IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESTELLE ROBINSON, *et al*, Plaintiffs	:	CIVIL ACTION
v.	:	
HOLIDAY UNIVERSAL, INC., *et al*, Defendants	:	NO. 05-5726

MEMORANDUM AND ORDER

PRATTER, DISTRICT JUDGE FEBRUARY 23, 2006

Plaintiffs, Estelle Robinson and Gene M. Swindell, filed a class action complaint on December 6, 2004 in the Pennsylvania Court of Common Pleas for Philadelphia County against Defendants Holiday Universal, Inc. ("Holiday"), Scandinavian Health Spa, Inc. ("Scandinavian"), and Bally Total Fitness Holding Corporation ("Bally Holding"). Their complaint attacks the health club initiation fees charged by the Defendants. Plaintiffs' action was commenced more than two months before the federal Class Action Fairness Act ("CAFA") became effective on February 18, 2005, and the original Defendants were not entitled to remove the action to federal court pursuant to CAFA's removal provisions. After CAFA became effective, however, the Plaintiffs added an additional defendant, Bally Total Fitness Corporation ("BTFC"), which properly and timely removed the case to federal court pursuant to CAFA. The Plaintiffs subsequently voluntarily dismissed BTFC and now request remand to state court. For the reasons set forth below Plaintiffs' motion to remand is denied.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Robinson and Swindell filed a class action complaint on December 6, 2004 in

the Pennsylvania Court of Common Pleas for Philadelphia County, alleging that Defendants Holiday, Scandinavian, and Bally Holding charged and collected grossly excessive initiation fees in violation of the Pennsylvania Health Club Act, 73 PA. CONS. STAT. ANN. § 2161 *et seq.*, which regulates health clubs operating within the Commonwealth, and the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 PA. CONS. STAT. ANN. § 201-1 *et seq.*, which prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce. The Plaintiffs also articulated claims for unjust enrichment and for declaratory relief.

In Pennsylvania state court, the Plaintiffs requested, and were granted, leave to join Bally Total Fitness Corporation ("BTFC"), a subsidiary of Bally Total Fitness Holding Corporation, as a defendant. Plaintiffs filed their Joinder Complaint adding BTFC as a defendant on September 30, 2005. On October 28, 2005, BTFC filed a timely notice of removal based on the amount in controversy and minimum diversity of citizenship contemplated by CAFA.

Thereafter, Plaintiffs, apparently in an attempt to have the case remanded to state court, voluntarily dismissed defendant BTFC from the case on November 4, 2005, and, on November 10, 2005, Plaintiffs filed here the motion to remand pursuant to 28 U.S.C. § 1447(c). Plaintiffs claim that the dismissal of BTFC as a defendant dissolved the Court's basis for jurisdiction under CAFA because, prior to BTFC's joinder, none of the original Defendants would have been entitled to remove the case under CAFA. Plaintiffs also argue that remand is appropriate due to considerations of judicial economy, fairness, and efficiency.

II. DISCUSSION

A. BTFC Properly Removed Under the Class Action Fairness Act

CAFA "permits defendants to remove certain class actions to federal court if minimal

diversity of citizenship exists." Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806 (7th Cir. 2005). Specifically, CAFA provides that district courts shall have original jurisdiction over any class actions where: (1) at least one member of the plaintiff class is diverse from any defendant; (2) the aggregate amount in controversy exceeds $5,000,000; and (3) the proposed plaintiffs class contains 100 or more members. 28 U.S.C. § 1332(d)(2)(A), (d)(5). The parties here do not dispute that CAFA's numerosity and amount in controversy requirements are met in this case.

CAFA is not retroactive; it only applies to actions commenced after February 18, 2005. Pub. L. 109-2, § 9; Exxon Mobil Corp. v. Allapattah Servs., 125 S. Ct. 2611, 2628 (2005); Natale v. Pfizer, Inc., 424 F.3d 43, 44 (1st Cir. 2005); Bush v. Cheaptickets, Inc., 425 F.3d 683, 684 (9th Cir. 2005). Although CAFA does not define when a class action is "commenced," many courts have held that, for CAFA jurisdictional purposes, a class action commences when it begins in state court. Natale, 424 F.3d 43 at 44; Bush, 425 F.3d at 686 ("CAFA's 'commenced' language surely refers to when the action was originally commenced in state court."); Dinkel v. Gen. Motors Corp., No. 05-190-P-H, 2005 U.S. Dist. LEXIS 27237, at *6 (D. Me. Nov. 9, 2005). Under the Pennsylvania Rules of Civil Procedure, "[a]n action may be commenced by filing with the prothonotary (1) a praecipe for a writ of summons, or (2) a complaint." Pa.R.C.P. 1007.

When a plaintiff adds a new defendant, a new action is "commenced" for purposes of that defendant. See Adams v. Fed. Materials Co., Inc., No. 5:05-cv-90R, 2005 U.S. Dist. LEXIS 15324, at *13 (W.D. Ky. July 28, 2005) ("Plaintiffs' decision to add . . . a defendant presents precisely the situation in which it can be and should be said that a new action has 'commenced' for purposes of removal pursuant to the CAFA."); Schorsch v. Hewlett Packard Co., 417 F.3d 748, 749 (7th Cir. 2005) ("[A] defendant added after February 18 could remove because suit

against it would have been commenced after the effective date."); Knudsen v. Liberty Mutual Ins. Co., 411 F.3d 805, 807 (7th Cir. 2005). As stated in Adams, allowing a newly-added defendant a window of time for exercising its removal rights "is both a logical extension of pre-existing removal practice and in keeping with the general intent of Congress in passing the CAFA - that is, extending the privilege of removal to federal district courts to defendants in large class actions on the basis of minimal diversity." Thus, in this case, there are two relevant "commencement" dates: (1) December 6, 2004 when the lawsuit was filed against the original three Defendants; and (2) September 30, 2005, when the complaint was filed against BTFC as a new defendant.[1] Here, the simple fact of the matter is that the Plaintiffs did not file a complaint against BTFC until September 28, 2005, well after the effective date of CAFA. Thus, for BTFC, the post-CAFA filing of a complaint against it "opened a new window of removal," which it used to timely remove the case.[2] Knudsen, 411 F.3d at 807.

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[1] Plaintiffs assert, without substantial discussion, that the filing of the complaint against BTFC did not "commence" a new action because the joinder of BTFC relates back pursuant to Federal Rule of Civil Procedure 15(c) to the date of the original filing against the three original Defendants. Plaintiffs' joinder complaint added BTFC as a defendant. BTFC, although a wholly owned subsidiary of Bally Holding, is presumed to be a separate entity. Mellon Bank, N.A. v. Metro Commc'ns, Inc., 945 F.2d 635, 643 (3d Cir. 1991). Plaintiffs have not proffered any evidence tending to show that BTFC knew or had reason to know that suit would have been brought against it but for a mistake concerning its identity. FED. R. CIV. P. 15(c)(3)(B); see e.g., Fry v. Waste Mgmt., Inc., No. 94-6865, 1995 U.S. Dist. LEXIS 11792, at *3-4 (E.D. Pa. Aug. 11, 1995). There is no indication that Bally Holding participated in any misrepresentations or took advantage of the "technicalities" of pleading to act as a buffer between itself and BTFC. See e.g., Arthur v. Guerdon Indus., Inc., No. 85-244, 1990 U.S. Dist. LEXIS 14042, at *6-7 (D. Del. 1990). Mere lack of knowledge of a proper party is not enough under the relation back principle. Olin v. George E. Logue, Inc., 119 F. Supp. 2d 464, 473 (M.D. Pa. 2000).

[2] BTFC first received notice of the action against it on September 28, 2005, when the joinder complaint was filed in the court of common pleas. Accordingly, BTFC was entitled to its own thirty day period for removal. See K.S. v. Sch. Dist. of Phila., No. 05-4916, 2005 U.S. Dist. LEXIS 29470, at *9 (E.D. Pa. Nov. 22, 2005); Harper v. Westfield Apartments, No. 04-2231,

B. Voluntary Dismissal of BTFC from Lawsuit Does Not Undo Proper Removal

Plaintiff next argues that, even if the joinder of BTFC constituted a new "commencement" for CAFA purposes, BTFC's dismissal from the case removes the Court's jurisdictional reach entirely. That is, Plaintiffs assert that the case, as it stands now (i.e., after the voluntary dismissal of BTFC) before the Court, was "commenced" against the three remaining defendants well before the effective date of CAFA. Thus, conclude the Plaintiffs, CAFA cannot supply the ground for subject matter jurisdiction because it is not retroactive.

Under CAFA, any single defendant can remove without the consent of the other defendants, and the entire lawsuit is removed, not merely the claims against the removing defendant. Specifically, CAFA provides that "[a] class action may be removed to a district court of the United States . . . without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants." 28 U.S.C. § 1453(b). It is the entire "action" that is removable, not just the claims against particular defendants. Dinkel, 2005 U.S. Dist. LEXIS 27237, at *12. Thus, when BTFC removed the class action to this Court, it removed the entire class action and not just the claims against it.[3]

2005 U.S. Dist. LEXIS 5311, at *4 (E.D. Pa. Mar. 30, 2005). BTFC timely filed its notice of removal on October 28, 2005.

[3] This conclusion differs from Brown v. Kerkhoff, 2005 U.S. Dist. LEXIS 24346, at *56 (S.D. Iowa Oct. 19, 2005) (holding that addition of removing defendants after effective date of CAFA allowed removal of claims against removal defendants but not original defendants; remanding case after plaintiffs dismissed removal defendants). See also Dinkel, 2005 U.S. Dist. LEXIS 27237, at *12 n.6. The court in Brown stated: "Because CAFA is not applicable to [the pre-CAFA defendants], the only way the Court could exercise jurisdiction over them is as pendant parties." The Court finds that this reasoning is inconsistent with general removal practice as well as the mandates of 28 U.S.C. § 1453(b). Thus, the Court finds unpersuasive the

Propriety of remand is "decided[] on the basis of the record as it stands at the time the petition for removal is filed." Westmoreland Hosp. Ass'n v. Blue Cross of W. Pa., 605 F.2d 119, 123 (3d Cir. 1979). Here, as discussed above, BTFC properly removed the entire action to the district court at the time of the filing of the notice of removal because all of the jurisdictional requirements of CAFA were then met: an action was commenced against BTFC after February 18, 2005; minimum diversity was met; the aggregated amount in controversy exceeds $5,000,000; and the proposed plaintiffs class contains more than 100 members. Plaintiffs cannot now "unring the bell" by dismissing the removing defendant, BTFC, (which Plaintiffs themselves brought into the suit) in an attempt to return the lawsuit to its status on December 6, 2004. The Court had subject matter jurisdiction over the action when it was removed on October 28, 2005, and it continues to have subject matter jurisdiction over it now.

Plaintiffs further argue that remand is proper by analogizing this situation to the operation of 28 U.S.C. § 1447(e), which requires courts to remand cases if a post-removal permissive joinder of additional defendants destroys the court's subject matter jurisdiction.[4] Plaintiffs argue that this provision shows that the Court must remand once the plaintiff makes a permitted change in the defendant parties that destroys the court's only basis for subject matter jurisdiction. Plaintiffs' reliance on Section 1447(e) is misplaced, however, as there has been no attempted

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Brown court's focus on the inability of the pre-CAFA defendants to remove the action under CAFA rather than the court's subject matter jurisdiction over the entire class action after post-CAFA defendants removed the entire action pursuant to 28 U.S.C. § 1453(b). See 28 U.S.C. § 1332(d), 1453(b).

[4] In its entirety, 18 U.S.C. § 1447(e) provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."

post-removal joinder of additional defendants, nor has the Court's subject matter jurisdiction been destroyed. Section 1447(e) operates to deny a sought-after result to a plaintiff that endeavors to manipulate subject matter jurisdiction by changing the cast of characters. The Court's ruling herein similarly refuses to reward changes.

III. CONCLUSION

For the foregoing reasons, the Court finds that the Defendants have met their burden of showing that removal was proper and the Court has subject matter jurisdiction, and there are no doubts that must be resolved in favor of remand. Schwartz v. Comcast Corp., No. 05-2340, 2005 U.S. Dist. LEXIS 15396, at *14 (E.D. Pa. July 29, 2005). Thus, Plaintiffs' Motion for Remand will be denied. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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HOLIDAY UNIVERSAL, INC., *et al*, Defendants	:	NO. 05-5726

ORDER

PRATTER, DISTRICT JUDGE FEBRUARY 23, 2006

AND NOW this 23rd day of February, 2006, upon consideration of Plaintiffs' Motion to Remand (Docket No. 4), Defendants' Response (Docket No. 10), Plaintiffs' Reply (Docket No.11), and Defendants' Sur-Reply (Docket No. 12), it is hereby ORDERED that Plaintiffs' Motion to Remand is DENIED. It is FURTHER ORDERED that Plaintiffs shall file and serve on opposing counsel their Response, if any, to Defendants' Motion to Dismiss (Docket No. 2) no later than twenty-one (21) days from the date of this Order.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE