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

JODI L. YOUNG and DAVID A. YOUNG, her husband,	:	**CIVIL ACTION**
Plaintiffs,	:	
v.	:	
JOHNSON & JOHNSON CORP., ETHICON, INC., and LIFECORE BIOMEDICAL, INC.	:	**NO. 05-2393**
Defendants.	:	

ORDER AND MEMORANDUM

O R D E R

AND NOW, this 2nd day of November, 2005, upon consideration of Plaintiffs' Motion to Dismiss Complaint Without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(2) (Document No. 10, filed September 13, 2005), Memorandum of Law of Defendants Johnson & Johnson and Ethicon, Inc. in Opposition to Plaintiffs' Motion to Dismiss Complaint Without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(2) (Document No. 15, filed September 30, 2005), Defendant Lifecore Biomedical, Inc.'s Joinder in the Memorandum of Law of Defendants Johnson & Johnson and Ethicon, Inc. in Opposition to Plaintiffs' Motion to Dismiss Complaint Without Prejudice Pursuant to Fed. R. Civ. P. 41 (a)(2) (Document No. 16, filed September 30, 2005), and Plaintiffs' Supplemental Memorandum of Law in Reply to Defendants' Opposition to Plaintiffs' Motion to Dismiss Complaint Without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(2) (Document

No. 18, filed October 7, 2005), and for the reasons stated in the attached Memorandum, **IT IS ORDERED** as follows:

1. Plaintiffs' Motion to Dismiss Complaint Without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(2) is **GRANTED**;

2. The case is **DISMISSED WITHOUT PREJUDICE**;

3. Defendants' request to brief the issue of reimbursement of costs is **DENIED**; and,

4. The Clerk of Court shall **MARK** the case **CLOSED FOR STATISTICAL PURPOSES**.

MEMORANDUM

I. BACKGROUND

Plaintiffs commenced this civil action by filing a Writ of Summons in the Court of Common Pleas of Philadelphia County on November 12, 2004. Plaintiffs named Johnson & Johnson Corp. ("Johnson & Johnson"), Ethicon, Inc. ("Ethicon"), and Lifecore Biomedical, Inc. ("Lifecore") as defendants. After defendants were given an opportunity to review plaintiffs' medical records and the parties discussed the possibility of submitting the case to mediation, plaintiffs filed the Complaint in state court on May 2, 2005. In the Complaint, plaintiffs allege injuries based on the use of a medical device called Gynecare Intergel ("Intergel") during surgery performed on Mrs. Young. Lifecore filed a Notice of Removal to this Court on May 20, 2005 pursuant to 28 U.S.C. § 1441(a). Johnson & Johnson and Ethicon filed an answer to plaintiffs' Complaint on May 23, 2005. Lifecore answered the Complaint on May 26, 2005.

On June 10, 2005, plaintiffs filed a civil action in the Circuit Court of the 15th Judicial Circuit of Florida that named Johnson & Johnson, Ethicon, Lifecore, and Vital Pharma, Inc. ("Vital") as defendants. Plaintiffs' claims in the Florida litigation are basically identical to the claims in the case presently before this Court, except for the addition of Vital as a defendant. On July 13, 2005, Johnson & Johnson and Ethicon filed answers to plaintiffs' Complaint in the Florida litigation. On July 19, 2005, Lifecore filed its answer in the Florida litigation. By order of Judge Jonathan D. Gerber of the 15th Judicial Circuit of Florida dated July 28, 2005, plaintiffs' claims in the Florida litigation were consolidated with numerous similar cases (approximately fifty) against defendants in the Florida court.

In the instant case, defendants engaged in some discovery after filing their answers. Third-party discovery subpoenas were issued on June 1, 2005, June 6, 2005, and July 20, 2005. On June 7, 2005, interrogatories and requests for documents were propounded upon plaintiffs. On August 8, 2005, Lifecore filed a motion to compel plaintiffs to answer interrogatories and produce documents and other tangible things. The Court granted the motion on August 9, 2005.

On August 19, 2005, during a telephone conversation, counsel for the plaintiffs notified defense counsel Glenn F. Rosenblum that plaintiffs wanted to dismiss the instant case without prejudice. Defense counsel Albert L. Piccerilli responded in writing on August 29, 2005 and explained that defendants would oppose any motion to dismiss without prejudice. The Court scheduled a Preliminary Pretrial Conference for September 15, 2005. On September 13, 2005, plaintiffs filed a motion to dismiss without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2). Counsel for the parties discussed the pending motion at the Preliminary Pretrial Conference but no resolution was reached at that time.

II. DISCUSSION

A. Dismissal Under Rule 41(a)(2)

Federal Rule of Civil Procedure 41(a)(2) provides: "an action shall not be dismissed at the plaintiff's instance save upon order of the court . . . ." While the decision to dismiss an action pursuant to Rule 41(a)(2) falls within the discretionary power of the Court, Ferguson v. Eakle, 492 F.2d 26, 28-29 (3d Cir. 1974), motions filed under Rule 41(a)(2) should be allowed unless dismissal would cause substantial prejudice to the defendant. Miller v. Trans World Airlines, Inc., 103 F.R.D. 20, 21 (E.D. Pa. 1984).

In assessing whether the prejudice is substantial, the Court must examine the circumstances of the case and "weigh the relevant equities . . . ." Barron v. Caterpillar, Inc., 1996 WL 460086 at *2 (E.D. Pa. Aug. 7, 1996). The plain legal prejudice required to deny a motion pursuant to Rule 41(a)(2) must be more than the prospect of a second lawsuit or tactical advantage. See Shulley v. Mileur, 115 F.R.D. 50, 51 (M.D. Pa. 1987) ("dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit") (citations omitted); Environ Products, Inc. v. Total Containment, Inc., 1995 WL 459003 at *5 (E.D. Pa. July 31, 1995) ("[p]lain legal prejudice simply does not result when . . . plaintiff may gain some tactical advantage by a voluntary dismissal") (citations omitted). "Legal prejudice entails the loss of some 'vested' or 'substantial right.'" Pouls v. Mills, 1993 WL 308645 at *1 (E.D. Pa. Aug. 12, 1993), aff'd, 27 F.3d 558 (3d Cir. 1994) (citations omitted). See also Selas Corp. of America v. Wilshire Oil Co. of Texas, 57 F.R.D. 3 (E.D. Pa. 1972) (denying a motion to dismiss because dismissal would have precluded defendant from maintaining a claim for malicious prosecution).

In determining whether the prejudice is substantial, courts have considered the following factors: "(1) whether the expense of a second litigation would be excessive and duplicative; (2) how much effort and expense has been expended by the defendant in preparing for the current trial; (3) the extent to which the current suit has progressed; (4) the plaintiff's diligence in [filing] the motion to dismiss; and (5) whether the attempt at dismissal is designed to evade federal jurisdiction and frustrate the purpose of the removal statue." Peltz v. Sears, Roebuck & Co., 367 F. Supp. 2d 711, 715 (E.D. Pa. Mar. 8, 2005) (citing Total Containment, Inc. v. Aveda Mfg. Corp., 1990 WL 290146, at *2 (E.D. Pa. Dec. 7, 1990)).

The Court concludes that these factors weigh in favor of plaintiffs' motion to dismiss without prejudice. The Court will now examine each factor in turn.

1. The expense of a second litigation would not be excessive or duplicative.

Defendants argue that the requested dismissal would impose duplicative and needless litigation costs. In advancing this argument, defendants contend that the Court should deny plaintiffs' motion because plaintiffs filed their motion to dismiss without prejudice ten months after they commenced this action and litigating a Pennsylvania-based dispute in a Florida forum will create burdensome and unnecessary costs. The Court is not persuaded by defendants' arguments.

First, although the instant suit was commenced in state court by Writ of Summons on November 12, 2004, the parties were engaged in settlement discussions, not litigation, until the Complaint was filed in state court on May 2, 2005. Moreover, it appears that defendants were not actively litigating the case until after it was removed to this Court on May 20, 2005. The Florida Complaint was filed only three weeks later on June 10, 2005. As of the latter date,

defendants were on notice of the two suits and should have known that plaintiffs could proceed in only one of them.

