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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Herman A. Dending, et al.,

Plaintiffs

Case No. C 84-7854

vs.

Chrysler Plastic Products
Corporation, et al.,

Defendants

MEMORANDUM AND ORDER

POTTER, J.:

This cause came to be heard upon plaintiffs' motion to remand, defendant Chrysler Plastic Products Corporation's (Chrysler) opposition, and plaintiffs' reply thereto. Also before the Court are defendants Chrysler, The Goodyear Tire & Rubber Company, The BFGoodrich Company, Firestone Tire & Rubber Company, Concoco, Inc., Uniroyal, Inc., Union Carbide Corporation and Diamond Shamrock Chemicals Company's motions to strike plaintiffs' first amended complaint, plaintiffs' opposition, and defendant Chrysler's reply thereto. Also before the Court is plaintiffs' motion for leave to file their first amended complaint. The Court will first consider plaintiffs' motion to remand.

Plaintiffs contend that this action was removed improvidently and that this Court is without jurisdiction. Plaintiffs base their contentions on the fact that they indicated in their complaint a belief that at least some of the "John Doe" defendants were residents of the State of Ohio, and also that the interrogatories attached to the complaint, later answered by defendant Chrysler, revealed that some of the "John Doe" defendants were residents of Ohio. As persuasive as plaintiffs' argument are, the Court cannot adopt their reasoning.

Defendant Chrysler, in its opposition to plaintiffs' motion to remand, correctly indicates that a proper interpretation of Ohio Civil Rule 15(D) substantiates the fact that there was complete diversity at the time of removal, and that it would be incorrect to grant plaintiffs' motion for remand.

In Fuller v. National Enquirer, 555 F. Supp. 1114 (N.D. Ohio 1983), Chief Judge Battisti considered the same type of conflict. In Fuller, plaintiff's argument for granting his motion to remand was persuasive, but that court would have to "disregard the impact of the Ohio rule of procedure. . . ."

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CLEVELAND, OHIO

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As in Fuller, this Court must also look to the strict interpretation of Ohio Civil Rule 15(D).

Under O.R.C. 15(D), plaintiffs must fulfill certain requirements. When a fictitious name is used to represent an unknown defendant, plaintiffs must "aver in the complaint the fact that he could not discover the name." Also, "[t]he summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant[s]."

In the present case, as in Fuller, plaintiffs failed to follow the procedures outlined in O.R.C. 15(D). Plaintiffs failed to state that the names were not discoverable. Also, summons were never issued to the "John Doe" defendants with the proper title: "name unknown." Therefore, it is as if these defendants did not exist at the time of removal. As such, there was complete diversity, and plaintiffs' motion to remand will be denied.

Plaintiffs also argue in their motion to remand that their first amended complaint, filed without leave of court on April 25, 1984, included defendants, which will defeat diversity. Defendants' motion to strike is in response to this maneuver. Plaintiffs responded with a motion for leave to file the first amended complaint, stating that Fed.R.Civ.P. 15(a) requires the courts to "freely" grant leave when justice so requires.

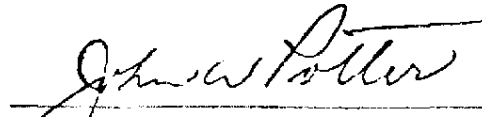
The Court will grant plaintiffs' motion for leave to file their first amended complaint and add the new defendants. However, the Court, in reviewing the pleadings, recognizes that the new parties are merely "nominal" parties. "In determining the question of removability, the citizenship and non-joinder of a party who is merely nominal or formal is disregarded. Only the citizenship and non-joinder of real parties must be considered." See Glenmede Trust Co. v. Dow Chemical Co., 384 F. Supp. 423 (E.D. Pa. 1974) and Hilton, et al. v. Atlantic Refining Co., 327 F.2d 217 (1964). Thus, the addition of the new parties will not affect the Court's upholding of defendants' right to removal.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs' motion for remand be, and it hereby is, DENIED; and it is

FURTHER ORDERED that plaintiffs' motion to file their first amended complaint be, and it hereby is, GRANTED nunc pro tunc; and it is

FURTHER ORDERED that defendants' motions to strike plaintiffs' first amended complaint be, and they hereby are, DENIED.


United States District Judge

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