

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

THE HEIRS OF RICHARD DESKINS,

Plaintiffs,

v.

CONSOL ENERGY, INC., et al.,

Defendants.

**REPORT AND
RECOMMENDATION**
Case No. 1:11cv00069

This case comes before the court on plaintiffs’ Motion For Remand and the defendants’ Motion For Limited Discovery, (Docket Item Nos. 9, 15) (“Motions”). The Motion For Remand is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). The Motion For Limited Discovery is before the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A). The parties have waived oral argument, and the Motions are ripe for decision. As directed by the order of referral, the undersigned now submits the following report and recommended disposition on the Motion To Remand.

I. Facts and Procedural History

Plaintiffs, the heirs and beneficiaries of Richard Deskins, brought this action in the Circuit Court of Buchanan County, Virginia, for a declaratory judgment that they own the coal and coalbed methane, (“CBM”), rights to certain parcels of land totaling approximately 392 acres in Buchanan County. They also seek an accounting of all the coal mined and all the CBM produced from the land by the

defendants, Consol Energy, Inc., Island Creek Coal Company, Inc., OXY USA, Inc., and CNX Gas Company, L.L.C. They also seek judgment in an unspecified amount for the royalties owed to them from the defendants for the coal and CBM.

The plaintiffs sue collectively as “The Heirs of Richard Deskins,” but Exhibit 1 to the motion for judgment lists the names of 75 living descendants and heirs of Richard Deskins. The citizenship of these heirs or of the defendants is not mentioned in the motion for judgment. Nor does the motion for judgment give any estimate of the amount in controversy. The motion for judgment does allege that coal has been mined from the land and that no royalties have been paid to the owners representing 93/98ths of the coal rights in the land. The motion for judgment also alleges that the land at issue is contained in the tracts of six CBM wells.

On September 13, 2011, the defendants filed a Notice Of Removal, (Docket Item No. 1), removing the action to this court. In the Notice, the defendants assert that the court has subject matter jurisdiction over the action based on diversity of citizenship under 28 U.S.C. § 1332. The Notice Of Removal alleges:

6. Consol and Island Creek are Delaware corporations with their principal places of business in Pennsylvania.

7. CNX is a Virginia limited liability company whose sole member is a corporation organized under the laws of Delaware and whose principal place of business is in Pennsylvania.

8. OXY is a Delaware corporation with its principal place of business in Texas.

9. The plaintiffs are individuals who are citizens of states other than Delaware, Pennsylvania and Texas.

10. The matter in controversy exceeds the sum or value or \$75,000.00 exclusive of interest and costs.

An Answer filed in the state court action admits that coal has been mined and CBM produced from portions of the land at issue.

II. Analysis

The defendants assert that removal of this action to this court is proper under 28 U.S.C. §§ 1332, 1441 and 1446. Section 1441(a) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C.A. § 1441(a) (West 2006). Section 1446 allows removal of a state court action upon the filing in the district court of a “notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal” within 30 days of receipt by the defendants of a document “from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C.A. § 1446(a) and (b) (West 2006). Section 1332 grants the district court original subject matter jurisdiction over any civil case in which “the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between ... citizens of different States....” 28 U.S.C.A. §1332(a)(1) (West 2006).

Furthermore, the party seeking to remove a case to federal court has the burden of establishing that federal jurisdiction exists. *See Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994). Removal cannot be based on speculation, but, rather, must be based on facts as they exist at the time of removal. *See Varela v. Wal-Mart Stores, East, Inc.*, 86 F. Supp. 2d 1109, 1112 (D.N.M. 2000). “Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction.” *Mulcahey*, 29 F.3d at 151.

Plaintiffs have filed the Motion For Remand arguing that removal of this case to this court was improper without the grounds for removal being apparent in their initial pleading. The defendants have responded arguing that the court also may consider the facts alleged in the Notice Of Removal in deciding whether removal was proper or the Motion For Remand should be granted.

The Fourth Circuit Court of Appeals recently addressed the standard to be applied when considering a motion to remand based on the pleadings. In *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008), the Fourth Circuit held that a court may consider the allegations contained in the notice of removal, in addition to the complaint, to determine if subject matter jurisdiction justifying removal was sufficiently alleged.

