

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICHARD DELAHEY,

Plaintiff,

v.

DISNEY THEATRICAL
PRODUCTIONS LTD., *et al.*,

Defendants.

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Civil Action No. RDB-08-775

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MEMORANDUM OPINION

This action arises out of a four-count complaint filed by Plaintiff Richard Delahey (“Plaintiff” or “Delahey”) against, *inter alia*,¹ Defendants Hippodrome Foundation, Inc., Hippodrome Performing Arts Center LLC, and Theater Management Group – Maryland, LLC² (collectively “Defendants”) for injuries sustained in connection with the disassembly of the theatrical production of *The Lion King* at the Hippodrome Theatre in Baltimore, Maryland, on September 5, 2005. Plaintiff’s Complaint alleges negligence (Count I) and products liability, including design defect (Count II), manufacturing defect (Count III), and failure to warn (Count

¹ Other Defendants include Disney Theatrical Productions Ltd., Buena Vista Theatrical Group Ltd., Disney on Broadway, The Walt Disney Company, Michael T. Carey, III, Theater Management Group, Inc., Clear Channel Broadcasting, Inc., and Hudson Scenic Studio, Inc.

² For purposes of this memorandum opinion alone, Theater Management Group – Maryland, LLC will be referred to as simply Theater Management Group. Theater Management Group – Maryland, LLC should not be confused with Theater Management Group, Inc., a different entity that was named as a defendant in this case, but that was not involved in the pending motions.

IV). All four counts are asserted against each Defendant.

Defendants filed a Notice of Removal from the Circuit Court for Baltimore City on March 26, 2008. Defendants' Notice of Removal states that "when all of the irrelevant parties are extracted from the case, what will remain is a dispute as to whether Buena Vista Theatrical Group Ltd., a resident of the State of New York[,] was Plaintiff's co-employer for purposes of the workers' compensation law and is thus immune from Plaintiff's action for damages." (Defs.' Notice of Removal 3.) Soon thereafter, on April 17, 2008, Plaintiff filed a Motion for Remand, which remains pending. (Paper No. 10.) Plaintiff, who resides in Maryland, argues that this Court lacks diversity jurisdiction under 28 U.S.C. § 1332 because three named Defendants—Hippodrome Foundation, Hippodrome Performing Arts Center, and Theater Management Group—are Maryland entities, thus destroying complete diversity.

On July 9, 2008, this Court held a hearing on Plaintiff's Motion to Remand. After hearing argument from the parties, this Court requested that nondiverse Maryland Defendants submit Motions to Dismiss clarifying the sufficiency of Plaintiff's claims against them. Therefore, now pending are Hippodrome Foundation's and Hippodrome Performing Arts Center's Motion to Dismiss (Paper No. 36) and Theater Management Group's Motion to Dismiss (Paper No. 37). A hearing having already been conducted on Plaintiff's Motion to Remand, a second hearing on the pending Motions to Dismiss is unnecessary. *See* Local Rule 105.6 (D. Md. 2008). For the reasons stated herein, Theater Management Group's Motion to Dismiss is GRANTED and Hippodrome Foundation's and Hippodrome Performing Arts Center's jointly filed Motion to Dismiss is GRANTED IN PART and DENIED IN PART. The latter motion is granted as to Hippodrome Foundation, but denied as to Hippodrome Performing Arts Center.

Because Hippodrome Performing Arts Center is a Maryland entity, this Court lacks complete diversity, and Plaintiff's Motion for Remand is GRANTED.

BACKGROUND

The facts are viewed in a light most favorable to Plaintiff. On September 5, 2005, Walt Disney Company's theatrical stage production of *The Lion King* had completed an engagement at the Hippodrome Theatre, and the set was being dismantled for transport to the next venue. (Am. Compl. ¶ 1.) During the dismantling, Plaintiff Delahey was assisting crew members with loading the set onto tractor trailers. (*Id.* ¶ 2.)

Hippodrome Foundation agreed by way of a Theatre Agreement with Buena Vista Theatrical Group, Ltd. to provide the theater and the necessary labor to put on the stage production.³ Hippodrome Foundation fulfilled its obligation by entering into an Operating Agreement with The Baltimore Center for the Performing Arts, Inc. and Theater Management Group. Pursuant to the Operating Agreement, Theater Management Group was authorized to subcontract out for labor to put on the performance. In doing so, Theater Management Group contracted with and hired laborers from multiple unions. Delahey was a member of one of these unions.

