

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

TOSH COAL COMPANY,)	
)	
Plaintiff,)	Case No. 2:01CV00042
)	
v.)	OPINION AND ORDER
)	
FIRST FINANCIAL INSURANCE COMPANY, ET AL.,)	
)	By: James P. Jones
)	United States District Judge
Defendants.)	
)	

*Jeffrey L. Elkins, Adkins, Elkins, & Hunnicutt, Norton, Virginia, for Plaintiff;
Howard C. McElroy, Bundy McElroy Hodges, Abingdon, Virginia, for First Financial
Insurance Company; William J. Sturgill, Norton, Virginia, for The Becky Corporation.*

The plaintiff Tosh Coal Company (“Tosh”) has objected to the removal of this action from state court. For the reasons set forth hereafter, I will deny the objection.

I

In its action filed in state court, Tosh sought a declaratory judgment that there was coverage under a certain insurance policy issued by the defendant First Financial Insurance Company (“First Financial”) to Tosh as to a fire that occurred on premises leased by Tosh from the defendant The Becky Corporation (“Becky”). According to

the suit papers, First Financial has denied coverage on the ground that a certain exclusion in the insurance policy applies to the loss; Tosh asserts that the exclusion does not apply. Tosh seeks an adjudication that the fire loss is insured under the policy.

Tosh also named as a defendant its lessor, Becky. Becky and Tosh agree that the lease agreement requires Tosh to provide insurance coverage for the leased premises during the term of the lease.

Tosh and Becky are both Virginia corporations, while First Financial is incorporated in Illinois, with its principal place of business in North Carolina.

Tosh contends that since there is not complete diversity between the parties, there is no removal jurisdiction and the case ought to be remanded to the Circuit Court of Wise County, Virginia. In addition, Tosh asserts that remand is proper because the defendant Becky did not join in the removal. First Financial responds that the defendant Becky has the same interests as the plaintiff in the controversy and thus ought to be aligned as a party plaintiff, preserving diversity and excusing any requirement that Becky join in the removal.

II

While complete diversity of citizenship is normally required in order to afford

subject matter jurisdiction in a federal district court,¹ it is settled that the court must align the parties according to the actual issues in controversy as determined from the pleadings.² Accordingly, “[i]f the interests of a party named as a defendant coincide with those of the plaintiff in relation to the purpose of the lawsuit, the named defendant must be realigned as a plaintiff for jurisdictional purposes.”³

In the present case it is clear that Tosh and Becky have a common interest in determining the existence of insurance coverage. Tosh asserted no claim against Becky in its suit papers, and there is no indication that any controversy exists between Tosh and Becky as to whether First Financial is obligated to afford coverage under its policy. For these reasons, it is necessary for the court to align Becky as a plaintiff, which has the effect of preserving diversity jurisdiction and excusing the fact that Becky did not join in removal.

III

For the reasons set forth in this opinion, it is **ORDERED** as follows:

1. The Becky Corporation is hereby aligned as a plaintiff in this action; and

¹ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

² See *Smith v. Sperling*, 354 U.S. 91, 96 (1957); *City of Indianapolis v. Chase Nat’l Bank of N.Y.*, 314 U.S. 63, 69-70 (1941).

³ *Dolch v. United Cal. Bank*, 702 F.2d 178, 181 (9th Cir. 1983).

2. The Objection to Removal (Doc. No. 5) is denied.

ENTER: June 22, 2001

United States District Judge