UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:17-cv-80058-ROSENBERG/BRANNON

ADRIENNE FRANSAS *et al.*,

Plaintiffs,

v.

BRENNTAG NORTH AMERICA INC. *et al.*,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR REMAND

THIS CAUSE is before the Court on Plaintiffs' Motion for Remand [DE 12]. The Court has carefully reviewed Plaintiffs' Motion, Defendant's Response in Opposition [DE 43], and Plaintiffs' Reply in Support [DE 50], and is otherwise fully advised in the premises. For the reasons set forth below, Plaintiffs' Motion is GRANTED to the extent that this action is REMANDED to the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida. Plaintiffs' Motion is DENIED to the extent that Plaintiffs shall not recover their fees and costs incurred as a result of the removal of this action.

I. INTRODUCTION AND BACKGROUND

On or about December 8, 2016, Plaintiffs filed a Complaint and Demand for Jury Trial in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida. *See* DE 1-2 at 2–18. According to the Complaint, Plaintiff Adrienne Fransas was exposed to asbestos and asbestiform fibers contained in talc and talcum powders designed, manufactured, sold, or distributed by Defendants between 1967 and 1985, as a result of which she developed peritoneal malignant mesothelioma. Plaintiffs' Complaint contains three counts for negligence, strict liability, and loss

of consortium. The count for negligence is against all Defendants; the count for strict liability is against all Defendants except Publix Super Markets, Inc. ("Publix"). Plaintiffs are Florida citizens. All Defendants in this action are diverse with the sole exception of Publix, a Florida corporation with its principal place of business located in Florida.

On January 17, 2017, Defendant Johnson & Johnson Consumer, Inc. ("JJCI") removed this action to federal court. *See* DE 1. In its Notice of Removal, JJCI asserts that Plaintiffs fraudulently joined Publix to destroy diversity jurisdiction. In support, JJCI attached to its Notice of Removal the Declaration of Cynthia Roberts, a "Category Manager" for Publix, which refutes many of the Complaint's allegations against Publix. *See* DE 1-6.

On January 26, 2017, Plaintiffs filed the Motion for Remand presently before the Court, asserting that Publix was not fraudulently joined and requesting that the Court remand this action and award Plaintiffs their fees and costs incurred as a result of the removal. Because the Court concludes that Publix was not fraudulently joined, this action must be remanded. However, because JJCI's removal was not objectively unreasonable, Plaintiffs shall not recover their fees and costs.

II. LEGAL STANDARD

A defendant may remove a civil action filed in state court to federal court if the action is one over which the federal court has original jurisdiction. 28 U.S.C. § 1441(a). Federal courts have original diversity jurisdiction over civil actions where the amount in controversy exceeds $75,000 and the action is between citizens of different states. 28 U.S.C. § 1332(a)(1). "Diversity jurisdiction requires complete diversity; every plaintiff must be diverse from every defendant." *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998) (citing *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1355 (11th Cir. 1996)).

In the absence of complete diversity, an action may nevertheless be removable if the joinder of the non-diverse party is fraudulent. *See id.* "Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity." *Id.* "Under this doctrine, if a non-diverse defendant is joined for the sole purpose of destroying federal jurisdiction, the court should ignore the presence of the non-diverse defendant." *Harvey v. Geico Gen. Ins. Co.*, No. 14-80078-CIV, 2014 WL 3828434, at *2 (S.D. Fla. Aug. 4, 2014).

> To establish fraudulent joinder, the removing party has the burden of proving [by clear and convincing evidence] that either: (1) there is no possibility that the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.[1] This burden is a heavy one.

Stillwell v. Allstate, 663 F.3d 1329, 1332 (11th Cir. 2011) (internal quotation marks and citations omitted) (brackets in original).

