

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431
(MJD)

This Document also relates to:

Leonard Anderson v. Bayer Corporation et al.,

Case No. 03-2933

Robert A. Pritchard, Christopher E. Fitzgerald and Robert F. Wilkins, Pritchard Law Firm, PLC and Timothy W. Porter, Patrick C. Malouf and David L. Stringe, Jr. Porter & Malouf for and on behalf of Plaintiffs.

C. Alleen McLain, Watkins & Eager PLLC for and on behalf of Bayer Corporation.

This matter is before the Court upon Plaintiffs' motion for remand. Bayer Corporation ("Bayer") opposes the motion, arguing that this Court has diversity jurisdiction over Plaintiffs' claims.

Background

This action was originally filed in Mississippi state court on behalf of thirty-two plaintiffs, most of which are citizens of Mississippi. Plaintiffs allege that they were prescribed Baycol, and that they have suffered harm, injury and damages as a result of ingesting Baycol. Complaint ¶ 14. They have asserted claims of strict liability, negligence, fraud, negligent misrepresentation, breach of warranty and civil conspiracy against Bayer Corporation, Bayer AG, and GlaxoSmithKline. The basis for these claims is that Baycol was a defective drug that carried serious health risks, and that the defendants downplayed and understated the health hazards, *Id.* ¶ 9, were aware of the

serious health risks yet failed to withdraw the drug from the market and continued to promote and market Baycol with inadequate warnings, ¶ 10, and misrepresented facts regarding Baycol. ¶ 11. Plaintiffs have also brought medical negligence claims against their treating physicians, alleging that the physicians knew or should have known that substantial health risks were associated with Baycol yet prescribed Baycol to Plaintiffs. Id. ¶ 63. Plaintiffs further allege that the physicians should have observed Plaintiffs more closely, detected obvious side effects sooner, and discontinued Baycol immediately upon detection of the side effects. Id. ¶¶ 63 and 64.

Bayer Corporation timely removed this action to the United States District Court, District of Mississippi asserting subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). In the removal petitions, Bayer asserts that the non-diverse defendants, the treating physicians, were fraudulently joined.

Standard

Remand to state court is proper if the district court lacks subject matter jurisdiction over the asserted claims. 28 U.S.C. § 1447(c). In reviewing a motion to remand, the court must resolve all doubts in favor of remand to state court, and the party opposing remand has the burden of establishing federal jurisdiction by a preponderance of the evidence. In re Business Men's Assurance Co. of America, 992 F.2d 181, 183 (8th Cir. 1983)(citing Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3rd Cir. 1987) cert. dismissed 484 U.S. 1021 (1988)).

“Joinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendants.” Wiles v.

Capitol Indemnity Corporation, 280 F.3d 868, 870 (8th Cir. 2001). The burden is on the removing party to show that there is no possibility that the plaintiff will be able to state a cause of action against the resident defendant or that there has been outright fraud in the pleading of jurisdictional facts. Parnas v. General Motors Corporation, 879 F. Supp. 91, 92 (E.D. Mo. 1995). In deciding this issue, the Court may consider the pleadings and supporting affidavits. Id.

It is the Bayer's position that remand is not warranted in this case because Plaintiffs have failed to state a claim against the treating physicians. Bayer argues that the main thrust of the allegations in the Complaint is that the manufacturing defendants misrepresented the safety of Baycol and failed to warn the public of the serious risks associated with Baycol. Bayer argues that based on these allegations, there is no support for the conclusory assertion that the treating physicians knew or should have known of Baycol's risks. Having failed to allege a cause of action against the physicians, Bayer asserts their joinder in this case was fraudulent.

The Court finds that Plaintiffs have failed to state a cause of action against the treating physicians. Reading the Complaint as a whole, it is clear that the main thrust of this action is that the manufacturing defendants misrepresented Baycol's risks and failed to adequately warn of such risks. Plaintiffs have not included any factual assertions in the Complaint to support the conclusory allegations that the treating physicians knew or should have known of Baycol's risks. In addition, this Complaint names thirty-two Plaintiffs yet the Complaint contains no factual allegations specific to any of the named Plaintiffs concerning the medical treatment they received. The Court thus finds that the

allegations against the physicians are conclusory, and that such allegations that will not defeat a finding of fraudulent joinder. See eg. In re: Rezulin Products Liability Litigation, 2003 WL 43356 at *1 (S.D.N.Y. Jan. 6, 2003); In re: Rezulin Products Liability Litigation, 133 F. Supp.2d 272, 295 (S.D.N.Y. 2001); Spier v. Bayer Corp. et al., (In re Baycol Products Litig.), No. 02-4835, MDL 1431 (D. Minn. 2003). See also, Young v. City of St. Charles, Mo., 244 F.3d 623 (8th Cir. 2001)(conclusory allegations not sufficient to withstand motion to dismiss). Based on the allegations contained in the Complaint, the Court finds that there is no reasonable basis in fact and law supporting a claim against the treating physicians.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' motion for remand is DENIED.

Date:

Michael J. Davis
United States District Court