Second, the amount of time already spent by counsel for the defendants on this case is insignificant when compared to amount of time that will be spent completing discovery and preparing for trial. This case is in the preliminary stages of discovery; no depositions have been taken. Plaintiffs filed their motion to dismiss two days prior to the Preliminary Pretrial Conference. Third, much of defendants' work on the case to date will not be wasted. The evidence obtained in discovery remains relevant and undoubtedly will be utilized in the Florida litigation. Fourth, the consolidation of plaintiffs' case with a number of companion cases in the Florida court will mitigate, rather than create, duplicative expenses by combining defendants' efforts in this case with their efforts in the other Florida cases and avoiding duplicative discovery and separate trials.

2. Defendants have not made significant efforts or incurred significant expenses in preparing for trial.

Defendants contend that they have incurred significant expenses for the following efforts: (1) learning about the product in question; (2) drafting and filing answers to plaintiffs' pleadings; (3) creating and issuing discovery; and (4) investigating the consulting and testifying medical expert witnesses. Def. Opp. at 27. While these costs are more than minimal, the Court concludes that they are not substantial enough to weigh in favor of denying plaintiffs' motion to dismiss.

In denying motions to dismiss pursuant to Rule 41(a)(2), other courts have pointed to extensive discovery and substantial costs to defendants. See, e.g., Hartford Acc. & Indem. Co. v.

Costa Lines Cargo Servs., Inc., 903 F.2d 352, 361 (5th Cir. 1990) (concluding that the district court did not abuse its discretion in denying plaintiff's motion to dismiss because hearings had been conducted on various issues, one defendant had been granted summary judgment, and significant discovery had occurred); Martinez Cruz v. Lausell, 692 F. Supp. 48, 50 (D. P.R. 1988) (finding that plaintiffs were not entitled to voluntary dismissal without prejudice because the case had been pending for three years and extensive discovery had been undertaken at substantial cost to defendants). These cases are distinguishable because defendants' discovery efforts to date have been relatively minimal, and, as noted above, the majority of defendants' work in the instant case will be useful in the Florida litigation. Whatever efforts could be deemed wasted are not significant enough to rise to the level of providing a ground upon which to deny plaintiffs' motion. Moreover, in granting plaintiffs' motion to dismiss without prejudice and allowing plaintiffs to proceed as part of the Florida litigation, defendants' wasted expenses will be mitigated by the economy of litigating the Intergel cases as consolidated suits before Judge Gerber.

3. The case has not progressed far beyond the pleadings.

The chronology of the case has been set out above and need not be repeated in this section. The specific dates that are pertinent to this analysis are as follows. First, plaintiffs filed their motion to dismiss on September 13, 2005 which was less than four months after the case was removed on May 20, 2005. Second, defendants were on notice of the two suits, this case and the Florida case, three weeks after this case was removed and should have known at that time that one of the cases would have to be dismissed. Third, by August 19, 2005, defendants knew

that plaintiffs wanted to dismiss this case.[1] Finally, during the months between defendants' notice of removal and plaintiffs' motion to dismiss, only limited discovery took place. Therefore, the Court concludes that the case has not progressed far enough to weigh in favor of defendants' request to deny plaintiffs' motion to dismiss without prejudice on this ground.

4. The delay of four months in filing the motion to dismiss after the case was removed to federal court does not warrant denial of the motion.

Defendants argue that plaintiffs' motion should be denied because of "months of improper lulling behavior by plaintiffs." Def. Opp. at 2. The Court does not agree. Plaintiffs waited until they received confirmation that their claims were filed properly in Florida before pursuing dismissal of the instant case. These actions were cautious, but they were not "lulling."

