

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

WILLIAM N. DUNNING,)	CIVIL ACTION NO. 5:01CV00099
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
HENRY FLACK INTERNATIONAL,)	
INC., and)	
J. W. BOLLUM & CO., LTD.)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the defendants' Objections to the Magistrate Judge's March 27, 2002 Memorandum Opinion and Order granting the plaintiff's motion for a jury trial. For the reasons expressed herein, the court will overrule the defendants' objections and decline to modify or set aside the March 27, 2002 Order of the Magistrate Judge.

I.

The plaintiff, William N. Dunning, filed this action in the Circuit Court of Clarke County, Virginia, on April 30, 2001. The plaintiff is suing for injuries alleged to have resulted from exposure to the solvent toluene. His claims include failure to provide a safe working environment, failure to warn and breach of express and implied warranties. The Motion for Judgment contained no demand for a jury trial. On November 29, 2001, the defendants, Henry Flack International, Inc. and J. W. Bollom & Co., Ltd., removed the case to this court. This matter was then referred to the United States Magistrate Judge B. Waugh Crigler for proposed findings of fact, conclusions of law, and a recommended disposition. See 28 U.S.C. §§ 636(b)(1)(B)(West 1993 & Supp. 2001).

It is undisputed that the plaintiff did not make a written demand for a jury within ten days

after service of the Notice of Removal, as required under Rule 81(c) of the Federal Rules of Civil Procedure. At the initial pretrial conference before the Magistrate Judge on January 8, 2002, the plaintiff expressed his intention to file a motion for a trial by jury. On January 11, 2002, the plaintiff did file a written motion for a jury trial pursuant to Fed. R. Civ. P. 39(b). The defendants submitted a brief in opposition. The Magistrate Judge issued a Memorandum Opinion and Order on March 27, 2002, granting the plaintiffs' motion for trial by jury.

The defendants filed timely objections. Under Fed. R. Civ. P. 72(a), a party may object to non-dispositive, pre-trial Orders of a United States Magistrate Judge. The rule reads, in pertinent part:

The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Fed. R. Civ. P. 72(a). Therefore, the court reviews the order of the Magistrate Judge for clear error.

II.

Rule 81(c) of the Federal Rules of Civil Procedure addresses how the right to trial by jury is preserved upon removal of a case from state to federal court. The rule provides as follows:

If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury.

Fed. R. Civ. P. 81(c). The Magistrate Judge found that the plaintiff had waived his right to

a jury trial for failure to file a demand within 10 days after service of the Notice of Removal. No objections have been filed to this finding, and therefore, the court relies on it in continuing its analysis.

Notwithstanding that a party has waived the right to a jury trial, “the court in its discretion upon motion may order a trial by a jury of any or all issues.” Fed. R. Civ. P. 39(b).

In making this determination, courts are instructed to consider such factors as:

1. whether the issues are more appropriate for determination by a jury or judge;
2. whether any prejudice would result to the opposing party by granting a jury trial;
3. the timing of the motion; and
4. the effect a jury trial would have on the court’s docket and the orderly administration of justice.

Malbon v. Pennsylvania Millers Mutual Ins. Co., 636 F.2d 936 (4th Cir. 1980). These factors are not exclusive, and courts often also consider the reason for failure to make a timely demand.

See Vannoy v. Cooper, 872 F. Supp. 1485, 1487 (E.D.Va. 1995).

The Magistrate Judge ruled that discretion should be exercised in favor of a jury trial. The defendants object that the Magistrate Judge failed to consider properly the reasons for the plaintiff’s failure to make a timely demand and the prejudice which would result to the defendants. The defendants also object to what they perceive as the Magistrate Judge’s reliance on custom in the Western District as grounds for his decision. They argue that reliance on local custom is contrary to applicable case law.

The plaintiff does not provide a direct explanation for his failure to make a demand for a jury trial under Rule 81(c). However, the plaintiff had argued in his motion that the waiver exception of Rule 81(c) applied to his case. While the argument was rejected by the Magistrate Judge, it does suggest that the plaintiff may not have been aware of his obligations under the rule. While this is hardly a compelling excuse, the court is not persuaded that it mandates a

ruling against the plaintiff. The reason for not demanding a jury trial is but one factor to be taken into consideration. The fact that the Magistrate Judge did not believe that it outweighed the other factors is not clear error.

