

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

SAMUEL K. LIPARI
(Statutory Trustee of Dissolved
Medical Supply Chain, Inc.)

Plaintiff,

V.

Case No. 06-0573-CV-W-FJG

**GENERAL ELECTRIC COMPANY,
GENERAL ELECTRIC CAPITAL BUSINESS
ASSET FUNDING CORPORATION,
GE TRANSPORTATION SYSTEMS GLOBAL
SIGNALING, L.L.C.
CARPET n, MORE, and
STEWART FOSTER**

Defendants.

BRIEF IN OPPOSITION TO MOTION TO REMAND
THE MATTER TO STATE COURT

General Electric Company (“GE”), General Electric Capital Business Asset Funding Corporation (“GE Capital”), and GE Transportation Systems Global Signaling, LLC (“GE Transportation”) (collectively the “GE defendants”) oppose plaintiff’s attempts to remand this case back to state court. Plaintiff has attempted to cast this proceeding as a case that includes local defendants. However, given plaintiff’s failure to provide for the remaining local defendant in the Case Management Order, it is now apparent that this matter is most accurately a proceeding between diverse parties that should be heard by the federal court.

BACKGROUND

On March 22, 2006, plaintiff filed suit in Missouri state court against five defendants. Three of the defendants (the GE defendants) are out of state of state entities. Two of the defendants are considered Missouri residents. On April 4, plaintiff served GE, GE Capital, and

Heartland Financial. The next day, on April 5, plaintiff served GE Transportation. On April 27, at 23:59, plaintiff attempted to serve Carpets N' More. The summons was returned non est, apparently because there was no answer.

On May 4, 2006, both the GE defendants and Heartland Financial filed motions to dismiss. On May 25, the state court judge denied the GE defendants' motion but granted Heartland Financial's motion to dismiss. Since that time, plaintiff has made no attempts to refile a claim against Heartland Financial. Thus, the only remaining parties in this suit are the three GE defendants and the one Missouri resident defendant (Carpets N' More). However, plaintiff has set a Case Management Scheduling Order without serving Carpets N' More. Because plaintiff's intentions were not apparent until the July 5 Case Management Order, defendants' motion to remove the case on July 17 is timely.

ARGUMENT

Under § 1446, "a case can be removed within 30 days after receipt by the defendant through service or otherwise, of a copy 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 been removable, except that a case may not be removed on the basis of jurisdiction confirmed by § 1332 of this title more than one year after commencement of the action." *Id.* at § 1446(b). Here, the case was not initially removable because plaintiff named two local defendants. However, on May 25, one of the local defendants, Heartland Financial, was dismissed from the proceeding. Thereafter, plaintiff proceeded to set a Case Management Scheduling Order without serving Carpets N' More.

Courts have defined “other paper” as “the voluntary act of a plaintiff which gives the defendant notice of the changed circumstances which now support federal jurisdiction.” *Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 762 (5th Cir. 2000). Although there is no case directly on point, the Case Management Scheduling Order should constitute an “other paper” because it constitutes an act by plaintiff which gives the defendants notice of changed circumstances which now support federal jurisdiction. Here, the Case Management Order sets forth a trial date, mediation date (complete by September 1, 2006), timing for filing of exhibit and witness lists, as well as motions in limine, jury instructions and deposition designations. All these dates are set without the resident defendant Carpets N’ More’s ability to participate. Given the shortness in the dates on this matter, and given plaintiff’s desire to go forward without Carpets N’ More, it is now clear that plaintiff no longer intends to include Carpets N’ More in this proceeding.

The Court in *Bertha v. Beach Aircraft Corp.*, 674 F. Supp. 24 (CD Ca. 1987), considered what constituted an “other paper.” In *Bertha*, plaintiff named a number of local defendants, including Doe defendants. After the Complaint was filed and before all the local defendants were served, plaintiff filed with the Court an “at-issue memorandum” in which plaintiff represented that all essential parties had been served and that no other parties would be served. The Court determined that the “at-issue memorandum” constituted the “other paper.” *Id.* at 27. In so ruling, the Court also noted that in courts which utilized the trial setting conference procedure, the trial setting conference order could also serve as a “other paper.” *Id.* at 26. In this case, the Case Management Scheduling Order should serve as an “other paper” because it sets forth the plaintiff’s intentions to go forward in this lawsuit without Carpets N’ More.

Plaintiff's Arguments Are Not Supported By The Rules.

Plaintiff now argues that this case became diverse when he failed to serve Carpets N' More within 30 days after the date of issue of this service. Plaintiff's argument ignores § 506.12 and Rule 54.01. Under Mo. R. Civ. P. 54.01(d), if a party files a request for separate or additional summonses or other process, the clerk shall issue the requested process. Under 54.01, a plaintiff may make repeated attempts to serve a party beyond the initial 30 day window. In fact, a party may attempt to continue to serve a defendant for months after the filing of the lawsuit. Accordingly, plaintiff's right to serve Carpets N' More did not expire when the initial summons expired.

CONCLUSION

It was not until plaintiff made his assertions at the Case Management Conference and agreed to the Case Management Order that it became evident that Carpets N' More was no longer a party to this proceeding. Once it became evident that Carpets N' More was no longer proceeding, the GE defendants had a 30 day window to remove the case to federal court. By filing their removal within 12 days of the Case Management Order, the GE defendants successfully complied with § 1446(b).

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COMPANY, GENERAL ELECTRIC CAPITAL
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AND GE TRANSPORTATION SYSTEMS
GLOBAL SIGNALING, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 3rd day of August, 2006, by first class mail, postage prepaid to:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ John K. Power