ERIC HALLMAN, et al., Plaintiffs, vs. UNIQUE VACATIONS, INC., et al., Defendants.

CASE NO. 10-23534-CIV-ALTONAGA/Brown

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

2010 U.S. Dist. LEXIS 138919*; *22 Fla. L. Weekly Fed. D 479

October 19, 2010, Decided
October 19, 2010, Entered on Docket

COUNSEL: [*1] For Eric Hallman, Dawn Hallman, Plaintiffs: Keith Steven Brais, Richard Dennis Rusak, Brais & Associates PA, Miami, FL.

For Unique Vacations, Inc., a Florida corporation, Sandals International Resorts, LTD., a Foreign corporation, Defendants: Cherri-Ann Daniella Bentley Giannell, Joseph Stephen Giannell, Reginald John Clyne, Clyne & Associates, P.A., Coral Gables, FL.

JUDGES: CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE.

OPINION BY: CECILIA M. ALTONAGA

OPINION

ORDER

THIS CAUSE came before the Court on Plaintiffs, Eric Hallman and Dawn Hallman's ("Hallmans[']") Motion to Remand and Determination of Attorney's Fees Entitlement for Wrongful Removal (the "Motion") [ECF No. 5], filed October 4, 2010. The Court has considered the parties' written submissions and applicable law.

This case concerns a scuba diving incident at Sandals Grande Antigua Resort where the Hallmans were vacationing. During the course of the scuba diving activity, the dive boat left the dive site and the Hallmans spent two and a half hours in the open ocean before the boat was able to locate and pick them up from the water. (*See* Notice of Removal ("Notice") Ex. A 4-12 ("Complaint") ¶ 15 [ECF No. 1-2]). On July 30, 2010, the Hallmans filed a four-count [*2] civil action in state court against Defendants, Unique Vacations, Inc. ("Unique") and Sandals International Resorts, Ltd. ("Sandals"). (*See* Notice ¶ 1 [ECF No. 1]). Plaintiffs allege they booked their vacation at Sandals Grande Antigua Resort through the travel agency, Unique. (*See* Compl. ¶ 8). With regard to the negligence claim stated in Count I against Unique, Plaintiffs allege Unique breached its duty to warn of the dangerous operation of the Sandals Grande Antigua scuba activities, including a prior instance of a Sandals Grande Antigua dive boat leaving scuba divers in the ocean for several hours, as occurred to the Hallmans. (*See id*. ¶ 20). Plaintiffs allege loss of consortium against Unique (and Sandals) in Count III, again as to Unique predicated on its negligence in failing to warn the Hallmans. (*See id*. ¶¶ 26-29). In Count IV, Plaintiffs state a claim of unfair and deceptive trade practices against Unique (and Sandals) with respect to how the scuba diving activity was marketed and sold to Plaintiffs on the Internet. (*See id*. ¶¶ 30-35).

Defendants removed the action on September 30, 2010 on the basis of diversity jurisdiction because the Hallmans are New Jersey residents and [*3] Defendants are either foreign or Florida companies, and the damages claimed exceed $75,000. (*See* Notice 2). Unique is a Florida corporation, and as such, Plaintiffs assert jurisdiction under *28 U.S.C. § 1441* cannot lie. (*See* Mot. 3). Plaintiffs also seek the award of attorney's fees for wrongful removal. In response, Defendants maintain they properly removed this case because Unique -- a marketing company that does not own, manage, or control the resort where the incident occurred -- was fraudulently joined as a defendant to defeat diversity; in Unique's absence there would be complete diversity, and Sandals would then move to have the case heard in An-

tigua as the proper forum for this action. (*See* Mem. Opp'n 3 [ECF No. 7]).

Under *28 U.S.C. § 1447(c)*, a case removed from state court should be remanded if it appears that it was removed improvidently. The burden of establishing federal jurisdiction falls on the party who is attempting to invoke the jurisdiction of the federal court. *See McNutt v. Gen. Motors Accept. Corp. of Ind., Inc., 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)*. Moreover, courts should strictly construe the requirements of removal jurisdiction and remand all cases in which such jurisdiction [*4] is doubtful. *See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 109, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)*. When the plaintiff and defendant clash on the issue of jurisdiction, uncertainties are resolved in favor of remand. *See Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994)*.

