UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALI ALTAYE, As Duly Appointed Personal Representative of the Estate of Sanan Altaye, Deceased,

Plaintiff,

vs.

S A & R TRUCKING COMPANY INC; AMERI-CO LOGISTICS, INC; A & R EXPRESS TRUCKING CO., INC, d/b/a A & R TRUCKING LLC; and DORA PENSAMIENTO and CARLOS MARROQUIN, d/b/a BROTHER'S TIRES & BRAKES MOBILE SERVICE and BROTHER'S TRUCK AND TRAILER REPAIR; CANAL INSURANCE COMPANY, CONTINENTAL DIVIDE INSURANCE COMPANY, and STATE OF MICHIGAN ASSIGNED CLAIMS PLAN, Jointly and Severally,

Defendants;

CANAL INSURANCE COMPANY,

Defendant/Cross-Plaintiff/Cross-Defendant,

vs.

A&R EXPRESS TRUCKING CO.,

Defendant/Cross-Defendant/Cross-Plaintiff.
_____/

Case No. 16-14458

HON. AVERN COHN

ORDER OF REMAND

I. Introduction

This is essentially a vehicle accident case where brakes are alleged to have failed on a tractor trailer which led to the driver's death. Plaintiff is using trucking

companies, a repair company, individuals, and two insurance companies. The case was filed in Wayne County Circuit Court. A&R Express Trucking Co., with the apparent consent of all defendants, filed a notice of removal. (Doc. 1). The basis for jurisdiction was essentially that the complaint presents a federal question under the Federal Motor Carrier Safety Regulations. Following removal, the Court, skeptical of jurisdiction, issued an Order Regarding Jurisdiction requiring defendant to provide a "detailed statement of jurisdiction, with citation to authority, which justifies the exercise of jurisdiction in this matter." (Doc. 15 at p. 3). Defendants have filed a statement. (Doc. 19). As will be explained, the statement fails to persuade the Court that federal question jurisdiction exists, by either a federal claim being asserted or by preemption of a state law claim. Accordingly, the case will be remanded to state court.

II. Background

A. The Amended Complaint

The Amended Complaint asserts eight (8) claims, as phrased by plaintiff as follows:

Count I - negligence in inspection, repair and maintenance.

Count II - negligent brake service/repair

Count III -negligent hiring, retention and selection

Count IV - joint venture

Count V -wrongful death

Count VI - survival action

Count VII - breach of contract/statutory duty

Count VIII - declaratory relief

As to Count I, In paragraph 53, plaintiff alleges that the defendants A&R Express Trucking, SA&R Trucking Company and Ameri-Co. committed acts of negligence "in violation of the Federal Motor Carrier Safety Regulations and the statutes of the State of Wyoming." Plaintiff also cites several safety regulations under the Federal Motor Carrier Safety Regulations.

In Counts II, III, IV and V, plaintiffs cite no specific statute or regulation but simply plead general allegations of negligence or joint operation.

Count VII is directed at the defendant insurance companies, Canal Insurance Company and Geico, and appears to plead a claim under Michigan law. Count VIII is also directed at the insurance companies and seeks declaratory relief relating to no-fault benefits.

B. The Removal Petition

The basis for jurisdiction permitting removal is alleged as follows:

> **II. Diversity Jurisdiction and Federal Question Jurisdiction Under the FMCSR**
>
> 7. This action is a civil action over which this Court has original jurisdiction under 28 U.S.C. 1331, specifically a law of the United States, the Federal Motor Carrier Safety Regulations, 49 CFR Part 390 (FMCSR), and is one which may be removed to this Court by Defendant pursuant to the provisions of 28 U.S.C. §1441 (b) and 28 U.S.C §1446 (C) in that diversity of citizenship exists and the case arises under federal law.
>
> . . . .
>
> 14. Because Plaintiff alleges causes of action premised under Michigan common law which claim failure to maintain a commercial vehicle, Plaintiff alleges causes of action completely preempted by federal law under the FMCSR.

As to diversity jurisdiction, according to the Amended Complaint, the removing defendant, A&R Express Trucking Company, is alleged to be a citizen of Michigan. Plaintiff is also alleged to be a citizen of Michigan. Thus, diversity jurisdiction does not

exists. Moreover, as a Michigan citizen, A&R Express Trucking Company cannot remove a case to federal court based solely on diversity jurisdiction. See 28 U.S.C. § 1441(a)(2). Thus, jurisdiction must exist, if at all, under federal question, i.e. the action "arises under" the Constitution or laws of the United States. See 28 U.S.C. § 1331.

III. Legal Standards

A. Jurisdiction in General

A federal court is always "under an independent obligation to examine their own jurisdiction," FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990), and a federal court may not entertain an action over which it has no jurisdiction. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982). Indeed, a court is required to dismiss an action at any time if it lacks subject-matter jurisdiction. See Fed. R. Civ. P. 12(h)(3); See Wagenknecht v. United States, 533 F.3d 412, 416 (6th Cir.2008) ("a district court may sua sponte dismiss an action when it lacks subject matter jurisdiction.").

B. Federal Question Jurisdiction

Defendants argue that plaintiff's claims are removable because the complaint on its face alleges violations of federal law, i.e. violations of the Federal Motor Carrier Safety Regulations. Federal courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. And, "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" to federal court. 28 U.S.C. § 1441(a). Thus, a defendant may remove to federal court any civil action arising under the laws of the United States. Whether a particular civil action arises under the laws of

the United States depends on application of the "well-pleaded complaint rule." Under that rule, "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (citing Gully v. First National Bank, 299 U.S. 109 (1936); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908)). If the complaint relies only on state law, the district court generally lacks subject matter jurisdiction and the action is not removable.

> [T]he plaintiff is the master of the complaint ... [and] may, by eschewing claims based on federal law, choose to have the cause heard in state court.... [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.

Caterpillar Inc. v. Williams, 482 U.S. 386, 398–99 (1987).

IV. Analysis

A. The Amended Complaint Does Not Plead a Claim under Federal Law

Defendants argue that the complaint presents a federal question because plaintiff alleges several violations of the Federal Motor Carrier Safety Regulations. As noted above, the only claim which directly mentions the Federal Motor Carrier Safety Regulation is Count I, asserting negligence against the trucking companies. It is not aimed at all of the defendants.

Passing references are insufficient to warrant the characterization that Plaintiff's complaint arises under federal law. An action arises under federal law under § 1331 if the federal law creates the cause of action or "the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law." Franchise Tax

Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 27–28, 103 S.Ct. 2841, 2855–2856, 77 L.Ed.2d 420 (1983). As a practical matter, virtually no court permits removal on the latter basis, as courts most often require that the complaint itself actually contain a federal claim. See, Schwarzer, Tashima, & Wagstaffe, Federal Civil Procedure Before Trial, § 2:697 (1997). The fact that a state law cause of action may require reference to a federal law or raise incidental federal issues is not enough to lead to removability. See, Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, (1986); Smith v. Industrial Valley Title Ins. Co., 957 F.2d 90 (3rd Cir.1992).

B. Violations of Federal Motor Carrier Safety Regulations Do Not Create a Federal Cause of Action

Even assuming Count I pleads a claim for violation of the Federal Motor Carrier Safety Regulations, the question is then whether a violation of these regulations creates a viable federal claim. Defendants contend that the Federal Motor Carrier Safety Regulations create an independent and private cause of action for violations of the motor carrier safety statues and regulations, citing Marrier v. New Penn Motor Express, Inc., 140 F. Supp. 2d 326 (D.Vt. 2001) as support. In Marrier, plaintiff plead a claim under the Interstate Transportation Act, 49 U.S.C. § 13101 et seq. not simply the Federal Motor Carrier Safety Regulations. Marrier is an outlier. As another district court said when determining whether a claim for violation of the Federal Motor Carrier Safety Regulations was viable:

> The majority of courts do not agree with the decision in Marrier and instead find that only a commercial cause of action exists, not a private cause of action. This position is based on legislative history and interpretation of subsequent provisions. Furthermore,"the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." Merrell Dow, 478 U.S. at 813. While some of Plaintiff's claims implicate federal

> trucking law, the heart of the action involves a standard automobile negligence case and common issues of state law.

Lipscomb v. Zurick Inso. Co., 2012 WL 1902595, *2 (E.D. La. May 25, 2015). The court in Lipscomb went on to cite from a district court in Oklahoma which surveyed the legal landscape on the issue:

> The court's discussion in Craft v. Graebel–Oklahoma Movers, Inc., 178 P.3d 170 (Okla.2007), provides insight into the varied interpretations of the statute.
>
> > This Court has identified 39 published and unpublished opinions discussing section 14704. Most of these opinions consider claims for commercial damages arising under subsections (a)(1) and (b). Only three consider whether section 14704(a)(2) authorizes a claim for personal injury. In Marrier v. New Penn Motor Express, Inc., 140 F.Supp.2d 326 (D.Vt.2001), the federal district court of Vermont concluded that it did. No other courts, however, have followed Marrier's lead. In Stewart v. Mitchell Transport, 241 F. Supp. 2d 1216 (D.Kan. 2002), and Schramm v. Foster, 341 F. Supp. 2d 536 (D.Md .2004), the federal district courts of Kansas and Maryland rejected Marrier and concluded that section 14704 does not create a private right of action for personal injury. Both opinions concluded that, even though subsection (a)(2) implies a right of action for any person under any circumstances, the statute as a whole is clearly limited to commercial damages. In addition, the legislative history establishes that Congress was interested only in enabling private entities to assume the Interstate Commerce Commission's role to enforce the commercial aspects of the Motor Carrier Act. We are persuaded by the superior reasoning of the federal district courts of Maryland and Kansas and conclude that Plaintiff has not stated a federal claim.

Lipscomb, 2012 WL 1902595 at * 3 (citing Craft v. Graebel–Oklahoma Movers, Inc., 178 P.3d 170, 176– 7 (Okla.2007). See also Jones v. D'Souza, No. 7:06CV00547, 2007 U.S. Dist. LEXIS 66993, at *22–24, 2007 WL 2688332 (W.D.Va. Sept. 11, 2007) (finding the statute does not create a private right of action for personal injuries); Tierney v. Arrowhead Concrete Works, Inc., 791 N.W.2d 540, 546–47 (Minn. Ct. App. 2010) (“[T]he district court did not err in holding that 49 U.S.C. § 14704(a)(2) does not create a

private cause of action for personal injury."); Ware v. Transport Drivers, Inc., 30 F. Supp. 3d 273, 276 (D. Del. 2014) (citing Lipscomb for the proposition that "[n]either the Federal Motor Carrier Safety Regulations nor the Federal Motor Carrier Safety Act creates a private right of action). See also Dobberowsky v. Cryogenic Transp., Inc., 989 F. Supp. 848 (E.D. Mich. 1997) (holding that claim under Whistleblowers Protection Act which was based on termination for complaining about violations of the Federal Motor Carrier Safety Regulations did not plead a federal cause of action permitting removal).

Based on the cited authority, the Court does not find Marrier persuasive and instead follows the majority of courts in concluding that violations of the Federal Motor Carrier Safety Regulations do not create a private cause of action for personal injury.

Defendants also cite Owner-Operator Independent Drivers Ass'n v. New Prime, Inc., 192 F.3d 778 (8th Cir. 1999). In New Prime, the Court of Appeals for the Eighth Circuit found that a claim brought by owner-operators of trucks against motor carriers alleging that lease agreements used by carriers violated the Truth in Leasing Regulations. New Prime, and cases following it, have all dealt with claims between owner-operators of trucks and motor carriers for violations of leasing regulations in a commercial dispute, i.e. a commercial cause of action. That is not the case here. Plaintiff has alleged violations of safety regulations in a personal injury action. Thus, New Prime is neither controlling nor persuasive authority.

Overall, the Amended Complaint does not plead a federal claim.

C. The Federal Motor Safety Regulations Do Not Permit Removal Based on Preemption

As eluded to in the removal petition, defendants assert that plaintiff's state law

negligence claims are preempted by the Federal Motor Safety Regulations such as to permit removal. The Court disagrees.

