

MANGIN v. MURPHY OIL USA, INC., Dist. Court, ED Louisiana 2005

(2005)

KERRY MANGIN, ET. AL.

v.

MURPHY OIL USA, INC., ET. AL.

Civil Action No. 04-2172 C/W, No. 04-2267., 04-2268, 04-2269, 04-2271, 04-2273, 04-2275, 04-2277, 04-2279, 04-2281, 04-2268, 04-2270, 04-2272, 04-2274, 04-2276, 04-2278, 04-2280, 04-2282, Section: "J" (2).

United States District Court, E.D. Louisiana.

April 29, 2005.

ORDER AND REASONS

CARL BARBIER, District Judge.

On June 10, 2003 a fire and chemical emissions occurred at the Murphy Oil refinery located in St. Bernard Parish. As a consequence, numerous persons living near the refinery filed a number of different lawsuits in state court seeking various damages allegedly related to the fire and chemical releases. The key players in this litigation are the individual plaintiffs ("Plaintiffs"); Murphy Oil USA, Inc. ("Murphy"), which owned and operated the refinery; and Associated Electric & Gas Insurance Services Limited ("AEGIS"), which issued a policy of excess liability insurance to Murphy. This is the second time these cases have been removed from state court, and the second motion to remand. The original state court lawsuits were filed on the day following the fire, and the parties have spent nearly two years jockeying for position in either state or federal court. Meanwhile, little or no discovery has apparently taken place,[1] the class certification has been delayed[2] and large amounts of time and expense have been incurred by all parties solely on jurisdictional issues. Having previously determined that diversity jurisdiction did not exist, once again this Court concludes there is no basis for removal of these purely state law claims.

Before the Court is a single Motion to Remand,[3] jointly filed by a number of Plaintiffs in these consolidated actions. To determine whether this court has jurisdiction over this matter, the sole question that must be answered is whether Plaintiffs' causes of action "relate to" an arbitration agreement in the insurance policy AEGIS issued to Murphy. If Plaintiffs' causes of action "relate to" the arbitration agreement, this court has subject matter jurisdiction pursuant to 9 U.S.C. §§ 201-208. However, if the causes of action do not "relate to" the arbitration agreement, subject matter jurisdiction does not exist and the case must be remanded to state court. For reasons below, the Court finds that Plaintiffs' Motion to Remand should be GRANTED and the seventeen cases removed to this Court in August of 2004 should be remanded pursuant to 28 U.S.C. § 1447(c).

BACKGROUND

On or about June 11, 2003, Plaintiffs, who are all Louisiana residents, filed suit in the Thirty-Fourth Judicial District for the Parish of St. Bernard, Louisiana, against Murphy, which is domiciled outside Louisiana, and other non-diverse parties for damages allegedly sustained as a result of the chemical emissions and fire that occurred at Murphy's Meraux (St. Bernard) Refinery on June 10, 2003.[4] On June 17, 2003, Murphy removed approximately fourteen

cases to this Court, alleging that the plaintiffs improperly joined three non-diverse defendants.[5] Contending that the Louisiana defendants were proper parties to the lawsuit, the plaintiffs filed motions to remand.[6] The Court held oral argument regarding the motions to remand on December 10, 2003.[7] After a brief, limited opportunity for discovery, this the Court ultimately concluded that certain non-diverse parties had been properly joined, requiring the removed cases to be remanded.[8]

After returning to state court, Plaintiffs amended their lawsuits to add AEGIS, Murphy's liability insurer, as a direct defendant pursuant to the Louisiana Direct Action Statute.[9] Shortly thereafter, in August 2004, seventeen cases were removed from State court to this Court — Murphy removed one of the cases, and AEGIS removed sixteen.[10] Realizing that there was no diversity jurisdiction present to support removal, Defendants this time removed the cases on the basis that: (1) a coverage dispute between AEGIS and its insured, Murphy, is subject to a binding arbitration clause contained in their insurance agreement, and such clause is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and, (2) the subject matter of Plaintiffs' state law claims "relates to" the arbitration agreement within the meaning of the statute.[11] On September 28, 2004, Plaintiffs responded by filing a motion to remand twelve of the sixteen actions.[12] Plaintiffs contend that the Convention does not confer federal removal jurisdiction under the circumstances present in this matter because Plaintiffs' claims do not "relate to" the arbitration agreement.

