of Removal, Zurich alleges that West is a resident of Pennsylvania, that Zurich is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Schaumburg, Illinois, and that the amount in controversy is in excess of $75,000.00. See 28 U.S.C. § 1332.

petition to compel arbitration in state court. If the "plaintiff," Zurich's removal would be improper under 28 U.S.C. § 1446, since only a "defendant" may remove an action.

Zurich argues that West's petition to vacate was an "initial pleading" because it was based on different legal grounds and sought different relief than the petition to compel arbitration which Zurich filed in April, 1988.[3] Zurich states that, in its petition to compel arbitration, the only relief Zurich sought was to have the state court appoint a neutral arbitrator to participate in the panel along with the arbitrators the parties had selected, and that after the state court appointed an arbitrator, the petition was fully adjudicated and no longer retained any remaining legal effect. Therefore, Zurich continues, the state court fully divested itself of this matter, and there remained no pending action in the state court. So, when West filed his petition to vacate, Zurich had a right to remove the action, since it was a distinct filing and not related to any pending action in any other court.

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 1441, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where the action is pending." 28 U.S.C. § 1441(a). District courts have original jurisdiction over matters where there is complete diversity between parties and the amount in controversy exceeds $75,000, exclusive of interests and costs. 28 U.S.C. § 1332(a). "The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through

[3] Because I conclude that this matter should be remanded, it is not necessary to consider the merits of West's motion to dismiss Zurich's counterclaim, or Zurich's motion for summary judgment.

service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b).

"As a basic premise, federal courts sitting in diversity are required to apply the substantive law of the state whose laws govern the action." Robertson v. Allied Signal, Inc., 914 F.2d 360, 378 (3d Cir. 1990). "When ascertaining matters of state law, the decisions of the state's highest court constitute the authoritative source." Connecticut Mutual Life Insurance Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983). In removing this matter to this Court, Zurich invoked federal diversity jurisdiction, and the Court will apply Pennsylvania substantive law.[4]

III. DISCUSSION

A. Whether Zurich's removal was unauthorized and untimely.

The question presented is not one to which either the parties or the Court can find direct case authority: may the filing of a petition to vacate an arbitration award be considered an "initial pleading" under 28 U.S.C. § 1446, where the subject arbitration had taken place after a state court compelled arbitration. I conclude that it may not.

West argues that the entire arbitration proceeding should be viewed as a unitary action,

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[4] No party specifically argues that Pennsylvania law applies, but Plaintiff and Defendant both rely on Pennsylvania law in their briefs. Generally, in resolving a claim brought under the Court's diversity jurisdiction, the law to be applied is the law of the forum state. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); see also Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 417 (1996) (holding that, under Erie doctrine, "federal courts sitting in diversity apply state substantive law and federal procedural law"). The insurance agreement at issue appears to have been formed in Pennsylvania, Plaintiff resides in Pennsylvania, and the state court litigation which preceded the instant removal action proceeded in a Pennsylvania court applying Pennsylvania law. Since no party objects to the application of Pennsylvania law, I will apply Pennsylvania substantive law to examine the matter sub judice.

and not a series of distinct and unrelated steps. Zurich argues that its initial petition to compel arbitration sought only limited and specific relief, and that, after the state court had ruled on and disposed of the petition, that petition no longer had any residual legal effect, and the state court was divested of the action; thus, when West filed the petition to vacate, there was no ongoing action before the state court, mandating the conclusion that the petition to vacate was a new, distinct pleading which Zurich could remove to this Court.

As there is no direct case authority, the Court must look elsewhere for guidance, namely to the statute itself. In Pennsylvania, arbitration is statutorily governed by Chapter 73 of the Pennsylvania Code. Of importance to the matter sub judice is Subchapter A, 42 Pa.C.S.A. §§ 7301-20, regarding Statutory Arbitration, and known as the "Uniform Arbitration Act" ("Act"). See 42 Pa.C.S.A. § 7301. Noticeably, the provisions guiding arbitration proceedings are not listed piecemeal throughout Pennsylvania's code, but, rather, consecutively set forth under this subchapter. A perusal of the Act discloses that the Act contains inter-dependent sections, which were obviously constructed with the understanding that the controversy would continue in a single fashion.[5]

Further proof can be adduced by specific language in the Act itself, such as found in 42 Pa.C.S.A. § 7319(3), which requires that, after the parties make application under the Act to a court, all "subsequent applications to a court shall be made to the court hearing the initial application unless the court otherwise directs." This exemplifies the Legislature's contemplation of the unitary nature of the controversy, in that the Legislature anticipated that the same court

[5] See, e.g., the interplay between § 7303 and § 7304; § 7304 and § 7319; § 7311 and §§ 7313, 7314 and 7315; § 7314 and § 7307; § 7314 and § 7304; and, § 7314 and § 7305.

which first considered the controversy should remain in control if the controversy re-surfaces further down the line. If Zurich's arguments were correct, and all proceedings which arise during the course of a controversy were to be viewed and accepted as distinct legal filings, then any party could file subsequent applications in any court in which jurisdiction was satisfied under the Act. However, I conclude that the intention of the Act was to cohere the litigation of a controversy, and to treat each arbitration as a single, unitary proceeding.

Several decisions of the Pennsylvania Superior Court support the conclusion that, in Pennsylvania, statutory arbitration should be viewed as a single, continuing controversy. In Gardner v. Prudential Insurance Co., 481 A.2d 654 (Pa. Super. Ct. 1984), the Superior Court reviewed Prudential's appeal from the lower court's order appointing an arbitrator and directing that arbitration take place. The Superior Court concluded that such an appeal from an order compelling arbitration was interlocutory, and, as such, generally unreviewable. See Gardner, 481 A.2d at 655. The Superior Court specifically dismissed Prudential's argument that such an order is appealable by right as a final order, stating that the "order by compelling arbitration forces the parties into, rather than out of, court." See id. If the petition to compel arbitration was a legal pleading totally distinct from the other statutory arbitration proceedings, then it would follow that any ruling by a lower court could be appealed, as it would have fully dealt with the merits of the application before it. However, as the Superior Court stated, compelling arbitration does not end the parties' interaction with the court, but, rather, initiates it.

Then, in Ostroff v. Keystone Ins. Co., 515 A.2d 584 (Pa. Super. Ct. 1986), the Superior Court considered an appeal of the lower court's order vacating an arbitration award, where the plaintiffs were the ones who first initiated the court's involvement when they filed their petition

to compel arbitration. The Superior Court held that, "[h]aving once submitted themselves to the court's jurisdiction in order to have the matter arbitrated, absent an allegation of prejudice, appellants will not be heard to complain when the losing party seeks to vacate the award." See Ostroff, 515 A.2d at 593. The Superior Court further held that personal service of the motion to vacate the award was not necessary, since state procedural rules only require "notice of an *initial* application for an order of the court [to] be served in the manner prescribed for the service of a writ of summons in a civil action." See id. (emphasis in original). These two holdings lead inexorably to the conclusion that the Superior Court considers arbitration proceedings to be unitary proceedings, which are initiated at the time of the first filing, and not, as Zurich contends in the instant action, a series of unrelated legal actions.

The Superior Court has also held that a "petition to compel arbitration is the functional equivalent of a complaint." See Clark v. State Farm Auto Ins. Co., 599 A.2d 1001,1006 (Pa. Super. Ct. 1991) (finding that failure to raise preliminary objections challenging venue before filing pleading responsive to petition to compel arbitration constitutes waiver); see also Boyce v. St. Paul Property & Liability, 618 A.2d 962 (Pa. Super. Ct. 1992) (following Clark). And, again considering whether an order compelling arbitration is a final order or interlocutory, the Superior Court noted that a "final order is one which ends the *litigation* or disposes of the *case*." See Patton v. Hanover Ins. Co., 612 A.2d 517, 518 (Pa. Super. Ct. 1992) (emphasis added). By using the terms "litigation" and "case," the Superior Court was clearly referring to the entire arbitration matter, from beginning to end, and not to a specific step in the arbitration process, such as a petition to compel arbitration. The obvious conclusion is that the Superior Court views an arbitration proceeding to be one, unitary proceeding, initiated by the first legal filing.

I predict that the Pennsylvania Supreme Court would find Pennsylvania's Uniform Arbitration Act to have been designed by the State Legislature as a unitary framework, so that, when invoked by a party, jurisdiction rests continually, throughout the controversy, with the court that first substantively deals with any aspect of the controversy. Proof of this intent can be found in the Act's construction, and its application by the Pennsylvania courts.