Defendants cite Holbrook v. Andersen Corp., 130 F.R.D. 516 (D.Me. 1990), to support their contention that plaintiffs' delay should persuade the Court to deny plaintiffs' motion. The facts in Holbrook, however, are distinguishable from the instant case. In Holbrook, depositions had been taken, extensive discovery had occurred, and the case was scheduled for trial. Id. at 521. In the instant case, no depositions have been taken, only limited discovery has occurred, and the case has not been scheduled for trial. In fact, the Court has yet to issue a scheduling order.

As in Holbrook, other courts have pointed to significant delays in denying motions to dismiss pursuant to Rule 41(a)(2). See Barron, e.g., 1996 WL 460086 at *3 (denying plaintiffs' motion for dismissal because it came more than a month after the date set for all discovery to be

[1] In a letter dated August 23, 2005 and addressed to defense counsel Glenn F. Rosenblum, counsel for the plaintiffs, Philip L. Gazan, confirmed that on August 19, 2005 during a telephone conversation Mr. Gazan told Mr. Rosenblum of plaintiffs' interest in dismissing this case. Pl. Mot. Ex. B.

completed and following a final pretrial conference). However, based on what is stated in the analysis of the first three factors, supra, the Court concludes that, unlike Holbrook and Barron, this case is much closer on its facts to those cases in which the delay in filing a motion to dismiss was not substantial enough to warrant a denial of the motion. See e.g., Parker v. Kelley Corp., 1992 WL 184320, at *2 (E.D. Pa. July 23, 1992) (declining to find legal prejudice and granting a Rule 41(a)(2) motion where "only written discovery and two depositions have been completed . . . this action has not progressed to the point where extensive trial preparations have commenced"). Like Parker, the slight delay in plaintiffs' decision to move the Court to dismiss the case without prejudice under the circumstances presented is not significant enough to weigh against granting the motion.

5. Plaintiffs' motion to dismiss was not filed to avoid federal jurisdiction.

Defendants argue that plaintiffs' motion amounts to "a flight from federal court and a subversion of the federal removal statute." Def. Opp. at 24. Defendants argue that plaintiffs have added Vital, a Florida corporation, as a defendant in the Florida litigation to defeat complete diversity and prevent removal to federal court in Florida. The Court disagrees with defendants' argument.

Defendants cite both Peltz and Myers v. Hertz Penske Truck Leasing, Inc., 572 F. Supp. 500 (N.D. Ga. 1983), where the plaintiffs filed subsequent actions in state court and added in-state parties as defendants in those cases. The courts in both Peltz and Myers denied dismissal pursuant to Rule 41(a)(2) and "found that the motion to dismiss could only be explained as an attempt to defeat removal." Peltz, 367 F. Supp. 2d at 716 (citing Myers, 572 F. Supp. at 502-03). Those cases are distinguishable on the ground that plaintiffs in this case have articulated

legitimate reasons for filing their motion to dismiss. Plaintiffs have stated that they want to proceed in the Florida courts so as to enable them to consolidate their claims with numerous other similarly-situated plaintiffs represented by counsel more experienced in handling medical device cases.

In analyzing this factor, the Court is mindful of what the defendants refer to as a "distressingly familiar National trend" in medical device litigation. Def. Opp. at 1. The Court, however, does not believe that plaintiffs' motives in pursuing their Pennsylvania-based claims in a Florida forum are "unfair and unconscionable." Def. Opp. at 8. While the dismissal may have the practical effect of precluding removal to federal court because of the naming of a Florida defendant, the Court concludes the motion to dismiss does not amount to an effort to avoid the federal courts because plaintiffs have articulated legitimate reasons for seeking to litigate this matter in the Florida courts.