Despite the fact that Plaintiffs' motion to remand was filed on behalf of plaintiffs in twelve of the seventeen cases, the motion addresses whether this Court has subject matter jurisdiction over all seventeen cases removed in August 2004. "Parties may neither consent to nor waive federal subject matter jurisdiction." [13] Consequently, this ruling affects all seventeen cases removed in August 2004.

LAW AND ANALYSIS

United States Code Title 28, Section 1441(b) provides that any "civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." The party seeking removal of an action bears the burden of demonstrating that removal is proper.[14]

Defendants contend that this Court has subject matter jurisdiction over this case based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention").[15] "Congress ratified the Convention in 1970 to provide United States citizens predictable enforcement of arbitral contracts in foreign courts." [16] "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate awards are enforced." [17] To obtain rights under the Convention, Congress had to guarantee enforcement of arbitration contracts and awards made pursuant to the Convention, so Congress promulgated the Convention Act in 1970, which is currently codified at 9 U.S.C. §§ 201-209.[18] Section 205 provides as follows:

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or defendants may, at any time before the trial thereof, remove such action or proceedings to the district

court of the United States for the district and division embracing the place where the action or proceeding is pending.[19]

Section 202 defines which arbitration agreements are governed by the Convention.

Specifically, Section 202 provides that an "arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, . . . , falls under the Convention." Notably, "[i]n order for an agreement to fall under the Convention, it must arise out of a commercial relationship." [20]

The arbitration agreement between AEGIS and Murphy contains the necessary elements to fall under the Convention. Specifically, the Convention covers arbitration agreements where: (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) the agreement to arbitrate arises out of a commercial legal relationship; and, (4) a party to the agreement is not an American citizen.[21] The Plaintiffs concede that the agreement between AEGIS and Murphy satisfies the four requirements listed above.[22]

1. Do Plaintiffs' state court actions "relate to" the arbitration agreement?

The issue raised by the remand motion is whether Plaintiffs' causes of action "relate to" the arbitration agreement, as required for removal under 9 U.S.C. § 205. In *Beiser v. Weyler*, the Fifth Circuit recently addressed the issue of whether a plaintiff's state law cause of action "related to" an international arbitration agreement with the defendants.[23] In *Beiser*, the plaintiff served as a director and the only employee of Horizon Energy Limited ("Horizon").[24] Horizon entered into a contract with Roy M. Huffington, Inc. to acquire oil and gas development rights in Hungary. To finance the development, Horizon entered into a second contract, by which Hungarian Horizon Energy would provide a line of credit. The agreements contained clauses providing for arbitration in London. As an officer of the company, the plaintiff signed both agreements on behalf of Horizon. Subsequently, a dispute arose, and the plaintiff filed suit on behalf of himself individually, in Texas state court alleging a number of state law claims and contending that he was wrongfully deprived of his financial interest in the oil field.[25] The defendants removed the case to federal court based on 9 U.S.C. § 205, on the grounds that the plaintiff's case was "related to" the arbitration clauses in the agreements.[26]

Insisting that he, as an individual, was not a party to the contracts containing the arbitration provisions, the plaintiff moved to remand the case. The district court denied the motion without reasons and ordered arbitration. Challenging the subject matter jurisdiction of the federal court under § 205, the plaintiff appealed.[27] Addressing whether the plaintiff's claim "related to" the arbitration agreement, the Fifth Circuit noted that the contracts were the only written agreements governing the plaintiff's work in Hungary.[28] Further, the appellate court explained that the plaintiff was Horizon's only employee and the contracts were entered into to secure plaintiff's interest in developing the oil interest.[29] Although the plaintiff did not formally commit himself to any of the agreements individually, the Court decided that it was at least conceivable that a court might pierce the corporate veil and hold him personally responsible for the contracts designed to secure his involvement with the development. The court stated that "the fact that we often call a corporation a separate legal person does not mean that [the plaintiff] is simply a stranger to the two agreements." [30]

To determine whether it had jurisdiction under § 205, the court examined the meaning of the phrase "relates to" within the context of 9 U.S.C. § 205. The court found that the phrase

"relates to" means: "conceivably having an effect on the outcome of".[31] Further, the court stated that "[w]hatever else the phrase `relates to' conveys, it means at least as much as having a possible effect on the outcome of an issue or decision." [32] Based on the definition provided, the court explained it is conceivable that a court might pierce the corporate veil and hold plaintiff personally liable on the contracts designed to secure his involvement in the development. Consequently, the court held that the subject matter of the plaintiff's lawsuit "related to" an arbitration agreement falling under the Convention and the district court had jurisdiction to render its decision.[33]

Ultimately, the question in this case is whether the arbitration can conceivably effect the outcome of Plaintiffs' direct action against AEGIS or its insured, Murphy. This raises the issue of whether an arbitration finding of coverage (or no coverage) would collaterally estop the parties from raising the same issues in this Court.

