

Craig v. A.W. Chesterton Co.

United States District Court for the Southern District of Alabama, Southern Division

May 18, 2023, Decided

CIVIL ACTION NO. 22-00462-JB-B

Reporter

2023 U.S. Dist. LEXIS 87307 *

GLORIA CRAIG, Plaintiff, v. A.W. CHESTERTON COMPANY, et al., Defendants.

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Core Terms

removal, products, vessels, Defendants', military, discovery response, asbestos, exposed, ships, exposure, responses, turbines, ascertained, asbestos-containing, federal official, alleges, deposition, connect, manufactured, asbestos exposure, naval vessel, pipefitter, settlement, aboard, argues

Opinion

[*1] ORDER

This matter is before the Court on Plaintiff, Gloria Craig's Motion to Remand. (Doc. 38). After careful consideration, the Court finds that the Motion is due to be **DENIED**.

I. BACKGROUND

Plaintiff has mesothelioma. (Doc. 1-1). She alleges her disease was caused by exposure to asbestos her ex-husband ("Mr. Craig") brought into their home. (*Id.*). Specifically, Plaintiff alleges Mr. Craig brought home asbestos that got on his clothes while working at Alabama Dry Dock and Shipbuilding Co. ("ADDSCO") in Mobile, Alabama. (*Id.*). Plaintiff claims she was exposed to Mr. Craig's "take-home" asbestos when she did his laundry and performed other household tasks. (*Id.*).

Plaintiff commenced this action in the Circuit Court of Mobile County, Alabama on June 23, 2022. (Doc. 1-1). The Complaint named numerous defendants, including Paramount Global ("Westinghouse") and General Electric Company ("GE"). (*Id.*). Westinghouse removed this action on November 16, 2022 based on "federal officer" jurisdiction under 28 U.S.C. § 1442(a)(1). (Doc. 1). GE joined in the removal on November 18. (Doc. 6).

1

Plaintiff concedes Defendants' removal satisfies the substantive requirements for the exercise of "federal officer" jurisdiction. She **[*2]** moves for remand on the sole ground that removal was untimely under 28 U.S.C. § 1446. (Doc. 38). Plaintiff argues Defendants could have ascertained removability no later than her service of discovery responses on August 29, 2022, such that Defendants' removal more than thirty days thereafter was untimely. (Doc. 38). Westinghouse and GE ("Defendants"), however, argue removal was timely under subsection (b)(3) of § 1446, which allows for removal within thirty days of receipt of "an amended pleading, motion, order or other **paper** from which it may first be ascertained that the case is one which is or has become removable[.]" (Emphasis added). Defendants contend Plaintiff's October 19, 2022 discovery responses were the "paper" from which it could first be ascertained the case became removable was. (Docs. 1 and 44). October 19 was less than thirty days prior to Westinghouse's November 16 removal.

II. THE "PAPERS"

The "papers" arguably indicating removability of this action include the Complaint, Plaintiff's written discovery responses, and her deposition. There are no factual disputes about the content of these "papers." Rather, the parties dispute what "paper" was the "first" from which removability may have been ascertained, for **[*3]** purposes of the running of the thirty-day removal period under subsection § 1446(b)(3).

A. The Complaint - June 23, 2022

Plaintiff filed her Complaint on June 23, 2022. It alleges Mr. Craig was employed as a pipefitter at ADDSCO in the 1970s and 1980s. (Doc. 1-1). ADDSCO serviced both non-military commercial ships and military ships. The Complaint identifies ADDSCO as follows:

2

During all relevant time periods, ADDSCO was engaged in the ship building, repair and servicing industry within the state of Alabama. ADDSCO, referred to herein as "Premise Defendant(s)," the "Vessel Defendants" and the "Equipment Defendants" utilized numerous asbestos-containing products and materials, such as asbestos-containing insulation, valves, pumps, turbines, boilers, gaskets, packing, refractory material and other equipment.