The Eastern District of Virginia cases relied on by the defendant do not warrant a different outcome. The *Keating* court did base its denial of the plaintiff's motion for a jury trial on the lack of any reason from the plaintiff as to why the court should exercise its discretion. See 715 F.Supp. at 1338. ("Unless some cause beyond mere inadvertence is shown, untimely request for jury trials should be denied.") However, this court is not bound by a ruling in the Eastern District. Moreover, the court notes that rulings issued subsequent to *Keating* within the Eastern District have not relied solely on the lack of a good excuse from plaintiff in order to deny a motion for a jury trial. The *Vannoy* court, in denying the plaintiff's Rule 39(b) motion, discussed not only the lack of justification for failure to request Rule 39(b) relief in a timely manner, but also the fact that such relief was requested more than four months after removal and more than five weeks after the court raised the issue. 872 F.Supp. at 1490. Meanwhile, in *Gelardi*, the court relied on the "lack of justifiability" for the delayed request and the effect it had on the orderly administration of the court's docket. See *Gelardi v. Transamerica Occidental Life Ins. Co.*, 163 F.R.D. 495, 497 (E.D.Va. 1995). Thus, the court considers it appropriate to weigh the lack of a good excuse from the plaintiff with the other factors listed in *Malbon*.

Regarding these other factors, the court agrees with the Magistrate Judge's findings that the granting of a jury trial would not have an adverse affect on the docket or the orderly administration of justice. In addition, the plaintiff expressed his intent to request a jury trial at the first pretrial conference and did so days later. Thus, the timing of the motion is not

problematic for the plaintiff as it was made early in the litigation process.

On the issue of prejudice, the defendants argue not that they would be prejudiced in preparing for a jury trial; rather, they argue that they will be prejudiced because they do not want a jury trial and should not have to face one after the plaintiff waived his right. The defendants merge the factor concerning prejudice with the one concerning whether the issues of the case are more appropriate for a judge or a jury. They contend that “the complexity of the medical causation issue in this case, which will involve multiple expert witnesses, is more appropriate for consideration by the court than a jury. A jury is more likely to be confused and more likely to rely upon sympathy for the plaintiff, as opposed to careful analysis of scientific and medical evidence, in deciding the critical issue of causation.” (Defs.’ Obj. at 4-5.) Thus, the defendants conclude that they would be prejudiced by a jury trial.

As for the proposition that the case is too complex for a jury, this court has never agreed with those who express a lack of faith in a jury’s ability to understand issues and to carry out their duties accordingly. Moreover, this is not part of the inquiry into whether prejudice will result to defendants by granting a plaintiff’s motion for jury trial. Instead, a court must determine whether the defendants can adequately prepare for a jury trial. *See Vannoy*, 872 F.Supp. at 1490. The plaintiff’s motion was filed at the start of this litigation. No discovery had begun. The parties have in all likelihood not finalized their trial strategy. As such, the court identifies no discernible prejudice to the defendants, and finds that the Magistrate Judge’s similar finding was not clearly erroneous.

Finally, contrary to the defendants’ contention, the Magistrate Judge’s reference to the historical practice in the Western District regarding a more flexible approach on the timing of jury demands was not the basis for his decision to grant the plaintiff’s motion. The Magistrate

Judge was merely contrasting this with what is clearly a policy disfavoring such an approach in the Eastern District where most of the case law on the issue has been generated. The Magistrate Judge then duly addressed each of the Fourth Circuit's factors for determining whether to grant a Rule 39(b) motion and determined that discretion should be exercised in favor of the plaintiff. Therefore, the defendants' objection on this ground is overruled.

III.

Accordingly, because the Magistrate Judge's order granting the plaintiff's Rule 39(b) motion for a jury trial was neither clearly erroneous nor contrary to law as contemplated by Fed. R. Civ. P. 72(a), the court will decline to modify or set aside the order.

An appropriate order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

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WILLIAM N. DUNNING,)	CIVIL ACTION NO. 5:01CV00099
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v.)	<u>ORDER</u>
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HENRY FLACK INTERNATIONAL,)	
INC., and)	
J. W. BOLLOM & CO., LTD.)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

Upon consideration of the defendants' objections to the Magistrate Judge's March 27, 2002 Order and Memorandum Opinion, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED AND DECREED

that the defendant's Objections to the Magistrate Judge's Order and Opinion Granting Plaintiff's Rule 39(b) Motion for a Jury Trial, filed April 5, 2002, shall be, and hereby are, OVERRULED; the court shall, and hereby does, DECLINE TO SET ASIDE OR MODIFY any portion of the Order under Fed. R. Civ. P. 72(a).

The Clerk of the Court hereby is directed to send a certified copy of this Order and accompanying Memorandum Opinion to Magistrate Judge B. Waugh Crigler and to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date