

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CARMEN FERNANDEZ, :
 :
 Plaintiff, :
 :
 V. : Civil No. 3:05-CV-1950 (RNC)
 :
 WAL-MART STORES EAST, INC., :
 ET AL., :
 :
 Defendants. :

RULING AND ORDER

This slip-and-fall case brought by plaintiff Carmen Fernandez, a Connecticut resident, in Connecticut Superior Court, was removed to this Court by defendant Wal-Mart Stores East, Inc. on the basis of diversity jurisdiction. Plaintiff has moved to remand the case to state court for lack of jurisdiction on the ground that her complaint names as a defendant another Connecticut resident, James Tate, who managed the Wal-Mart store where the fall occurred. Wal-Mart counters that Tate was fraudulently named as a defendant solely to defeat removal and is not a party in any event because he has not been served with process. For the reasons that follow, the motion to remand is granted.

Wal-Mart has not sustained its heavy burden of proving by clear and convincing evidence that Tate was fraudulently named as a defendant in order to defeat removal. See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004) (defendant bears "the heavy burden" of proving fraudulent joinder

by "clear and convincing evidence, with all factual and legal ambiguities resolved in favor of plaintiff"); Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998) (to show fraudulent joinder, defendant must prove "that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court"). Wal-Mart asserts that Tate cannot be held personally liable under a negligence theory. But at least one other Connecticut plaintiff has succeeded in suing a Wal-Mart store manager for negligence. See Meek v. Wal-Mart Stores, Inc., 72 Conn. App. 467, 468 (Conn. App. Ct. 2002). Thus, the fraudulent joinder argument is without merit.

Nor has Wal-Mart sustained its burden on the issue of service of process. See United Food & Commercial Workers Union, Local 919 v. Centermark Props. Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994) (removing defendant has the burden of proving that court has diversity jurisdiction); Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 274 (2d Cir. 1994) (doubts about jurisdiction must be resolved against removability). The record contains an affidavit of a constable stating that he personally served Tate with the writ, summons and complaint on October 29, 2005. Wal-Mart has submitted an affidavit signed by Tate stating that he was not served that day. At most, Tate's affidavit creates an issue of fact; it does not provide a basis for

resolving the issue in favor of Wal-Mart. Accordingly, the case must be remanded.

Plaintiff has requested an award of costs and fees for improper removal (doc. # 9). Tate's affidavit indicates that Wal-Mart had an objectively reasonable basis for seeking removal on the ground that he had not been served and thus was not a party to the case. Accordingly, plaintiff's request is denied. See Martin v. Franklin Capital Corp., 126 S. Ct. 704, 711 (2005).

For the foregoing reasons, the motion to remand is hereby granted and plaintiff's request for an award of fees and costs is denied. The Clerk will remand the action to the Connecticut Superior Court for the Judicial District of Waterbury.

So ordered.

Dated at Hartford, Connecticut this 10th day of May, 2006.

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Robert N. Chatigny
United States District Judge