IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION

Avondale Mills, Incorporated, Plaintiff, vs. Norfolk Southern Corporation, Norfolk Southern Railway Company, Benjamin Aiken, Mike Ford, and James Thornton, Defendants.	C/A No. 1:05-2817-MBS **O R D E R**

Plaintiff Avondale Mills, Incorporated brought the within action on September 26, 2005 in the Court of Common Pleas for the Second Judicial Circuit (Aiken County), South Carolina. On September 28, 2005, Defendants Norfolk Southern Corporation and Norfolk Southern Railway Company (together "Norfolk Southern") removed the action on the basis of diversity jurisdiction. See 28 U.S.C. §§ 1441(b), 1332.

On October 27, 2005, Plaintiff filed a motion to remand. Plaintiff also filed a motion to dismiss on December 1, 2005. On March 6, 2006, the court issued an order denying Plaintiff's motions to remand and to dismiss. This matter now is before the court on Plaintiff's motion to reconsider the court's decision denying the motion to remand, which motion was filed March 20, 2006 (Entry 87). Norfolk Southern filed a memorandum in opposition to Plaintiff's motion on April 7, 2006 (Entry 103), to which Plaintiff filed a reply on April 17, 2006 (Entry 113). The court possesses discretion to reconsider its interlocutory order denying the motion to remand. See Terry v. June, 420 F. Supp. 2d 493 (W.D. Va. 2006).

Also before the court is Plaintiff's motion to certify the court's March 6, 2006 order pursuant to 28 U.S.C. § 1292(b), which motion was filed March 21, 2006 (Entry 89). Norfolk Southern filed a memorandum in opposition to Plaintiff's motion on April 10,2006 (Entry 104), to which Plaintiff filed a reply on April 20, 2006 (Entry 120).

A. Motion to Reconsider

Norfolk Southern removed the complaint on the basis of 28 U.S.C. § 1441(b), which provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Although the Individual Defendants are South Carolina residents, the court determined that the Individual Defendants could be disregarded for purposes of removability because they were not "properly joined and served" at the time of removal. In its motion for reconsideration, Plaintiff contends the court's order was erroneous because the Individual Defendants voluntarily appeared by appending consents to Norfolk Southern's notice of removal, and therefore were "properly joined and served" at the time of removal. The court disagrees.

As the court stated in its March 6, 2006 order, Norfolk Southern voluntarily appeared by filing an answer in state court on September 28, 2005. The Individual Defendants undertook no such action and had not voluntarily submitted to the state court's jurisdiction when the case was removed. The Individual Defendants' mere filing of consents to removal in federal court did not constitute a voluntary appearance that waived the need for proper service. See 14C Charles Alan Wright et al.,

Federal Practice & Procedure: Jurisdiction 3d § 3738 (removal does not act as general consent to jurisdiction); Barton v. Horowitz., 1999 WL 502151 *7 n.1 (D. Colo. March 11, 1999) (rejecting argument that filing or joining the petition for removal operates as a waiver of formal service of process); Pattiz v. Semple, 7 F.2d 618 (E.D. Ill. 1925) (under prior practice, noting that a general appearance would be taken as equivalent to personal service of process, but that filing of petition to removal did not constitute a general appearance).

The Individual Defendants were not "properly joined and served" until service was effected via certified mail on September 30 and October 3, 2005, subsequent to Norfolk Southern's filing of the notice of removal.[1] Consent to removal by the Individual Defendants did not render the removal defective. Accord Ott v. Consolidated Freightways Corp., 213 F. Supp. 2d 662 (S.D. Miss. 2002.). Plaintiff's motion to reconsider is **denied**.

