

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PROVIDENT PIONEER PARTNERS, L.P.,)
)
Plaintiff,)
)
v.) C.A. No. 01-781-SLR
)
ELECTRIC & GAS TECHNOLOGY INC.,)
and PIONEER POWER INC.,)
)
Defendants.)

MEMORANDUM ORDER

I. INTRODUCTION

Plaintiff Provident Pioneer Partners, L.P. ("PPP") initiated this breach of contract action in Delaware state court alleging defendants Electric Gas & Technology, Inc. ("EGT") and Pioneer Power, Inc. ("PPI") failed to perform certain obligations made pursuant to an amended agreement stemming from a settlement of litigation¹ in Texas. As a result of EGT's and PPI's alleged

¹The parties have a history of protracted litigation and unconsummated agreements. (D.I. 16) Apparently this litigation emanates from a 1995 asset purchase agreement signed between Nathan Mazurek as president of American Circuit Breaker Corporation and Superior Technology, a wholly owned subsidiary of EGT. PPP is a limited partnership created by Mazurek. In March 1997, because of failures to perform certain obligations, suit was instituted in Texas state court, which was subsequently transferred to the United States District Court for the Northern District of Texas, Dallas Division. By December 1997, the District Court entered an order dismissing the litigation without prejudice because the parties had entered into a settlement. The following terms were included in the settlement: 1) ACB assigned its obligations to PPP; 2) PPI was created as a vehicle to distribute ACB's assigned assets between PPP and EGT; and 3) it was agreed that if settlement failed suit could be initiated only

failure to perform, PPP sought to rescind the agreement as well as its obligations to perform. (D.I. 1) In response, EGT removed the action to this court and then moved to transfer to the United States District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. § 1391 and 1404(a). (D.I. 1, 3) EGT asserts Texas is the more appropriate forum since all events related to the case arose in Texas and almost all witnesses reside there. (D.I. 3)

In response, PPP moves for remand (D.I. 7) arguing diversity jurisdiction is lacking as there are residents of Delaware on both sides of the litigation. EGT contends diversity is present because PPI was only joined in the litigation to avoid diversity. EGT argues PPI is a shell corporation controlled by PPP and is not a true or indispensable party to the litigation. EGT argues PPI's failure to file any responsive pleading in this case further evinces that it is not a true party. (D.I. 16) In reply, PPP asserts EGT has offered nothing to support its conclusory allegations against itself or PPI. (D.I. 17) Moreover, PPP asserts PPI is a necessary party to which PPP is obligated to transfer all of its equity. This lawsuit was filed to declare that PPI could not enforce its contractual rights

in the United States District Court for the Northern District of Texas. (D.I. 16, Ex. E) In 1998, another settlement was reached to resolve outstanding issues. In 1999, the parties entered a third agreement. As this lawsuit demonstrates, the matter remains unresolved.

against PPP. (See D.I. 16, Ex. G)

II. DISCUSSION

28 U.S.C. § 1447(c) provides “[i]f at any time before final judgment it appears that the case was removed [from state court] improvidently and without jurisdiction, the district court shall remand the case.” According to the Third Circuit Court of Appeals, it “is settled that the removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand.” Steel Valley Authority v. Union Switch Signal Division, 809 F.2d 1006, 1010 (3d Cir. 1987). In determining whether remand based on improper removal is appropriate, the court “must focus on the plaintiff’s complaint at the time the petition for removal was filed,”² and assume all factual obligation therein as true. Id. The court must determine whether nominal or fraudulently joined parties exist that can be disregarded or if there are indispensable parties that must be included. Id. Moreover, [w]hen a non-diverse party has been joined as a defendant, then in the absence of a substantial federal question the removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined.” Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992). The removing party bears a “heavy

²Id; Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3d Cir. 1985).

burden of persuasion.” Id., quoting Steel Valley, 809 F.2d at 1010.

According to the Third Circuit, joinder is fraudulent when there is “no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action” or to “seek a joint judgment.” Batoff, 977 F2d at 851. A federal court must find joinder proper and remand to state court if “there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants.” Id.

III. ANALYSIS

Applying these principles to this action, the court finds there is a lack of complete diversity. The undisputed evidence reflects PPP is a limited partnership incorporated in Delaware. (D.I. 10) The citizenship of a limited partnership, for diversity purposes, is the citizenship of each of its partners, both general and limited. Carden v. Arkoma Assocs., 494 U.S. 185, 195-96 (1990). The general partner of PPP is Provident Canada Corporation (“PCC”). (D.I. 10, Ex. A) Since PCC is incorporated in Delaware (D.I. 10, Ex. B), PPP is a citizen of Delaware. On the other side, EGT is incorporated in and therefore a citizen of Texas. (D.I. 3) As a Delaware corporation, PPI is a Delaware citizen. (D.I. 10, Ex. C)

Despite EGT's arguments that PPI is not an indispensable party and was fraudulently joined, the court finds the grounds for fraudulent joinder under Bartoff are not present. The agreement reflects there are contractual obligations among the parties that, if not consummated, could create claims for relief. (D.I. 10, Ex. G; F) Further, EGT has offered no affirmative proof to demonstrate the scheme or sham alleged. The absence of any responsive pleading by PPI does nothing more than suggest neglect or inadvertence. The Supreme Court has interpreted the "diversity statute to require 'complete diversity of citizenship.'" Carden, 494 U.S. at 187. Herein, complete diversity is absent.

IV. CONCLUSION

For the reasons stated, at Wilmington this 6th day of September, 2002;

IT IS ORDERED that:

1. Plaintiff PPP's motion³ to remand is granted. (D.I. 7)
2. This matter is remanded to the Superior Court of the State of Delaware, New Castle County.
3. Defendant EGT's motions to transfer and extend time are denied at moot. (D.I. 3, 15)

Sue L. Robinson
United States District Judge

³The request for attorney's fees is denied (D.I. 8).