



MDL 2816 IN RE: SORIN 3T HEATER-COOLER SYSTEM

2022 | Cited 0 times | M.D. Pennsylvania | June 27, 2022

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA IN RE: SORIN 3T HEATER- : MDL NO. 2816 COOLER SYSTEM PRODUCTS :
CIVIL ACTION NO. 1:18-MD-2816 LIABILITY LITIGATION (NO. II) :

_____ : (Judge Conner) : THIS DOCUMENT RELATES TO: :
Cherkala v. LivaNova Deutschland : GmbH, et al., No. 1:21-CV-1627 :

MEMORANDUM Plaintiffs Brian and Yvonne Cherkala move the court to join the above- Cherkala II-filed civil action, Cherkala v. LivaNova Deutschland GmbH, No. 1:20-CV-1803 (M.D. Pa.) Cherkala I , and to remand both actions to the Court of Common Pleas of Cuyahoga County, Ohio, for lack of subject-matter jurisdiction. Defendants LivaNova 1

and Cleveland Clinic oppose the motion, contending joinder is improper and plaintiffs fraudulently joined Cleveland Clinic (the only nondiverse defendant) in Cherkala II to defeat diversity jurisdiction. For the reasons that follow, we will Cherkala II only to the Cuyahoga County Court of Common Pleas.

1 Plaintiff has sued three LivaNova entities: LivaNova Deutschland GmbH (f/k/a Sorin Deutschland GmbH), LivaNova Holding USA, Inc. (f/k/a Sorin Group USA, Inc.), and LivaNova USA, Inc. (f/k/a Cyberonics, Inc.). (See Doc. 1-2 ¶¶ 4-6). We refer to this gro

I. Factual Background and Procedural History Plaintiff Brian Cherka -heart surgery at the Cleveland Clinic Main Campus on August 28, 2017. (See Doc. 1-2 ¶ 47). Plaintiffs allege that a Stockert 3T Heater-Cooler system manufactured and sold by LivaNova

the system, as well as negligent maintenance of the system by hospital staff, caused Cherkala to develop a Mycobacterium chimaera infection. (See id. ¶¶ 4-7, 16, 58-86). Plaintiffs commenced their first lawsuit, Cherkala I, in the Court of Common Pleas of Cuyahoga County, Ohio, in August 2020. See Cherkala I, No. 1:20-CV-1803, Doc. 1-2. Therein, plaintiffs asserted statutory product-liability claims as well as common-law negligence and loss-of-consortium claims against LivaNova only. See id. ¶¶ 56-76. LivaNova removed Cherkala I to the United States District Court for the Northern District of Ohio, see id., Doc. 1, and the case was transferred into the Sorin 3T Heater-Cooler MDL assigned to this court on October 2, 2020, see id., Doc. 11. 2

The parties have since engaged in mandatory discovery in the MDL, including the exchange of plaintiff and defense fact sheets, respectively, on January 19, 2021, and May 3, 2021. (See Doc. 20 at 3).



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On August 26, 2021, plaintiffs initiated this lawsuit, Cherkala II, again in the Court of Common Pleas of Cuyahoga County. (See Doc. 1- reasserts their original claims against LivaNova, but also adds a negligence claim

2 The Sorin 3T Heater-Cooler MDL was initially assigned to former Judge Panel on Multidistrict Litigation reassigned the MDL to the undersigned.

against Cleveland Clinic f an[,] and disinfect the Stockert 3T Heater-Cooler Systems technicians and/or engineers responsible for performing all maintenance, repair,

disinfection, and cleaning -Cooler units. (See id. ¶¶ 82-83).

