

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

WILEY WHITACRE,

Plaintiff,

vs.

ENERGY PANEL STRUCTURES, INC. ;
and THE BLACK BROS. CO. ;

Defendants.

No. C09-3051-MWB

ORDER

This action was commenced in the District Court of Palo Alto County, Iowa, on July 14, 2009. On August 10, 2009, the defendant Black Bros. Co. (“Black”) filed a notice of removal in this court. *See* Doc. No. 1-1. Attached to the Notice of Removal was a copy of the Petition at Law filed in the state court action. *See* Doc. No. 1-2. The Petition at Law lists Energy Panel Structures, Inc. (“EPSI”) and Black as the defendants. In the Notice of Removal, Black asserted that this court has diversity jurisdiction over the case by virtue of the amount in controversy and diversity of citizenship of the parties. *See* 28 U.S.C. § 1332. Under section 1332, complete diversity is required between the plaintiff and all of the defendants. According to the notice, the plaintiff is a citizen of Iowa, EPSI is a citizen of Minnesota, and Black is a citizen of Illinois, so the diversity requirement is satisfied.

On August 11, 2009, the plaintiff filed an Amended and Substituted Petition at Law in Palo Alto County district court adding four additional defendants to the case, all employees of EPSI, and all presumably citizens of Iowa.¹ Black alleges that this filing was

¹Citizenship is not alleged in the Amended and Substituted Petition at Law, but because the plaintiff worked for EPSI in Iowa, and the four additional defendants are alleged to be his co-employees in Iowa, at least one of the four additional defendants is likely to be a citizen of Iowa.

a nullity because “the state court lost jurisdiction on August 10, 2009.” Doc. No. 19, p. 1. *See, e.g., National S.S. Co. v. Tugman*, 106 U.S. 118, 122, 1 S. Ct. 58, 27 L. Ed. 87 (1882) (explaining that once a case is removed to federal court, “the jurisdiction of the State Court absolutely ceased . . . [and][t]he duty of the State Court was to proceed no further in the cause”).

Actually, the Iowa state court did not lose jurisdiction over the case until the filing of the Notice of Removal in Palo Alto County district court, which occurred at 10:10 a.m. on August 11, 2009. *See Anthony v. Runyon*, 76 F.3d 210, 213-14 (8th Cir. 1996) (holding that removal is complete when notice of removal is filed in state court, not when notice of removal is filed in federal court). However, because the Amended and Substituted Petition at Law was filed in Palo Alto County district court at 11:04 a.m., it was filed a little less than an hour after the state court lost jurisdiction. Accordingly, the filing was without effect.

At some point, the plaintiff became aware that his Amended and Substituted Petition at Law was not filed in this case, and on September 11, 2009, he filed a motion for leave to file the Amended and Substituted Petition at Law in this action.² Doc. No. 13. EPSI has no objection to the motion. Black does, however, object to the motion, on the grounds that the amendment would destroy this court’s diversity jurisdiction by adding parties who reside in Iowa. The court held a hearing on the motion on September 30, 2009. During the hearing, Black did not offer convincing argument in resistance of the motion.

The analysis begins with Title 28 U.S.C. § 1447(e), which 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

²Black filed an Answer to the original Petition at Law on August 17, 2007, Doc. No. 7, so consent of the parties or leave of court is required before the plaintiff may amend the petition. Fed. R. Civ. P. 15(a)(2). The plaintiff did not, as required by Local Rule 15, attach to the motion a copy of the proposed amended pleading. Counsel for the plaintiff recognized this omission, and on September 30, 2009, he emailed a copy of the proposed pleading to the court.

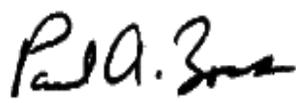
action to the State court.” The court has discretion whether to deny or permit the joinder. *See Bailey v. Bayer Cropscience*, 563 F.3d 302, 307-08 (8th Cir. 2009). The leading appellate authority guiding district courts in the exercise of this discretion is *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987), in which the Fifth Circuit identified four factors germane to this inquiry, to-wit: (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction, (2) whether the plaintiff has been dilatory in seeking amendment, (3) whether the plaintiff would be significantly injured if the amendment were not permitted, and (4) any other factors bearing on the equities. *Id.*, 833 F.2d at 1182. *See Sharp v. Wal-Mart Stores, Inc.*, 2007 WL 215644 (S.D. Ala. Jan. 25, 2007).

Applying these factors, the court is convinced that the plaintiff is not attempting to add the additional defendants to defeat federal jurisdiction, even though the additional parties could have been named in the original petition. The plaintiff sought the amendment promptly, less than a month after the lawsuit was commenced. Although the plaintiff might not be injured significantly if the amendment were not permitted, it would be a waste of judicial resources to have the litigation split between state and federal court. After considering these factors, the court concludes that the Amended and Substituted Petition at Law should be allowed.

The plaintiff is directed to proceed to file the Amended and Substituted Petition at Law. The parties are directed to file, **by October 9, 2009**, either a stipulation as to the citizenship of the parties for diversity purposes, or affidavits or other proof concerning citizenship.

IT IS SO ORDERED.

DATED this 30th day of September, 2009.



PAUL A. ZOISS

CHIEF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT