JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 17-4999 PA (SKx)	Date	July 17, 2017
Title	Anthony Warren v. MasTec, Inc., et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Kamilla Sali-Suleyman	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a second Notice of Removal filed by defendants MasTec, Inc. and MasTec Network Solutions, Inc. ("Defendants"). (Docket No. 1 ("NOR II").) Defendants assert that this Court has jurisdiction over the action brought against it by plaintiff Anthony Warren ("Plaintiff") based on the Court's diversity jurisdiction, and assert that individual defendant Matt Bistline[1/] ("Bistline") was fraudulently joined. See 28 U.S.C. § 1332. Defendants previously filed a notice of removal on March 21, 2017. (NOR II, Ex. D, Ex. 1 ("NOR I").) On March 28, 2017, the Court remanded for lack of subject matter jurisdiction.[2/] (Warren v. MasTec, Inc., CV 17-2271 PA (SKx) (C.D. Cal. Mar. 28, 2017) ("Remand Order").)

I. Legal Standard

Federal courts are courts of limited jurisdiction, having subject matter jurisdiction over only those matters authorized by the Constitution and Congress. See, e.g., Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). A suit filed in state court may be removed to federal court if the federal court would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a). A removed action must be remanded to state court if the federal court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). "The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction." Prize Frize, Inc. v. Matrix (U.S.) Inc., 167 F.3d 1261, 1265 (9th Cir. 1999). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

[1/] Erroneously sued as Matt Bisline. (See NOR II, Ex. C.)

[2/] Specifically, the Court found that Defendants failed to demonstrate complete diversity of citizenship because Plaintiff's citizenship was inadequately alleged and Defendants failed to show that Bistline was fraudulently joined.

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II. Defendant Bistline Is Not Fraudulently Joined

As in their March 21 notice of removal, Defendants assert that the citizenship of defendant Bistline, Plaintiff's former supervisor, should be ignored because Bistline was fraudulently joined as a defendant in this action. In attempting to invoke this Court's diversity jurisdiction, Defendants must prove that there is complete diversity of citizenship between the parties and that the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. The Ninth Circuit has recognized fraudulent joinder of a non-diverse defendant as an exception to the complete diversity requirement. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001). If a plaintiff "fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987). If the Court finds that the joinder of a non-diverse defendant is fraudulent, then that defendant's presence in the lawsuit is ignored for the purposes of determining diversity. See, e.g., Morris, 236 F.3d at 1067.

"There is a presumption against finding fraudulent joinder, and defendants who assert that plaintiff has fraudulently joined a party carry a heavy burden of persuasion." Plute v. Roadway Package Sys., Inc., 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001). A claim of fraudulent joinder should be denied if there is any possibility that the plaintiff may prevail on the cause of action against the in-state defendant. See id. at 1008, 1012. "The standard is not whether plaintiffs will actually or even probably prevail on the merits, but whether there is a possibility that they may do so." Lieberman v. Meshkin, No. C-96-3344 SI, 1996 WL 732506, at *3 (N.D. Cal. Dec. 11, 1996); see also Good v. Prudential Ins. Co. of Am., 5 F. Supp. 2d 804, 807 (N.D. Cal. 1998). "Fraudulent joinder claims may be resolved by 'piercing the pleadings' and considering summary judgment-type evidence such as affidavits and deposition testimony." Morris, 236 F.3d at 1068 (internal quotation marks omitted). "Nonetheless, piercing the pleadings is a strictly circumscribed inquiry limited to uncontroverted summary evidence which establishes unmistakably that a diversity-defeating defendant cannot possibly be liable to a plaintiff under applicable state law." Celeste v. Merck, Sharp & Dohme Corp., No. 14cv360AJB (MDD), 2014 WL 2739025, at *3 (S.D. Cal. June 17, 2014) (internal quotation marks omitted). "In determining whether a defendant was joined fraudulently, the court must resolve 'all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party.'" Plute, 141 F. Supp. 2d at 1008 (quoting Dodson v. Spiliada, 951 F.2d 40, 42–43 (5th Cir. 1992)). A court should remand a case "unless the defendant shows that the plaintiff would not be afforded leave to amend his complaint to cure the purported deficiency." Padilla v. AT&T Corp., 697 F. Supp. 2d 1156, 1159 (C.D. Cal. 2009) (internal quotation marks and brackets omitted). Thus, if there is "a non-fanciful possibility that plaintiff can state a claim under state law against the non-diverse defendants, the court must remand." Mireles v. Wells Fargo Bank, N.A., 845 F. Supp. 2d 1034, 1062 (C.D. Cal. 2012) (internal quotation marks and brackets omitted).

Plaintiff alleges a claim against Bistline for harassment on the basis of race or color in violation of the California Fair Employment Housing Act ("FEHA"). (Compl. ¶¶ 233–246.) Before a plaintiff may file a FEHA civil complaint, he must file an administrative complaint with the Department of Fair

Employment and Housing ("DFEH"). Williams v. City of Belvedere, 72 Cal. App. 84, 90 (1999). The administrative complaint must be filed within one year of the unlawful conduct. See Cal. Gov't Code § 12960(b), (d). Timely filing of the administrative complaint is required to bring a civil action for damages under the FEHA. Williams, 72 Cal. App. at 90. Plaintiff filed his Administrative Complaint on August 18, 2016. (NOR II ¶ 30.) In his deposition on March 9, 2017, Plaintiff admitted that he most recently heard Bistline make a "racially inappropriate remark" on May 15, 2015, at the latest, i.e., more than one year before the Administrative Complaint was filed. (See NOR II, Groode Decl., Ex. A, 185.) Defendants previously argued that Plaintiff's claim against Bistline is barred because Plaintiff failed to timely exhaust administrative remedies, as he filed the Administrative Complaint more than one year after Bistline's last alleged unlawful act. (NOR I ¶¶ 27, 30.) The Court rejected this argument, explaining that it is possible that a California court would apply the continuing violation doctrine to toll the statute of limitations for the claim against Bistline as a result of harassment by other MasTec personnel during the statutory period.

The continuing violation doctrine provides an exception to the one-year statutory deadline by allowing a plaintiff to bring claims under FEHA that occurred, in part, outside the limitations period. Id. at 802. Under California law,

> [t]he continuing violation doctrine tolls the limitations period for filing a DFEH complaint if an employer engages in repetitive violations of an employee's FEHA rights and the employer's actions: (1) were "sufficiently similar in kind," (2) "occurred with sufficient frequency," and (3) did not "acquir[e] a degree of 'permanence' so that employees [were] on notice that further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile."

Llamas v. Hanger Prosthetics & Orthotics, Inc., 2014 U.S. Dist. LEXIS 47068, at *5–6 (C.D. Cal. Apr. 1, 2014) (quoting Richards, 26 Cal. 4th at 802; Acuna v. San Diego Gas & Elec. Co., 217 Cal. App. 4th 1402, 1412–13 (2013)).

As noted in the prior remand order, Plaintiff has alleged that Defendants also committed violations of FEHA, including harassment and discrimination based on race or color, as recently as September 3, 2015. (See Compl. ¶¶ 15, 163–232.) The claims against Defendants were undisputedly timely filed with the DFEH. Defendants now assert that no other MasTec personnel could have harassed Plaintiff within the statutory period, as

> Plaintiff's own testimony demonstrates that his contacts with MasTec personnel from the commencement of his leave on May 15, 2015 until his last of day of employment on September 3, 2015 were few and were limited to discussions relating to his leave of absence and possible return to work. Further, Plaintiff has provided no testimony to indicate that

> MasTec personnel made any race-based comments during these limited conversations regarding his medical status.

(NOR II, ¶ 38 (internal citations omitted).) However, in the March 9 deposition excerpts cited by Defendants to support this argument, Plaintiff was asked exclusively about his contact with Defendants' employees regarding his medical status and leave of absence. (See Groode Decl., Ex. B at 268, 274,–275, 279–281, 287–289.) Thus, Plaintiff's deposition does not preclude the possibility that Plaintiff suffered harassment during the statutory period, and it remains possible that the continuing violation doctrine could apply to toll the statute of limitations for the claim against Bistline. See Negherbon v. Wells Fargo Bank, 2015 U.S. Dist. LEXIS 143393, at *25–26 (N.D. Cal. Oct. 21, 2015) (concluding that California's continuing violation doctrine may toll the statute of limitations as to FEHA claims against defendant supervisor if similar violations were committed by defendant employer's other employees). Accordingly, it is not clear that Plaintiff's claim against Bistline will fail. See id.; Llamas, 2014 U.S. Dist. LEXIS 47068, at *5–6. Moreover, a state court would likely grant Plaintiff leave to amend his Complaint if necessary to state a claim against Bistline. See Padilla, 697 F. Supp. 2d at 1159.