B. Motion to Certify

Plaintiff seeks an interlocutory appeal pursuant to 28 U.S.C. § 1292 of the court's March 6, 2006 order. Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The court of Appeals which would have jurisdiction of an appeal of such action may thereupon,

[1] Plaintiff also argues that removal was not perfected until September 29, 2006, when the state court clerk received a copy of the notice of removal. Based on its contention that the Individual Defendants voluntarily appeared by filing consents to removal, Plaintiff asserts that diversity jurisdiction did not exist when the state court received a copy of the notice of removal, and therefore removal was defective. Norfolk Southern contends that removal is complete upon filing in federal court. The court need not address this argument, however, because it has determined that the Individual Defendants were not served until September 30, 2006 and October 1, 2006, after the state court's jurisdiction clearly had terminated.

> in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Federal courts are courts of limited jurisdiction. Where federal jurisdiction is doubtful, a remand is necessary. Mulcahey v. Columbia Organic Chemicals Co., 29 F.3d 148, 151 (4th Cir. 1994). In this case, the court has construed § 1441(b) consistently with Wensil v. E.I. DuPont de Nemours & Co., 792 F. Supp. 447 (D.S.C. 1992), to conclude that it possesses subject matter jurisdiction. Plaintiff disagrees with the court's threshold finding. If the Fourth Circuit were to agree with Plaintiff, the case would be remanded. The court finds that the question whether this action falls within federal subject matter jurisdiction is a controlling question of law.

Plaintiff asserts a substantial grounds for a difference of opinion exists as evidenced by the fact that Wensil has been criticized by a sister district court in this Circuit. See Oxendine v. Merck & Co., Inc., 236 F. Supp. 2d 517 (D. Md. 2002). The Oxendine court rejected the Wensil interpretation of § 1441(b) in favor of a line of cases that had determined § 1441(b) could not be used by an out-of-state defendant to remove an action prior to the proper joinder and service of an in-state defendant. The cases relied upon in Oxendine are distinguishable, however, because those cases involved situations where complete diversity did not exist among the parties. See Pullman Co. v. Jenkins, 305 U.S. 534 (1939); Pecherski v. General Motors Corp., 636 F.2d 1156 (8th Cir. 1981); Katz v.CostaArmatori, S.p.A., 718 F. Supp. 1508 (S.D. Fla. 1989). Pullman and its progeny stand for the proposition that the presence of a *nondiverse*, unserved defendant prevents a case from being removable, and to hold otherwise would improperly expand federal jurisdiction. See Ott v.

Consolidated Freightways Corp., 213 F. Supp. 2d 662, 666 (S.D. Miss. 2002). The cases relied on in Oxendine have no application where, as here, complete diversity exists among the parties.

The overwhelming majority of cases follow the analysis set forth in Wensil. See, e.g., McCall v. Scott, 239 F.3d 808 (6th Cir. 2001); Massey v. Cassens & Sons, Inc., 2006 WL 381943 (S.D. Ill. Feb. 16, 2006) (criticizing Oxendine); Test Drilling Svc. Co.v. Hanor Co., 322 F. Supp. 2d 953 (C.D. Ill. 2003); Ott v. Consolidated Freightways Corp., 213 F. Supp. 2d 662, 666 (S.D. Miss. 2002; Davis v. Cash, 2001 WL 1149355 (N.D. Tex. Sept. 27, 2001); Mask v. Chrysler Corp., 825 F. Supp. 285 (N.D. Ala. 1993); Republic Western Ins. Co. v. International Ins. Co., 765 F. Supp. 628 (N.D. Cal. 1991); Windac Corp. v. Clarke, 530 F. Supp. 812 (D. Neb. 1982). Based on these precedents, the court discerns no substantial grounds for a difference of opinion.

The court further does not perceive that interlocutory appeal would materially advance the ultimate termination of this litigation. The court's resources will be lost and resolution of this action will be delayed by a fruitless interlocutory appeal, given the strength of the Wensil analysis and its validation by other jurisdictions. In the court's view, certification would result in protracted and expensive litigation, and would offend the federal policy against piecemeal appeals. See Graves v. C&S Nat'l Bank, 491 F. Supp. 280, 283-84 (D.S.C. 1980). Plaintiff's motion to certify pursuant to 28 U.S.C. § 1292(b) is **denied**.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Judge

Columbia, South Carolina

July 17, 2006.