UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROHAN B. GOLDSON & SUZETTE HOLNESS, Individually, and as Personal Representatives for the Estate of DAVIE GOLDSON,

Plaintiffs,

vs.

KB HOME, a Delaware Corporation, and KB HOME TAMPA, LLC, a Delaware Limited Liability Company,

Defendants.

Case No. 8:17-cv-340-T-24 AEP

DEFENDANTS' RESPONSE OPPOSING PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Defendants KB HOME TAMPA, LLC, and KB HOME hereby respond opposing Plaintiffs' Motion for Leave to Amend Complaint (DE6, "Motion"), and in support, state:

BACKGROUND

Plaintiffs originally filed this suit in Florida state court on June 23, 2016. DE1-1, at 8. In the original complaint, the only defendant was KB HOME TAMPA, LLC. *Id.* Plaintiffs never served that complaint.

Then, nearly seven months later, Plaintiffs filed the First Amended Complaint on January 12, 2017. DE2, at 1. In addition to KB HOME TAMPA, LLC, that complaint also named KB HOME as a defendant. *Id.* Plaintiffs served that complaint on both defendants.

On February 10, 2017, Defendants removed the suit to this Court on the basis of diversity jurisdiction, as all Plaintiffs are citizens of Florida, but neither Defendant is. DE1.

Defendants moved to dismiss Counts I, II, and III of the First Amended Complaint on February 17, 2017, asserting that each count is untimely and that Count II additionally violates fundamental principles of Florida contract law. (DE4).

Then, on March 1, 2017, Plaintiffs moved for leave to file a Second Amended Complaint naming a new individual defendant, MARSHALL SCOTT GRAY. (DE6). The proposed Second Amended Complaint is substantively identical to the First Amended Complaint, except that it adds two paragraphs with respect to Mr. Gray. (*Compare*, DE2, *with*, DE6 Ex. A). Specifically, Plaintiffs allege Mr. Gray was the general contractor involved in building the Home upon which this action is based. (DE6 Ex. A, ¶¶6-7). It does not seek to add any new claims.

As grounds for the amendment, Plaintiffs allege only that their "counsel has just recently learned the identity and the name" of Mr. Gray. (DE6, ¶2; *see also* ¶7). Plaintiffs do not specify when they "learned" about Mr. Gray, or allege the circumstances under which they did so. Plaintiffs likewise do not assert any efforts to "learn" about Mr. Gray prior to the removal of the action to this Court.

MEMORANDUM OF LAW

This Court should deny the Motion because the circumstances demonstrate the amendment is solely for the purpose of defeating this Court's diversity jurisdiction.

28 U.S.C. Section 1447(e) provides that "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to state court." Settled federal law establishes that the court should deny an amendment seeking to join an additional defendant

if the amendment's purpose is to defeat the federal court's jurisdiction.

Under section 1447(e), "the parties do not start out on an equal footing. This is because of the diverse defendant's right to choose between a state or federal forum. Giving diverse defendants the option of choosing the federal forum is the very purpose of the removal statutes." *Burr v. Philip Morris, USA*, No. 8:07-cv-1429-T-23MSS, 2008 WL 2229689, at *1 (M.D. Fla. May 28, 2008) (citing *Hensgens*, 833 F.2d at 1181, and *Sexton v. G & K Servs.*, Inc., 51 F. Supp. 2d 1311, 1313 (M.D. Ala. 1999)); *see also Small*, 923 F. Supp. 2d at 1357.

Accordingly, "when faced with an amended pleading naming a new non-diverse defendant in a removed case, [district courts] should scrutinize that amendment more closely than an ordinary amendment." *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987); *Small v. Ford Motor Co.*, 923 F. Supp. 2d 1354, 1356 (S.D. Fla. 2013) (same). The *Sexton* court explained, "[j]ust as plaintiffs have the right to choose to sue in state court when complete diversity does not exist, non-resident defendants have the right to remove to federal court when there is diversity." 51 F. Supp. 2d at 1313 (quoting *Hensgens*, 833 F.2d at 1182).

A court considering a motion to amend to join a non-diverse party "should deny leave to amend unless strong equities support the amendment." *Small*, 923 F. Supp. 2d at 1356; *see also Osgood v. Discount Auto Parts, LLC*, 955 F. Supp. 2d 1352, 1355 (S.D. Fla. 2013) (same). As this Court has previously held:

> the [c]ourt must balance the equities involved by considering the following factors: (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction, (2) whether the plaintiff has been dilatory in asking for the amendment, (3) whether the plaintiff will be significantly injured if amendment is not allowed, and (4) any other factors bearing on the equities.

Scipione v. Advance Stores Co., No. 8:12-cv-687-T-24-AEP, 2012 WL 3105199, at *2 (M.D. Fla. July 31, 2012) (Bucklew, J.) (quoting *Stephens v. Petsmart, Inc.*, No. 09-cv-815-T-26-TBM, 2009 WL 3674680, at *2 (M.D. Fla. Nov. 3, 2009)); *Hensgens*, 833 F.2d at 1181.

At bottom, denial of leave to amend is appropriate where "the record suggests that the principal if not the sole motive of the amendment is to defeat federal jurisdiction." *Burr*, 2008 WL 2229689, at *2. Here, the record in fact demonstrates the amendment is for the purpose of avoiding federal jurisdiction, and the factors weigh strongly against amendment.

Initially, the timing of the motion to amend is particularly suspicious and demonstrates it is for the purpose of defeating diversity jurisdiction. As this Court has recognized, where "a plaintiff seeks to add a nondiverse defendant immediately after removal but before any additional discovery has taken place, district courts should be wary that the amendment sought is for the specific purpose of avoiding federal jurisdiction." *Burr*, 2008 WL 2229689, at *2 n.6 (quoting *Mayes v. Rapoport*, 198 F.3d 457, 463 (4th Cir. 1999)).

That is precisely the case here, where the Motion to add a nondiverse defendant came within weeks of the notice of removal, and before any discovery in this case has even begun. Indeed, just as in *Scipione*, the "timing of [Plaintiffs'] motion in relation to the date of removal, as well as [their] identification of [the nondiverse proposed defendant] before any discovery has taken place, suggests that [Plaintiffs'] motion for joinder relates more to the issue of diversity than it does the merits of this case." *Scipione*, 2012 WL 3105199, at *2.

Further with respect to timing, although Plaintiffs filed this suit in June of 2016, and amended their complaint in January of 2017 to add additional claims and a new defendant, Plaintiffs did not seek to add the nondiverse defendant until shortly after Defendants

removed the action. In their Motion, Plaintiffs do not even offer a reason for the delay, other than vaguely claiming their counsel "has just recently learned the identity and name" of the proposed nondiverse defendant. (DE6, ¶2). Plaintiffs provide no explanation or context for that purported revelation, nor does the Motion allege any efforts to identify the nondiverse defendant before the case was removed. That alone shows the true purpose of the amendment is to return the case to state court.

Moreover, Plaintiffs will not be significantly injured or prejudiced by a denial here, although Defendants will be harmed if leave is granted. "[I]n analyzing whether the plaintiff will be significantly injured if amendment is not allowed, 'this court generally attempts to determine whether a plaintiff can be afforded complete relief in the absence of the amendment.' " *Scipione*, 2012 WL 3105199, at *3 (quoting *Jones v. Rent-A-Center East, Inc.*, 356 F. Supp. 2d 1273, 1276-77 (M.D. Ala. 2005)).

Here, Plaintiffs have already sued two solvent corporations, but seek to add an individual defendant for the same alleged wrongs, without raising any new claims. Again, here just as in *Scipione*, Plaintiffs "may obtain a judgment against [the existing Defendants] without [Mr. Gray]'s presence should [they] prevail, discovery will allow [Plaintiff] access to the same information with or without [Mr. Gray] in the case, there has been no suggestion that [the existing Defendants] would be unable to satisfy a judgment, and [Plaintiffs] may sue [Mr. Gray] in state court should [they] wish." 2012 WL 3105199, at *3; *see also Osgood*, 955 F. Supp. 2d at 1356 (reaching same conclusion for substantially the same reasons).

Further, KB HOME has entered into an indemnification agreement with Mr. Gray, such that it will be responsible to satisfy the amount of any judgment entered against Mr.

Gray in this case. (*See* Agreement, attached as Exhibit A). That agreement acknowledges that Mr. Gray "is an employee of" KB HOME. *Id.* As Plaintiffs themselves acknowledge, Mr. Gray's employment by KB HOME invokes vicarious liability and could render the existing Defendants liable for Mr. Gray's acts even if the existing Defendants were without fault. (Motion, ¶3). Accordingly, Plaintiffs will not be harmed by a denial here.

In contrast to the absence of any significant harm to Plaintiffs by denial of leave to amend, Defendants have already moved to dismiss various counts of the presently-operative complaint. (DE4). They would incur delay and additional expense in relitigating those issues if a new operative complaint is allowed. And further, adding a nondiverse defendant under these circumstances would infringe the existing Defendants' "right to choose between a state or federal forum," which is "the very purpose of the removal statutes." *Burr*, 2008 WL 2229689, at *1.

CONCLUSION

Accordingly, this Court should deny the Motion for leave to amend the operative complaint to include the nondiverse defendant.

Respectfully submitted,

/s/Benjamine Reid

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this Response was electronically filed through the CM/ECF system on the 15th day of March, 2017, which will cause service to the following:

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/s/Benjamine Reid
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AGREEMENT TO INDEMNIFY EMPLOYEE/CONTRACTOR/BROKER

This Agreement ("Agreement") dated as of January 21, 2002 is entered into by and between KB Home, a Delaware corporation (the "Company") and Marshall Gray, an individual ("Gray").

WHEREAS, Gray is an employee of the Company, is the holder of that certain Contractor's License issued by the State of Florida Department of Business and Professional Regulations, is licensed by the State of Florida Department of Business and Professional Regulations as a real estate broker and is serving as the corporate broker for Company's subsidiary in Tampa, Florida.

WHEREAS, Gray has requested the Company to indemnify him as to any legal liability which he might accrue personally when acting within the scope of his employment on behalf of the Company.

NOW, THEREFORE, for good and valuable consideration, including, without limitation, Gray's agreement to serve as the general contractor and corporate broker on behalf of the Company, the parties agree as follows:

1. Company shall indemnify and hold harmless Gray from and against, any and all demands, losses, liabilities, obligations, claims, causes of action, damages and expenses or fees of any kind or nature, including attorney's fees, arising by reason of Gray's relationship to the Company as employee or agent, so long as, concerning the challenged conduct, Gray acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Company and, with respect to any criminal action or proceeding, had no reasonable cause to believe that his conduct was unlawful. Company shall not indemnify Gray for dishonest, fraudulent, or grossly negligent conduct; willful misconduct; or acts that fall outside of Gray's scope of employment.

2. This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof, shall be construed in accord with Florida law, and shall not be amended except by written agreement signed by both parties.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first set forth above.

Marshall Gray

KB HOME,
a Delaware corporation

By: _____
William R. Hollinger
Senior Vice President and Controller