District courts have original jurisdiction over civil actions where the matter in controversy exceeds $75,000, and the suit is between citizens of one state and citizens or subjects of a foreign state. *28 U.S.C. § 1332(a)*. Diversity jurisdiction requires complete diversity, meaning that every plaintiff must be diverse from every defendant. *See Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998)* (citing *Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 135[9] (11th Cir. 1996))*. A corporation is "deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *28 U.S.C. § 1332(c)(1)*. Moreover, pursuant to *28 U.S.C. § 1441(b)*, a civil action is removable based upon diversity "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Consequently, a federal court [*5] lacks subject matter jurisdiction over a matter brought pursuant to *28 U.S.C. § 1332(a)* if a defendant is a citizen of the state in which the action is brought.

Courts have recognized an exception to the complete diversity requirement in cases where a non-diverse party has been fraudulently joined. *See Triggs, 154 F.3d at 1287*. The Eleventh Circuit has identified three situations in which joinder may be deemed fraudulent: (1) when there is no possibility that the plaintiff can prove a cause of action against the non-diverse defendant; (2) where a plaintiff has pled fraudulent jurisdictional facts to bring the resident defendant into state court; and (3) where a diverse defendant is joined with a non-diverse defendant as to whom there is no joint, several, or alternative liability, and the claim against the diverse defendant has no real connection to the claim against the non-diverse defendant. *See id*. (citing *Coker v. Amoco Oil Co., 709 F.2d 1433, 1440 (11th Cir. 1983), superceded by statute on other grounds as stated in Georgetown Manor, Inc. v. Ethan Allen, Inc., 991 F.2d 1533 (11th Cir. 1993)*; *Tapscott, 77 F.3d at 1355, abrogated on other grounds by Cohen v. Office Depot, Inc., 204 F.3d 1069, 1072 (11th Cir. 2000))*. [*6] Where a defendant is fraudulently joined, its citizenship is not considered in determining whether complete diversity exists. *See Russell Petro. Corp. v. Environ Prods., Inc., 333 F. Supp. 2d 1228, 1231 (M.D. Ala. 2004)*. In that situation, the federal court must dismiss the non-diverse defendant and deny any motion to remand the matter back to state court. *See Henderson v. Wash. Nat'l. Ins. Co., 454 F.3d 1278, 1281 (11th Cir. 2006)*.

The removing party bears the burden of demonstrating fraudulent joinder, *see Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997)*, and must do so by clear and convincing evidence. *Henderson, 454 F. 3d at 1281*. All factual allegations must be resolved in a light most favorable to the plaintiff. *See Crowe, 113 F.3d at 1538*. "Where a plaintiff states even a colorable claim against the resident defendant, joinder is proper and the case should be remanded to state court." *Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1380 (11th Cir. 1998)* (citing *Crowe, 113 F.3d at 1538*; *Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1562 (11th Cir. 1989))*. Further, the claims against those defendants who are alleged to be fraudulently joined must be obviously frivolous, and [*7] the mere possibility of stating a valid cause of action makes joinder legitimate. *See Accordino v. Wal-Mart Stores E., L.P., No. 3:05-CV-761-J-32MCR, 2005 U.S. Dist. LEXIS 34328, 2005 WL 3336503, at *2 (M.D. Fla. Dec. 8, 2005)*.

Here, of the three situations where joinder maybe deemed fraudulent, *see Triggs, 154 F.3d at 1287*, Defendants, who as the removing parties carry the burden, have identified only one ground: that there is no possibility the Plaintiffs can prove a cause of action against the non-diverse Defendant. (*See* Mem. Opp'n 3). But Defendants woefully fail to carry their burden.

First, Plaintiffs have stated not one, but three claims against their travel agent, Unique, for failing to warn of a dangerous condition known to Unique regarding this particular tour, and for unfair and deceptive trade practices. Rather than moving to dismiss the Counts stated against it for failure to state a claim, Unique filed an Answer and Affirmative Defenses (*See* Notice Ex. D [ECF No. 1-5]), and with conclusory allegations asserts it did not owe a duty to the Plaintiffs (*See id*., Affirmative Defense ("Aff. Def.") 4), no claim is stated because Unique did not own the resort where the incident occurred (*See id*., Aff. Def. 8), [*8] and Unique is merely a marketing agent and not responsible for the operations of Sandals (*See id*., Aff. Def. 11). That this Defendant answered the Complaint rather than seek a dismissal does not bode well for a finding that all three claims are