Delahey has alleged that during the disassembly of the set, the crew fell behind schedule, and that new loading methods were implemented in an attempt to expedite the process. (*Id.* ¶¶ 5-8.) Specifically, Delahey alleges that the Defendants arranged to have the street adjacent to the Hippodrome Theatre closed to thru traffic in order to line up multiple trucks, in excess

³ In connection with the agreement, Buena Vista Theatrical Group, Ltd., agreed to, and subsequently did, reimburse Hippodrome Foundation for the cost of labor, including workers' compensation insurance. (Defs.' Opp'n Mot. Remand Ex. 2, Certification of Olive Waxter.)

of the loading dock's limit of two trucks. (*Id.* ¶ 8.) One side of the dual loading dock was left open to allow the crew to bring road cases and materials to street level by pushing the extremely heavily loaded road cases up a concrete ramp and onto the street to a waiting truck. (*Id.* ¶ 9.) The Defendants instructed Delahey and other crew members to push road cases down the loading dock to the trucks on the street. (*Id.* ¶ 10.) As a pusher, Delahey was told to roll nine-foot-tall road cases, in excess of 500 pounds apiece, up a ramp onto Baltimore Street. (*Id.* ¶¶ 10-11.) Delahey alleges that he was pushing an oversized road case that was defective in its design, manufacturing and warnings. (*Id.* ¶ 14.) As Delahey moved the case down Baltimore Street, it became "unstable and collapsed on top of [him], causing severe and permanent injuries." (*Id.* ¶ 15.)

As a result of injuries sustained, Delahey completed an Employee's Claim Form with the Maryland Workers' Compensation Commission in which he identified his employer as "Theater Management Group." (Defs.' Opp'n Mot. Remand Ex 3, Employee's Claim Form.) On October 19, 2005, the Workers' Compensation Commission ordered Theater Management Group, through its insurer, to provide compensation to Delahey in the amount of \$450.00 a week for injuries arising out of and in the course of his employment on September 5, 2005. (*Id.* Ex. 5.)

STANDARD OF REVIEW

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). Therefore, the court accepts all well-pleaded allegations as true and construes the facts and reasonable inferences derived therefrom in the light most

favorable to the plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). A complaint must meet the “simplified pleading standard” of Rule 8(a)(2), *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), which requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

Although Rule 8(a)(2) requires only a “short and plain statement,” a complaint must contain “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). The factual allegations contained in a complaint “must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 1965. Thus, a complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

While “notice pleading requires generosity in interpreting a plaintiff’s complaint[,] . . . generosity is not fantasy.” *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 191 (4th Cir. 1998). In considering a motion to dismiss, the court “need not accept as true unwarranted inferences, unreasonable conclusions, or arguments” nor “the legal conclusions drawn from the facts.” *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P’ship*, 213 F.3d 175, 180 (4th Cir. 2000) (citations omitted).

DISCUSSION

The initial basis for the Defendants’ Notice of Removal was that, although there were nondiverse Defendants included in the Amended Complaint, Plaintiff could not establish any of his claims against the three Maryland Defendants—Hippodrome Foundation, Hippodrome Performing Arts Center, and Theater Management Group. Specifically, Hippodrome

Foundation, Hippodrome Performing Arts Center, and Theater Management Group asserted that they were included only to destroy complete diversity, thus avoiding federal jurisdiction. As such, they argued at the motions hearing conducted on July 9, 2008, that the fraudulent joinder doctrine applied. “Under this doctrine, a district court can assume jurisdiction over a case even if, *inter alia*, there are nondiverse named defendants at the time the case is removed. This doctrine effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.” *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999) (citations omitted). “To show fraudulent joinder, the removing party must demonstrate either ‘outright fraud in the plaintiff’s pleading of jurisdictional facts’ or that ‘there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.’” *Hartley v. CSX Transportation Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (citations omitted).

It became clear at the July 9, 2008 hearing that certain aspects of Plaintiff’s case against the nondiverse Defendants suffered from significant infirmities, but it remained unclear as to whether Plaintiff had “no possibility” for recovery against any of the nondiverse Defendants. Therefore, instead of determining at the hearing whether the fraudulent joinder doctrine permitted this Court to exercise jurisdiction, this Court granted Hippodrome Foundation, Hippodrome Performing Arts Center, and Theater Management Group leave to file motions to dismiss. Consequently, the dual pending Motions to Dismiss filed by Hippodrome Foundation, Hippodrome Performing Arts Center, and Theater Management Group are intertwined with Plaintiff’s previously filed Motion to Remand. If the motions to dismiss are successful for all

three nondiverse Defendants, then complete diversity exists between the parties and Plaintiff's Motion to Remand would be DENIED. If, on the other hand, any of the motions are not successful and any of the nondiverse defendants remain in this case, then complete diversity would not exist and the case should be remanded to the Circuit Court for Baltimore City.