(2) Collateral Estoppel — Can the arbitration conceivably affect Plaintiffs' state law claims against Murphy or AEGIS?

To determine whether the arbitration agreement could conceivably have an effect on the outcome of Plaintiffs' case, the Court requested that the parties brief the following question: Whether the findings in the arbitration proceeding between AEGIS and Murphy can have a collateral estoppel effect on the Plaintiffs' action?[34] Arguing that such determination is within the Court's discretion and decided on a case-by-case approach, both AEGIS and Murphy have answered this question in the affirmative, while Plaintiffs assert that the arbitration cannot have a collateral estoppel effect on Plaintiffs' lawsuit.

Plaintiffs rely primarily on the Fifth Circuit cases of *Matter of Talbott Big Foot, Inc.* and *Zimmerman v. International Companies & Consulting, Inc.* to support their position.[35] In those cases, the Fifth Circuit held that an arbitral provision between an insurer and its insured does not override the direct action statute where the insurer seeks to stay the plaintiffs' direct action suit pending the outcome of arbitration.[36]

In *Talbott*, the Fifth Circuit addressed the following issues: (1) whether injured claimants can proceed directly against an insurer under the Louisiana Direct Action Statute despite an arbitration clause in the policy that obligates the insured and insurer to arbitrate coverage disputes and (2) if the Louisiana Direct Action Statute does authorize the injured claimants to proceed against the insurer irrespective of the ongoing arbitration proceeding, whether this violates any federal policy favoring arbitration.[37] The court explained that the first question is one of Louisiana law.[38] After considering Louisiana appellate decisions, the court found that because the arbitration clause in the policy at issue was indistinguishable from the proscribed "no action" clauses, the arbitration clause could not be used by the insurer to delay the plaintiff's lawsuit.[39]

With respect to the second question, the Fifth Circuit stated that the plaintiffs, "who are not parties to [the] policy, have not agreed to arbitrate their claims or defer their action while the insurer and insured arbitrate coverage disputes. Thus, the Federal Arbitration Act, the source of the federal policy favoring arbitration, has no application to require appellants to arbitrate or stay their lawsuits." [40] Therefore, according to Fifth Circuit precedent, Plaintiffs in these consolidated cases, who are not parties to the insurance policy requiring arbitration, are not required to arbitrate their claims or delay their action while Murphy and AEGIS resolve any dispute they may have.[41]

Murphy and AEGIS argue that removal of this action does not implicate the Louisiana Direct action statute because they do not seek either to compel Plaintiffs to arbitrate or to stay Plaintiffs' lawsuits pending arbitration. Murphy suggests that the arbitration should proceed simultaneously with the litigation,[42] while AEGIS' counsel suggested at oral argument that the arbitration should be stayed pending a liability determination by this Court. At the oral argument, it became obvious to the Court that Murphy and AEGIS do not genuinely intend to arbitrate their alleged coverage dispute.[43] As pointed out by Plaintiffs' counsel during oral argument, AEGIS has a record of removing cases under the Convention based on an alleged arbitral dispute with its insured, however, arbitration does not occur and the cases proceed to resolution in federal court.[44] And if, as AEGIS argues, the coverage issues were arbitrated and AEGIS was permitted to raise a collateral estoppel argument in Plaintiffs' direct action, the practical effect would be that Plaintiffs would have been required to submit their direct action claims to arbitration, contrary to the Louisiana Direct Action Statute and contrary to Talbott and Zimmerman.