(*Id.*). The Complaint alleges Mr. Craig's some 15-years employment as a "pipefitter" at ADDSCO

required him to work around asbestos. (Doc. 1-1 and Doc. 38). Specifically:

While engaged in the performance of his duties as a pipefitter, Mr. Craig was an employee of ADDSCO and was required to work with and around various asbestos-containing materials. These asbestos-containing materials included but [*4] are not limited to asbestos-containing insulation, valves, pumps, turbines, boilers, gaskets, packing, refractory material and other equipment.

(*Id.*).

Plaintiff alleges Mr. Craig was exposed to asbestos attributable to "Equipment

Defendants," including GE and Westinghouse:

[Mr. Craig's] work exposed [him] to significant amounts of asbestos from products and materials manufactured and/or distributed by "Equipment Defendants" on the premises of "Premise Defendants" and aboard ships, vessels, and other seafaring equipment of "Vessel Defendants."

(*Id.*). The Complaint defines "Equipment Defendants" as follows:

The term "Equipment Defendant" refers to each and every one of those Defendants that produced and/or manufactured asbestos-containing products, equipment

and/or materials and placed the asbestos-containing products and/or material into the stream of commerce. These asbestos-containing materials included but are not limited to asbestos-containing insulation, valves, pumps, turbines, boilers, gaskets, packing, refractory material and other equipment.

(*Id.*). "Vessel Defendants" are defined as owners and related entities which exercised control

over "various ships" on which Mr. Craig worked at [*5] ADDSCO. The "various ships" included non-

military commercial vessels and military vessels:

3

The term "Vessel Defendants" refers to each and every one of those defendants which owned, contracted the use of, leased, rented, oversaw, managed or otherwise exercised controlled over various ships, including but not limited to transport ships, oil tankers, oil rigs, merchant marine vessels, military vessels, etc., that Mr. Craig serviced, repaired, constructed, refurbished, converted and generally performed work on as a pipefitter and/or pipefitter overseer during his employment at ADDSCO. This work on these ships required Mr. Craig to work with and around the various asbestos-containing products and equipment previously mentioned[, including turbines.]

(*Id.*).

The Complaint alleges exposure on both commercial and military vessels. It does not

identify any specific vessel, whether commercial or military, on which Mr. Craig was exposed to

Defendants' products.

B. Plaintiff's Discovery Responses - August 29, 2022

On August 29, 2022, Plaintiff served responses to requests for production of documents,

which alleged Mr. Craig worked on " some military vessels" at ADDSCO. (Doc. 38-2). The

responses included [*6] exhibits related to Mr. Craig's employment and asbestos exposure history, as

well as his settlement of prior asbestos claims. Plaintiff describes these exhibits as follows: 1.

Mr. Craig's Asbestos Client Personal Information

document ("Mr. Craig's Work and Asbestos History Document"); 2. Mr. Craig's Product Identification Worksheet ("Mr. Craig's PID/Exposure

Document"); and 3. Mr. Craig's settlement letters and/or agreements from various solvent

Defendants and bankruptcy trusts ("settlement letters and agreements"). (Docs. 38-3, 38-4 and

38-5).

Mr. Craig's "Work and Asbestos History Document" identified ADDSCO as an employer

and the USS Lexington naval vessel as one of his job site locations there. (Doc. 38-4 at

PageID.8066). He described his work at ADDSCO as removing "pipe insulation and asbestos

4

gasket from old pipe lines." (*Id.*). Mr. Craig's "PID/Exposure Document" identified GE and Westinghouse "turbines" as products he remembered at ADDSCO. (Docs. 38-3 at PageID.8050 and 8055). Turbines were the only products Mr. Craig identified for GE and Westinghouse. Mr. Craig's "settlement letters and agreements" noted tentative settlements with GE and Westinghouse for "asbestos case[s]." (Doc. 38-5 [*7] at PageID.8081, 8159 - 8160).

