UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-2109 AHM (VBKx)	Date	August 24, 2009
Title	TORY HOWZE v. MARUBENI ITOCHU STEEL AMERICA, INC., et al.		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE

S. Eagle	Not Reported	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs: Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

On February 24, 2009, Plaintiff Tory Howze filed this employment discrimination lawsuit in Los Angeles County Superior Court against Defendant Marubeni Itochu Steel America, Inc. ("Marubeni"), and Does 1-100. Her Complaint prayed for "[a] jury trial on all issues," and it was signed by her attorney. Compl. at 24-25. The Civil Case Cover Sheet Addendum and Statement of Location required by the Los Angeles County Superior Court also stated on the first page that Plaintiff requested a jury trial. On March 26, 2009, Defendant removed the action to this Court. On May 12, 2009, Plaintiff filed a "Notice of Request for Jury Trial." On June 29, 2009, Plaintiff filed a First Amended Complaint ("FAC") with five new claims and a jury demand in the caption.

Defendant now moves to strike Plaintiff's jury demand on grounds of untimeliness. The lawyering on both sides of this motion has been less than exemplary. Plaintiff's attorney filed his opposition brief eight days after the deadline, and offered only the dubious excuse that he had relied on a recently departed associate to keep track of Defendant's motion. For its part, Defendant miscited a key Ninth Circuit case, failed to mention a key discussion in a case it relied on heavily, and failed to inform the Court of governing law of which it should have been aware. As a result, both sides have placed an undue burden on this Court, and more importantly, failed to act as zealous and effective advocates for their clients. Future behavior of this kind could invite sanctions. For the reasons explained below, the Court DENIES the motion.

I. DISCUSSION

Defendant Marubeni contends that Plaintiff's jury demand must be stricken because the Complaint filed in state court does not comply with federal requirements for

making a jury demand. Defendant further argues that Plaintiff's "Notice of Request for Jury Trial" was untimely, and that the jury demand in the FAC cannot make up for the earlier defects. Marubeni relies on two Ninth Circuit cases, but seriously misconstrues one of them and fails to discuss key parts of the other. And Marubeni fails to cite, let alone discuss, Federal Rule of Civil Procedure 83(a)(2), which is dispositive of this matter.

Plaintiff does not disagree that her "Notice of Request for Jury Trial" was untimely because it was filed several weeks after she was served with the Notice of Removal. *See* Fed. R. Civ. P. 81(c)(3)(B) ("If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after . . . it is served with a notice of removal filed by another party."). But as the Ninth Circuit stated in a case that Defendant relies on,

> Rule 81(c) provides two possible avenues around waiver in removal cases. First, [Plaintiff] would have been entitled to a federal jury trial had she made a proper jury request under *state* law before the case was removed. . . . Second, [Plaintiff] would not have had to request a jury trial after removal if her state complaint already contained a jury demand that would have satisfied [Federal Rule of Civil Procedure] 38(b).

Lutz v. Glendale Union High School, 403 F.3d 1061, 1063-64 (9th Cir. 2005) (citations omitted) (emphasis in original). These guidelines are also articulated clearly in Rule 81(c)(3)(A) and in another Ninth Circuit case Defendant relies on but misrepresents, *Mondor v. U.S. District Court for the Central District of California*, 910 F.2d 585 (9th Cir. 1990).[1]

[1] Defendant states in its motion that "[a] jury demand made in state court before removal preserves the right to a jury so long as it meets the Rule 38(b) requirements. Whether it satisfies state requirement [sic] for jury demands is immaterial. [citation to *Mondor*]." *Mondor* held no such thing. Rather, *Mondor* states that "[Rule 81(c)] . . . provides that a new jury demand is not necessary when a pre-removal demand has been made that satisfies state law, or when state law does not require an affirmative demand." *Id.* at 586.

Although it is likely that the jury demand in Howze's state complaint satisfied state law, the applicable California law is somewhat unclear. It is clear, however, that the jury demand in Howze's state complaint satisfied federal Rule 38(b). As explained below, although the demand was not in compliance with the technical requirements of Local Rule 38-1, pursuant to Federal Rule of Civil Procedure 83(a)(2) this is not a fatal error.