Despite Defendants' willingness to address any potential problem involving the Louisiana Direct Action Statute by allowing the liability portion of the case to proceed without a stay, the Court finds that the potential arbitration proceeding between AEGIS and Murphy will not affect the outcome of Plaintiffs' case. The collateral estoppel doctrine requires the party asserting preclusion to prove:

(1) the issue decided in the prior adjudication is identical with the one presented in the pending suit; (2) the party against whom collateral estoppel is asserted was a party or in privity with a party therein; (3) there was a final judgment on the merits; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.[45]

The first element may be satisfied because at least some of the issues pertaining to whether or not coverage is owed by AEGIS to Murphy may be identical to issues in Plaintiffs' direct action against AEGIS. With respect to the second element, the Fifth Circuit in *Matter of Talbott Big Foot, Inc.* has flatly rejected AEGIS' argument that its insured, Murphy, would adequately represent the interests of the direct action plaintiffs in an arbitration so as to satisfy the "privity" requirement of collateral estoppel.[46] The court explained that privity "requires some type of legal relationship between two entities so that the one engaged in the litigation is legally accountable to the other." [47] Stated another way, "federal courts will bind a nonparty whose interests were represented adequately by a party in the original suit." [48] The adequate representation requirement refers to

the concept of virtual representation, by which a nonparty may be bound because the party to the first suit is so closely aligned with his [the nonparty's] interests as to be his virtual representative. For a non-party to be so closely aligned ... requires more than a showing of parallel interest or, even, a use of the same attorney in both suits. The question of virtual representation is one of fact and is to be kept within strict confines. Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues.[49] No such relationship, either express or implied, exists between Plaintiffs and Murphy. As Plaintiffs point out, policy terms do not control the scope and nature of the injured party's rights, because Plaintiffs' rights under the direct action statute vest at the time of injury, whereas the rights of Murphy remain subject to conditions in the policy that arise subsequent

to the injury, such as the requirement of notice.[50] Unlike the plaintiff in Beiser, Plaintiffs in this case truly are "strangers to the arbitration agreement".

Finally, with respect to the fourth element, Plaintiffs, who are non-parties to the alleged arbitration, will not have had a full and fair opportunity to litigate the issue. Therefore, the Court finds that the arbitration cannot have a collateral estoppel affect on Plaintiffs' suit and the arbitration cannot affect Plaintiffs' causes of action within the meaning of the Convention.

Thus, the Plaintiffs' state law tort claims do not "relate to" the outcome of the arbitration between AEGIS and Murphy. The arbitration between AEGIS and Murphy will determine only coverage or defense obligations between Murphy and AEGIS under the terms of the AEGIS policy. A determination of coverage or no coverage will not affect whether Plaintiffs are entitled to recover on their direct action against AEGIS or Murphy. As counsel for Plaintiffs has pointed out, if Plaintiffs succeed in their direct action versus AEGIS, but AEGIS is successful in the arbitration, then AEGIS would be entitled to be indemnified by its insured, Murphy, for any amounts paid to Plaintiffs. An ultimate determination that Defendants are liable to Plaintiffs would not create or destroy the disputed obligation that exists between the insured and its insurer. Consequently, the arbitration agreement between AEGIS and its insured, Murphy, cannot affect the outcome of Plaintiffs' lawsuit and, for that reason, this Court does not have subject matter jurisdiction over the cases removed in August of 2004. These cases must be remanded in accordance with 28 U.S.C. § 1447(c). Accordingly,

IT IS ORDERED that Plaintiffs' Motion to Remand[51] should be and hereby is GRANTED;

IT IS FURTHER ORDERED that pursuant to 28 U.S.C. § 1447(c) the seventeen consolidated cases, which were removed in August of 2004, should be and hereby are REMANDED to State court.

[1] Except for limited discovery in this court relating to the issue of improper joinder in connection with the first remand motion.

[2] A class certification hearing was scheduled in state court for the latter part of last year, but was thwarted by the second removal by Defendants.

[3] Rec. Doc. 9.

[4] Notice of Removal (Rec. Doc. 1).

[5] The fourteen removed cases were consolidated with lead Case No. 03-CV-1645, which was originally filed in federal court on June 10, 2003. On December 9, 2003, Murphy removed a related case, Bruney v. Murphy, Case No. 03-CV-3453, on the same grounds as the previously removed fourteen cases.

[6] Civil Action No. 03-1645, Record Documents 68 and 88.

[7] Civil Action No. 03-1645, Record Document 92.

[8] Civil Action No. 03-1645, Record Document 97.

[9] AEGIS's Memorandum of Law in Opposition to Motion to Remand, p.1 (Rec. Doc. 12).

[10] Notices of Removal were filed in each of the cases now consolidated with 04-2172. The lead case, 04-2172, was removed by Murphy on August 3, 2004. The Notice of Removal in case number 04-2267 provides that AEGIS removed a total of sixteen cases on or about August 10, 2004.