"obviously . . . frivolous." *Accordino, 2005 U.S. Dist. LEXIS 34328, 2005 WL 3336503, at *2.*

Second, Defendants do not even address the elements necessary to state a claim of negligence or of unfair and deceptive trade practices against Unique, or why the present Complaint does not state even a "colorable claim against the resident defendant." *Pacheco de Perez, 139 F.3d at 1380*. Defendants, as the parties who shoulder the burden of demonstrating fraudulent joinder, should have briefed the necessary elements for each of the claims stated against Unique, and shown how Plaintiffs fail as to each. This is particularly troubling given that Plaintiffs "need not have a winning case against the allegedly fraudulent defendant; [they] need only have a *possibility* of stating a valid cause of action in order for the joinder to be legitimate." *Triggs, 154 F.3d at 1287* (emphasis in original). It is not the Court's task to engage in that analysis for the Defendants in the absence of an [*9] effort on their part to do so. Consequently, the Court cannot make the finding Defendants seek, that is, that Plaintiffs do not have a possibility of stating a valid cause of action against Unique.

In addition to seeking remand, Plaintiffs seek an award of attorney's fees incurred as a result of preparing the Motion for Remand. Pursuant to *28 U.S.C. § 1447(c)*, when a case is remanded due to improper removal, attorney's fees and costs may be due the plaintiff. The Supreme Court has established a standard to guide district courts in deciding whether to award attorney's fees and costs upon remand. "[T]he standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under *§ 1447(c)* only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)*. The Eleventh Circuit has noted that the reasonableness standard enunciated by the Supreme Court was meant to balance "'the desire to deter removals sought for the purpose of prolonging litigation and imposing [*10] costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.'" *Bauknight v. Monroe Cnty., Fla., 446 F.3d 1327, 1329 (11th Cir. 2006)* (quoting *Martin, 546 U.S. at 140*). Thus, "there is no indication that a trial court should ordinarily grant an award of attorney's fees whenever an effort to remove fails." *Kennedy v. Health Options, Inc., 329 F. Supp. 2d 1314, 1319 (S.D. Fla. 2004)*.

The parties disagree as to whether Defendants had a reasonably objective basis for removal. Defendants assert that because Unique has no interest in Plaintiffs' suit and was named solely to obtain jurisdiction over Sandals and to avoid jurisdiction in Antigua, where the accident occurred, there was an objectively reasonable basis for seeking removal. (*See* Mem. Opp'n 3). However, the record is far from clear that the Florida Defendant was fraudulently joined.

In *Tran v. Waste Mgmt., Inc., 290 F. Supp. 2d 1286 (M.D. Fla. 2003)*, the court awarded attorney's fees to the plaintiff upon remand, finding that although the removal might have been filed in good faith,

> it can be stated with relative ease [*11] that the Notice was patently improper considering the facts presented in the case, the presumption against the exercise of federal jurisdiction, such that all uncertainties as to removal jurisdiction are to be resolved in favor of remand, and Eleventh Circuit precedent providing that in the remand context "the district court's authority to look into the ultimate merit of the plaintiff's claims must be limited to checking for obviously fraudulent or frivolous claims."

Id. at 1295-96 (quoting *Crowe, 113 F.3d at 1542*) (footnote call numbers omitted). The same result is warranted here. Given that Defendants have not shown Plaintiffs have no possible claim against Unique, there was no objectively reasonable basis for removal of this case. Accordingly, Plaintiffs are entitled to the attorney's fees and costs incurred as a result of Defendants' improper removal.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that

1. The Motion to Remand **[ECF No. 5] is GRANTED**.

2. This case is **REMANDED** to the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

3. The parties shall confer in a good faith effort to determine the amount of attorney's fees and costs to [*12] be paid to Plaintiffs. If the parties fail to reach an agreement, Plaintiffs shall file a bill of costs and other appropriate documentation evincing all costs, actual expenses, and attorney's fees expended in connection with seeking an order of remand by October 29, 2010.

4. In light of the expedited briefing of the issues by the parties and the foregoing concluded analysis, the hearing scheduled for October 20, 2010 is **CANCELLED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of October, 2010.

/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA

UNITED STATES DISTRICT JUDGE