

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STEPHEN J. GRABOWSKI, JR., and)
CONNIE GRABOWSKI,)
)
Plaintiffs,)
)
v.) C.A. No. 02-1668-SLR
)
J.J. WHITE, INC., THE PLUMBERS AND)
PIPE FITTERS LOCAL NO. 74 OF THE)
UNITED ASSOCIATION OF JOURNEYMAN)
AND APPRENTICES OF THE PLUMBING)
AND PIPEFITTING INDUSTRY OF THE)
UNITED STATES AND CANADA, AFL-CIO)
JACK WEBB, WILLIAM MANGLER, DAVID)
SMITH, and JOSEPH ZIEMBA,)
)
Defendants.)

MEMORANDUM ORDER

At Wilmington this 2d day of May, 2003, having reviewed the various pending motions;

IT IS ORDERED that, for the reasons that follow, the motion to dismiss filed by defendant The Plumbers and Pipefitters Local No. 74 of the United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("Local No. 74") (D.I. 17) is denied as moot, plaintiffs' motions to amend and to remand (D.I. 31, 32) are granted and defendant's motion for sanctions (D.I. 41) is granted to the extent described below.

1. **Background.** Plaintiffs Stephen J. Grabowski, Jr. and Connie Grabowski filed suit in the Superior Court of the State of Delaware in October 2002. The complaint raised numerous

claims against a number of defendants, all arising out of an incident which occurred in October 2000. Plaintiffs allege that on October 16, 2000, individual defendants Mangler, Smith and Ziemba attacked plaintiff Stephen Grabowski on the job site, causing plaintiff physical injuries, mental anguish, medical expenses, loss of earning capacity and, as to plaintiff Connie Grabowski, loss of consortium. Individual defendant Webb is alleged to have witnessed the attack and to have reported it falsely to the employer, defendant J.J. White, Inc., and to defendant Local No. 74. With respect to defendant Local No. 74, the complaint includes a count (Count XIII) of negligence, asserting Local No. 74:

- a. Failed to take any precaution to prevent the attack;
- b. Failed to warn Plaintiff Grabowski that it possessed information that an attack was imminent;
- c. Failed to follow the mandates of its constitution and by-laws to encourage a safe work environment;
- d. Failed to provide a safe environment for Plaintiff Grabowski, a union member, when it knew or should have known that an attack was imminent;
- e. Failed to take the appropriate precautions after the union member in a local laborer's union was similarly attacked;
- f. Failed to warn and instruct its union members who were assigned to work for the Defendant Employer that such conduct would not be condoned.

(D.I. 17, Ex. 1) Plaintiffs also asserted a count (Count XIV) of negligent infliction of emotional distress against Local No. 74.

2. Defendant Local No. 74 removed the case to this court on or about December 6, 2002 based on the position that plaintiffs'

negligence claims against it were not based on state tort law but, in reality, implicated the duty of fair representation. See Johnson v. United Food and Commercial Workers, 828 F.2d 961, 967 (3d Cir. 1987). This court has original jurisdiction over claims by union members alleging that a union or its officials breached the duty of fair representation. Vaca v. Sipes, 386 U.S. 171 (1961); Breining v. Sheet Metal Workers Int'l Association, Local Union No. 6, 493 U.S. 67, 83 (1989). On or about December 12, 2002, defendant Local No. 74 filed the pending motion to dismiss arguing, inter alia, that plaintiffs' complaint as it applied to Local No. 74 was barred by the six-month statute of limitations applicable to breach of duty of fair representation claims. See Del Costello v. Int'l Brotherhood of Teamsters, 462 U.S. 151 (1983). (D.I. 17)

3. Rather than respond either to the removal or to the motion to dismiss, plaintiffs filed a motion to amend the complaint to assert intentional tort claims against defendants Local No. 74 and Webb. (D.I. 31) Plaintiffs also filed a motion to remand, based on the new theories of liability. (D.I. 32)

4. Defendant Local No. 74 has argued in response that it would be unfair to permit amendment, after having gone to the trouble of removing the negligence actions as originally styled to this court and of filing a motion to dismiss. (D.I. 35) Defendant follows with a motion to impose sanctions under Fed. R.

Civ. P. 11. (D.I. 41)

5. Standard of Review.

a. Removal. The exercise of removal jurisdiction is governed by 28 U.S.C. § 1441(a). The statute is strictly construed, requiring remand to state court if any doubt exists over whether removal was proper. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941). A court will remand a removed case "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). The party seeking removal bears the burden to establish federal jurisdiction. Steel Valley Auth. v. Union Switch & Signal Div. Am. Standard, Inc., 809 F.2d 1006 (3d Cir. 1987); Zoren v. Genesis Energy, L.P., 195 F. Supp. 2d 598, 602 (D. Del. 2002).

The existence of a federal question rests upon the allegations of a "well-pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386 (1987). A plaintiff, therefore, is described as the "master of the complaint" and a defendant may not remove a state law claim, even on federal preemption grounds, if the plaintiff pleads only state law claims. Id. The doctrine of "complete preemption," however, stands as an exception to the well-pleaded complaint rule. It holds that "once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its

inception, a federal claim, and therefore arises under federal law." Id. at 393.

b. Amendment. "A party may amend the party's pleading once as a matter of course at anytime before a responsive pleading is served. . . ." Fed. R. Civ. P. 15(a). "Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party. . . ." Id. Although motions to amend are to be liberally granted, a district court "may properly deny leave to amend where the amendment would not withstand a motion to dismiss." Centifanti v. Nix, 865 F.2d 1422, 1431 (3d Cir. 1989). Courts may also deny leave to amend where they find "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment. . . ." Foman v. Davis, 371 U.S. 178, 182 (1962).

6. **Conclusions.** The court finds that the case was properly removed based on federal question jurisdiction, 28 U.S.C. § 1331.

7. The court further finds, however, that plaintiffs' motion to amend shall be granted and the case remanded to state court for further proceedings, based on plaintiffs' right to amend before an answer is filed and on the nature of the claims, which deserve a full and fair hearing.

8. Given plaintiffs' failure to respond to either the

removal or the motion to dismiss, plaintiffs shall pay to defendant Local No. 74 \$2000 as a sanction for this unnecessary stage of the litigation.

Sue L. Robinson
United States District Judge