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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIA GORETTI OETTINGER,
Plaintiff,
v.
THE HOME DEPOT, THE HOME DEPOT USA,
INC., and DOES 1 to 10,
Defendants.

No. C 09-01560 CW
ORDER GRANTING
PLAINTIFF'S MOTIONS
FOR LEAVE TO AMEND
COMPLAINT AND TO
REMAND AND DENYING
DEFENDANT'S MOTION TO
STRIKE THE
DECLARATION OF LARRY
K. ARGUELLO

Plaintiff Maria Goretti Oettinger, a citizen of California, moves, pursuant to Federal Rule of Civil Procedure 15(a), for leave to amend her complaint to add an additional defendant and to remand the case on the ground that the additional defendant would defeat diversity jurisdiction. Defendant Home Depot U.S.A., Inc., a citizen of Georgia, opposes the motions.¹ The matter was heard on July 9, 2009. Having considered all of the papers filed by the parties and oral argument on the motions, the Court GRANTS Plaintiff's motions.

¹ Defendant states that it is incorrectly identified in Plaintiff's complaint as The Home Depot and The Home Depot USA, Inc. The Court will refer to Defendant as Home Depot U.S.A., Inc.

1 Defendant also moves to strike designated paragraphs of the
2 declaration of Larry K. Arguello, counsel for Plaintiff. Because
3 the Court has not relied on any statements in the declaration that
4 are not confirmed by Defendant's exhibits, Defendant's motion is
5 moot and therefore DENIED.

6 BACKGROUND

7 The following facts are alleged in Plaintiff's complaint. On
8 March 1, 2007, Plaintiff was shopping at the Home Depot store
9 located at 3005 Industrial Parkway, Union City, California.
10 Plaintiff's foot came in contact with a defect in the flooring. As
11 a result, Plaintiff fell and sustained injuries.

12 Plaintiff filed a form complaint in Alameda County superior
13 court on February 26, 2009. Defendant filed an answer on March 26,
14 2009. On April 9, 2009, Defendant removed the action to this Court
15 pursuant to 28 U.S.C. § 1441(b) on grounds of diversity
16 jurisdiction. Plaintiff does not dispute that removal was proper.

17 On May 8, 2009, Plaintiff filed this motion for leave to amend
18 her complaint to add a new defendant, Scott Korey. Plaintiff
19 initially maintained that Korey was and is the manager of the Home
20 Depot store in Union City where her injury allegedly occurred. In
21 its opposition, Defendant indicates that Korey is an assistant
22 operations manager. (Korey Dec., ¶ 1.) Plaintiff accepts the
23 correction concerning Korey's title.

24 Plaintiff assumes that Korey is a citizen of California
25 because he works in Union City. Defendant does not dispute that
26 assumption. If the Court were to grant Plaintiff leave to amend
27 her complaint to add Korey as a defendant, there would no longer be
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1 complete diversity between the parties and the Court would no
2 longer have subject matter jurisdiction. Accordingly, Plaintiff
3 also moves that the case be remanded.

4 Plaintiff has expressed a preference for litigating this case
5 in state court. First, Plaintiff's counsel expressed to
6 Defendant's counsel that because of his lack of experience in
7 federal court, he might need to bring in another attorney to help.
8 (Tolson Dec., ¶8.) Second, Plaintiff argues in her motion that
9 litigating a case in federal court is more expensive than
10 litigating the same case in state court.

11 LEGAL STANDARD

12 Federal Rule of Civil Procedure 15(a) provides that leave of
13 the court allowing a party to amend its pleading "shall be freely
14 given when justice so requires." Leave to amend lies within the
15 sound discretion of the trial court, which "must be guided by the
16 underlying purpose of Rule 15 to facilitate decision on the merits,
17 rather than on the pleadings or technicalities." United States v.
18 Webb, 655 F.2d 977, 979 (9th Cir. 1981) (citations omitted). Thus,
19 Rule 15's policy of favoring amendments to pleadings should be
20 applied with "extreme liberality." Id.; DCD Program, Ltd. v.
21 Leighton, 833 F.2d 183, 186 (9th Cir. 1987) (citations omitted).

22 Title 28 U.S.C. § 1447(e) provides that if, "after removal the
23 plaintiff seeks to join additional defendants whose joinder would
24 destroy subject matter jurisdiction, the court may deny joinder, or
25 permit joinder and remand the action to the State court."
26 Permitting joinder of non-diverse defendants in a removed action
27 divests a district court of jurisdiction if, as here, diversity is

1 the sole basis for subject matter jurisdiction. Morris v. Princess
2 Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir. 2001) (citing Desert
3 Empire Bank v. Insurance Co. of North America, 623 F.2d 1371, 1374
4 (9th Cir. 1980)).

5 Once a case has been removed, a diversity-destroying amendment
6 could be motivated by the plaintiff's desire to gain procedural
7 advantage by returning to state court. Clinco v. Roberts, 41 F.
8 Supp. 2d 1080, 1086-87 (N.D. Cal. 1999). Therefore, a district
9 court must scrutinize a proposed diversity-destroying amendment to
10 ensure that it is proper; in other words, 28 U.S.C. § 1447(e)
11 applies and the logic and liberal policy of Rule 15(a) do not
12 apply. Id.

13 When a party seeks to join diversity-destroying defendants,
14 courts generally look at six factors. Palestini v. Gen. Dynamics
15 Corp., 193 F.R.D. 654, 658 (C.D. Cal. 2000); IBC Aviation Servs.,
16 Inc. v. Compania Mexicana de Aviacion, et. al., 125 F. Supp. 2d
17 1008, 1011 (N.D. Cal. 2000); Bonner v. Fuji Photo Film, 461 F.
18 Supp. 2d 1112, 1119-20 (N.D. Cal. 2006). The six factors are

- 19 (1) whether the new defendants should be joined under
20 Fed. R. Civ. P. 19(a) as "needed for just adjudication";
21 (2) whether the statute of limitations would preclude an
22 original action against the new defendants in state
23 court; (3) whether there has been unexplained delay in
24 requesting joinder; (4) whether joinder is intended
25 solely to defeat federal jurisdiction; (5) whether the
26 claims against the new defendant appear valid; and
27 (6) whether denial of joinder will prejudice the
28 plaintiff.

Palestini, 193 F.R.D. at 658.

DISCUSSION

I. Palestini Factors

A. Necessary Party

Federal Rule of Civil Procedure 19 provides that joinder is required of persons whose absence would preclude the grant of complete relief, or whose absence would impede their ability to protect their interests. IBC Aviation, 125 F. Supp. 2d at 1011 (citing Fed. R. Civ. Pro. 19). Such a

necessary party is one "having an interest in the controversy, and who ought to be made [a] party, in order that the court may act on that rule which requires it to decide and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." This standard is met when failure to join will lead to separate and redundant actions.

Id. (citing CP Nat'l Corp. v. Bonneville Power Admin., 928 F.2d 905, 910, 912 (9th Cir. 1991)).

Defendant argues that Plaintiff can obtain complete relief without joinder of Korey because, under the principle of respondeat superior, liability for Korey's actions is imputed to Defendant. Defendant points out that Plaintiff's allegations and claims are against both "Defendants" and thus, any judgment against Korey would be joint and several with Defendant. Defendant also argues that money damages are plausibly recoverable only from itself, because Korey is without means to satisfy a judgment. (Korey Dec., ¶ 5.) Plaintiff responds that Korey is necessary for recovery because, in the current business climate, Home Depot may not be able to satisfy a judgment.

Under California state law, a "plaintiff seeking to hold an employer liable for injuries caused by employees acting within the

1 scope of their employment is not required to name or join the
2 employees as defendants." Perez v. City of Huntington Park, 7 Cal.
3 App. 4th 817, 820 (1992). Moreover, the statute of limitations,
4 discussed below, prevents a separate and redundant action in state
5 court. Korey is not a necessary party to Plaintiff's suit against
6 Defendant. This factor favors Defendant.

7 B. Statute of Limitations

8 Plaintiff correctly states that a separate state court action
9 against Korey would be barred by the two-year statute of
10 limitations of California Code of Civil Procedure section 335.1.
11 Therefore, this factor favors Plaintiff.

12 C. Unexplained Delay

13 Plaintiff filed her complaint in state court on February 26,
14 2009. Defendant removed the case to this Court on April 9, 2009.
15 Plaintiff moved to amend the complaint and remand on May 8, 2009.
16 Plaintiff argues that the motion to amend the complaint was timely
17 because it was made very soon after the notice of removal and,
18 overall, very early in the case.