Plaintiff's August 29 discovery responses do not allege Mr. Craig was exposed to Defendants' products on the Lexington or on any other naval vessel. The responses allege Mr. Craig's was exposed to Defendants' products somewhere on ADDSCO's premises, but do not identify any vessel, whether private or naval, as the location(s) of his exposure to Defendants' products. The responses state (i) he was exposed to Defendants' asbestos products, and separately, (ii) he was exposed to asbestos products on naval vessels including the Lexington, but they do not connect the two statements; they do not state Mr. Craig was exposed to Defendants' products on the Lexington or on any other naval vessel.

C. Plaintiff's Deposition - September 8, 2022

Plaintiff was deposed on September 8, 2022. She testified Mr. Craig told her he worked on both commercial and naval ships, including the Lexington, at ADDSCO. (Doc. 44-3). This is consistent with her affidavit testimony that Mr. Craig's employment at

ADDSCO included work "on all sorts of ships, including oil tankers, naval ships and cargo ships." (Doc. 44-2). Plaintiff could not identify any equipment Mr. Craig worked with on the [*8] ships. (Doc. 44-3).

As with the Complaint and the August 29 discovery responses, Plaintiff's deposition testimony does not establish Mr. Craig was exposed to Defendants' products on the Lexington or another naval vessel.

5

D. Plaintiff's Discovery Responses - October 19, 2022

Plaintiff served answers to interrogatories on October 19, 2022. (Doc. 38-7). The answers noted, "[a]s of this writing, [Plaintiff] identified the USS Lexington as one of the ships that Mr. Craig worked on." (*Id.* at PageID.8265). The answers went further, specifically alleging Westinghouse and GE products were "on the USS Lexington." (*Id.*). Plaintiff produced a list which, unlike the Complaint and prior discovery responses, alleged Mr. Craig was exposed to Westinghouse's turbines on the Lexington. She produced additional records on November 7, 2022, which more specifically connected the Lexington and Westinghouse equipment.

III. DISCUSSION

A. Standard applicable to "Federal Officer" Removal under § 1442(a)

Plaintiff argues Defendants' removal is subject to strict construction. (Doc. 38). She contends the thirty-day removal period in this case should likewise be construed strictly. (*Id.*). Plaintiff is mistaken. She relies on cases [*9] that are inapplicable to "federal officer" removal under § 1442(a).

Courts are to construe removal under § 1442(a) liberally. Indeed, "[u]nlike certain other removal provisions, § 1442(a) must be liberally construed in favor of removal." [*Morgan v. BillVann Co.*, 2011 U.S. Dist. LEXIS 140394, *12 \(S.D. Ala. Dec. 6, 2011\)](#) (citing [*Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 777 \(E.D. Pa. 2010\)](#) ("the Court must broadly construe Defendants' ability to remove under Section 1442(a)(1) as to avoid frustrating its policy objective of having the validity of the defense of official immunity tried in a federal court by applying a narrow, grudging interpretation"); [*McGee v. Arkel Int'l, LLC*, 716 F. Supp.](#)

[2d 572, 578 \(S.D. Tex. 2009\)](#) ("In light of the policy behind § 1442(a), the statute must be interpreted liberally to allow

6

a defendant acting under the control of a federal officer to assert his or her federal defenses in federal court."); [Parlin v. DynCorp, Inc., 579 F. Supp. 2d 629, 634 \(D. Del. 2008\)](#) ("Unlike section 1441, which is strictly construed ..., section 1442(a) is liberally construed to give full effect to the purposes for which it was enacted."). See also, [Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1253 \(9th Cir. 2006\)](#) ("where the timeliness of a federal officer's removal is at issue, we extend section 1442's liberal interpretation to section 1446.").

