

ENTERED

August 09, 2024

Nathan Ochsner, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

AARON PETRY,	§	
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION NO. 4:24-1981
	§	
VERSABAR, INC., SABINE BASE, LLC,	§	
SMART FABRICATORS OF TEXAS,	§	
LLC, SHELL OFFSHORE, INC., AND	§	
SHELL OIL COMPANY,	§	
<i>Defendants.</i>	§	

MEMORANDUM AND ORDER

Aaron Petry sued Versabar, Inc., Sabine Base, LLC, Smart Fabricators of Texas, LLC, Shell Offshore, Inc., and Shell Oil Company in Texas state court in 2021 for injuries he received while working on an offshore rig. (Docket Entry No. 1 at 2, 5). In February 2023, Shell International Exploration Production, Inc. was added as a defendant. (*Id.* at 2). Shell International removed the case to this court in May 2024, (*Id.*), after participating in 14 months of discovery and moving for summary judgment in state court. Petry moves to remand on the basis that the defendants have waived their right to remove. (Docket Entry No. 11).

Based on the briefing, the record, and the applicable law, the court grants Petry’s motion to remand. The reasons are set out below.

I. Background

Aaron Petry, a Houston resident, was working on an offshore oil storage facility (the ship *Telford 31*) off the coast of Nigeria when he was badly injured during a crane lift in September 2021. (Docket Entry No. 1-4 at 102). Petry worked for one of several subcontractors of Raytheon Energy, Ltd. Shell Nigeria Exploration and Production Company Limited (SNEPCo), a Nigerian

oil and gas production company, had hired Raytheon for repair work on an offshore oil facility owned by the Nigerian National Petroleum Corporation, Ltd. Raytheon in turn contracted with Petry's employer. (Docket Entry No. 1-5 at 102-109). The accident allegedly resulted from poor planning for the crane lift. involving a SNEPCo employee working from his home in Houston during the COVID-19 pandemic. (Docket Entry No. 2 at 8).

Petry sued a number of entities involved in the crane accident in the Texas state court case he filed in October 2021. (Docket Entry No. 1 at 2). Petry added Shell International as a defendant in February 2023. (*Id.*). Petry added SNEPCo as a defendant in the Fourth Amended Petition, filed in January 2024. (*Id.* at 3). In May 2024, Shell International removed from state to federal court under the New York Convention. (*Id.*). Petry promptly moved to remand. (Docket Entry No. 11). SNEPCo has moved in this court to dismiss for lack of personal jurisdiction under Rule 12(b)(2). (Docket Entry No. 2). Petry has asked the court to decide the motion to remand before the motion to dismiss under Rule 12(b)(2), asserting that jurisdictional discovery is needed to resolve that motion. (Docket Entry No. 12).

II. The Standard for Finding a Waiver of the Right to Remove

“To remove a case based on diversity, the diverse defendant must demonstrate that all of the prerequisites of diversity jurisdiction contained in 28 U.S.C. § 1332 are satisfied.” *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 572 (5th Cir. 2004) (en banc). “A case may be removed pursuant to 28 U.S.C. § 1332 if there is complete diversity of citizenship and the amount in controversy is greater than \$75,000 exclusive of interests and costs.” *Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 183 (5th Cir. 2018).

A defendant can waive its right to removal by “proceeding to defend the action in state court or otherwise invoking the processes of that court.” *Brown v. Demco, Inc.*, 792 F.2d 478, 481

(5th Cir. 1986) (a waiver resulted from filing answers and amended answers, motions, third-party demands, cross claims, amended cross claims, and from participation in discovery, including depositions). Waiver of the right to remove by litigation conduct is not lightly found, and the waiver must be “clear and unequivocal.” *Resolution Tr. Corp. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994) (quoting *Beighley v. Fed. Deposit Ins. Corp.*, 868 F.2d 776, 782 (5th Cir. 1989)).

Most litigation conduct does not waive the right to remove. *See, e.g., Kenny v. Wal-Mart Stores, Inc.*, 881 F.3d 786, 791 (9th Cir. 2018) (filing a demurrer did not waive the right to remove); *Foley v. Allied Interstate, Inc.*, 312 F. Supp. 2d 1279, 1284-85 (C.D. Cal. 2004) (filing an answer, serving interrogatories, and requesting an extension of time to respond to discovery did not waive the right to remove). “In general, the right of removal is not lost by action in state court short of proceeding to an adjudication on the merits.”, *Foley*, 312 F. Supp. 2d at 1282 (quoting *Resolution Trust Corp.*, 43 F.3d at 1240 (9th Cir. 1994)).

Discovery and motion practice in the state court taken before the basis for removal is apparent are generally not deemed to waive the right of removal. *See Taylor v. United Rd. Servs., Inc.*, 313 F. Supp. 3d 1161, 1173-74 (E.D. Cal. 2018) (the defendant’s conduct did not waive the right to remove because at the time of that conduct, it was not apparent that removal jurisdiction existed). However, if a defendant manifests its assent to state court jurisdiction by, for example, moving for summary judgment or filing affirmative claims in the state court before filing a removal notice, that may waive the right to remove. *See Acosta v. Direct Merchs. Bank*, 207 F. Supp. 2d 1129, 1132-33 (S.D. Cal. 2002) (holding that filing counterclaims and cross-claims waived the right to remove); *Cf. Koch v. Medici Ermete & Figli S.R.L.*, No. CV 13-1411, 2013 WL 1898544, at *3 (C.D. Cal. May 6, 2013) (filing a compulsory counterclaim did not waive the right to remove).