I. Theater Management Group's Motion to Dismiss (Paper No. 37)

Section 9-509 of the Maryland Workers' Compensation Act contains a broad exclusivity provision for workplace injuries.⁴ *See* Md. Code Ann., Lab. & Empl. § 9-509. Plaintiff states in his response to Theater Management Group's Motion to Dismiss that "[t]he contract between [Hippodrome Foundation] and Buena Vista Theatrical Group Ltd. required Hippodrome Foundation to supply production labor, including stagehands. Hippodrome Foundation contracted with [Theater Management Group] to fulfill that portion of the contract. Plaintiff's employment was governed by a contract between his labor union and [Theater Management Group]." (Pl.'s Resp. 4.) Plaintiff also completed a claim form in which he listed Theater Management Group as his employer (Def.'s Opp'n Mot. Remand Ex 3, Employee's Claim Form), and Plaintiff in fact was awarded workers' compensation benefits by the Workers' Compensation Commission on October 19, 2005. (*Id.* Ex. 5.) It is undisputed, therefore, that Plaintiff was an employee of Theater Management Group who, after a workplace accident, applied for and received workers' compensation benefits, which are the exclusive remedy for the injuries he sustained.

Plaintiff argues, however, that for the purposes of his current lawsuit he should be considered a "causal employee." Causal employees are not covered under the workers'

⁴ The limited exceptions to the exclusivity provisions are not at issue in this case.

compensation statute. *See* Md. Code Ann., Lab. & Empl. § 9-205 (stating that “[a] casual employee is not a covered employee”). Thus, a casual employee is not prohibited by the exclusivity provision from seeking to recover by way of a lawsuit sounding in negligence. As a corollary, however, “the conclusion that one is a casual employee precludes recovery under the Act.” *Leonard v. Fantasy Imports, Inc.*, 504 A.2d 660, 664 (Md. Ct. Spec. App. 1986). Therefore, a covered employee is not barred from filing a lawsuit, and a casual employee is barred from recovering under the Maryland Workers’ Compensation Act.

Plaintiff’s argument is barred by principles of judicial estoppel. Judicial estoppel “prevents ‘a party who successfully pursued a position in a prior legal proceeding from asserting a contrary position in a later proceeding.’” *Gordon v. Posner*, 790 A.2d 675, 689 (Md. Ct. Spec. App. 2002), *cert. denied*, 798 A.2d 552 (citations omitted). Plaintiff has acknowledged that he applied for and received workers’ compensation benefits. In doing so, Plaintiff necessarily represented (directly or indirectly) to the Workers’ Compensation Commission that he was a covered employee. Having done so, he may not attempt to evade the exclusivity provision in this subsequent action by arguing casual employee status. Plaintiff’s position in this Court is plainly inconsistent with his previous position, and is therefore barred by judicial estoppel.⁵ *See*

⁵ Plaintiff’s counsel indicated at the hearing that he did not represent Plaintiff when he filed for benefits. It is insufficient, however, for Plaintiff to prevent the application of the doctrine of judicial estoppel simply by asserting that a previously retained attorney asserted the inconsistent position. Arguments made on behalf of the Plaintiff belong to him, and he cannot dissociate himself with them simply by changing counsel.

As an additional matter, Plaintiff’s concern that Theater Management Group may have “decided not to raise the casual employee defense to the workers’ compensation claim to receive the benefit of reduced liability,” (Pl.’s Opp. n. 5), is unfounded. Moreover, Theater Management Group certainly did not bear the burden of advising Plaintiff, who was represented by counsel at the time, on the means to maximize his recovery against the company.

Abrams v. Am. Tennis Courts, Inc., 862 A.2d 1094, 1102 (Md. Ct. Spec. App. 2004) (finding that judicial estoppel prohibited subsequent tort suit after plaintiff fraudulently persuaded the Workers' Compensation Commission to award benefits).

