UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NEU-JO INDUSTRIAL, INC., and
TRU-FAB, INC.

Case No.: 98-1965-CIV-T-24B

Plaintiffs,

vs.

STEPHEN M. COTHRON,

Defendant. /

MOTION AND INCORPORATED MEMORANDUM OF LAW TO REMAND

Plaintiffs, Neu-Jo Industrial, Inc. ("Neu-Jo") and Tru-Fab, Inc. ("Tru-Fab"), hereby move to remand this action to state court and in support thereof state as follows:

INTRODUCTION

In June of 1996, the Defendant, Stephen M. Cothron ("Cothron"), the president of Millwrights and Machinery Erectors Local Union #1000, AFL-CIO (the "Union"), called upon Neu-Jo, a corporation which provides services in connection with moving industrial equipment, as he had many times in the past, to solicit Neu-Jo to utilize the hiring hall of the Union. Just as it had on every prior occasion, Neu-Jo refused to unionize its workforce and/or utilize the Union's hiring hall. However, Cothron represented to Neu-Jo that the Union would provide Neu-Jo one

worker on a temporary basis for a specific job. Neu-Jo agreed to this arrangement based on Cothron's representation that this agreement would only apply to the one worker and that Cothron would not try to organize or represent any other employees working for Neu-Jo.

Based on Cothron's fraudulent misrepresentations, Neu-Jo entered into a one page contract (the "Assumption Agreement") with the Union, which purported to assume a collective bargaining agreement to unionize Neu-Jo's entire workforce. Cothron stated that the Assumption Agreement would entitle Neu-Jo to utilize one skilled worker under the terms and conditions of a pre-negotiated multi-employer collective bargaining agreement, but would not otherwise affect Neu-Jo's workforce. A copy of the collective bargaining agreement was never provided to Neu-Jo. Thus, when Neu-Jo entered into the Assumption Agreement, it believed it was hiring one sole Union employee for a specific job.

The Defendant and the Union now assert that Neu-Jo is obligated to exclusively utilize the Union's hiring hall to fill every position, within the subject trade jurisdiction, with a union worker, to organize its entire workforce, and to comply with every term of the collective bargaining agreement for all of Neu-Jo's employees within that trade jurisdiction. While the Plaintiffs

agree that this is a fair reading of the collective bargaining agreement, Neu-Jo would have never entered into the Assumption Agreement but for Cothron's fraudulent statements.

On August 17, 1998, the Plaintiffs filed this action against Cothron, in the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida. The Complaint states a cause of action against Cothron based on his fraudulent misrepresentations to Neu-Jo for fraud in the inducement, fraud in the execution, and indemnity.

The next day, on August 18, 1998, Plaintiffs' counsel sent, by regular mail, a copy of the Complaint to Cothron's counsel. See, letter from David W. Adams to Tobe Lev dated August 18, 1998, attached hereto as Exhibit "A." Despite the undersigned's request, Cothron's counsel refused to accept service. On September 23, 1998, 36 days after receiving the Complaint, Cothron filed his Notice of Removal. This action should be remanded back to the state court because: (1) preemption is not a proper basis for removal except in cases of "complete preemption"; (2) "complete preemption" does not apply to this state common law tort action; and (3) the Defendant's notice of removal was not timely filed.

I. Standard of Review

The federal removal statutes must be construed strictly and

narrowly against removal, in favor of remand. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-109 (1941). In a motion to remand, the removing party (i.e. the Defendant) bears the burden of showing the existence of federal jurisdiction and that removal is proper. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1373 (11th Cir. 1998); Diaz v. Sheppard, 85 F.3d 1502, 1505 (11th Cir. 1996). On a motion for remand, all doubts must be resolved in favor of remand. Pacheco de Perez, at 1373.

II. Preemption is not a basis for removal except in cases of "complete preemption."

An action originally filed in state court may be removed to federal court based upon federal question jurisdiction if the plaintiffs' suit "arises under" the "Constitution, treaties or laws of the United States." 28 U.S.C. § 1441 and § 1331. In general, a case "arises under" federal law if federal law creates the cause of action, or if a substantial disputed issue of federal law is a necessary element of a state law claim. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983). The determination of whether federal question jurisdiction exists must be made on the face of the plaintiffs' complaint; an anticipated or even inevitable federal defense generally will not support removal based upon federal question jurisdiction. Caterpillar, Inc. v.

Williams, 482 U.S. 386 (1987). As a general rule, assertion of federal preemption as a defense is insufficient to invoke federal question jurisdiction to permit removal to federal court. Kemp v. I.B.M. Corp., 109 F.3d 708 (11th Cir. 1997).

However, there is an exception to the rule that preemption does not provide a basis for removal where the federal law at issue has entirely preempted the field. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). This is known as the "complete preemption" doctrine. The complete preemption doctrine is limited in application and is found only when the preemptive force of the statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim. Caterpillar, Inc., at 393. Complete preemption does not apply to the claims asserted in the Plaintiffs' Complaint.

A. The Garmon doctrine does not completely preempt state law and therefore is not a valid basis for removal.

In his Notice of Removal, Cothron argues that the Garmon doctrine requires preemption and therefore provides a basis for federal question jurisdiction. In support of this argument, Cothron cites San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), in which the United States Supreme Court held that when an activity is subject to Section 7 or 8 of the National Labor

Relations Act, state as well as federal courts must defer to the exclusive competence of the National Labor Relations Board. While, the Plaintiffs assert that the Garmon Act has no application in this context, it is clear that the Garmon Act cannot provide a basis for federal court jurisdiction necessary to support removal. See, Ethridge v. Harbor House Restaurant, 861 F.2d 1389 (9th Cir. 1988)(Garmon preemption is not a basis for removal from state to federal court); Hayden v. Reickard, 957 F.2d 1506 (9th Cir. 1992); Ramsay v. Steeltech Manufacturing, Inc., 895 F. Supp. 225 (E.D. Wis. 1995)(suit could not be removed on ground that is was preempted by National Labor Relations Act); Rivera v. Federacion de Musicos de Puerto Rico, Inc., 369 F. Supp. 1169, 1172-73 n. 6 (D. Puerto Rico 1974)(Garmon doctrine does not vest a district court with removal jurisdiction).

If the Garmon doctrine preempts a state claim, jurisdiction vests in neither state or federal court, but rather exclusively in the NLRB. Ethridge, at 1397. Moreover, the assertion of Garmon preemption does not create a federal question for federal court jurisdiction. Id. At 1400-01. Thus, Cothron's claim that the Garmon doctrine preempts the Plaintiffs' claims cannot provide a jurisdictional basis for removal of the claims to federal court.

B. Common law causes of action that merely "relate to" an employee benefit plan do not arise under federal law and can not be removed.

Cothron asserts that the Plaintiffs' count for indemnification, seeking recovery of any damages resulting from the Assumption Agreement which was procured by Cothron's fraud, is preempted under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et. seq. Cothron's support for this argument is that the indemnification in effect seeks to make Local 1000 [1] liable for delinquent trust fund contributions and therefore "it relates to an employee benefit plan" and that ERISA supersedes "any and all State laws" that "relate to any employee benefit plan". Contrary to Cothron's arguments, this is an insufficient nexus to confer removal jurisdiction.

Congress has provided for complete preemption, in certain limited circumstances, in 29 U.S.C. § 1132(a), which provides the exclusive cause of action for recovery of benefits governed by an ERISA plan. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). However, an ERISA preemption defense, without more, does not create removal jurisdiction. Franchise Tax Bd. v. Constr.

---

[1] Cothron mistakenly states that Plaintiffs seek to hold the Union liable. However, the Complaint does not name the Union as a party but rather names Cothron, individually, as the only Defendant.

Laborers Vacation Trust, 463 U.S. 1 (1983); Kemp v. IBM Corp., 109 F.3d 708, 712-713 (11th Cir. 1997); McClelland v. Gronwaldt, ---F.3d ---, 1998 WL 574887 (5th Cir. Sept. 9, 1998)(a copy is attached hereto as Exhibit"B"). Removal jurisdiction is only available pursuant to ERISA preemption where the plaintiffs are seeking relief under 29 U.S.C. § 1132(a). Kemp, at 712.

Section 1132(a) states that a participant or beneficiary of a "plan" may bring suit "to recover benefits due to him under the terms of his plan. . ." 29 U.S.C. § 1132(a)(1)(B). The Plaintiffs in this action are not beneficiaries under any "plan" covered by ERISA, nor has Cothron alleged that they are. On the contrary, Cothron admits that in related litigation, various trust funds have sued the Plaintiffs under ERISA seeking to collect benefits on behalf of beneficiaries. Thus, it is clear that the Plaintiffs are not seeking to recover benefits due under terms of any "plan". Since the Plaintiffs' claims do not fall within § 1132(a), those claims may not be characterized as an ERISA claim under that section and no "complete preemption" exits which would support removal in this action. Kemp, at 714.

Cothron does not argue that the Plaintiffs' claims arise under Section 1132(a) but rather argues that Plaintiffs' claims "relate to" an ERISA plan. However even if this were true, which

Plaintiffs' vigorously contest, this would only provide Cothron with an ordinary preemption defense but would not create federal question jurisdiction necessary for removal. Kemp, at 714; Franchise Tax Bd., 463 U.S. at 7. Accordingly, this preemption defense is not properly before the Court and this action must be remanded to the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida.

C. Complete preemption under Section 301 of the Labor Management Relations Act does not apply.

A claim will fall under Section 301 if it either invalidates a collective bargaining agreement or if it requires interpretation of a collective bargaining agreement. International Brotherhood of Teamsters v. American Delivery Service Co., Inc., 50 F.3d 770, 774 (9th Cir. 1995). However, the standard for preemption is more limited. The Supreme Court has held that for purposes of complete preemption under Section 301, "application of state law is preempted by Section 301 ... only if such application requires the interpretation of a collective bargaining agreement." Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399 (1988).[2] Thus, because

[2] Cothron cites several cases for the proposition that Section 301 applies to suits impugning the existence and validity of a labor agreement. See, Notice of Removal at p. 3. However, this is irrelevant to the issue of whether the claim is preempted by Section 301 and therefore subject to removal.

a claim for fraud in the inducement does not require interpretation of a collective bargaining agreement, it is not preempted by Section 301(a), and may be brought in either state or federal court. International Brotherhood, at 774.

The Ninth Circuit Court of Appeals addressed the exact issue presented here and held that a claim for fraudulent inducement was not preempted by Section 301. Operating Engineers Pension Trust v. Wilson, 915 F.2d 535 (9th Cir. 1990).[3] The Court reasoned that although a tort action for fraud may involve interpreting the same set of facts as a Section 301 action, this does not require preemption. Because a claim for fraud in the inducement does not require reference to the collective bargaining agreement, it is not preempted by Section 301. Operating Engineers, at 539; International Brotherhood, at 774; See also, Walton v. UTV of San Francisco, Inc., 776 F. Supp. 1399 (N.D. Cal. 1991)(Section 301 does not preempt fraud and misrepresentation claims); DeLapp v. Continental Can Co., 868 F.2d 1073 (9th Cir. 1989)(affirmed

---

[3] Cothron cites Operating Engineers Pension Trust v. Wilson but misstates that the Court held that Section 301 did preempt a claim of fraud in the execution. See, Notice of Removal, p. 4. The Court in Operating Engineers specifically stated that it was not addressing the issue of whether a claim for fraud in the execution was preempted, but instead only addressed the fraud in the inducement claim. Operating Engineers, at 537.

determination on merits of fraud claim even though breach of contract claim was preempted by Section 301).

The Eleventh Circuit Court of Appeals has also held that a claim for fraudulent inducement is not preempted by Section 301. Varnum v. Nu-Car Carriers, Inc., 804 F.2d 638 (11th Cir. 1986). The Court recognized that:

> the complaint did not go to a term of employment covered by the collective bargaining agreement. Instead, the complaint involved Nu-Car's conduct prior to the appellant's accepting employment.

Varnum, at 640 (emphasis added). Accordingly, preemption was not applicable.[4]

Just as in Varnum, this action involves conduct which occurred prior to the existence of an applicable collective bargaining agreement. Plaintiffs seek recovery for the damages caused by Cothron's statement that the Assumption Agreement signed by Neu-Jo would only apply to one worker and that Cothron would not attempt

---

[4]Cothron cites four cases for the proposition that Section 301 preempts claims for fraud and misrepresentation. See, Notice of Removal, p. 4. However, these cases are distinguishable from the instant case in that these cases involved claims made by employees who were covered by a collective bargaining agreement who suffered an adverse employment decision. Here the Plaintiffs are employers -- not employees -- and are not seeking to enforce rights or recover benefits set forth in the collective bargaining agreement.

to unionize Neu-Jo's workforce. The Plaintiffs' state law claims do not involve interpretation of the collective bargaining agreement for two reasons: (1) both Cothron and the Plaintiffs agree that the terms of the collective bargaining agreement apply to all of Neu-Jo's employees within the trade jurisdiction; and (2) Plaintiffs allege that Cothron misrepresented the terms and effect of the Assumption Agreement, attached to the Complaint as Exhibit "A", not the collective bargaining agreement. Cothron states in his Notice of Removal that "[t]he Assumption Agreement is not limited to one welder whose employment Neu-Jo contends was its sole inducement for signing." Notice of Removal, p. 4. Accordingly, the gravamen of the Plaintiffs' complaint is the validity of the Assumption Agreement and not an interpretation of the collective bargaining agreement. Thus, the Plaintiffs' claims are not preempted under Section 301.