Cherkala I in May 2021. (See Doc. 12 at 2). Together with their Cherkala II complaint, plaintiffs filed a motion pursuant to Ohio Rule of Civil Procedure 10(D)(2)(b), positing their claim against Cleveland Clinic was not a - of-merit requirement, but seeking an extension of time to obtain an affidavit if the the claim. (See Doc. 1-3 at 3-15). LivaNova removed Cherkala II to the Northern District of Ohio the same day. (See Doc. 1). The notice of removal acknowledges that Cleveland Clinic is a nondiverse defendant but asks the court to ignore its citizenship for jurisdictional purposes because plaintiffs fraudulently joined Cleveland Clinic in Cherkala II to destroy diversity. (See id. ¶¶ 17-37). The case was thereafter transferred into the Sorin 3T Heater-Cooler MDL. (See Doc. 10). Plaintiffs promptly filed the instant motion of Cherkala I and Cherkala II under Federal Rule of Civil Procedure 20 and remand of the entire combined lawsuit to Ohio state court for lack of jurisdiction. (See Doc. 12 at 1). For its part, LivaNova moves to dismiss Cherkala II claims against LivaNova pursuant to the first-filed rule and the rule against claim-splitting, or, alternatively, to stay Cherkala II pending resolution of Cherkala I or to sever the Cherkala II

claims against LivaNova from those against Cleveland Clinic and merge the claims against LivaNova into Cherkala I. (See Doc. 21 ¶¶ 7-10). Both motions are fully briefed and ripe for disposition. II. Legal Standards

A. Motion to Remand Under 28 U.S.C. § 1441, a defendant may remove an action brought in state jurisdiction. See 28 U.S.C. § 1441(a). A plaintiff may move to remand the case due

to a procedural defect in the removal within 30 days after the notice of removal is filed. See *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 162 (3d Cir.

2014) (quoting *Brown v. Jevic*, 575 F.3d 322, 326 (3d Cir. 2009)). The removing party bears the burden of proving that the matter is properly before the federal court. See *Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir. 2007) (citations omitted); *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987) (same).



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B. Motion to Dismiss Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of complaints that fail to state a claim upon which relief may be granted. See FED. R. CIV. P. 12(b)(6). When ruling on a motion to dismiss under Rule 12(b)(6), the court must consider the complaint in the light most favorable to the plaintiff, and determine whether, under

Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (quoting Pinker v.

Roche Holdings, Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)). In addition to reviewing the facts contained in the complaint, the court may also consider to the complaint, matters of public record, [and] undisputedly authentic documents

Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010) (citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)).

Phillips, 515 F.3d at 232 (alteration in original) (quoting Bell Atl. Corp. v. Twombly,

550 U.S. 544, 555 (2007)). To test the sufficiency of the complaint, the court conducts a three-step inquiry. See Santiago v. Warminster Township, 629 F.3d 121, 130-31 (3d Cir. 2010) (alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)). Next, the factual and legal elements of a claim must be separated; well-pleaded facts are accepted as true, while mere legal conclusions may be disregarded. Id. at 131-32; see Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009). Once the court isolates the well-pleaded factual matter in Iqbal, 556 U.S. at 679 (citing Twombly, 550 U.S. at 556); Twombly, 550 the court to draw the reasonable inference that the defendant is liable for the Iqbal, 556 U.S. at 678.

C. Motion to Join Federal Rule of Civil Procedure 20 governs permissive joinder of parties in one lawsuit, see FED. R. CIV. P. 20, and Rule 20(a)(2) speaks specifically to joinder of defendants, see FED. R. CIV. P. 20(a)(2). The rule allows a plaintiff to join multiple persons as defendants in one action if they jointly, severally, or in the alternative with respect to or arising out of the

question of law or fact common. See id.

Rule 20 is a flexible rule that contemplates both fairness and judicial economy. See 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FED. PRACTICE & PROC. § 1652 (3d ed. 2022); Hagan v. Rogers, 570 F.3d 146, 153 (3d Cir. 2009) (quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966)). Although joinder is encouraged when the requirements of Rule 20 are satisfied, see Hagan, 570 F.3d at

153 (quoting United Mine Workers of Am., 383 U.S. at 724), the court may deny joinder, in its discretion, to avoid prejudice, expense, or delay, see 7 WRIGHT & MILLER, supra, § 1652. III. Discussion Plaintiffs ask us to join Cherkala I and Cherkala II pursuant to Rule 20(a)(2) of the Federal