As a general principle, the removal statutes are to be construed narrowly. Kerr v. Holland America–Line Westours, Inc., 794 F .Supp. 207, 209 (E.D. Mich. 1992); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–109 (1941). Further, "[t]he party seeking removal bears the burden of establishing its right thereto." Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 339 (6th Cir.1989). A defendant may remove an action to federal court only if that court has "original jurisdiction" over the action. 28 U.S.C. § 1441(a).

However, there is an exception to the well-pleaded complaint rule: when Congress "so completely preempts a particular area of law, the lawsuit arising under state law becomes federal in character." Wright v. General Motors Corp., 262 F.3d 610, 613 (6th Cir. 2001) (citing Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987)). "This is so because when the federal statute completely preempts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." Aetna Health Inc. v. Davila, 542 U.S. 200 at 207–08 (citing Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 8, (2003) (internal punctuation marks omitted)). The Supreme Court has found only three statutes that evince congressional intent to completely preempt a field: § 301 of the LMRA, 29 U.S.C. § 185, see Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists, 376 F.2d 337, 339–40 (6th Cir.1967), aff'd, 390 U.S. 557, 560 (1968); § 502(a) of ERISA, 29 U.S.C. § 1132(a), see Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 63–66 (1987); and §§ 85 and 86 of the National Bank Act, 12 U.S.C. §§

85, 86, see Beneficial National Bank, 539 U.S. at 10–11

In Sadorf v. Valdez, 2004 WL 1375534 (N.D. Ill. June 17, 2004), the district court considered whether a claimed violation of the Federal Motor Carrier Safety Regulations preempted a state law claim for negligence. In Sadorf, plaintiff was injured in an a three vehicle accident. One vehicle involved was a truck. Plaintiff sued in state court alleging negligence on the part of the truck driver and the trucking company. Defendants removed to federal court on the grounds that the allegations of negligence arose under the purview of the Federal Motor Carrier Regulations because they pertain to driver qualifications, vehicle inspection, and vehicle maintenance. Such allegations of negligence are similar to those alleged in this case.

Regarding preemption, the district court stated:

> The [Federal Motor Carrier Safety Regulations] are derived from primarily two statutes, 49 U.S.C. § 3102(b)(1) directs that "[t]he Secretary of Transportation may prescribe requirements for ... qualifications ... of employees of, and safety of operation and equipment of, a motor carrier ...." and the Secretary of Transportation is also authorized to promulgate regulations by the Motor Carrier Safety Act of 1984. In that Act, Congress directed the Secretary of Transportation to establish minimum federal safety standards for commercial motor vehicles and their operators. See 49 U.S.C. § 2505.
>
> These statutes do not expressly preempt state law. Nor do they evince an intent to occupy the field completely. See 49 U.S.C. § 31141(f)(4) (providing that the remedies "are in addition to other remedies provided by law"); Specialized Carriers & Rigging Ass'n v. Virginia, 795 F.2d 1152, 1155 (4th Cir.1986); North Carolina Motorcoach Assoc. v. Guilford County Bd. of Educ., 315 F.Supp.2d 784 (2004 WL 902285 (M.D.N.C. April 27, 2004)); Yellow Freight Sys., Inc. v. Amestoy, 736 F.Supp. 44, 47 (D.Vt.1990) (collectively, finding no express or "complete" preemption by FMCSA/FMCSR).

Sadorf, 2012 WL 1375534 at *2.

The Court agrees with the holding in Sadorf and the cited authorities. While the Federal Motor Safety Carrier Regulations include many safety regulations, there is

nothing to indicate that the regulations preempt state law. As such, removal based on complete preemption is improper.

V. Conclusion

For the reasons stated above, the Amended Complaint does not plead a federal cause of action permitting removal nor are the state law claims preempted so as to justify removal. Lacking a basis for federal question jurisdiction, the matter is REMANDED to Wayne County Circuit Court.

SO ORDERED.

S/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: April 20, 2017
Detroit, Michigan