Therefore, the Court finds Defendants have not met the "heavy burden of persuasion" that there is no possibility that Plaintiff will prevail on his claim against Bistline. See Plute, 141 F. Supp. 2d at 1008. As a result, the Court finds that Bistline has not been fraudulently joined, and this Court cannot ignore his citizenship in assessing the propriety of removal. Accordingly, Defendants have failed to establish that this Court has jurisdiction over this action.

III. Successive Removal is Not Supported by New Circumstances

Furthermore, even if fraudulent joinder were sufficiently alleged, this removal constitutes an improper successive removal. A second removal is permissible when made on new grounds arising from subsequent pleadings or events. See Peabody v. Maud Van Cortland Hill Schroll Trust, 892 F.2d 772, 776 (9th Cir. 1989); Kirkbride v. Cont'l Cas. Co., 933 F.2d 729, 732 (9th Cir. 1991) ("[A] defendant who fails in an attempt to remove on the initial pleadings can file a second removal petition when subsequent pleadings or events reveal a new and different ground for removal." (emphasis in original; quotation marks omitted)); One Sylvan Rd. N. Assocs. v. Lark Int'l, Ltd., 889 F. Supp. 60, 62–63 (D. Conn. 1995). However, a party cannot remove a case twice based on the same grounds. See Seedman v. U.S. Dist. Court for Cent. Dist. of Cal., 837 F.2d 413, 414 (9th Cir. 1988) ("[A] second removal petition based on the same grounds does not 'reinvest' the court's jurisdiction."). Indeed, a second attempt at removal is justified only when there has been a "substantial change in the nature of the instant case since it was last in this court." One Sylvan, 889 F. Supp. at 64.

Defendants' current Notice of Removal relies on a deposition of Plaintiff taken on March 9, 2017, by Defendants. This deposition was in Defendants' possession prior to the filing of the initial removal. Indeed, other excerpts from it were relied upon in the initial notice of removal. Yet, Defendants did not present or rely on the excerpts elucidating Plaintiff's communications with other

MasTec personnel until this second Notice of Removal. This evidence cannot constitute a "new and different ground" to justify a successive removal, as it did not come from a subsequent pleading, nor has a subsequent event or substantial change in the nature of the case caused this evidence to become relevant. Compare Andersen v. Schwan Food Co., EDCV 13-02208 JGB (DTBx), 2014 U.S. Dist LEXIS 41698, at *14 (E.D. Cal. Mar. 26, 2014) (remanding successive removal where calculations of amount in controversy were based on defendants' payroll records available at time of initial removal); Leon v. Gordon Trucking, Inc., 76 F. Supp. 3d 1055 (C.D. Cal. 2014) (remanding successive removal where second removal cured failure in initial notice of removal to allege defendant's own citizenship); with Benson, 188 F.3d at 782–83 (permitting successive removal where plaintiff's demand letter revealed amount in controversy); Rea v. Michaels Stores Inc., 742 F.3d 1234, 1238 (9th Cir. 2014) (permitting successive removal where intervening change in law rendered removal proper). This information "could – and indeed, should – have been presented to the Court" in the initial Notice of Removal, but it was not. See Andersen, 2014 U.S. Dist. LEXIS 41698, at *14 (internal quotation marks and citation omitted). Successive removals under such circumstances are improper.

Conclusion

For the foregoing reasons, Defendants have failed to meet their burden to demonstrate that the Court has subject matter jurisdiction or that removal was procedurally proper. Accordingly, the Court remands this action for lack of subject matter jurisdiction to Los Angeles Superior Court, Case No. BC639516. See 28 U.S.C. § 1447(c).

IT IS SO ORDERED