United States Courts
Southern District of Texas
FILED
JUL - 3 2002
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

KELLY-MOORE PAINT COMPANY, INC.

v.

C.A. No. G-02-477

THE DOW CHEMICAL COMPANY,
UNION CARBIDE CORPORATION,
COOPER INDUSTRIES, INC., AND
THE FLINTKOTE COMPANY

JURY

PLAINTIFF'S EXHIBIT
KG-497a

NOTICE OF REMOVAL

Union Carbide Corporation ("UCC"), one of the defendants, files this Notice of Removal of this civil action filed against it by plaintiff Kelly-Moore Paint Company, Inc. to the United States District Court for the Southern District of Texas, Galveston Division, pursuant to the provisions of 28 U.S.C. § 1441, *et seq.*, and on the basis of the following which show that this case is properly removable:

1. On May 10, 2002, plaintiff filed its original petition in *Kelly-Moore Paint Company, Inc. vs. Dow Chemical Company, et al.*; No. 19785*BH02 in the 23rd Judicial District Court of Brazoria County, Texas.

2. The time within UCC is required by the laws of the United States, 28 U.S.C. § 1446(b), to file this Notice of Removal has not expired. UCC and Cooper Industries, Inc. were the first defendants served in this action, on June 5, 2002.[1]

3. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1), in that this is an action between the citizens of

[1] Defendant Flintkote Company was served on June 14, 2002 (through the Texas Secretary of State) and Defendant The Dow Chemical Company was served on June 24, 2002.

different states and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs.

4. Plaintiff is deemed to be a citizen of the State of California because it is both incorporated and has its principal place of business in California. *See* Plaintiff's Original Petition, ¶ II; *see also* 28 U.S.C. § 1330(c)(1).

5. None of the properly joined defendants is a citizen of the State of California.

a. Defendant UCC is incorporated in New York and has its principal place of business in Connecticut.

b. Defendant The Dow Chemical Company ("TDCC") is a Delaware corporation with its principal place of business in the State of Michigan. TDCC's consent to the removal of this action is attached as Ex. G.[2]

6. Although defendant The Flintkote Company ("Flintkote") has its principal place of business in California,[3] it has been fraudulently joined in this action to destroy diversity jurisdiction in federal court. *See, e.g., Jackson v. Dole Fresh Fruit Co.*, 921 F. Supp. 454, 455 (S.D. Tex. 1996) (Kent, J.) (Court may disregard a party's citizenship if it "was joined as a Defendant primarily to defeat diversity jurisdiction," citing *Navarro Sav. Assoc. v. Lee*, 446 U.S. 458, 461(1980)). Notably, Flintkote is only a

[2] In fact, TDCC is <u>not</u> properly joined in this action either. TDCC is not the "successor" to UCC as plaintiff alleges. Like the other defendants in this case, TDCC's joinder is nothing more than a procedural sleight-of-hand by plaintiff as part of its overall effort to fix venue in Brazoria County. In TDCC's case, it has been made a defendant in this action in an transparent attempt to circumvent Texas venue laws.

[3] Flintkote is incorporated in Delaware.

"conspiracy" defendant. *See* Plaintiffs' Original Petition, at 4.[4] In this regard, the bases of plaintiff's claim against Flintkote are contained in these allegations:

> Defendant Flintkote owned and operated an asbestos mine in Canada from 1946-1970. During that time Flintkote was a member of the Quebec Asbestos Mining Association. QAMA participated in the suppression of the Saranac study, as well as the suppression and alteration of the Braun/Traun study in 1957 and 1958.

Id. However, Flintkote neither owned an asbestos mine nor was a member of QAMA. Accordingly, there is no possibility that plaintiff can recover against Flintkote on the facts that it alleges and its citizenship should be disregarded by the Court for the purpose of determining jurisdiction. *See, e.g. Burden v. Gen. Dynamics Corp.*, 60 F.3rd 213, 216 (5th Cir. 1995).