B. The Timeliness of Removal

As noted, Plaintiff's Motion to Remand asserts the sole ground that removal was untimely. To assess the timeliness of a removal under § 1446(b), the Court must consider "the document received by defendant from the plaintiff - be it the initial complaint [*10] or a later received paper - and determine[] whether that document and notice of removal **unambiguously** establish federal jurisdiction." [Lowery v. Alabama Power Co., 483 F.3d 1184, 1213 \(11th Cir. 2007\)](#) (emphasis added). In [Lowery](#), the Eleventh Circuit held the "document" received by the defendant, including a "paper" received after the complaint, "must contain an **unambiguous statement** that **clearly establishes** federal jurisdiction." [Lowery, 483 F.3d at 1213, n.63](#) (emphasis added). The Court in [Lowery](#) cited [Bosky v. Kroger Texas, LP, 288 F.3d 208, 211 \(5th Cir. 2002\)](#), and quoted its holding that the "document" must demonstrate grounds for removal that are "**unequivocally clear and certain.**" *Id.* (emphasis added). The Court also cited [Huffman v. Saul Holdings, LP, 194 F.3d 1072 \(10th Cir. 1999\)](#), in which the Tenth Circuit stated:

Under § 1446(b), the removal period does not begin until the defendant is able "to intelligently ascertain removability so that in his petition for removal he can make a simple and short statement of the facts." [DeBry v. Transamerica Corp., 601 F.2d 480, 489 \(10th Cir. 1979\)](#). "**If the statute is going to run, the notice ought to be unequivocal. It should not be one which may have a double design.**" *Id.*

7

[Huffman, 194 F.3d at 1078](#) (emphasis added).

Plaintiff argues the question presented by her Motion is, when did Defendants learn "facts that enabled [them] to 'ascertain' that [they] had a 'colorable federal defense,' and that [they were] being sued for acts directed by, or 'under color of,' [*11] a federal officer. [28 U.S. Code § 1446\(b\)\(3\)](#)." (Doc. 38). Defendant Westinghouse, however, offers an alternative question: Whether the running of the removal period was "delayed until Plaintiff produced a paper specifically identifying Westinghouse equipment on the Lexington (*i.e.*, a Navy ship as opposed to a commercial ship) as a source of her **asbestos** exposure?" (Doc. 44). The Court finds Westinghouse's alternative question is consistent with the liberal standard favoring "federal officer" removal and with the requirement of an unambiguous and unequivocal "document" that clearly establishes federal jurisdiction.

According to Plaintiff, Defendants could have ascertained removability from her initial Complaint, filed June 23, 2022, but in no event later than her service of discovery responses on August 29, 2022. She argues, "[a]s of August 29, 2022, it was obvious and apparent that this case involved the USS Lexington, Navy vessels and Westinghouse and GE equipment." (Doc. 38). Assuming Plaintiff's statement is correct, her conclusion that the case was "therefore removable on August 29, 2022," is not.

The Court finds [Morgan, 2011 U.S. Dist. LEXIS 140394](#), to be well reasoned and materially indistinguishable from the issue and facts presented by [*12] Plaintiff's Motion for Remand. The relevant issue in [Morgan](#) was whether certain discovery responses "were such that [the removing defendants] could or should have 'ascertained' from them that the case had become removable." [2011 U.S. Dist. LEXIS 140394, at *48](#). The complaint in [Morgan](#) alleged plaintiff was exposed to

8

defendants' products throughout his employment, from 1950 to 1992. *Id.* at 6 - 7 (plaintiff "was exposed . . . while working with and around . . . **asbestos** products manufactured and supplied by [d]efendants."). The plaintiff also served discovery responses, which identified his job sites, employers, and times of employment. *Id.* at 7. Plaintiff worked in military and non-military settings. *Id.* at 7, 49. The discovery responses also alleged plaintiff served eleven (11) years in the Navy and Coast Guard, and identified specific military vessels on which he served. *Id.* at 7-8. However,

the responses did not connect defendants' products to the specified military vessels on which plaintiff served. *Id.* at 8 (the responses did not link plaintiff's "military service to particular products manufactured, designed, installed or marketed by [defendants].").

Following plaintiff's service of discovery responses, he was deposed. *Id.* [*13] He testified defendants' products were on at least one of the military vessels he had previously identified in written discovery responses. *Id.* This was the first time plaintiff connected *defendants' products* to a *military vessel* on which he served. *Id.* Plaintiff "associated ***asbestos*** with turbines onboard one or more of [specified] Navy and Coast Guard ships, **and** that the turbines had been manufactured by [defendants]." *Id.* (emphasis added).

Notwithstanding that plaintiff's previous discovery responses alleged both his service on specific military vessels and his exposure to defendants' products, the court rejected plaintiff's argument that these disconnected allegations notified defendants he was exposed to their products on a military vessel. *Id.* at 49 (plaintiff's responses did not place defendants "on notice that a portion of [p]laintiff's exposure to [defendants'] ***asbestos*** containing products occurred while aboard military vessels . . . , so as to start the 30 day removal period.") The discovery responses, which alleged an extensive work history in both military and non-military settings,

9

failed to link defendants' products to the identified military vessels. *Id.* at 49-50. The court acknowledged, "[t]o be sure, [the] responses do reflect that (i) [plaintiff] served as a machinist on specifically identified [military] vessels and (ii) he was exposed to ***asbestos*** from a broad class of [defendants' products]." *Id.* at [*14] n. 17. Nevertheless, the court found the responses did not start the 30 day removal period under § 1446(b) because they failed to connect (i) plaintiff's service on specified military vessels to (ii) plaintiff's exposure to defendant's products:

[Plaintiff's discovery responses] do not draw any connection between the two. From those interrogatory responses, the removing defendants could not reasonably ascertain that he was complaining of exposure via **their "motors, turbines, and motor generators"** on **those military vessels**, as opposed to these types of products at the myriad other sites where he worked during his 42-year career.

Id. (emphasis added).

The court in [Morgan](#) concluded the 30 day removal period did not commence until plaintiff, in his deposition, alleged his exposure to *defendants' products* was *aboard* the *military vessels* he had previously identified. "[T]he first time [defendants] could intelligently ascertain the availability of § 1442(a)(1) jurisdiction was when, during plaintiff's deposition, he testified that he had been exposed to ***asbestos*** from [defendants] General Electric and Westinghouse turbines aboard U.S. Navy vessels in the early 1950s." *Id.* at 53.

The court's analysis in [Morgan](#) undermines Plaintiff's [*15] argument that "Defendants could 'first ascertain' that federal jurisdiction exist[ed] at the time of [her] 8/29/22 Discovery Responses (along with [her] deposition)." (Doc. 38). Plaintiff argues, "[a]s of August 29, 2022, it was obvious and apparent that this case involved the USS Lexington, Navy vessels and Westinghouse and GE equipment." (*Id.*). That may well be, but "involvement" of Defendants' equipment unlinked to the Lexington did not establish removability. Neither Plaintiff's August

10

29 responses nor her deposition affirmatively allege Mr. Craig's exposure to Defendants' products occurred on the Lexington or any other military vessel. In fact, at that point, Plaintiff's allegations would have equally supported Mr. Craig's exposure to Defendants' products having been on commercial ships at ADDSCO. Although Defendants may have then speculated Mr. Craig was exposed to Defendants' products on the Lexington, the § 1446(b) 30 day removal period is not triggered by an ability to speculate removability. [Morgan, 2011 U.S. Dist. LEXIS 140394 at *50](#) ("Section 1446(b) does not require a defendant to guess that the action might possibly be removable, to fill in factual gaps in a plaintiff's discovery responses in a manner that maximizes removability, to [*16] read a plaintiff's mind, or to draw non-obvious linkages between disparate facts.").