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Rules of Civil Procedure and thereafter remand the joined actions for lack of subject-matter jurisdiction. hurdles, both of which are fatal. First, Rule 20(a)(2) is a pleading rule that permits

; it does not authorize joinder in one action of two existing lawsuits. See FED. R. CIV. P. 20(a)(2). Rule 20(a)(2) may well apply to allow plaintiffs to join LivaNova and Cleveland Clinic as defendants in one pleading in Cherkala II, but plaintiffs cite no authority to support their view that the rule also permits what would effectively be a merger of Cherkala I and Cherkala II into a single lawsuit. 3

Second, and more importantly, subject-matter jurisdiction is a threshold inquiry, so our analysis necessarily begins motion for joinder, but with their challenge to our diversity jurisdiction.

See generally *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 414 (3d Cir. 1999) (citing *Steel Co. v. Citizens for a Better En*, 523 U.S. 83

(1998))). LivaNova bears the burden of proving this matter is between citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds \$75,000. See 28 U.S.C. § 1332(a); see also *Frederico*, 507 F.3d at 193 (citations omitted); *Steel Valley Auth.*, 809 F.2d at 1010 (same). There is no dispute sub judice that Cleveland Clinic is a citizen of the same state as plaintiffs (Ohio) and thus is nondiverse. (See

3 Plaintiffs might have intended to invoke Federal Rule of Civil Procedure 42, which permits consolidation of separate civil actions. See FED. R. CIV. P. 42. Rule 20 was not inadvertent. In any event, even if plaintiffs intended to proceed by consolidation under Rule 42 rather than joinder under Rule 20, as explained infra, we must first ask whether we have subject-matter jurisdiction over Cherkala II before we decide whether to consolidate that case with Cherkala I.

Doc. 1 ¶¶ 11, 12, 17; Doc. 1-2 ¶¶ 2, 3, 9). Nonetheless, LivaNova maintains Cleveland Clinic was fraudulently joined and the court should disregard its citizenship in assessing diversity. (See Doc. 1 ¶¶ 17-37; Doc. 20 at 15-19). Federal courts may disregard the presence of a nondiverse defendant and assume jurisdiction over a case if that defendant was fraudulently joined for the purpose of defeating diversity. See *In re Briscoe*, 448 F.3d 201, 216 (3d Cir. 2006) (citation omitted). Jo colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint Id. at 219 (quoting *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985)). Our court of appeals has explained that a party charging fraudulent See *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) (quoting *Steel Valley Auth.*, 913 F.2d at 1010, 1012 any See *In re Briscoe*, 448

F.3d at 219 (emphasis added) (citing *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 find joinder to be proper and remand the case. See *Boyer*, 913 F.2d at 111 (citation

omitted).



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lone claim against Cleveland Clinic, whether construed as a general negligence claim or a medical claim, 4

is nonviable and was necessarily included in Cherkala II for the sole purpose of defeating diversity jurisdiction. (See Doc. 20 at 15-19). According to LivaNova, claim is a general negligence claim as plaintiffs originally asserted, it is time-barred

s two-year statute of limitations. (See *id.* at 17); see also OHIO REV. CODE ANN. § 2305.10(A). And if construed as a medical claim, it fails both for lack of an affidavit of merit and also on timeliness grounds, as medical claims are subject to an even shorter one-year limitations period under Ohio law. (See Doc. 20 at 17-19); see also OHIO REV. CODE ANN. § 2305.113(A); OHIO R. CIV. P. 10(D)(2). LivaNova acknowledges reliance on the termination-rule articulated by the Supreme Court of Ohio in *Frysinger v. Leech*, 512 N.E.2d 337 (Ohio 1987), but argues the rule defers claim accrual only in cases involving the negligence of individual providers and not in cases, like this one, against the hospital system alone. (See Doc. 20 at 18-19).

