UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
Case No. 24-61946-CIV-SMITH/HUNT

CARMEN SEMIDEY, as Personal Representative of the Estate of FLORENCIO SEMIDEY,

Plaintiff,

v.

GENERAL NOLI USA, INC., a Foreign Corporation,

Defendant.
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REPORT AND RECOMMENDATIONS

This matter is before this Court on a Motion to Remand by Plaintiff. ECF No. 5. The Honorable Rodney Smith, United States District Judge, previously referred this case to the undersigned for a Report and Recommendation. *See* ECF No. 8, 28 U.S.C. § 636(b). Having carefully reviewed the Motion, the Response, the entire case file, the arguments of counsel at a March 6, 2025 hearing, and applicable law, and being otherwise fully advised in the premises, the undersigned hereby RECOMMENDS that the Motion be GRANTED IN PART for the reasons laid out below.

Background

This case concerns the death of Plaintiff, a truck driver, due to allegedly improper loading by Defendants. An order of tiles shifted while in transit, causing the truck driven by Plaintiff to overturn, killing Plaintiff. The case was scheduled for trial in state court in November 2024. In October 2024, Defendant removed the case to this Court. Defendant

claimed it only determined that the case was removable on September 22, 2024, when the state court issued a written order memorializing its August 9, 2024, grant of partial summary judgment on liability to Plaintiff on her Carriage of Goods by Sea Act (COGSA) claims. *See* 46 U.S.C. § 30701.

Plaintiff now seeks to have the case remanded to state court, arguing the removal was improper and merely a ruse to get out of the trial. Plaintiff notes that federal removal statutes mandate that a state-court defendant must remove an action no later than thirty (30) days after receiving any "paper" demonstrating that a federal question has become part of the plaintiff's case. Plaintiff argues the claims have not changed over the course of the case, and that COGSA was in fact referenced several times, both by Plaintiff and Defendant, in earlier filings with the Court. Plaintiff therefore contends Defendant was on notice regarding the COGSA claim long before it removed the case.

The matter has been fully briefed and is now ripe for ruling.

Legal Standard

"In the Eleventh Circuit, under § 1446(b)(3), 'a case becomes removable when three conditions are present: there must be (1) 'an amended pleading, motion, order or other paper,' which (2) the defendant must have received from the plaintiff . . . and from which (3) the defendant can 'first ascertain' that federal jurisdiction exists." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1213 n.63 (11th Cir. 2007) (quoting 28 U.S.C. 1446(b)).

Discussion

Defendant argues it could not "ascertain" this case was removable until the state court's September 22, 2024, written order memorializing its August 9, 2024, findings. Defendant hangs its hat on the wording of the Plaintiff's Second Amended Complaint,

filed in state court, which does not explicitly mention COGSA. It asserts there was no COGSA claim presented in the Second Amended Complaint, and as proof points out that Defendant did, in fact, argue that point to the trial judge. Defendant dismisses previous arguments and filings regarding COGSA as mere suggestions that COGSA may be applicable. Defendant argues the ruling on the summary judgment motion that "triggered" the removal should be interpreted as a leave to amend in which a COGSA claim would then be first asserted, and therefore that the COGSA claim did not exist until that summary judgment ruling.

Plaintiff responds Defendant simply cannot get around the state court's ruling that COGSA had been there all along, nor can Defendant overcome legal precedent defining "paper" as far broader than just a court order.

