IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION

Avondale Mills, Incorporated, Plaintiff, vs. Norfolk Southern Corporation, Norfolk Southern Railway Company, Benjamin Aiken, Mike Ford, and James Thornton, Defendants.	C/A No. 1:05-2817-MBS **O R D E R**

Plaintiff Avondale Mills, Incorporated brought the within action on September 26, 2005 in the Court of Common Pleas for the Second Judicial Circuit (Aiken County), South Carolina. Defendants Norfolk Southern Corporation and Norfolk Southern Railway Company (together "Norfolk Southern") removed the action on September 28, 2005 on the basis of diversity jurisdiction. See 28 U.S.C. §§ 1441(b), 1332.

This matter is before the court on Plaintiff's motion to remand filed October 27, 2005 (Entry 24) and Plaintiff's motion to dismiss without prejudice (Entry 41) filed December 1, 2005. Norfolk Southern filed a memorandum in opposition to Plaintiff's motion to remand on November 29, 2005, to which Plaintiff filed a reply on December 9, 2005. Norfolk Southern filed a memorandum in opposition to Plaintiff's motion to dismiss on December 16, 2005, to which Plaintiff filed a reply on December 19, 2005. These matters, among others, came before the court for a hearing on December 19, 2005. The court concludes that Plaintiff's motions should be denied.

I. FACTS

This case arises out of a train collision and derailment in Graniteville, South Carolina, on January 6, 2005. Chlorine was released from several of the train's tank cars. Plaintiff, a textile manufacturing facility, alleges that the resulting chlorine gas impaired its production capability. According to Plaintiff, it suffered economic losses because the facility was forced to close for a period and its equipment and inventory were damaged. Plaintiff further alleges that, since the accident, its machinery breaks down frequently and requires close monitoring, which reduces efficiency and causes loss of capacity. Plaintiff also contends that it has lost customers, revenues, and other business opportunities; suffered harm to its reputation; experienced increased administrative costs; and accrued other similar commercial damages. Plaintiff alleges causes of action for negligence, gross negligence, negligence per se, strict liability, nuisance, and trespass. Plaintiff seeks compensatory and punitive damages.

II. DISCUSSION

Plaintiff has moved both to remand under 28 U.S.C. § 1447 and for voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(2). Plaintiff urges the court to dismiss the within action and to allow it to proceed with its claims against Defendants in the case of Avondale Mills Inc., Avondale Mills Graniteville Fabrics, Inc. v. Norfolk Southern Corp., Norfolk Southern Railway Co., Benjamin Aiken, Mike Ford, and James Thornton, C/A No. 1:05-3177-MBS.[1] Norfolk Southern, relying on Shortt v. Richlands Mall Assoc., Inc., 1990 WL 207354 (4th Cir. Dec. 19, 1990) (unpublished), and Taylor v. Commonwealth, 170 F.R.D. 10 (E.D. Va. 1996), asserts that it would be error for the court

[1] Plaintiff contends that Avondale Mills Inc. and Avondale Mills Graniteville Fabrics, Inc. are the true parties in interest because they are the entities that own and operate property damaged by the chlorine spill.

to decide Plaintiff's motion for voluntary dismissal before making a determination as to whether the court possesses subject matter jurisdiction.

In both Shortt and Taylor, the question was whether a district court possessed authority to grant the plaintiff's Rule 41(a)(2) motion when it also had pending the defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). The cases stand for the proposition that "'[i]f a court believes that it is without subject matter jurisdiction, it is inappropriate for that court to engage in the balancing process required by Rule 41(a)(2); dismissal is required and there is simply no discretion to be exercised.'" Shortt, 1990 WL 207354 **4.[2] Neither Shortt nor Taylor precisely aligns with the procedural posture of the within case. Shortt, and Taylor involved plaintiffs who chose the federal forum and defendants who challenged federal jurisdiction. Under that fact pattern, the Fourth Circuit required the issue of subject matter jurisdiction be decided as a threshold matter. An assertion can be made that Plaintiff's motion for remand is the equivalent of the Shortt and Taylor defendants' Rule 12(b)(1) motion because under both scenarios the moving party is challenging the propriety of the federal forum chosen by the non-moving party. On the other hand, Plaintiff's motion

[2] The Fourth Circuit articulated a different view in Flath v. Bombardier, Inc., 217 F.3d 838 (4th Cir. 2000) (unpublished). In Flath, the plaintiffs brought an action in federal court on the basis of federal admiralty jurisdiction, alleging that Lake Murray, South Carolina, was a "navigable waterway." During discovery the plaintiffs' counsel became concerned that Lake Murray might not be a navigable waterway and that federal jurisdiction did not exist. The plaintiffs moved for voluntary dismissal pursuant to Rule 41(a)(2). The district judge undertook the appropriate balancing test. One of the factors the district judge considered was the lack of subject matter jurisdiction, and he determined this fact militated in favor of dismissal. On appeal, the Court of Appeals for the Fourth Circuit noted the district judge's determination that he lacked subject matter jurisdiction "was not essential to the appropriateness of [his] granting the motion for voluntary dismissal. The motion for dismissal was predicated upon Rule 41(a)(2), not upon Rule 12(b)(1) for lack of subject matter jurisdiction." Id. at **3. The Fourth Circuit stated that the only relevant question was whether the granting of the motion for voluntary dismissal would substantially prejudice the defendants. It would appear that Flath is distinguishable because no Rule 12(b)(1) motion was pending at the time the district judge undertook his analysis.

to dismiss could be construed as mooting its motion to remand. The court concludes that both Plaintiff's motions should be denied; therefore, it is of no consequence which of Plaintiff's motions is addressed first. The court first will turn to Plaintiff's motion to remand.

A. Motion to Remand

Norfolk Southern removed this case on the basis of 28 U.S.C. § 1441(b), which provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable 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.

Plaintiff is a citizen and resident of Georgia. Defendants Norfolk Southern Corporation and Norfolk Southern Railway Company are Virginia corporations with their principal places of business in Virginia. Defendants Benjamin Aiken, Mike Ford, and James Thornton (together the "Individual Defendants") are South Carolina residents. Plaintiff contends, among other things, that removal was improper because the Individual Defendants are citizens of South Carolina, "the State in which such action is brought." Norfolk Southern asserts, however, that the Individual Defendants may be disregarded for purposes of removability because they were not "properly joined and served" at the time of removal. The court agrees.

The language in § 1441(b) providing that diversity cases "shall be removable only if none of the persons properly joined and served as defendants is a citizen of the state in which such action is brought" implies that a resident defendant who has not been served may be ignored for purposes of determining removability. Charles Alan Wright, et al., 14B Federal Practice & Procedure Jurisdiction 3d § 3723. "Courts have held, virtually uniformly, that where, as here, diversity does

exist between the parties, an unserved resident defendant may be ignored in determining removability under 28 U.S.C. § 1441(b)." Ott v. Consolidated Freightways Corp., 213 F. Supp. 2d 662, 665 (S.D. Miss. 2002) (citing cases). An action, to be removable, must be one that could have been brought in federal court. Wensil v. E.I. DuPont de Nemours & Co., 792 F. Supp. 447, 448 (D.S.C. 1992) (citing 28 U.S.C. § 1441(a)). Diversity jurisdiction is determined by the face of the complaint, not by which defendants have been served. Id.

The complaint was filed in state court on September 26, 2005. Norfolk Southern appeared and filed an answer in state court on September 28, 2005. Voluntary appearance by a defendant is the equivalent to personal service. S.C. R. Civ. P. 4(d); Fed. R. Civ. P. 4(h) (allowing service to be effected on corporations in the manner prescribed for individuals by Rule 4(e)(1); Rule 4(e)(1) allows service to be effected "pursuant to the law of the state in which the district court is located"). Norfolk Southern filed its notice of removal on September 28, 2005. The Individual Defendants were served by certified mail on September 30 and October 3, 2005. See S.C. R. Civ. P. 4(d)(8) (for service by certified mail, "[s]ervice is effective upon the date of delivery as shown on the return receipt."). The Individual Defendants were not "properly joined and served" on the date of removal. The court concludes that removal was proper under § 1441(b). Plaintiff's motion to remand is **denied**.

B. Motion to Dismiss

Having determined that it possesses subject matter jurisdiction, the court turns to Plaintiff's motion for voluntary dismissal pursuant to Rule 41(a)(2). Rule 41(a)(2) provides that a case "shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." In deciding a Rule 41(a)(2) motion, a district court may

consider the following factors: (1) the opposing party's effort and expense in preparing for trial, (2) excessive delay and lack of diligence on the part of the movant, (3) insufficient explanation of the need for a voluntary dismissal, and (4) the present stage of the litigation. Miller v. Terramite Corp., 114 F. Appx. 536, 539 (4th Cir. 2004). The court does not discern any evidence of "excessive delay and lack of diligence" on the part of Plaintiff. Thus, the court will weigh the remaining factors.

As to the first factor, Norfolk Southern asserts that it has expended considerable resources defending the case and dismissal would limit its ability to coordinate discovery with other cases pending in federal court. As to the third factor, the court notes that, instead of filing C/A No. 1:05-3177, Plaintiff could have utilized Fed. R. Civ. P. 15 to amend the within complaint; Rule 17 to substitute the real parties in interest; or Rule 21, which provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. The court is not persuaded by Plaintiff's explanation regarding the need for voluntary dismissal. These factors militate against dismissal.

With respect to the fourth factor, this case has fairly recently been commenced. However, as the parties are aware, discovery regarding the collision and derailment has been on-going under the direction of this court for nearly a year. Discovery has been coordinated to the extent practicable among the various cases pending before this court. This factor also militates against dismissal. Plaintiff's motion to dismiss is **denied**.

III. CONCLUSION

For the reasons stated, Plaintiff's motions to remand (Entry 24) and to dismiss (Entry 41) are **denied**. Plaintiff shall file its response to Norfolk Southern's motion to disqualify King & Spalding (Entry 44) within fifteen days of the date of entry of this order, in accordance with the motion to

extend time granted on January 6, 2006. The court will file a tentative scheduling order contemporaneously herewith. Therefore, Plaintiff's motion to stay Rule 26 requirements (Entry 42) is **denied as moot**.

Since the allegations of Avondale Mills Inc., Avondale Mills Graniteville Fabrics, Inc. v. Norfolk Southern Corp., Norfolk Southern Railway Co., Benjamin Aiken, Mike Ford, and James Thornton, C/A No. 1:05-3177-MBS, are duplicative of those asserted in this case, Plaintiff shall amend its complaint in this case, 1:05-2817-MBS, within fifteen days of the date of entry of this order to reflect the proper party plaintiffs. The court thereafter will dismiss the later-filed case, 1:05-3177-MBS.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Judge

Columbia, South Carolina

March 6, 2006.