I conclude that this matter should be remanded, as the instant petition to vacate is not the "initial pleading" in this controversy, and Zurich's removal was unauthorized and untimely. When Zurich filed its petition to compel arbitration in the state court, it freely and independently decided to avail itself of the state court's jurisdiction and control of the entire arbitration proceedings. Zurich could have filed its petition to compel arbitration in federal court. Also, if West had filed the petition to compel arbitration in state court, Zurich could have removed it. But, Zurich cannot at one stage in the arbitration proceedings invoke the jurisdiction of a state court, and then, at a later stage, and for presumably strategic purposes, decide to have the proceedings resolved in federal court. See, generally, Lapides v. Bd. of Regents of University System of Georgia, 122 S. Ct. 1640, 1645 (2002) (holding that state waived Eleventh Amendment immunity by removing case to federal court, because, otherwise, inconsistent and unfair results would ensue). To allow such a practice would unfairly benefit such a litigant, who could unilaterally select a forum, then, if the forum seems unfavorable, decide to remove the litigation from that forum. Such a result should not be allowed.

Thus, Zurich's removal of this action was unauthorized, since Zurich is not the "defendant" in this matter, as is required under 28 U.S.C. § 1441, but, rather, the "plaintiff," because Zurich was the party that first invoked court intervention when it filed its petition to

compel arbitration. See, e.g., Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 356 (2d Cir. 1995) (holding that the party that initiated the litigation is the "plaintiff" and the opposing party the "defendant" under 28 U.S.C. § 1441). Zurich could have filed its petition to compel in any court, state or federal, which had jurisdiction over the matter; "[i]t chose to do so in state court." See Oppenheimer, 56 F.3d at 356. Zurich, in fact, does not contest West's argument that Zurich was the "plaintiff" in the petition to compel. Instead, in answering West's contention, Zurich ignores its status in the petition to compel, and, instead, focuses on its status in the petition to vacate, which it argues is a separate action. (See Zurich's Ans. to Mot. to Remand (Docket # 6) at 15-16.) As stated earlier, the petition to vacate is not a separate legal proceeding, but, rather, a continuation of the litigation commenced when Zurich filed its petition to compel. Therefore, as the "plaintiff" in the instant litigation, Zurich was not authorized to remove this matter to this Court.

B. Whether West will be awarded fees.

Having determined that this matter will be remanded, I will now consider West's motion for fees and costs. In ordering a case to be remanded, a court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." See 28 U.S.C. § 1447(c). A "district court may require the payment of fees and costs by a party which removed a case which the court then remanded, even though the party removing the case did not act in bad faith." See Mints v. Educational Testing Service, 99 F.3d 1253, 1260 (3d Cir. 1996) (affirming the assessment of fees and costs under 28 U.S.C. § 1447(c) where there was no colorable basis for removal). "[A] district court has broad discretion and may be flexible in determining whether to require the payment of fees under section 1447(c)." Id.

I conclude that Zurich's removal of this action was in good faith, as it was not in contravention of a settled area of the law, and was not based on a lack of diligence. Although bad faith is not a requisite for assessing fees and costs under 28 U.S.C. § 1447(c), I believe that, given the unique facts of this case, such an assessment is inappropriate. Therefore, I will deny West's motion for fees and costs.

IV. CONCLUSION

For the foregoing reasons, West's motion to remand this action will be granted, and West's motion for fees and costs will be denied. Because I have concluded that this matter will be remanded, it is inappropriate for this Court to rule on the remaining pending motions, and they will be permitted to pend for either party to pursue in state court. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY WEST,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO: 02-CV-546
ZURICH AMERICAN INSURANCE COMPANY,	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of June, 2002, upon consideration of Plaintiff West's Motion to Remand and for Fees and Costs, Defendant Zurich's Response, and Plaintiff West's Reply; Plaintiff West's Motion to Dismiss Defendant Zurich's Counterclaim, and Defendant Zurich's Response; and, Defendant Zurich's Motion for Summary Judgment,[1] **IT IS HEREBY ORDERED** that:

1) Plaintiff West's motion to remand is **GRANTED**; The **Clerk of the Court shall REMAND** this case to the Court of Common Pleas, Montgomery County, from which it was removed, as the case was not authorized to be removed by Defendant Zurich, nor was it timely removed after the petition to compel arbitration, the initial pleading, was filed, pursuant to the requirements of 28 U.S.C. § 1446;

2) Plaintiff West's Motion for Fees and Costs is **DENIED**;

3) Plaintiff West's Motion to Dismiss Zurich's Counterclaim shall remain

[1] In a letter to the Court dated May 28, 2002, West's counsel requested an indefinite extension of time to respond to Zurich's motion and, if appropriate, file his own dispositive motion. Said matter is reserved for decision by the Montgomery County Court of Common Pleas.

pending;

4) Defendant Zurich's Motion for Summary Judgment shall remain pending;

5) The letter from West's counsel to the Court dated May 28, 2002, is to be **FILED AND DOCKETED**.

BY THE COURT:

_____

CLIFFORD SCOTT GREEN, S.J.