[11] Plaintiffs' Memorandum in Support of Motion to Remand, p. 3 (Rec. Doc. 9).

[12] Plaintiffs' Memorandum in Support of Motion to Remand (Rec. Doc. 9).

[13] *Moore v. Cozart*, 2000 WL 680327, *1 (E.D. La. May 22, 2000) (Berrigan, J.) (citing *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848 (5th Cir. 1999)).

[14] *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 921-22 (5th Cir. 1997); *Jaranilla v. Megasea Maritime Ltd.*, 2002 WL 2022516, *1 (E.D.La. Aug. 29, 2002).

[15] 9 U.S.C.A. §§ 201-208 (West 1999).

[16] *Beiser v. Weyler*, 284 F.3d 665, 666 (5th Cir. 2004).

[17] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *Imperial Ethiopian Government v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976).

[18] *McDermott Intern., Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1207-08 (5th Cir. 1991). Chapter 2 of Title 9, entitled Convention on the Recognition and Enforcement of Foreign Arbitral Awards, provides the scope and criteria by which an arbitration agreement or award falls under the Convention.

[19] 9 U.S.C.A. § 205 (West 1999) (emphasis added).

[20] *Beiser v. Weyler*, 284 F.3d 665, 666 n.2 (5th Cir. 2002).

[21] *Marathon Oil Co. v. Ruhrgas*, 115 F.3d 315, 321 (5th Cir. 1997), reh'g en banc granted and opinion vacated, 129 F.3d 746 (5th Cir. 1997), aff'd on other grounds, 145 F.3d 211 (5th Cir. 1998), rev'd on other grounds, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co. (Pemex)*, 767 F.2d 1140, 1144-1145 (5th Cir. 1985).

[22] Plaintiffs' Memorandum in Support of Motion to Remand, pp. 6-7 (Rec. Doc. 9).

[23] *Beiser v. Weyler*, 284 F.3d 665, 666 (5th Cir. 2004).

[24] *Id.*

[25] *Id.* at 667.

[26] *Id.*

[27] *Id.* at 667-68.

[28] Id. at 669.

[29] Id. at 666.

[30] Id. at 670.

[31] Id. at 669.

[32] Id.

[33] Id. at 675.

[34] Rec. Doc. 25.

[35] Plaintiffs' Supplemental Memorandum in Support of Motion to Remand, p. 4 (Rec. Doc. 32).

[36] Matter of Talbott Big Foot, Inc., 887 F.2d 611 (5th Cir. 1989); Zimmerman v. International Companies & Consulting, Inc., 107 F.3d 344 (5th Cir. 1997).

[37] Matter of Talbott Big Foot, Inc., 887 F.2d 611, 612 (5th Cir. 1989).

[38] Id. at 612.

[39] Id. at 613-14.

[40] Id. at 614.

[41] The Court rejects AEGIS' arguments based on Acosta v. Master Maintenance & Construction, Inc., 52 F. Supp. 2d 699, 706 n.21 (M. D. La. Mar. 2, 1999), which stated that Talbott and Zimmerman are inapposite because they involve the FAA, as opposed to the Convention. As the Fifth Circuit has explained, the Convention incorporates by reference the FAA, which becomes the vehicle by which Defendants may seek to compel arbitration. Beiser, 284 F.3d at 673. See also Talbott, 887 F.2d at 614 n.3 (stating that the Convention "simply adopts the provisions of the [FAA]").

[42] Memorandum on Behalf of Murphy Oil USA, Inc. with Respect to "Collateral Estoppel" (Rec. Doc. 28).

[43] Although AEGIS and Murphy claim to have agreed to arbitrate their coverage dispute, counsel admitted at oral argument that no arbitration has occurred and none is presently scheduled. They have also conducted no arbitration related discovery.

[44] See, e.g., Adams v. Georgia Gulf Corp., 237 F.3d 538 (5th Cir. 2001); Oldham v. Louisiana Interstate Gas Co., slip opinion, Case No. 99-284-S (M.D. La. July 30, 1999).

[45] Matter of Caton, 157 F.3d 1026, 1028 (5th Cir. 1998).

[46] Talbott, 887 F.2d at 614 n.4.

[47] Id.

[48] *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987).

[49] Id. at 1175 (internal quotations and citations omitted).

[50] *Auster Oil & Gas, Inc. v. Stream*, 891 F.2d 570, 577-78 (5th Cir. 1990).

[51] Rec. Doc. 9.

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