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U.S. DISTRICT COURT E.D.N.Y.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

BROOKLYN OFFICE

DENNIS ROCCHIO,

Plaintiff,

ORDER OF REMAND

-against-

13-CV-3698 (ENV)

SANOFI-AVENTIS U.S. LLC,

Defendant.

VITALIANO, D.J.

Plaintiff Dennis Rocchio brings this products liability action against defendant Sanofi-Aventis U.S., LLC ("Sanofi-Aventis") for injuries he allegedly sustained as a result of his treatment with Sculptra, a cosmetic product manufactured by defendant. Plaintiff originally filed this case in Supreme Court, Queens County on May 4, 2013. On July 1, 2013 defendant filed a notice of removal based on diversity of citizenship, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446.

Approximately two years prior to initiating the instant lawsuit, plaintiff brought a separate state court malpractice action against the doctor, now deceased, who had treated him with Sculptra, *Rocchio v. Public Administrator of the County of New York o/b/o Estate of Gervais Frechette*, No. 1411/2011 (Queens Cty. June 9, 2011) ("medical malpractice action"). Core events, and certainly the claimed injuries, alleged in the two lawsuits are identical. The medical malpractice action

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against Dr. Frechette plainly arises out of the same events implicated in the present lawsuit. The medical malpractice action is still pending and discovery is nearly complete. Because of removal, the cases can, at this point, not be administered jointly. Plaintiff now moves to consolidate the medical malpractice action with the instant products liability action.

The parties agree that joinder of the medical malpractice action would destroy complete diversity and, as a consequence, deprive this Court of subject matter jurisdiction. Defendant opposes the motion. Since, for the reasons discussed below, the Court finds that consolidation is warranted, the Court grants plaintiff's motion to consolidate and, on plaintiff's further motion, remands the consolidated case to Supreme Court, Queens County for want of subject matter jurisdiction here.

#### Analysis

In pertinent and controlling part, 28 U.S.C. § 1447(e) provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." A party seeking joinder and remand under § 1447(e) must, at the doorstep "first satisfy FED. R. CIV. P. 20, which permits a joinder of multiple defendants in one action 'if there is asserted against [defendant] any right to relief in respect of or arising out of the same transaction or occurrences and if any question of law or fact common to all defendants will arise in the action.'" *Nazario v. Deere & Co.*, 295 F. Supp. 2d 360, 363 (S.D.N.Y. 2003) (citation omitted). That is clearly the case here. Rocchio's medical malpractice and

product liability claims arise out of precisely the same incident, namely Dr. Frechette's treatment of plaintiff with Sculptra. Not only is there a substantial overlap of issues, but proof of injury, an essential element of both lawsuits, will be identical. Without question, the requirements of Rule 20 are met.

Although over the Rule 20 threshold, "joinder which destroys diversity [is proper] only when consistent with the principles of fundamental fairness as appraised by the following four factors: (1) any delay, as well as the reason for the delay, in seeking joinder; (2) resulting prejudice to the defendant; (3) likelihood of multiple litigation; and (4) plaintiff's motivation for the amendment." *Nazario* at 363; *McGee v. State Farm Mut. Auto. Ins. Co.*, 684 F. Supp. 2d 257, 263 (E.D.N.Y. 2009); *Bowers v. SMC Corp.*, 2008 U.S. Dist. LEXIS 29058, at \*11 (W.D.N.Y. 2008). Further, "[t]he decision whether to allow joinder in such a case is a matter of the Court's discretion." *McGee* at 261; *Moncion v. Infra-Metals Corp.*, 2002 WL 31834442, at \*2 (S.D.N.Y. 2002) ("[T]he decision to join new parties, even if those parties destroy diversity and require a remand, is within the sound discretion of the trial court.")

Turning to the first factor, plaintiff did not delay in seeking joinder. The request for joinder came hard on the heels of removal. Rocchio sought joinder a mere eight days after Sanofi-Aventis filed its notice of removal. Defendant points out that plaintiff waited nearly two years after filing the medical malpractice action to initiate the instant case. The argument is not worth a second of consideration. For § 1447(e) purposes "[d]elay is measured from the date of removal." *McGee* at

263 (citing *Deutchman v. Express Scripts, Inc.*, 2008 WL 3538593 (E.D.N.Y. 2008)).

With that perspective, the first factor weighs heavily in favor of joinder and remand.

As for prejudice to Sanofi-Aventis, other than losing a federal forum, none, frankly, is discernible. Defendant does contend, though, that it would be prejudiced by joining the medical malpractice action because that action is nearing the end of discovery. State courts are perfectly competent at joint pretrial management of related or consolidated actions, which is precisely what Supreme Court would have done had there not been a removal. Perhaps the first filed case might be delayed, but the discovery door will not be slammed on new parties. Federal remand case law well recognizes real world realities. Indeed, even where discovery in the related state court action is complete, federal courts have found no prejudice to defendants from a remand. *Nazario* at 634 (“We assume that if remand was ordered and [defendant] was not severed that the state court would reopen discovery and extend it to the extent necessary for [defendant] to defend itself.”) Further, because the instant action is still in its infancy and defendant has not yet expended substantial resources in defending itself, any prejudice to Sanofi-Aventis from a forum switch will be minimal. *Id.* (“Nor has this action advanced in any way to a point where remanding it to state court with additional defendants will require [defendant] to revise or abandon a litigation strategy for which resources have already been expended.”) This factor, too, is in movant’s favor.

Next, it is undisputed that denial of plaintiff’s motion would result in multiple

litigations dealing with nearly identical issues. Accordingly, factor three also weighs heavily in favor of joinder and remand. *See Bowers* at \*12 (“[A]bsent joinder, multiple litigation on identical issues will proceed in both state and federal courts, thereby undermining judicial economy and efficiency and possibly resulting in inconsistent verdicts on identical issues.”)

Lastly, while Rocchio’s motivation for joinder does appear to be a desire to destroy complete diversity and force Sanofi-Aventis to litigate in state court, that consideration does not outweigh the argument for joinder flowing from consideration of the three other factors. As defendant points out, during the five week period between the time when plaintiff filed the instant action and when defendant filed its notice of removal, plaintiff did not seek to consolidate the two actions in state court. Given the Court’s finding in favor of defendant on this factor, further conjecture about why plaintiff’s counsel chose one strategy over another in managing the medical malpractice and products liability claims when they both were initially in state court is unnecessary. This is especially so since, had he done nothing, Supreme Court would have most probably managed the two actions jointly anyway. All that matters is that Sanofi-Aventis wins this round, but the Court finds that the first three factors of the § 1447(e) test are overwhelmingly in plaintiff’s favor.

#### Conclusion

Accordingly, for the reasons outlined above, the Court grants plaintiff’s motion to consolidate this case with the medical malpractice action and, as

consolidated, this case be remanded to Supreme Court, Queens County.

The Clerk of Court is directed to effectuate remand and to close this case for administrative purposes.

SO ORDERED.

Dated: Brooklyn, New York  
October 18, 2013



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ERIC N. VITALIANO  
United States District Judge