III. The Defendant's Notice of Removal is untimely and therefore the case must be remanded to state court.

Notice of removal of a civil action or proceeding must be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading. 28 U.S.C. § 1446(b)(emphasis added). This thirty-day time period is a strictly applied rule of procedure that may not be extended by the

court. Liebig v. Dejoy, 814 F. Supp. 1074, 1076 (M.D. Fla. 1993).

The Middle District Court of Florida has held that the language "or otherwise" means that proper formal service is not required to put the defendant on notice of a possible removal issue (the "receipt rule"). IMCO USA, Inc. v. Title Ins. Co. of Minnesota, 729 F. Supp. 1322 (M.D. Fla. 1990). Once the defendant receives a copy of the complaint, the thirty day removal period is triggered. IMCO USA, Inc., at 1323; Lindley v. DePriest, 755 F. Supp. 1020 (S.D. Fla. 1991).

Plaintiffs' counsel forwarded a copy of the Complaint to the Defendant's counsel on August 18, 1998. On information and belief, the Plaintiffs assert that Defendant's counsel then forwarded a copy of the Complaint to Cothron.[5] Thus, Cothron had until September 17, 1998 to file his Notice of Remand. Cothron actually filed his Notice of Remand six days later on September 23, 1998. Accordingly, the Notice of Remand is untimely and this action must be remanded to the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida.

---

[5] To confirm this belief, on October 6, 1998, Plaintiffs served a single interrogatory upon Cothron to determine the exact date upon which he received a copy of the Complaint. The Plaintiffs will file the answer to that interrogatory as soon as it is received.

CONCLUSION

The Plaintiffs' claims are not subject to "complete preemption" necessary to establish federal question jurisdiction required for removal. Additionally, removal is inappropriate because the notice of removal has been untimely filed. Consequently, this action must be remanded to the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida.

DAVID W. ADAMS
Florida Bar No. 892416
DENISE L. WHEELER
Florida Bar No. 0017809
MACFARLANE FERGUSON &
MCMULLEN
P.O. Box 1531
Tampa, FL 33601
(813) 273-4200
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by U.S. mail this 23th day of October, 1998 to Tobe Lev, Egan, Lev & Siwica, P.A., P.O. Box 2231, Orlando, Florida 32802.

Attorney

MACFARLANE FERGUSON & MCMULLEN

ATTORNEYS AND COUNSELORS AT LAW

900 HIGHPOINT CENTER
106 EAST COLLEGE AVENUE
TALLAHASSEE, FLORIDA 32301
(850) 681-7381 FAX (850) 681-0281

400 NORTH TAMPA STREET, SUITE 2300
P O. BOX 1531 (ZIP 33601)
TAMPA, FLORIDA 33602
(813) 273-4200 FAX (813) 273-4396

625 COURT STREET
P. O. BOX 1669 (ZIP 33757)
CLEARWATER, FLORIDA 33756
(813) 441-8966 FAX (813) 442-8470

IN REPLY REFER TO

Tampa
DWA@macfar.com

August 18, 1998

Tobe Lev, Esq.
Egan, Lev & Siwica, P.A.
P.O. Box 2231
Orlando, Fl 32802

Re: Neu-Jo Industrial, Inc.
vs. Steve M. Cothron

Dear Mr. Lev:

Please find enclosed with this letter a courtesy copy of the Complaint we have filed in the Tenth Judicial Circuit, in and for Polk County, Florida, suing Stephen M. Cothron personally for the fraud that he perpetrated on Neu-Jo Industrial.

Please let me know whether you will accept service of this Complaint within the next 10 days 5, or whether we should proceed with service against Mr. Cothron.

Very truly yours,

David W. Adams

DWA/sab
Enc.

cc: E. John Dinkel III, Esq.
Mr. Jack Jones

EXHIBIT A