Therefore, Theater Management Group's Motion to Dismiss (Paper No. 37) is GRANTED.

II. Hippodrome Foundation's and Hippodrome Performing Arts Center's Motion to Dismiss (Paper No. 36)

As discussed above, Plaintiff listed Theater Management Group as his employer in forms submitted to the Workers' Compensation Commission and received benefits from Theater Management Group as a result thereof. Defendants Hippodrome Foundation and Hippodrome Performing Arts Center argue that Plaintiff's claim against them should be dismissed because they are Plaintiff's statutory employers under the Maryland Workers' Compensation Act.

Section 9-508(a) of the Maryland Workers' Compensation Act describes what is judicially termed a "statutory employer":

(a) In general. – A principal contractor is liable to pay to a covered employee or the dependents of the covered employee any compensation that the principal contractor would have been liable to pay had the covered employee been employed directly by the principal contractor if:

(1) the principal contractor undertakes to perform any work that is part of the business, occupation, or trade of the principal contractor;

(2) the principal contractor contracts with a subcontractor for the execution by or under the subcontractor of all or part of the work undertaken by the principal contractor; and

(3) the covered employee is employed in the execution of that work.

Md. Code Ann., Lab. & Empl. § 9-508(a); *State, to the Use of Hubert v. Bennett Building Co.*, 140 A. 52, 53 (Md. 1928). In *Rodrigues-Novo v. Recchi America, Inc.*, 846 A.2d 1048 (Md.

2004), the Court of Appeals of Maryland explained that a statutory employer must demonstrate four elements under section 9-508:

[T]he entity seeking tort immunity must be (1) a principal contractor; (2) who has contracted to perform work (3) which is a part of his trade, business or occupation; and (4) who has contracted with any other party as a subcontractor for the execution by or under the subcontractor of the whole or any part of such work.

Id. at 1053 (citing *Honaker v. W.C. & A.N. Miller Dev. Co.*, 365 A.2d 287, 288 (Md. 1976)).

Plaintiff has not contested that Hippodrome Foundation is a statutory employer for purposes of this lawsuit. It is undisputed that Hippodrome Foundation subcontracted with Theater Management Group to provide the necessary production labor, which included Plaintiff. Based on these facts, Hippodrome Foundation is a statutory employer for purposes of section 9-508 of the Maryland Workers' Compensation Act and therefore stands in the same position as Plaintiff's direct employer, Theater Management Group. As a matter of law, Plaintiff may not recover from Hippodrome Foundation due to the exclusivity provisions of section 9-509.

Hippodrome Performing Arts Center, however, was not a party to that contract and therefore cannot be a statutory employer under Maryland law. Unable to claim the same protections under the Maryland Workers' Compensation Act as Hippodrome Foundation, Hippodrome Performing Arts Center alternatively argues that it is entitled to a dismissal of Plaintiff's claims because "[t]here are no facts in the record to suggest that [Hippodrome Performing Arts Center] played any role with respect to the road case in controversy." (Defs.' Mem. Supp. Mot. Dismiss 10.) In support of this position, Hippodrome Performing Arts Center highlights the Certification of Olive Waxman, the Director of Hippodrome Foundation. Ms. Waxman states in her Certification that Hippodrome Performing Arts Center and its employees

did not supervise or instruct the individuals that loaded the set of *The Lion King*. (Defs.' Opp'n Mot. Remand Ex. 2, Certification of Olive Waxter §§ 10-12.).

Significant reliance on Ms. Waxman's Certification would require converting Defendants' Motion to Dismiss into a Motion for Summary Judgment, which this Court is unwilling to do. Although Defendants have alternatively sought summary judgment in their pending motions, this Court did not permit the Defendants to file a motion under Rule 56. (Paper No. 28.) Moreover, it is plainly too early to decide this case on the basis of a developed fact record. Defendants initially removed this case based on the fraudulent joinder doctrine. This Court was generous in allowing additional motions under Rule 12(b)(6), but it will not go so far as to allow Defendants to defeat a Motion to Remand on summary judgment standards without having permitted the Plaintiff a fair opportunity to discover facts that may assist his case.