The Court is equally unpersuaded by two additional arguments made by defendants. First, defendants contend that, as a result of the dismissal without prejudice, plaintiffs have obtained a result that would be unavailable through a motion to transfer the case to a more convenient forum pursuant to 28 U.S.C. § 1404(a). Def. Opp. at 2. As another judge in this district has noted: "[T]he power of the court to transfer an action to a more convenient forum under 28 U.S.C. § 1404(a) is 'quite distinct' from the power vested in the court to grant voluntary dismissal under Rule 41(a)(2)." Environ Products, 1995 WL 459003 at *4 (quoting Westinghouse Elec. Corp. v. United Elec. Radio and Mach. Workers of America, 194 F.2d 770, 771 (3d Cir. 1952) cert. denied 343 U.S. 966. While an analysis of a motion to transfer this case to Florida under § 1404(a) might yield a different result, "plaintiff[s] did not invoke the power of

the court under this section." Westinghouse Electric, 194 F.2d at 771. See also Hamilton v. Firestone Tire & Rubber Co., Inc., 679 F.2d 143 (9th Cir. 1982) (concluding that neither § 1404(a) nor the doctrine of forum non conveniens is applicable to the analysis of motions to dismiss under Rule 41(a)(2)). This Court agrees with those cases and will not deny the motion because of any possible inconsistency in outcome attributable to the filing of a motion to dismiss.

Next, defendants contend that litigating this case in the Florida courts will provide plaintiffs with a significant tactical advantage. More specifically, defendants explain that some of the potential trial witnesses – namely, the treating physicians – are beyond the subpoena power of the Florida courts. Def. Opp. at 7. As the Court noted at the outset of its analysis under Rule 41(a)(2), mere tactical advantage is insufficient to meet the standard of "clear legal prejudice." See 9 C. Wright & A. Miller, Federal Practice and Procedure § 2364, at 280-83 (2d ed. 1995).

In sum, the Court concludes that dismissal without prejudice under the circumstances of the case will not substantially prejudice defendants. Thus, plaintiffs' motion to dismiss without prejudice pursuant to Rule 41(a)(2) is granted.

B. Attorney's Fees and Costs Under Rule 41(a)(2)

The Court has discretion to impose conditions on the granting of the motion to dismiss without prejudice pursuant to Rule 41(a)(2), such as reimbursement of costs and attorney's fees to defendants. Citizens Sav. Ass'n v. Franciscus, 120 F.R.D. 22, 24 (M.D. Pa. 1988). Reimbursement of costs and attorney's fees is not a prerequisite for granting a dismissal pursuant to Rule 41(a)(2), but one court has said that it is "very common" and "often necessary for the protection of the defendant . . . ." Id. at 24. "The purpose of the 'terms and conditions' clause [of Rule 41(a)(2)] is to protect a defendant from any prejudice or inconvenience that may result

from a plaintiff's voluntary dismissal." GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 367 (D.C. Cir. 1981).

Defendants have requested that the Court direct the parties to brief the issue of cost reimbursement. The Court declines to do so on the ground that reimbursement is not appropriate under the circumstances of this case.

First, this case has not progressed very far. Trial preparation has not begun, no depositions have been taken, and little other discovery has occurred. See John Evans Sons, Inc. v. Majik-Ironers, Inc., 95 F.R.D. 186, 191 (E.D. Pa. 1982) (explaining that the purpose of such an award is to compensate defendant for having incurred the expense of trial preparation without the benefit of a final determination of the controversy). Second, any discovery obtained by defendants undoubtedly will be useful in the Florida litigation. See Southeastern Pennsylvania Transp. Authority v. American Universal Ins. Co., 1988 WL 21971 (E.D. Pa. Mar. 1, 1988) (denying reimbursement of costs and attorney's fees because discovery materials would be useful in subsequent litigation). Third, defendants have known about the possibility of dismissal for nearly the entire time this case has been in this Court. On June 10, 2005, plaintiffs filed their Complaint in the Florida litigation, and on August 19, 2005, defendants received notice of plaintiffs' interest in dismissing this case. Thus, within three weeks of removal, defendants had notice of the two cases, and within three months of removal, defendants knew that plaintiffs wanted to dismiss this case. Finally, any alleged wasted expenses incurred by defendants will be mitigated, if not entirely eliminated, by the economy of litigating the Intergel cases, including this one, as consolidated cases in the Florida courts.

For the reasons stated above, the Court concludes that reimbursement is not warranted and declines to attach any conditions to the dismissal of the action.

BY THE COURT:

/s/ Jan E. DuBois

JAN E. DUBOIS, J.