In determining whether the action should be remanded, "the district court must evaluate the factual allegations in the light most favorable to the plaintiff and must resolve any uncertainties about state substantive law in favor of the plaintiff." *Id.* at 1333 (quoting *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997)). In addition to the plaintiff's pleadings, courts consider any affidavits and deposition transcripts submitted by the parties. *See id.* at 1333 n.1; *Legg v. Wyeth*, 428 F.3d 1317, 1321 (11th Cir. 2005). Courts do not, however, "weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law." *Id.* (quoting *Crowe*, 113 F.3d at 1538). "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, the federal court must find that joinder was proper and remand the case to state court." *Crowe*, 113 F.3d at 1538 (quoting *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440 (11th Cir. 1983)). "In other words, '[t]he plaintiff need not have a winning case against the allegedly fraudulent defendant; he need

[1] JJCI asserts only the first of these two types of fraudulent joinder.

only have a possibility of stating a valid cause of action in order for the joinder to be legitimate.'" *Stillwell*, 663 F.3d at 1333 (quoting *Triggs*, 154 F.3d at 1287). To establish such a possibility, the plaintiff need not satisfy federal pleading standards:

> Nothing in our precedents concerning fraudulent joinder requires anything more than conclusory allegations or a certain level of factual specificity. . . . To determine whether it is possible that a state court would find that the complaint states a cause of action, we must necessarily look to the pleading standards applicable in state court, not the plausibility pleading standards prevailing in federal court.

Id. at 1334 (internal quotation marks and citations omitted). Florida Rule of Civil Procedure 1.110(b) establishes the pleading standards applicable in Florida state court and requires only "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief."

III. DISCUSSION

With these principles in mind, the Court has evaluated Plaintiffs' allegations and the Declaration of Cynthia Roberts, and concludes that JJCI has not met its heavy burden of proving there is no possibility that Plaintiffs can state a cause of action for negligence against Publix. This action must therefore be remanded. However, the Court also concludes that JJCI's removal was not objectively unreasonable. Accordingly, Plaintiffs shall not recover their fees and costs.

A. This action must be remanded to state court because JJCI has not shown that joinder of Publix was fraudulent.

As an initial matter, JJCI asserts, and Plaintiffs do not dispute, that Plaintiffs' negligence claim against Publix is governed by Florida Statutes section 774.208(1)(a), which provides:

> In a civil action alleging an asbestos or silica claim, a product seller other than a manufacturer is liable to a plaintiff only if the plaintiff establishes that:
>
> 1. a. The product that allegedly caused the harm that is the subject of the complaint was sold, rented, or leased by the product seller;
>
> b. The product seller failed to exercise reasonable care with respect to the product; and

c. The failure to exercise reasonable care was a proximate cause of the harm to the exposed person.

Under this standard, JJCI argues there is no possibility that Plaintiffs can state a cause of action for negligence against Publix. JJCI relies on the Declaration of Cynthia Roberts, which establishes the following:

- Between 1967 and 1985, Publix did not mine or distribute talc, nor did it design, test, or manufacture talcum powder products for sale in its retail grocery stores. DE 1-6 ¶ 5.

- Between 1967 and 1985, Publix sold finished talcum powder products to consumers, which were designed, tested, and manufactured by other entities. *Id.* ¶ 6.

- Publix does not know the source of the talc that was used in those finished talcum powder products. *Id.* ¶ 7.

- The entities involved in the mining and distribution of talc and the design, testing, and manufacture of the finished talcum powder products allegedly sold by Publix are separate entities from Publix, over which Publix does not exercise control. *Id.* ¶ 8.

- Any talcum powder products sold by Publix were received by Publix in a finished state, complete with packaging. Any such products were not altered by Publix prior to sale of the products to consumers or prior to placement of the products in Publix's stores for sale to consumers. *Id.* ¶ 9.

- Publix exercised no control over the design and manufacture of the finished talcum powder products allegedly at issue in this litigation, nor did Publix provide instructions or warnings to the manufacturer of said products, including such instructions or warnings relative to the alleged defects which allegedly caused injury or damages to the purchasers or users. *Id.* ¶ 10.

- Publix did not have knowledge or information regarding any alleged defects in the finished talcum powder products, which allegedly caused injury or damages to purchasers or users. *Id.* ¶ 11.