7. Similarly, although defendant Cooper Industries, Ltd., f/k/a Cooper Industries, Inc. ("Cooper"), has its principal place of business in Texas,[5] it has been fraudulently joined in this action to defeat removal to federal court based on diversity jurisdiction. *See, e.g., Dole Fresh Fruit Co.*, 921 F. Supp. at 455. Like Flintkote, Cooper is also only a "conspiracy" defendant. *See* Plaintiffs' Original Petition, at 3-4. Indeed, as plaintiff's petition makes clear, it is not even Cooper's acts about it complains, but instead that:

> Defendant Cooper Industries is the legal successor and/or is contractually liable for the negligent acts of Pneumo Abex Corporation. Pneumo Abex Corporation, through its predecessor American Brake Shoe Company, entered into an agreement in 1936 with the Saranac Laboratory to conduct

[4] The graveman of plaintiffs' claims is grounded in its purchases of raw asbestos from UCC. *Id.*

[5] Cooper Industries, Ltd. is incorporated in Bermuda. Cooper Industries, Inc. was incorporated in Ohio.

> research on asbestos. Pneumo Abex Corporation conspired along with Johns-Manville, Raybestos-Manahatten and others to delete all references to asbestos causing cancer in the published account of the Saranac studies. As a result, the published medical and scientific literature, upon which KM relied, was distorted.

Id. Cooper, however, is not the "legal sucessor" to Pneumo Abex Corporation ("Abex"). In 1994, Abex sold its friction products assets to a second-tier subsidiary of Cooper, Wagner Electric Corporation ("Wagner"). In 1998, Federal-Mogul Products, Inc. ("Federal Mogul") purchased from Cooper Wagner's stock. Thus, to the extent that any company is the "legal" sucessor to Abex, it is Wagner, not Cooper. *See, e.g., Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 374 (Tex. 1984) (parent corporation is not liable for acts of subsidiaries); *see also, e.g., Sun Towers, Inc. v. Heckler*, 725 F.2d 315, 331 (5th Cir. 1984) (parent corporation does not have any property interest in subsidiary's assets); *and see, e.g., Tenneco Inc. v. Enterprise Prod. Co.*, 925 S.W.2d 640, 645 (Tex. 1996) (purchaser of stock in a corporation does not purchase the corporate assets). However, joining Wagner as a defendant would not furthered plaintiff's sole aim here—defeating removal of this action to this Court.[6] In any event, because there is no possibility that

[6] Plaintiffs' allegation that Cooper is "contractually obligated for the negligent acts" of Abex is even more meritless. When Wagner purchased the friction product line from Abex in 1994, Wagner agreed to indemnify Abex with respect to certain liabilities Wagner had assumed as part of that transaction. Cooper guaranteed Wagner's indemnity obligation. Not surprisingly, Kelly-Moore is not a third-party beneficiary to that guaranty. *See, e.g., MCI Telecomms. Corp. v. Texas Util. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999):

> A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit. . . . The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied. Consequently, a presumption exists that parties contracted for themselves unless it "clearly appears" that they intended a third party to benefit from the contract.

plaintiff can recover against Cooper on the facts that it alleges, Cooper's its citizenship should be disregarded by the Court. *See, e.g. Burden*, 60 F.3rd at 216.

8. Based on a review of plaintiff's pleadings, the damages sought by plaintiff exceed the sum of $75,000. Accordingly, this action may properly be removed to this Court pursuant to 28 U.S.C. § 1441(a).

9. Pursuant to Local Rule 81, this Notice of Removal is accompanied by the following documents:

i. All executed process on file in this case for defendants (Exhibit A);

ii. Pleadings that assert causes of action (Exhibit B);

iii. All orders signed by the state judge (Exhibit C);

iv. The Docket Sheet (Exhibit D);

v. An index of matters being filed (Exhibit E); and

vi. A list of all attorneys, including their addresses, telephone numbers and whom they represent (Exhibit F).

10. In addition, defendant TDCC's consent to this removal is included as Exhibit G.

WHEREFORE, UCC accordingly prays that this Court take jurisdiction of this action to its conclusion and to final judgment to the exclusion of any further proceedings in the State court in accordance with law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2002, true and correct copies of the foregoing were served by certified mail, return receipt, requested on the following:

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