UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RACHEL MOLTNER,

Plaintiff,

STARBUCKS COFFEE COMPANY
a/k/a STARBUCKS CORPORATION,

Defendant.

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08 Civ. 9257 (LAP) (AJP)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND PURSUANT TO 28 USCS § 1447(c)

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The plaintiff, RACHEL MOLTNER, respectfully submits this memorandum of law in support of her motion to remand this action to State Court, in New York Supreme Court, New York County ("State Court"), pursuant to 28 U.S.C. § 1447(c).

PRELIMINARY STATEMENT

This action was commenced in State Court by filing a Summons and Complaint on July 31, 2008 (Exhibit 'A')[1]. The defendant STARBUCKS COFFEE COMPANY a/k/a STARBUCKS CORPORATION ("defendant" or "Starbucks") was served via the Secretary of State pursuant New York State Business Corporation Law § 306 and personally served and received the complaint on August 1, 2008 (Exhibit 'B'). Despite the 30-day deadline to remove under 28 U.S.C. § 1446(b), Starbucks did not serve and file its Notice of Removal until 90 days later, on October 29, 2008 (Exhibit 'H').

While there appears to be diversity of parties, as the plaintiff resides in New York and defendant is a Washington State corporation based in Seattle, Washington, and there is no question that the amount in controversy exceeds $75,000, the Court should remand this action as defendant did not timely remove it, as required by 28 U.S.C. § 1446(b).

STATEMENT OF FACTS

Plaintiff commenced this action in State Court on July 31, 2008 by filing a Summons and Complaint alleging that plaintiff was severely burned and sustained various other specified injuries as result of the defendant's negligence (Exhibit 'A'). Defendant was personally served by delivering a copy of the summons and complaint

[1] Exhibit references are to the Declaration Conveying Exhibits of David Tolchin.

to the manager of the Starbucks store where the accident took place, the next day, August 1, 2008 (Exhibit 'B'). The Defendant was also served by delivering a copy of the summons and complaint to the Secretary of State pursuant to New York State Business Corporation Law § 306 (Exhibit 'B').

With respect to plaintiff's injuries, the complaint is not "boilerplate". Rather, plaintiff alleges the following injuries, which are specific to her case:

> As a result of the defendant's negligence, plaintiff suffered severe and permanent personal injuries, including second and third degree burns to her body, including her left ankle and foot; plaintiff required skin graft surgery with a donor site at the hip; cosmetic deformity; scarring; lower back injury; fractured sacrum; bedsores set in; right leg pain and radiculopathy; herniated discs; plaintiff was required to use a walker and still uses a cane; was required to be hospitalized from February 19, 2008 to March 25, 2008, and was then required to be in a rehabilitation facility until April 17, 2008; extreme pain and suffering; mental anguish and distress; anxiety; emotional distress; difficulty walking; and plaintiff has been otherwise damaged, all of which damages are permanent in nature and continuing into the future.

(Exhibit 'A', ¶¶ 9 & 10).

As required by statute, the complaint did not set forth an *ad damnum* clause stating the dollar value amount sought from the jury. *See* NEW YORK CIVIL PRACTICE LAW & RULES ("CPLR") § 3017(c). Nevertheless, the alleged injuries alone establish that the amount in controversy far exceeds $75,000.

On August 26, 2008, defendant served its answer (Exhibit 'C') and a Demand for Relief pursuant to CPLR § 3017(c). (Exhibit 'D').

On September 4, 2008, plaintiff served a bill of particulars pursuant to CPLR § 3043 (Exhibit 'E'). The bill of particulars repeats the specific allegations of injuries, with the same intense specificity as set forth in the complaint. For example, the bill specified that she was "seen at the emergency room at Lenox hospital; was then transferred to New York Presbyterian Burn Unit where she remained from 2/19/08 to 3/25/08; she was then transferred to Jewish Home & Hospital for rehabilitation from 3/25/08 to 4/17/08." (Exhibit 'E', ¶ 7). In addition to the two-month admission and physical therapy, the plaintiff also underwent physical therapy at H & D Physical Therapy and was treated by four private physicians (Exhibit 'E', ¶ 9).

Upon receipt of complaint, and certainly the bill of particulars, Starbucks could intelligently ascertain that the amount in controversy exceeded $75,000. The complaint and the bill of particulars put the defendant on ample notice that the plaintiff sustained significant and painful burns, required intense and long-lasting burn treatment and medical attention, was confined to the New York Presbyterian Burn Unit for more than a month, from February 19th to March 25th, 2008; that she remained hospitalized until April 17, 2008, required additional medical care thereafter, and was permanently disfigured. It also alleges that as a result of defendant's negligence, she suffered a fractured sacrum, bedsores, and herniated discs—any one of these condition value far in excess of $75,000.

On or about September 12, 2008, defendant served various CPLR discovery demands, including a demand for a bill of particulars, even though plaintiff had already served a bill of particulars. Plaintiff responded to all of defendant's demands, and

stated that she was seeking damages in an amount not to exceed $3,000,000 (Exhibit 'F' & 'G').

Despite ample notice from the outset—as set forth in plaintiff's July 31, 2008 initial pleading—that the value of plaintiff's alleged injuries far exceeded $75,000, defendant sat on its rights until long after the 30-day removal deadline expired. In fact, defendant did not file its notice of removal until October 29, 2008, which was 90 days after receiving the complaint, and over 50 days after receiving plaintiff's September 4, 2008 bill of particulars (Exhibit 'H').

Because the Notice of Removal was untimely filed pursuant to 28 U.S.C. § 1446(b), plaintiff now moves for an order of remand to State Court.

ARGUMENT

DEFENDANT'S NOTICE OF REMOVAL IS UNTIMELY UNDER 28 U.S.C § 1446(b) AS THE COMPLAINT PUT DEFENDANT ON AMPLE NOTICE THAT THE AMOUNT IN CONTROVERSY EXCEEDS $75,000

The Court should remand this action to State Court as the defendant's Notice of Removal was untimely served and filed. The complaint, as well as the first bill of particulars, makes readily apparent the amount in controversy exceeds $75,000.

Title 28 U.S.C. § 1446(b) provides in pertinent part that "[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based…" *Id.* (Emphasis added).

"Removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand." *Leslie v. BancTec Serv. Corp.*, 928 F. Supp. 341, 347 (S.D.N.Y. 1996); *see also Zerafa v. Montefiore Hosp. Hous. Co.*, 403 F. Supp. 2d 320, 327 (S.D.N.Y 2005). "Removal jurisdiction must be strictly construed, both because the federal courts are courts of limited jurisdiction and because removal of a case implicates significant federalism concerns." *Tisdale v. A.G. Edwards & Sons (In re NASDAQ Market-Makers Antitrust Litig.)*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996), citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109, 61 S. Ct. 868 (1941) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined").

"While 28 USCS §§ 1441 and 1446 permit removal to federal court in certain circumstances, 28 USCS § 1447(c) allows for remand on the basis of any defect in the removal procedure or for lack of subject matter jurisdiction." *Zerafa*, 403 F. Supp. at 327, citing *LaFarge Coppee v. Venezolana De Cementos, S.A.C.A.*, 31 F.3d 70, 72 (2d Cir. 1994).

As the removing party here, the defendant has the burden of proving that it has met the requirements for removal. *See Codapro Corp. v. Wilson*, 997 F. Supp. 322, 325 (E.D.N.Y. 1998), quoting *Avon Prods. v. A/J Pshp.*, 1990 U.S. Dist. LEXIS 2186, 89 Civ. 3743/8032, 1990 WL 422416, at *1 (S.D.N.Y. March 1, 1990). "There is nothing in the removal statute that suggests that a district court has 'discretion' to overlook or excuse prescribed procedures." *Id.* at 325. A removing party, therefore, must not only demonstrate a jurisdictional basis for removal, but also demonstrate the necessary

compliance with the statutory removal requirements." *Polesky v. A.C. & S., Inc.*, 1998 U.S. Dist. LEXIS 14394, *5 (S.D.N.Y. 1998).

Starbucks cannot demonstrate that its removal was timely under § 1446(b). It received the initial pleading on August 1, 2008, but did not file its notice of removal until October 29, 2008—which was 59 days late.

In an attempt to cure this jurisdictional defect, Starbucks may attempt to argue that it was unable to ascertain from the face of the complaint whether the amount in controversy exceeded $75,000. But that argument is belied by common sense. Any sophisticated attorney knows the reasonable value of cases with similar injury allegations will exceed a controversy amount of $75,000, particularly attorneys such as defense counsel here who have represented Starbucks in the past. *See, e.g., Griffin v. Starbucks Corp.*, 52 A.D.3d 250, 859 N.Y.S.2d 176 (1st Dep't 2008) (plaintiff given choice to reduce jury verdict totaling $300,001 for burn due to hot coffee spill on leg to $76,000, or have new trial on future pain and suffering). Moreover, the injuries in our case are far more substantial than those suffered by the plaintiff in *Griffin*.

A litigation-savvy corporation such as Starbucks, or at least its insurer, can reasonably appreciate the amount in controversy based on our plaintiff's complaint alone. Even a layperson can as well. Indeed, in the world-famous McDonalds' Coffee Case, which was widely publicized, the jury awarded the 79-year-old plaintiff $160,000 (after reduction for comparative negligence) in compensatory damages, and the trial court upheld $480,000 in a punitive damages award reduced from $2.7 million. *See Liebeck v. McDonalds Restaurants P.T.S., Inc.*, No. D-202 CV-93-02419, 1995 WL 360309

(Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994), reduced 1994 WL 16777706 (Trial Order) (Sept. 19, 1994).

Stefenescu v. City of New York, 31 A.D.3d 428, 819 N.Y.S.2d 49 (2d Dep't 2006) highlights the seriousness of burn injuries. In *Stefenescu,* treatment for the plaintiff's burn injuries required minimal hospitalization, standard care, did not require skin grafts or surgery, and at the time of trial, no scarring was visible. *Id.* at 429, 819 N.Y.S.2d at 50. Notwithstanding, the jury awarded $650,000 for past pain and suffering. *Id.* at 429, 819 N.Y.S.2d at 50. The trial court reduced this amount to $150,000, but on appeal the Appellate Division increased the bottom line on that category of damages to $250,000, rather than $150,000 "in light of the great deal of pain suffered by the plaintiff for a short time after the accident." *Id.* at 429-30, 819 N.Y.S.2d at 50. *See also Salter v. Deaconess Fam. Med. Ctr.*, 267 A.D.2d 976, 791 N.Y.S.2d 586 (4th Dep't 1999) (holding $125,000 awarded for past pain and suffering was reasonable compensation where the plaintiff sustained second degree burns to leg and foot from a hot washcloth, requiring three months of treatments including debridement); *Goady v. Utopia Home Care Agency*, 305 A.D.2d 540, 759 N.Y.S.2d 183 (2d Dep't 2003) ($200,000 past pain and suffering jury award reduced on appeal to $125,000, where plaintiff sustained a second-degree burn from hot iron and five-centimeter keloid scar that was surgically removed, and no skin grafts were required).

Were our plaintiff's complaint to have omitted everything but her second and third degree burns to her foot and ankle, it would nevertheless have been sufficient to establish that the amount in controversy exceeded $75,000. When plaintiff's skin

grafting, fractured sacrum, radiculopathy, herniated discs, and two month continuous hospitalization is factored in, there can be no doubt that the jurisdictional amount was satisfied.

In the case at bar, the plaintiff's injuries as alleged are substantially more serious than those of the plaintiffs in cases mentioned above, *Stefenescu v. City of New York*; *Salter v. Deaconess Fam. Med. Ctr.*; and *Goady v. Utopia Home Care Agency*. None of the plaintiffs in those cases underwent a skin graft or required more than minimal hospitalization. In our case, the plaintiff required a skin graft with a donor site at her hip and one month of hospitalization in a burn-treatment facility along with another month of hospitalization in a physical rehabilitation facility. In addition to the burn related injuries, she also suffered a painful fracture to her sacrum along with herniated discs. Reasonably minds cannot differ on the fact that the amount in controversy exceeds $75,000, if only for the past pain and suffering. When one considers the likely medical expenses, special damages and future pain and suffering involved, the only conclusion is that plaintiff would more than meet the jurisdictional threshold.