4 Plaintiffs attach to the instant motion a first amended complaint which was apparently filed in the Court of Common Pleas of Cuyahoga County on August 27, 2021, (see Doc. 12-1), the day after LivaNova removed Cherkala II to this court. In the amended complaint, plaintiffs attempt to recast their claim against Cleveland Clinic, abandoning their initial assertion that the claim is a general negligence claim and reasserting it as a medical claim. In determining whether a claim is fraudulent, we See *In re Briscoe*, 448 F.3d at 217 (quoting *Batoff*, 977 F.2d at 851-52). Our therefore restricted to

The problem for LivaNova, as has been the problem in other lawsuits, see, e.g., *Warman v. LivaNova*, No. 1:22-CV-183, Doc. 23 (M.D. Pa. June 21, 2022); *Napier v. LivaNova*, No. 1:22-CV-901, Doc. 26 (M.D. Pa. June 21, 2022), is that it conflates the fraudulent-joinder analysis with Rule 12(b)(6)-style merits review. argument against application of *Frysinger* tolling, for example, relies on its view

typically applied by Ohio s intermediate appellate court in suits involving the alleged negligence of physicians. (See Doc. 20 at 18-19 (emphasis added) (citing, *inter alia*, *Birkmeier* , No. 1-17-57, 2018 WL 3026047, at *5 (Ohio Ct. App. June 18, 2018))). As plaintiffs underscore, that same court has also rejected the argument that *Frysinger* (See Doc. 28 at 4 (quoting *Amadasu* , 891 N.E.2d 802, 806 (Ohio Ct. App.

2008))). Although *Birkmeier* attempts to cabin *Amadasu* to cases involving claims against both a physician and a hospital, see *Birkmeier*, 2018 WL 3026047, at *6, we cannot say the law in Ohio is so settled on this point as to any possibility a state court see *In re Briscoe*, 448 F.3d at 219 (emphasis added) (citing *Batoff*, 977 F.2d at 851). LivaNova also with their complaint as required by Ohio Rule of Civil Procedure 10(D)(2)(a). (See

Doc. 20 at 17-18). LivaNova ignores, however, that simultaneously with the filing of their complaint,



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plaintiffs submitted a motion for extension of time to file their affidavit of merit a request explicitly contemplated by Ohio Rule 10(D)(2)(b). (See Doc. 1-3 at 3-15); see also OHIO R. CIV. P. 10(D)(2)(a), (b). motion remains pending. Thus, assuming arguendo Case 1:18-md-02816-CCC-SES Document 514 Filed 06/27/22 Page 10 of 12 against Cleveland Clinic as a medical claim and grant the motion for extension of time, Rule 10(D)(2) would present no barrier to the claim. Cleveland Clinic is free from infirmity. LivaNova has raised several, nonfrivolous

open questions as to based on that construction. But we need not be persuaded at this juncture that

plaintiffs are likely to prevail on their claim or even that they have stated a claim sufficient to satisfy Rule 12(b)(6). We must decide only whether there is at least against Cleveland Clinic. See Boyer, 913 F.2d at 111 (citation omitted). Resolution

of that question involves, in part, wading into unsettled issues of Ohio state law, and See Warman, No. 1:22-CV-183, Doc. 23 at 9-10; Napier, No. 1:22-

CV-901, Doc. 26 at 9-10. We thus hold that LivaNova has not met its heavy burden no negligence

claim against Cleveland Clinic. See Boyer, 913 F.2d at 111 (quoting Abels, 770 F.2d at 32); In re Briscoe, 448 F.3d at 216 (same). 5 IV. Conclusion The court will remand the above-captioned action to the Court of Common Pleas of Cuyahoga County, Ohio. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER Christopher C. Conner United States District Judge Middle District of Pennsylvania Dated: June 27, 2022

5 laim against Cleveland Clinic is not fraudulent, to sever the Cherkala II claims against LivaNova, retain jurisdiction over those claims in the MDL, and remand only the claim against Cleveland Clinic. (See claim against Cleveland Clinic is not fraudulent, however, means the court lacks subject-matter jurisdiction over this lawsuit. In the absence of subject-matter jurisdiction, any such severance order would be a legal nullity. Accordingly, while we agree with LivaNova that the claims against it in Cherkala II are duplicative of those against it in Cherkala I and likely subject to dismissal, we are constrained to leave that matter for resolution by the state court on remand.