Plaintiff's attempts to distinguish [Morgan](#) are unpersuasive. Plaintiff characterizes the court's conclusion in [Morgan](#) as based on plaintiff's failure to identify defendants' products. (Doc. 50). However, the court's decision was not based on a failure to identify these or other facts. It was based on plaintiff's failure to connect them. The discovery responses in [Morgan](#) alleged both plaintiff's military service on a specific military vessel and his exposure to defendants' specific

products, but that was insufficient because the responses did "draw any connection between the two." [2011 U.S. Dist. LEXIS 140394 at n. 17](#). The court concluded the § 1446(b) 30 day removal period began to run only when plaintiff later testified he had been exposed to defendants' **asbestos** products "aboard" military vessels. 1

1 Other cases cited in the [Morgan](#) opinion likewise expose the fallacy of Plaintiff's argument. [2011 U.S. Dist. LEXIS 140394 at *50-51](#). See [Contois v. Able Industries Inc., 523 F. Supp.2d 155, 158 \(D. Conn. 2007\)](#) (removing defendant could not have ascertained grounds for federal officer removal jurisdiction in interrogatory responses where plaintiff listed Navy vessel service and other work history, "leaving the defendants to guess as to whether Mortenson was exposed to products they [*17] manufactured that were used on the USS Bordelon"); *In re Asbestos Products Liability*

11

Plaintiff contends, by the time of her August 29 discovery responses, she had provided the "crucial information that (1) the exposures occurred on the Lexington and (2) allegations of specific kinds of equipment, pumps and turbines, that the Defendants were being sued for." (Doc. 50). Although Plaintiff characterizes this information as "crucial," Defendant notes the "crucial gap" - the August 29 discovery responses failed "to unambiguously allege Westinghouse-related **asbestos** exposure on a Navy ship as opposed to a commercial vessel." (Doc. 44). Further, an allegation of "specific kinds of" turbines falls short of an allegation of Defendants' turbines. Defendants correctly argue "where both Navy-related and non-Navy-related **asbestos** exposures are at issue [as with Plaintiff's alleged exposures at ADDSCO] in a multi-defendant case, and where the plaintiff's own pleadings and papers do not clearly associate a particular defendant with the Navy-related exposures, the removal period has not been triggered as to a § 1442(a)(1)-based removal." (*Id.*).

The Court finds Plaintiff's October 19, 2022 discovery responses [*18] triggered the running of the 30 day removal period under § 1446(b). With those responses, Plaintiff identified Defendants' equipment as being on the Lexington. The October 19 responses alleged, for the first time, Mr. Craig's exposure to Defendant Westinghouse's products occurred onboard a military vessel.2

[Litigation \(No. VI\), 770 F. Supp.2d 736, 740 \(E.D. Pa. 2011\)](#) (30-day removal period not triggered by pleading in which plaintiff listed Long Beach Naval Shipyard as one of several sites of **asbestos** exposure, without connecting defendant's products to that worksite). Plaintiff's attempts to distinguish these and other cases (Doc. 50 at PageID.8384-8385) suffer the same flaws as her attempts to distinguish [Morgan](#).

2 Based on the authority set out in Defendant Westinghouse's Opposition to Plaintiff's Motion to Remand (Doc. 44 at PageID.8307-8309), the Court rejects Plaintiff's arguments relating to prior suits to which Defendants were parties, arguments Defendants made in unrelated cases, and Defendants' knowledge apart from Plaintiff's allegation made in this action.

12

IV.CONCLUSION

Upon due consideration, and in light of the standards applicable to "federal officer" removal jurisdiction and § 1446(b), the Court concludes that removal was timely. Plaintiff's Motion to [*19] Remand (Doc. 38) is **DENIED**.

DONE and ORDERED this 18th day of May, 2023.

/s/ JEFFREY U. BEAVERSTOCK

CHIEF UNITED STATES DISTRICT JUDGE

13

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