IN THE UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 94-40704
(Summary Calendar)

IDA LOUISE FONTENOT,

Plaintiff-Appellant,

versus

SAMSONITE FURNITURE CO.,
A/K/A SAMSONITE,

Defendant-Appellee.

Appeal from United States District Court
from the Western District of Louisiana
(1:93-CV-302)

(January 25, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Plaintiff, Ida Louise Fontenot, appeals the district court's denial of her motion to remand to state court and entry of summary judgment in favor of defendant, Samsonite Furniture Company. Her motion to remand was filed more than one year after Samsonite removed the case to federal district court, but it challenges the federal court's subject matter jurisdiction --a challenge which may

[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. "Pursuant to that Rule, the Court has determined that this opinion should not be published.

be raised at any time. Based upon the unique facts of this case, we find the original removal proper. We affirm.

FACTS

On January 19, 1992, Ida Louise Fontenot sat down at work in the Pecan Grove Training Center. As she sat, the seat of the chair suddenly fell to the floor, causing injury to her buttocks and back. On February 23, 1993, Fontenot filed a complaint in Louisiana state district court against Samsonite which she alleges was the manufacturer of the chair. The complaint alleges that the chair collapsed and caused traumatic damage and pain to her lower back, spinal vertebrae, discs, as well as to nerves and other soft tissue in and/or related to her back. The complaint asserts that she is entitled to recover past and future damages and expenses which include the following: physical pain and suffering; mental anguish, distress, and shock; loss of enjoyment of life; medical and travel expenses; and loss of wages.[1]

At Samsonite's request, the case was removed to federal court on February 25, 1993 on the basis of 28 U.S.C. § 1332 diversity. Samsonite moved for summary judgment on March 17, 1994. On March 28, 1994, Fontenot filed a motion to remand which asserts that the district court has no jurisdiction because the amount in controversy is less than $50,000. Attached to this motion is an "Affidavit and Stipulation" in which Fontenot states that her damages do not exceed $50,000 and another affidavit which states that the chair was "a Samsonite chair, and clearly identified as

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[1] In accordance with Louisiana Code of Civil Procedure Article 893, the complaint does not allege a specific amount of damages. See note 2, infra.

such" which "contained no warning that the screws may come loose or that the seat could become unattached from the legs/frame and fall to the floor".

The district court denied her motion to remand, finding that at the time of removal, there existed subject matter jurisdiction based upon the allegations in the complaint. Fontenot appeals, contending that her affidavit was sufficient to prove that there is no federal subject matter jurisdiction. We disagree regarding the removal, which was properly done based upon the complaint. Because we find that the post-removal affidavit is insufficient to divest the district court of otherwise proper jurisdiction, we affirm.

The district court also observed that Fontenot could not produce the chair, and therefore could not prevail on her products liability claim against Samsonite because she could not prove that the product was manufactured by Samsonite. Accordingly, the district court entered summary judgment in favor of Samsonite and against Fontenot. Although the district court should not determine whether material facts are at issue on the basis of likely success on the merits, we affirm the grant of summary judgment for different reasons.

DISCUSSION

FONTENOT'S MOTION TO REMAND

In a jurisdictional inquiry, we look at the complaint as it existed at the time the petition for removal was filed. Hook v. Morrison Milling Co., 38 F.3d 776, 780 (5th Cir. 1994), quoting Anderson v. Electronic Data Sys. Corp, 11 F.3d 1311, 1316 at n. 8

(5th Cir. 1994), cert. denied, 115 S.Ct. 55, 130 L.Ed.2d 14 (1994).

In accordance with LSA-C.C.P. Art. 893,[2] there was no *ad damnum* clause in the complaint when it was filed in the state district court, or at any time thereafter. Fontenot's complaint alleged injury which included "traumatically induced damage, aggravation and derangement to the exterior and interior architecture of the spine, discs, nerves, ligaments, supporting structures and soft tissues of the cervical, thoracic and lumbosacral spine", and "pain, nerve dysfunction and numbness of the neck, shoulders, arms, entire back, hips and legs".

The notice of removal asserted that the amount in controversy in the state court proceeding exceeds $50,000 and therefore, due to diversity of the parties, the action was within the jurisdiction of federal district court pursuant to 28 U.S.C. § 1332. When the case was removed to federal district court, the complaint could reasonably be read to support this assertion. Based upon the allegations contained in the complaint, the federal court would have had original subject matter jurisdiction if Fontenot had filed

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[2] LSA-C.C.P. Art. 893.A.(1) provides that:

No specific monetary amount of damages shall be included in the allegations or prayer for relief of any original, amended, or incidental demand. The prayer for relief shall be for such damages as are reasonable in the premises. If a specific amount of damages is necessary to establish the jurisdiction of the court, the right to a jury trial, the lack of jurisdiction of federal courts due to insufficiency of damages, or for other purposes, a general allegation that the claim exceeds or is less than the requisite amount is sufficient. By interrogatory, an opposing party may seek specification of the amount sought as damages, and the response may thereafter be supplemented as appropriate.

the complaint in federal court instead of state court. Thus, on the face of the complaint, the federal court had original subject matter jurisdiction under § 1332. The removal was proper, and federal jurisdiction attached.

Fontenot did not challenge this factual allegation until Samsonite moved for summary judgment. At that time, Fontenot sought to have this matter remanded to state court pursuant to 28 U.S.C. § 1447(c), which provides, in pertinent part, as follows:

> **§ 1447. Procedure after removal generally**
>
> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) [28 USCS § 1446(a)]. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Fontenot filed the "affidavit and stipulation" with her motion to remand after the case had been in federal court for more than one year. This filing is the only thing in the record which indicates that the requisite jurisdictional amount was not satisfied. T h e only "event" alleged to affect the federal court's jurisdiction is the filing of Fontenot's "affidavit and stipulation" regarding the amount of damages. As noted above, it does not appear from the complaint that the federal district court lacks subject matter jurisdiction. This affidavit does not trump the complaint so as to require reversal of the district court's denial of the motion to remand.

We deem it important that Fontenot, aware of Samsonite's allegations that the amount in controversy exceeds $50,000 at the time of removal, elected not to question, clarify, or challenge the

amount of damages until shortly after Samsonite moved for summary judgment. As we stated in Boelens v. Redman Homes, Inc., 759 F.2d 504, 507 (5th Cir. 1985),

> The rule that a plaintiff cannot oust removal jurisdiction by voluntarily amending the complaint to drop all federal questions serves the salutary purpose of preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute.

Fontenot's complaint states a claim which could have been brought originally in federal court on the basis of § 1332 diversity. If Fontenot had amended her complaint to specify a damage amount less than $50,000, the amendment would not affect the federal court's jurisdiction. See and compare, St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 591-592, 82 L.Ed. 845 (1938) (The status of the case as disclosed by the plaintiff's complaint is dispositive on the issue of removal; post-removal amendment, stipulation, or affidavit which reduces the claim below the requisite amount does not deprive the district court of jurisdiction.)

For these reasons, we affirm the district court's ruling on the motion to remand.

SAMSONITE'S MOTION FOR SUMMARY JUDGMENT

Samsonite moved for summary judgment on the basis that (1) the chair was either non-existent or unavailable, and (2) without the chair, Fontenot could not prove that the chair was defective at the time it left the manufacturer.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). When a party fails to make a showing sufficient to establish the existence of an element which is essential to that party's case and on which that party will bear the burden of proof at trial, there can be no genuine issue as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A dispute about a material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Thus, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Randolph v. Laeisz, 896 F.2d 964, 969 (5th Cir. 1990), citing Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In order to prevail on the merits, one of the elements which Fontenot must prove is that the "unreasonably dangerous" characteristic of the product existed at the time the product left the control of its manufacturer or resulted from a reasonably anticipated alteration or modification of the product. Louisiana R.S. 9:2800.54.C, D.

Instead of filing a response to the motion for summary judgment, Fontenot filed the motion to remand, along with an affidavit which states the following:

1. The chair which caused my injury was a Samsonite chair, and clearly identified as such;

2. It contained no warning indicating the screws may come loose or that the seat could become unattached from the legs/frame and fall to the floor;

3. I sat in the chair and the seat came loose and fell to the floor causing my injuries.

Part of the evidence presented in support of Samsonite's motion was testimony by deposition that the screws in the Samsonite chairs, as well as those made by other companies, which were at Pecan Grove Training Center had to be tightened periodically. The seat and back would be replaced --i.e., a new seat and back would be put on an old frame-- when the screws could no longer be tightened because the chairs were "stripped". The summary judgment evidence also indicated that the chairs in the room in which Fontenot's accident occurred were approximately one or two years old at the time of the accident. There is no summary judgment evidence on the condition of the chair when it left its manufacturer. Fontenot stated that she looked at the back of the chair. Other summary judgment evidence indicated that some of the chairs contained notices underneath the seat which instructed the purchaser to periodically tighten the screws.

On the record before us, we conclude that, even if we were to assume that the chair had been manufactured by Samsonite, there is no evidence to show that the chair was defective in either design or construction at the time it left the manufacturer. The record does not show when the chair left the manufacturer, its condition upon arrival at Pecan Grove, or the existence of any defect prior

to Fontenot's accident. Likewise, even if we were to assume that there was no warning on the back of the chair, there is no indication that there was an inadequate warning somewhere on the chair other than the back. Fontenot has failed to advance any facts which show that the product was defective, much less that it was defective when it left the manufacturer's control. Because she has failed to produce sufficient evidence for a reasonable jury to find that the chair was defective at the time it left Samsonite's control, Samsonite is entitled to summary judgment.

FRIVOLOUS APPEAL

Samsonite asserts that this appeal is frivolous and requests damages pursuant to F.R.A.P. 38. We disagree and deny this request.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.