Accordingly, Starbucks did not need an explicit "*ad damnum*" statement to have notice that the amount in controversy exceeded $75,000.

The Notice of Removal must be filed with thirty days of receiving the initial pleading where the pleading enables the defendant to intelligently ascertain removability. *Burr v. Toyota Motor Credit Co.*, 478 F. Supp. 2d 432, 436 (S.D.NY. 2006), citing *Whitaker v. American Telecasting, Inc.*, 261 F.3d 196, 205-206 (2d Cir. 2001). "Where no amount is specified [in the initial pleading], this fact alone does not bar a finding that

the jurisdictional amount has been met." *Id.* at 436. "In such cases, courts examine the nature of the claims, factual allegations within the pleadings, and the record outside the pleadings to determine the amount in controversy." *Id.* at 438. In a notice of removal, the removing party need only show that there is a reasonable probability that that amount in controversy exceeds $75,000. *Id.* at 439 (Holding that where no amount was specified in complaint, defendant nonetheless satisfied burden of showing that there was a reasonable probability that that amount in controversy exceeds $75,000).

Our case is unlike the various recent decisions issued by Eastern District Magistrate Judge Orenstein concerning a removing party's burden in establishing in its Notice of Removal that the amount in controversy exceeds $75,000 where CPLR § 3017(c) bars a plaintiff from alleging a specific dollar value in the complaint. *See, e.g., Herrera v. Bird*, 2007 U.S. Dist. LEXIS 71564 (E.D.N.Y. Sept. 26, 2007). In those decisions, Magistrate Judge Orenstein held that the removing party failed to meet its burden where the complaint contained no more than "boilerplate" recitations of the alleged personal injuries which were not tailored to the facts of the case, and for that reason the court could not "conclude from the boilerplate that the amount in controversy necessarily exceeds $75,000." *Id.*

In our case, however, the enormity of plaintiff's injuries is clear from the complaint, which was not "boilerplate". Although the complaint by statute did not state a dollar amount, that fact does not bar a finding that the jurisdictional amount has been met. *Burr v. Toyota Motor Credit Co.*, 478 F. Supp. 2d 432, 438 (S.D.NY. 2006) (SAS) is a good example. There, the defendant argued that despite the lack of a damage amount, it

was evident from the face of the complaint that the amount of the plaintiffs' claim exceeded $75,000, and the court found the defendant's argument on this point persuasive. *Id.* at 439 (remanding on other grounds). The *Burr* complaint, which alleged serious and permanent personal injuries sustained by a relatively young person, and among other factors, a total or near-total disability enduring longer than three months, showed a "reasonable probability that the claim [was] in excess of the statutory jurisdictional amount." *Id.* at 439. The complaint in our case alleged plaintiff was admitted to the hospital in a burn unit and in rehabilitation for more than two months, and sustained painful burns and fractures—all of which injuries put a higher value at stake.

Two cases from the federal district court in Kentucky, a state which has a statute similar to New York's CPLR § 3017(c) that prohibits the plaintiff from specifying a dollar amount, *McCraw v. Lyons*, 863 F. Supp. 430 (W. D. Ky. 1994) and *Johnson v. Hartford Fire Ins. Co.,* 2008 U.S. Dist. LEXIS 62599 (W. D. Ky. Aug. 14, 2008), deal with the same issue as the one at bar. In both cases, the defendants filed for removal more than 30 days after receipt of the initial pleading. In each case, the court held that the notice of removal was untimely as each defendant could have ascertained and shown that the amount in controversy more likely than not exceeded the statutory jurisdictional amount. *McCraw* at 435; *Johnson,* 2008 U.S. Dist. LEXIS 62599 at *13.

If the Court does not immediately remand, it should set this matter down for a hearing to determine the good faith belief of the defendant and its counsel that

substantive allegations of the complaint alone did not satisfy the $75,000 jurisdictional threshold.

CONCLUSION

It is respectfully requested that for the reasons set forth herein the Court should remand this action to State Court, or at the very least set this matter down for a hearing as to defendant's actual belief.

Dated: New York, New York
November 12, 2008

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