Therefore, just as a plaintiff’s complaint sufficiently establishes diversity jurisdiction if it alleges that the parties are of diverse citizenship and that “[t]he matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332,” ... so too does a removing party’s notice of removal sufficiently establish

jurisdictional grounds for removal by making jurisdictional allegations in the same manner. Of course, on a challenge of jurisdictional allegations, “[t]he party seeking removal bears the burden of demonstrating that removal jurisdiction is proper.”... But this burden is no greater than is required to establish federal jurisdiction as alleged in a complaint.

Ellenburg, 519 F.3d at 200 (internal citations omitted).

The Fourth Circuit’s decision in *Ellenburg* was issued after, and, in fact, mentions, the Supreme Court’s decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), regarding notice pleading. In *Twombly*, the Supreme Court stated that “a plaintiff’s obligation to provide the ‘grounds’ of ... ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (citations omitted). Additionally, the Court established a “plausibility standard” in which the pleadings must allege enough to make it clear that relief is not merely conceivable but plausible. *See Twombly*, 550 U.S. at 555-63.

The Court further explained the *Twombly* pleading standard in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009):

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. ... Second, only a

complaint that states a plausible claim for relief survives a motion to dismiss. ...

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

(Internal citations omitted.)

I hold that the combined effect of these cases requires that a notice of removal can no longer rest on mere conclusory or unsupported allegations that subject matter jurisdiction exists. *See Wickline v. Dutch Run-Mays Draft, LLC*, 606 F. Supp. 2d 633, 637 (S.D. W.Va. 2009) (unsupported allegation in notice of removal that amount in controversy exceeds \$75,000.00 insufficient to establish jurisdiction). If the initial pleading does not plead sufficient facts to establish the district court's jurisdiction, the notice of removal must do so, and must do so in a way that raises the question of jurisdiction above the speculative level.

When this standard is applied to the pleadings in this case, I find that the defendants' Notice Of Removal does not set forth sufficient facts to withstand the Motion For Remand. As stated above, the initial pleading does not mention the citizenship of the parties or an amount in controversy. While the Notice Of Removal states factual allegations with regard to the citizenship of the defendants, it contains only the following conclusory statements with regard to the citizenship of the plaintiffs and the amount in controversy:

9. The plaintiffs are individuals who are citizens of states other than Delaware, Pennsylvania and Texas.

10. The matter in controversy exceeds the sum or value or \$75,000.00 exclusive of interest and costs.

The Notice Of Removal contains no factual allegations to support these conclusions. It may be argued that the pleadings, in combination, contain factual allegations sufficient to support the amount in controversy. In the initial pleading, the plaintiffs allege that coal has been mined from the land at issue and that no royalties have been paid to the owners representing 93/98ths of the coal rights in the land. The plaintiffs further allege that the land at issue is contained in the tracts of six CBM wells and that they have received no royalties for the CBM produced from these wells. The defendants' Answer further admits that coal has been mined and CBM produced from the tracts of land at issue. None of the pleadings, however, contain any further information regarding the citizenship of the plaintiffs. An exhibit to the initial pleading lists 75 known living descendants and heirs of Richard Deskins. The pleadings, including the Notice Of Removal, contain absolutely no factual information as to the citizenship of any one of these descendants or heirs. In fact, the defendants in their written arguments have conceded that they have no evidence regarding the citizenship of some of the plaintiffs. Their memorandum states: "The defendants' records contain addresses for *many of the plaintiffs*, none of which are in Delaware, Pennsylvania or Texas" (emphasis added). Thus, the defendants' allegation that the "plaintiffs are individuals who are citizens of states other than Delaware, Pennsylvania and Texas" is nothing more than a conclusion based on speculation.

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. The defendants' Notice Of Removal does not set forth sufficient facts to withstand the plaintiffs' Motion For Remand.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court grant the Motion For Remand. Based on this recommendation, I will deny the Motion For Limited Discovery.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: This 5th day of December, 2011.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE

