CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 01-5069-CIV-GRAHAM/TURNOFF
DCourt 00-11635-CA-42

RICHARD SKYLARK and
LEEAN KAY SKYLARK, his wife

Plaintiff,

v.

HONEYWELL INTERNATIONAL, INC., f/k/a
ALLIEDSIGNAL, INC., successor-in-interest to
BENDIX CORP., et. al.,

Defendants.
_______________________________________/

FILED by [illegible] D.C.
JAN 25 2002
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

ORDER

THIS CAUSE came before the Court upon Plaintiff's Emergency Motion for Remand To State Court For Trial Scheduled On February 11, 2002 and Memorandum of Law In Support Thereof (D.E. #8) and Defendant Honeywell International, Inc., f/k/a AlliedSignal, Inc., Successor-In-Interest to Bendix Corp., Motion for Temporary Stay of Plaintiffs' Emergency Motion for Remand & Memorandum of Law (D.E. #13).

THE COURT has reviewed the Motions, the pertinent portions of the record, and is otherwise fully advised in the premises.

BACKGROUND

Plaintiffs Richard Skylark and Leean Kay Skylark ("Plaintiffs") filed this action against several defendants on May 8, 2000, in the Eleventh Judicial Circuit in and for Miami-Dade County. Plaintiff Richard Skylark suffers from

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Mesothelioma, a terminal cancer within the membrane on the ~~lin~~ing of the lungs. Mesothelioma is caused by the inhalation of asbestos dust. It is likely that Mr. Skylark will succumb to his cancer within the next six to twelve months.

On July 25, 2001, Plaintiffs amended their complaint to add Defendant Honeywell International, Inc. f/k/a Allied -Signal, Inc. ("Allied"). Plaintiffs allege that Mr. Skylark used Allied's asbestos brake assemblies throughout his career as an auto mechanic. The state court set the trial date for November 5, 2001. Plaintiffs then consented to Allied's request for a continuance and the trial date was reset to February 11, 2002.

Federal Mogul Bankruptcy

When their Complaint was first filed, Plaintiffs named multiple defendants, including Flexitallic, Inc. and T&N PLC. Federal Mogul Global, Inc. ("Federal Mogul") is a successor-by-merger of 157 subsidiaries, including Flexitallic and T&N.[1] On October 1, 2001, Federal Mogul filed Chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the District of Delaware.

[1] Plaintiffs have since voluntarily dismissed all of the other Defendants, including Flexitallic, Inc. and T&N, PLC. At this time, Allied is the sole defendant in Plaintiffs' case.

Removal

On December 17, 2001, as a result of Federal Mogul's Chapter 11 Petitions, Allied removed Plaintiffs' action to this Court, pursuant to 28 U.S.C. §1452(a) and Rule 9027(a) of the Federal Rules of Bankruptcy Procedure. Allied argues that because of its cross-claim for contribution and indemnity against Federal Mogul, this action is "related to" Federal-Mogul's bankruptcy proceeding.

Proceedings In Delaware

In addition to removing Plaintiffs' action to this Court, Allied has removed virtually all of its other asbestos cases from state courts to their corresponding district courts. All of these removals are based on the relation of Allied's "cross-claims" to Federal Mogul's bankruptcy proceeding. In an apparent attempt to coordinate all of these actions, Allied filed, with the United States District Court for the District of Delaware ("Delaware District Court"), a motion to partially withdraw the reference pursuant to 28 U.S.C. §157(d) and to transfer all of its removed claims and causes of actions, pursuant to 28 U.S.C. §157(b)(5) to the United States Bankruptcy Court for the District of Delaware ("Delaware Bankruptcy Court"). On December 19, 2001, the Delaware District Court 1) partially withdrew the reference to the Delaware Bankruptcy Court and 2) provisionally transferred certain "friction product" claims to the Delaware District Court subject to further Order from the Court.[2] In its provisional order, the Delaware District Court mandates that the "[c]lerks of the several United States District Courts from which matters are transferred pursuant to this Order, shall retain physical possession of their files of each transferred matter pending a final determination of the Transfer Motion and further Order of this Court." On January 4, 2002, the Delaware Bankruptcy Court issued an Order that "clarified" the provisional order by extending the provisional transfer of Friction Product claims to include claims that would have been subject to the provisional order, but had not yet been removed on the date of the provisional order.[3]

Remand

On January 7, 2002, Plaintiffs filed their Emergency Motion for Remand. Plaintiffs argue that this cause should be remanded because: 1) there are no valid cross-claims related to the Federal Mogul Bankruptcy; 2) even if "related to" bankruptcy jurisdiction existed, this Court must abstain based on the mandatory abstention provision in the bankruptcy code and 3) even if mandatory abstention does not apply, this Court should abstain

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2 Allied attached an unsigned and unconformed copy of the Delaware District Court's December 19, 2001 Order to its pleadings.

3 Once again, Allied has submitted an unsigned and unconformed copy of the Delaware Bankruptcy Court's January 4, 2002, order.

from taking jurisdiction, based on the discretionary abstention provision in the bankruptcy code.

Request for Stay

On January 16, 2002, Allied filed its Motion for Temporary Stay of Plaintiffs' Emergency Motion for Remand and Memorandum of Law. Allied argues that the Delaware District Court has jurisdiction over Plaintiffs' claims and that therefore this Court should stay its ruling on the motion to remand pending the Delaware District Court's decisions with respect to transfer and remand.

DISCUSSION

I. REMAND

Standard of Review

Federal courts are of limited jurisdiction and may only hear cases that they have been authorized to hear by the Constitution of the United States. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994). This limited jurisdiction requires the moving party to bear the burden of establishing a basis for federal jurisdiction. See Diaz v. Sheppard, 85 F.3d 1502, 1505 (11th Cir. 1996). Doubts as to whether removal of an action is permissible should be resolved against removal. Id.

A. Subject Matter Jurisdiction

Pursuant to 28 U.S.C. §1452(a):

A party may remove any claim or cause of action in a

> civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. 1452(a). In its notice of removal, Allied asserts that "this Court has subject matter jurisdiction over the removed claims pursuant to 28 U.S.C. §1334 due to the fact that these cross-claims asserted by and against ALLIED are related to Federal Mogul's bankruptcy proceeding." Accordingly, the Court must determine if Allied has stated any cross-claims against Federal Mogul, and if so, whether these cross claims are related to Federal Mogul's bankruptcy proceeding.

Cross-Claim

Allied claims that it effectively asserted cross-claims for contribution and indemnification against Federal Mogul in paragraph 46 of its Answer and Affirmative Defenses to Plaintiff's Complaint. Paragraph 46 states:

> If found liable, Allied claims against all Defendants for contribution proportionate to the established fault, if any, of all Defendants found liable. See Exhibits A&B attached to this Answer for the current lists of entities against which Allied seeks apportionment.

(Allied Answer and Affirmative Defenses ¶46). The Court finds that Allied's blanket statement against 303 companies is unlikely to be considered a proper cross-claim under Rule 1.170(g) of the Florida Rules of Civil Procedure. However, for purposes of its ruling, the Court will assume that Allied has properly asserted a cross-claim against Federal Mogul. The question thus become whether this cross-claim is related to the bankruptcy proceeding.

Related To

Pursuant to 28 U.S.C. § 1452(a), a party may remove a case that is related to a bankruptcy case to the federal district court in the district in which the underlying state cause of action is pending if that court has jurisdiction under 28 U.S.C. § 1334. Section 1334(b) confers jurisdiction on the district court over cases "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334. "Related to" jurisdiction over a case arises under § 1334(b) when "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Wood v. Wood, 825 F.2d 90, 93 (5th Cir.1987) (adopting the standard stated by the United States Court of Appeals for the Third Circuit in Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir.1984)).

The Court finds that Allied's alleged cross-claims against Federal Mogul are not sufficient to invoke "related to" jurisdiction. Allied's potential claims against Federal-Mogul will have no bearing on the estate in bankruptcy unless and until Plaintiff obtains a judgment against Allied. This potential for an effect on the estate is simply too tenuous at this time to support removal. Indeed, "primary actions against solvent codefendants, are, "at best . . . a mere precursor to the potential third party claim for indemnification . . ." Pacor, 743 F.2d at 995. Allied's claims are simply too speculative and premature to support removal.

In other jurisdictions throughout the country, district courts in asbestos tort cases have also refused to allow removal based on "related to" bankruptcy jurisdiction. These courts were faced with similarly tenuous cross-claims for contribution and indemnity and refused jurisdiction based on the fact that the claims would not effect the bankruptcy estate. See Dotson v. Owens-Corning Fiberglas Corp., C.A. No. G-01-759 (S.D. Tex. Dec. 7, 2001)("Any potential claims for contribution and/or idemnity that the Automotive Manufacturer Defendants may have against Federal Mogul are merely speculative and, at best, manifestly premature. The Court cannot accept hypothetical claims as a proper basis for federal jurisdiction and therefore concludes that the Court lacks subject matter jurisdiction over these claims as a matter of law."); Combs v. Able Supply Co., Case Number 3:01-CV-046(TH)(E.D. Tex., Nov. 19, 2001); Johnson v AcandS, Inc., No. 1:01CV408GR (S.D.Miss., Oct. 3, 2001).

Based on the foregoing, the Court finds that Allied's alleged claims are not sufficiently "related to" Federal-Mogul's bankruptcy proceeding such that removal would be proper. Accordingly, this cause must be remanded.

B. MANDATORY ABSTENTION

Even if the Court had subject matter jurisdiction over this action, it would still remand the case based on the doctrine of mandatory abstention.

Pursuant to 28 U.S.C. § 1334(c)(2), courts must abstain from hearing a state law claim if: (1) The claim has no independent basis for federal jurisdiction other than § 1334(b); (2) the claim is a non-core proceeding; (3) an action has been commenced in state court; and (4) the action could be adjudicated timely in state court. Schuster v. Mims, 109 F.3d 237, 239 (5th Cir.1997) (citations omitted); In re Ackerman, Herbst & Pliskow, 221 B.R. 568 (S.D. Florida 1989); see also 28 U.S.C. §1334(c)(2).

Each of these requirements is met in this case. First, Allied asserts no basis for jurisdiction aside from 28 U.S.C. § 1334(b). Second, Allied concedes that the removed claims are non-core matters. Third, the action was commenced in state court nearly a year and a half ago, long before any matters were removed to this Court. Finally, the removed claims can be timely adjudicated in state court. Indeed, the state court has set this case for trial on February 11, 2002.

Because all of the elements for mandatory abstention have been met, the Court finds that even if it had subject matter jurisdiction, it would be required to abstain from exercising jurisdiction over this action.

C. **Discretionary Abstention**

The Court also finds that it is within its discretionary authority to abstain from exercising jurisdiction over this action. Pursuant to 28 U.S.C. § 1334(c)(1):

> Nothing in this section prevents a district court in the interest of justice or the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. (c)(1). The Court finds that the interests of justice require that it abstain from exercising jurisdiction over this action. Plaintiff Richard Skylark suffers from terminal cancer. His case is ready for trial in the state court. If this case is remanded, he will have his day in Court before he dies. However, if this case were transferred with the thousands of other removed cases to the Delaware Bankruptcy Court, Mr. Skylark is not likely to live to see an adjudication of his claims. This simply would not be just or proper. Accordingly, the Court finds remand is appropriate.

II. AUTHORITY OF DELAWARE DISTRICT COURT

Allied submits that this Court is without jurisdiction to rule on Plaintiff's Motion for Remand due to the Delaware District Court's provisional transfer order. The Court disagrees.

First, Allied has submitted unsigned and unconformed copies of the Delaware District Court's provisional transfer order and the Delaware Bankruptcy Court's clarification order. Accordingly, the Court cannot rely on these "copies" as rulings by the Delaware Courts. Nonetheless, even if these copies were in fact signed by the Delaware District Court and the Delaware Bankruptcy Court, such orders have no binding effect on this Court, particularly in a case where the debtor is no longer a party. See Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., LTD., 240 F.3d 956, 965 n. 14 (11th Cir. 2001)("In the case of the Southern District of Florida, the only courts it must be obedient to are [the Eleventh Circuit] and the Supreme Court of the United States."); Fox v. Acadia State Bank, 937 F.2d 1566, 1570 (11th Cir. 1991)("A district court is not bound by another district court's decision, or even an opinion by another judge of the same district court. . . ."). Accordingly, the Court will not stay its decision on Plaintiffs' Motion to Remand.

CONCLUSION

Based on the foregoing analysis, it is,

ORDERED AND ADJUDGED that Plaintiffs' Motion to Remand is GRANTED. It is further,

ORDERED AND ADJUDGED that the above styled cause is REMANDED to the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. It is further, ORDERED AND ADJUDGED that Allied's Motion for Temporary ~~Stay~~ of Plaintiffs' Emergency Motion fo Remand is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of January, 2002.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Turnoff
David M. Lipman, Esq.
Rodd R. Buell, Esq.