19 Defendant argues that Plaintiff has known for over two years
20 that there are managers who are citizens of California and who work
21 at the Home Depot store in Union City, yet Plaintiff did not name
22 any of them in the original complaint, and did not move to amend to
23 add one of them until immediately after the case was removed to
24 this Court.

25 Plaintiff has not explained why Korey was not named in the
26 original complaint, so this factor favors Defendant. However, the
27 period of ten weeks between initiation of the lawsuit and a motion
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1 for leave to amend is not a significant delay, so this factor is
2 given little weight.

3 D. Motive

4 Defendant argues that Plaintiff's motive for seeking joinder
5 is to destroy diversity, pointing to suspicions created by the
6 timing of her motion to amend, and to her preference to litigate
7 the case in state court. Plaintiff states that her objective is
8 simply to obtain a judgment against all persons and entities who
9 are liable, in order to maximize her prospects for collecting the
10 judgment. Defendant's view of Plaintiff's motive is no more
11 compelling than Plaintiff's explanation of her motive, and
12 Plaintiff's preference for state court is no less honorable than
13 Defendant's for federal court. Thus, the Court is unwilling to
14 impute an improper motive to Plaintiff and this factor favors
15 Plaintiff.

16 E. Validity of Claim

17 Plaintiff argues that the claim against Korey has merit
18 because it was part of Korey's job duties on the date of the
19 incident to keep the premises safe for the general public.
20 Defendant contends that Plaintiff's allegation that Korey failed to
21 maintain the store premises safely is a passive act of non-
22 feasance, for which he cannot be held liable. However, the cases
23 Defendant cites are not on point and it is well-established in tort
24 law that acts of non-feasance carry liability when a duty to act
25 exists. Plaintiff's citations with regard to this question are on
26 point, especially Dillon v. Wallace, 148 Cal. App. 2d 447, 455-456
27 (1957), a slip and fall case in a grocery store where the non-

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1 feasance defense by the store manager was specifically addressed
2 and rejected.

3 Plaintiff reasonably posits that one or more employees of
4 Defendant's store in Union City might share liability for
5 Plaintiff's injuries. Plaintiff asserts that Korey is one such
6 employee. It is worth noting that, despite Defendant's avowal that
7 Korey was not and is not the manager of the Union City store, he is
8 an assistant operations manager, a position that may reasonably
9 bear responsibility for the safety of areas of the store.
10 Moreover, Defendant does not specifically deny that Korey was
11 responsible for the safety of the area of the store where the
12 injury allegedly occurred. The case against Korey is not, on its
13 face, invalid or weak, so this factor favors Plaintiff.

14 F. Prejudice

15 Among other arguments, Plaintiff asserts that, because of the
16 statute of limitations, denying leave to amend would prejudice her
17 case by barring recovery from an individual employee of Defendant's
18 Union City store who may also share liability. Defendant asserts
19 that, because Korey has agreed to appear at deposition and trial
20 and because Defendant can fully satisfy a judgment, Plaintiff loses
21 nothing by not having Korey as a Defendant in the case. Because of
22 the interest in resolving the entire controversy and adjusting the
23 rights of all involved and because Plaintiff would be unable to
24 initiate a separate state court action against Korey, the Court
25 finds that Plaintiff's case would be prejudiced if leave to amend
26 were not granted.

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1 II. Weighing Factors

2 Based on the above analysis, the Court concludes that the
3 equities weigh in favor of joinder. Therefore, the Court grants
4 Plaintiff's motion for leave to amend to add Scott Korey as a
5 Defendant in her complaint. Because joinder divests the Court of
6 diversity jurisdiction, the case will be remanded to state court.

7 CONCLUSION

8 For the foregoing reasons, the Court GRANTS Plaintiff's motion
9 for leave to file her first amended complaint and GRANTS her motion
10 for remand to state court. (Docket No. 5.) Plaintiff may file the
11 proposed FAC forthwith and, if she does, the clerk shall remand the
12 case to the Alameda County superior court.

13 Defendant's motion to strike designated paragraphs in the
14 declaration of Larry K. Arguello is DENIED. (Docket No. 17.)

15 IT IS SO ORDERED.

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19 Dated: 7/15/09

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CLAUDIA WILKEN
United States District Judge

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