First, Plaintiff is correct that papers other than a court order can be considered for purposes of whether a removal is timely. *See, e.g., Holloway v. Morrow*, No. CIVA 07-0839 WSM, 2008 WL 401305, at *3 (S.D. Ala. Feb. 11, 2008) ("It is clear that discovery responses may properly be deemed "other paper" for removal purposes."). But the undersigned need not address whether the numerous papers filed between the filing of the Second Amended Complaint and the Court's September 2024 Order rendered Plaintiff's COGSA Claim removable. The Complaint itself was enough.[1]

[1] However, even if, contrary to the state court's determination, the Second Amended Complaint was deficient in pleading, multiple subsequent filings, including filings by Defendant, put Defendant on notice that Plaintiff was invoking COGSA. As Plaintiff notes,

> General Noli's October 18, 2024 removal came fifteen (15) years after Plaintiff asserted her NVOCC strict liability claims arising from the importation of goods into the United States; five (5) years after General Noli had moved for summary judgment under federal law on its NVOCC status; four (4) years after Plaintiff explicitly spelled out her COGSA theory of

Key to Defendant's argument is the idea that Plaintiff's Motion for Summary Judgment was a *de facto* motion for leave to amend the Second Amended Complaint by virtue of legal argument. However, the trial court clearly disagreed with Defendant's argument, finding the COGSA claim was in the Complaint, specifically in Paragraph 48, from the moment the Second Amended Complaint was filed. *See* ECF No. 5-3 at 4–5.

Indeed, in the order memorializing the prior ruling from the bench, the state court explicitly granted partial summary judgment based on the COGSA claim. Reading the Order, particularly in light of that court's oral ruling, it is obvious that the court found the COGSA claim existed at the time of Second Amended Complaint. ECF No. 1-7 at 2, 5-3 at 4-5. This is not a case where the claim emerged late in the game. This is a case where a state court judge has found that the COGSA claim was contained in the Second Amended Complaint and had been there the whole time.

"As construed by district courts in this Circuit, the 30-day removal period prescribed by § 1446(b) commences running as soon as a defendant is able to ascertain intelligently that the action is removable." *Holloway*, 2008 WL 401305 at *3. The state court's ruling demonstrates that Defendant should have been aware of Plaintiff's COGSA claim at least

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> liability in the 2020 discovery disputes; one (1) year after General Noli expressly moved for summary judgment on Plaintiff's COGSA claims; more than eleven (11) months after Plaintiff opposed that motion by expressly invoking COGSA; more than ten (10) months after Plaintiff expressly moved for partial summary judgment on those same COGSA claims; and one hundred and fifteen (115) days after the Florida court order allowed it to assert COGSA affirmative defenses.

ECF No. 5 at 11–12.

from the moment the Second Amended Complaint was filed. It is undisputed that the removal occurred more than 30 days after Plaintiff filed said Complaint. As this makes Defendant's removal untimely under § 1446(b), Plaintiff's Motion should be Granted, and this case should be remanded to state court.

Plaintiff also requests fees under 28 U.S.C. §1447(c). An award of fees under § 1447(c) is left to the district court's discretion. *Martin v. Franklin Cap. Corp*., 546 U.S. 132, 139 (2005). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Id.* at 141. Although the undersigned finds today's decision fairly clear, it is nonetheless true that there is no direct reference to COGSA in Plaintiff's Second Amended Complaint. Further, Defendant consistently argued that there was, indeed, no COGSA claim. Although two courts have now disagreed with Defendant's argument, it is nonetheless not an objectively unreasonable argument to make. The Court should therefore decline to award fees under 28 U.S.C. §1447(c).

Recommendation

For all the foregoing reasons, Plaintiff's Motion to Remand, ECF No. 5, should be GRANTED, and the case be remanded to state court for further proceedings. Plaintiff's request for an award of just costs and actual expenses, including attorney's fees, incurred as a result of the removal should be DENIED.

Within fourteen (14) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to any of the above findings and recommendations as provided by the Local Rules for this district. 28 U.S.C. § 636(b)(1); S.D. Fla. Mag. R. 4(b). Any response shall be filed within seven (7) days of

the objections. The parties are hereby notified that a failure to timely object waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions contained in this Report and Recommendation. 11th Cir. R. 3-1 (2016); *see Thomas v. Arn*, 474 U.S. 140 (1985).

DONE and SUBMITTED at Fort Lauderdale, Florida, this 9th day of June 2025.

PATRICK M. HUNT
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Rodney Smith
All counsel of record