Filing dispositive motions in the state court before a case becomes removable is generally not a basis for finding waiver. *See Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) (discovery and motions practice before the case became removable is not a waiver); *Wolfe v. Walmart Corp.*, 133 F. Supp. 2d 894 (N.D. Va. 2001) (discovery and motions practice after the case became removable waived the right to remove).

III. Analysis

Shell International removed on the basis of the New York Convention. (Docket Entry No. 1). The statute, 9 U.S.C. § 205, states that when the subject matter of an action pending in state court “relates to” an arbitration agreement falling under the Convention, a defendant may remove the action to federal court any time before trial. The defendants argue that Petry’s claims “relate to” two contracts: (i) the E&P Service and Coordination Agreement between Shell International and Shell International Exploration and Production BV (arbitration provision in Article 13); and (ii) the E&P Service Agreement between Shell International BV and SNEPCo (arbitration provision in Article 23). (*See generally* Docket Entry Nos. 1-2; 1-3). Both of these contracts were entered into in August 2003. (*Id.*). Petry was not a signatory to either contract, did not work for either contracting company, and did not participate in work under those contracts. The contracts were executed 18 years before the Petry was injured.

The defendants claim that the Convention applies because the contracts containing the arbitration clauses “relate to” Petry’s suit under the doctrine of direct benefits estoppel. *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002). Under this doctrine, a non-signatory to an arbitration agreement can be bound by that agreement if it “could *conceivably* affect the outcome of the plaintiff’s case.” *Id.* (emphasis in original). In practice, “a non-signatory can ‘embrace’ a contract containing an arbitration clause in two ways: (1) by knowingly seeking and obtaining ‘direct

benefits' from that contract; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract." *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010) (citations omitted); *see also QPro Inc. v. RTD Quality Servs. USA, Inc.*, 718 F. Supp. 2d 817 (S.D. Tex. 2010); *Lionheart Project Logistics, Inc. v. BBC Chartering USA, LLC*, No. CIV.A. 4:11-2076, 2011 WL 3739065 (S.D. Tex. Aug. 24, 2011). Neither of these scenarios apply.

First, Petry has not knowingly claimed benefits under the contracts that contain the arbitration clauses. "To satisfy the knowledge requirement, the case law requires that the non-signatory have had actual knowledge of the contract containing the arbitration clause." *Noble Drilling*, 620 F.3d at 473. Shell International does not argue that the "knowledge" requirement is satisfied. Indeed, it almost certainly is not.

Second, Petry is not suing "to enforce the terms" of the contracts Shell International relies on. Petry's complaint does not allege a breach of contract or a similar claim. (*See generally* Docket Entry No. 1-5). Petry asserts tort claims based on statutory law (the Jones Act) and maritime law. (*Id.*). These claims do not rely on, seek to enforce, or require reference to the 2003 contracts. Petry does not rely on either contract to assert or litigate his Jones Act and maritime law claims. *See Didmon v. Frontier Drilling (USA), Inc.*, 2012 WL 951544, at *4 (S.D. Tex. Mar. 19, 2012) (remanding a maritime personal injury case because the plaintiff did not "rely on the terms of the ADR agreement in asserting his tort claims against Frontier Cyprus.").

In addition, direct benefits estoppel does not apply when a plaintiff "disclaim[s] any reliance" on the contracts in question. *See Noble Drilling*, 620 F.3d at 474. In that case, the Fifth Circuit recognized that the plaintiff was "not required to base its claims on the Purchase Order Agreements and can . . . disclaim any reliance thereupon." *Id.* The court "conclude[d] that the

theory of direct benefits estoppel is not applicable, and Noble is not obligated to arbitrate its claims.” *Id.* at 475. Petry’s claims, including those involving a joint enterprise, a joint venture, and alter ego theories of liability do not rely on either contract. The court deciding Perry’s tort claims against the defendants will not need to look to the contract terms to resolve whether the defendants are liable to Petry and, if so, in what amount. Petry correctly states that the contracts do not relate to his claims arising from the accident. (Docket Entry No. 11 at 6). The Convention does not provide a viable basis for removal.

Even if there was a basis to remove, it has been waived. The record shows extensive litigation conduct by Shell International in the 14 months before removal, including conducting extensive discovery and filing a motion for summary judgment in the state court, after the case had become removable. (Docket Entry Nos. 1-1; 1-2). Shell International has waived the right to remove and the right to consent to another defendant’s removal, defeating the unanimous consent rule. *Beighley*, 868 F.2d at 782; *Regino’s v. Jacintoport Int’l LLC*, No. 23-cv-03613, 2023 WL 9053169 at *2 (S.D. Tex. Dec. 27, 2023). Other defendants also conducted extensive discovery in the state court and filed motions for summary judgment before removal. Allowing SIEP to now remove to federal court “would give [it] a second opportunity to forum-shop and further delay the progress of this suit.” *Certain Underwriters at Lloyd’s v. Bristol-Myers Squibb Co.*, 51 F. Supp. 2d 756, 760 (E.D. Tex. June 3, 1999) (quoting *Demco*, 792 F.2d at 482).

Petry’s motion to remand is granted. An order of remand is separately entered.

SIGNED on August 9, 2024, at Houston, Texas.



Lee H. Rosenthal
United States District Judge