Under Rule 12(b)(6), this Court is unable to determine that Plaintiff's claims against Hippodrome Performing Arts Center entirely fail as a matter of law. Although Plaintiff's Amended Complaint does not distill the precise role Hippodrome Performing Arts Center played among the various Defendants in contributing to Plaintiff's injuries, the Amended Complaint sufficiently describes the injuries sustained by the Plaintiff and the manner in which he sustained them. Therefore, the Amended Complaint alleges sufficient facts against Hippodrome Performing Arts Center to "state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1974. Especially with respect to Count I (negligence), Hippodrome Performing Arts Center's involvement in the circumstances that caused Plaintiff's injuries cannot be determined

until a fact record has been developed.⁶

Therefore, Defendants' Motion to Dismiss (Paper No. 36) is GRANTED IN PART and DENIED IN PART. The motion is granted as to Hippodrome Foundation, but denied as to Hippodrome Performing Arts Center. Therefore, because Hippodrome Performing Arts Center remains in this case and is a Maryland entity, there is not complete diversity of citizenship. Consequently, Plaintiff's Motion to Remand (Paper No. 10) is GRANTED and the case will return to Circuit Court for Baltimore City unchanged except for the dismissal of Defendants

⁶ It was determined at the motions hearing on Plaintiff's Motion to Remand that additional briefing in the form of a Rule 12(b)(6) motion was warranted, and the parties did not object at that time. If the Court had ruled prior to ordering additional briefing, this Court would have applied a stricter standard to Defendant's Notice of Removal based on the fraudulent joinder doctrine. In *Hartley*, the Fourth Circuit made clear that the "no possibility" standard is more difficult than the standard applied in a Rule 12(b)(6) motion:

The party alleging fraudulent joinder bears a heavy burden — it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor. This standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Hartley, 187 F.3d at 424 (internal quotations omitted).

To be clear, the result reached in this Memorandum Opinion would not be different even under the stricter fraudulent joinder standard. Plaintiff has no legal possibility of recovery against either Theater Management Group or Hippodrome Foundation. (Although Plaintiff could *possibly* demonstrate facts tending to show that he was a casual employee if discovery ensued, Maryland law quite clearly bars him from attempting to do so under judicial estoppel principles.) On the other hand, Plaintiff pled a possibly meritorious case against Hippodrome Performing Arts Center (at least as to Count I).

This Court recognizes the peculiar procedural posture of this case. Courts do not commonly dismiss defendants before remanding the case to state court. In this particular case, however, it makes little sense for this Court to require Theater Management Group or Hippodrome Foundation, both of which are plainly entitled to dismissal, to continue to litigate at the cost of both the parties and the state court.

Theater Management Group and Hippodrome Foundation.

CONCLUSION

In sum, Defendant Theater Management Group's Motion to Dismiss (Paper No. 37) is GRANTED and Defendants Hippodrome Foundation's and Hippodrome Performing Arts Center's Motion to Dismiss (Paper No. 36) is GRANTED IN PART and DENIED IN PART. Plaintiff's Motion for Remand (Paper No. 10) is GRANTED and the case shall return to the Circuit Court for Baltimore City. A separate Order follows.

Dated: September 25, 2008

/s/ _____
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICHARD DELAHEY,

Plaintiff,

v.

DISNEY THEATRICAL
PRODUCTIONS LTD., *et al.*,

Defendants.

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Civil Action No. RDB-08-775

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ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this 25th day of September 2008, HEREBY ORDERED that:

1. Theater Management Group – Maryland, LLC’s Motion to Dismiss (Paper No. 37) is GRANTED and Defendant Theater Management Group – Maryland, LLC is hereby dismissed from the case;
2. Hippodrome Foundation, Inc.’s and Hippodrome Performing Arts Center LLC’s Motion to Dismiss (Paper No. 36) is GRANTED IN PART and DENIED IN PART, as follows:
 - a. The Motion to Dismiss is GRANTED as to Hippodrome Foundation, Inc., and Hippodrome Foundation, Inc. is hereby dismissed from this case;
 - b. The Motion to Dismiss is DENIED as to Hippodrome Performing Arts Center LLC;
3. Richard Delahey’s Motion for Remand (Paper No. 10) is GRANTED;
4. All further proceedings in this case are remanded to the Circuit Court for

Baltimore City, Maryland pursuant to 28 U.S.C. § 1447;

5. Copies of this Order and the foregoing Memorandum Opinion shall be sent to counsel of record and the Clerk of the Circuit Court for Baltimore City, Maryland; and that the Clerk of Court forthwith transmit the record herein to the Clerk of the Circuit Court for Baltimore County; and
6. The Clerk of the Court shall CLOSE this case.

/s/

Richard D. Bennett
United States District Judge