- Publix did not create any claimed defect in the finished talcum powder products that allegedly caused injury or damages to purchasers or users. *Id.* ¶ 12.

- Publix did not test the finished talcum powder products prior to sale of the products to consumers or prior to placement of the products in Publix's stores for sale to consumers. *Id.* ¶ 13.

This Declaration refutes many of the allegations in Plaintiffs' Complaint and Plaintiffs have not submitted any affidavits or other evidence in rebuttal. Accordingly, JJCI argues it has proven there is no possibility that Plaintiffs can state a cause of action for negligence against Publix.

However, while the Declaration of Cynthia Roberts refutes many of the allegations in Plaintiffs' Complaint—including the allegation that Publix knew of the dangers posed by Defendants' products—the Declaration does not address what Publix *should have known*. Publix argues, and JJCI does not dispute, that a negligence claim under Florida law may be based not only on what the defendant knew, but also on what the defendant should have known.[2] Rather than argue otherwise, JJCI asserts that "the allegations against Defendants here are based entirely on *actual* knowledge." DE 43 at 13–14 (emphasis added). But this assertion ignores the following allegations against all Defendants, including Publix:

- "Defendants produced, sold and/or otherwise placed into the stream of intrastate and interstate commerce products which Defendants knew **or, in the exercise of ordinary care should have known**, were deleterious and highly harmful to Plaintiff's health and wellbeing . . . ." DE 1-2 at 9, Complaint ¶ 30.

- Before designing, manufacturing, selling and/or distributing their products, to which Plaintiff was exposed, each Defendant knew, **or in the exercise of reasonable care should have known**, that Plaintiff and/or others similarly situated would purchase, use and be exposed to asbestos from their products by inhaling asbestos fibers emitted or released from same. DE 1-2 at 9, Complaint ¶ 31.

- "[E]ach Defendant knew, **or should have known**, that Plaintiff's exposures to their products were harmful and could cause serious injuries including, but not limited to, mesothelioma, asbestosis, lung cancer, ovarian cancer and/or other forms of cancer." DE 1-2 at 9–10, Complaint ¶ 32.

- "Each Defendant also knew, **or should have known**, . . . that exposure to [Defendants' products] could cause severe injury. These facts, known to **or readily ascertainable by** Defendants, made each Defendant's products inherently and unreasonably dangerous . . . ." DE 1-2 at 10, Complaint ¶ 33.

[2] As noted above, the Court resolves any uncertainties about state substantive law in favor of Plaintiffs.

Viewed in the light most favorable to Plaintiffs, these allegations—which are not refuted by the Declaration of Cynthia Roberts—combined with the remaining unrefuted allegations in Plaintiffs' Complaint are sufficient to establish a possibility that Plaintiffs may state a claim for negligence against Publix under Florida law. Plaintiffs' joinder of Publix was therefore proper and this action must be remanded.

B. Plaintiffs are not entitled to fees and costs because JJCI had a reasonable argument in favor of removal.

Plaintiffs seek their fees and costs incurred as a result of the removal of this action. *See* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). Whether to award fees and costs under this section is within the discretion of the trial court. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* at 141. Although this Court ultimately finds jurisdiction lacking, JJCI did have a reasonable basis for removal. *See, e.g.*, *Harvey*, 2014 WL 3828434 at *4 (remanding where defendant had not proved fraudulent misjoinder but denying fees under § 1447(c)); *Trasylol*, 754 F. Supp. 2d at 1338 (same). Plaintiffs therefore are not entitled to fees and costs.

IV. CONCLUSION

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Remand [DE 12] is **GRANTED IN PART and DENIED IN PART** as follows:

1. This Case is **REMANDED** to the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida.

2. Plaintiffs shall not recover their fees and costs incurred as a result of the removal of this action.

3. The Clerk of the Court is directed to **CLOSE THIS CASE**. All pending motions are **DENIED AS MOOT**, all deadlines are **TERMINATED**, and all hearings are **CANCELLED**.

DONE AND ORDERED in Chambers, West Palm Beach, Florida, this 9th day of March, 2017.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to Counsel of Record