A. Howze's Jury Demand is Probably in Accordance with State Law

Rule 81(c)(3) provides that "[a] party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal." The Ninth Circuit has concluded that California state law requires an "express demand" for a jury trial because "[u]nder California law, a litigant waives trial by, *inter alia*, failing to 'announce that one is required' when the trial is set." *Lewis v. Time Inc.*, 710 F.2d 549, 556 (9th Cir. 1983) (citing Cal. Civ. Proc. Code § 631).[2] Plaintiff asserts that the express demands for a jury trial in her Complaint and civil cover sheet complied with California's requirements. She relies solely on a well-respected treatise on California procedure that states,

> The right to jury trial is dependent upon timely demand. . . . No particular form is required. The demand may be made orally at a case management conference; or a written demand may be filed in the case. . . . The right to jury trial is waived if no demand therefore has been made *by the time the case is first set for trial*, where the setting is by notice or stipulation.

Judge Robert I. Weil, *et al.*, *California Practice Guide: Civil Procedure Before Trial*, ¶¶ 12:306, 307, 311 (2009) (citing Cal. Civ. Proc. Code § 631) (emphasis added). Defendant provides no contrary authority, and cites only a Ninth Circuit case interpreting *federal* law, rather than the applicable California law. *See Wall v. Nat'l R.R. Passenger corp.*, 718 F.2d 906, 909 (9th Cir. 1983) (checking a jury demand box on the civil cover sheet is insufficient to meet the requirements of Rule 38(b)).

[2] California Civil Procedure Code § 631(d) states: "A party waives trial by jury . . . [b]y failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation."

This Court is aware of no other court in the Ninth Circuit that has applied California law to invalidate a jury trial demand where the plaintiff expressly demanded a jury in her state complaint and civil cover sheet. *Cf. Massok v. Keller Indus., Inc.*, 147 Fed. Appx. 651, 661 (9th Cir. Sept. 1, 2005) (mem.) ("There is no dispute that Massok was entitled to a jury trial under California state law, *see* Cal. Civ. Proc. Code § 631, and made a valid jury demand when he submitted his 'Civil Case Cover Sheet Addendum Certificate of Grounds for Assignment to Court Location.'"); *Singh v. Sw. Airlines Co.*, 82 Fed. Appx. 549, 551 (9th Cir. Nov. 24, 2003) (mem.) (finding no "express demand" under California law where pleading did not make jury demand).

The Court has found some California authorities suggesting that a jury demand must be made at a particular time, but none addressing directly the question of whether an express demand in a pleading is sufficient. *See, e.g., Stern v. Hillman*, 300 P. 972, 973 (Cal. Ct. App. 1931) ("Were we to hold that a written notice filed with the clerk two days prior complied with this section we would be substituting a different time, place, and manner for that prescribed by the Legislature."); 7 Witkin, Cal. Procedure § 98 (5th ed. 2008) ("It has been said that the waiver by failure to announce provision must be strictly construed."); Justice Eileen C. Moore, *Cal. Civ. Prac. Procedure* § 23:35 (2009) ("No particular form for demanding a jury trial is prescribed by statute or rule. A party . . . may demand one in the party's at-issue memorandum or countermemorandum. Alternatively, the party may announce that a jury is required at the time the case is first set for trial . . . .").

Rule 81(c) provides that a party need not renew a jury demand if it "expressly demanded a jury trial in accordance with state law." Even assuming that a jury demand is *waived* under California law if it is not made at a given time, Plaintiff's jury demand is probably still "in accordance" with California law. The Ninth Circuit held in *Lewis* that California law requires an "express demand." Plaintiff Howze did make express demands in her state Complaint and civil cover sheet, and according to a leading treatise that reflects the practices and customs of California state procedure, these demands were in perfect accord with state law. Thus, Plaintiff's jury demands probably suffice in federal court. This conclusion is consistent with "the purpose of the federal jury demand requirements, which is to notify counsel and the court as early as possible that a jury is sought." *Mondor*, 901 F.2d at 587. In this case, as in *Mondor*, "notice has been given to defendants' counsel since commencement of the action and to the district court upon

removal." *Id.*

But in light of the ambiguity in California state law — which the parties did very little to illuminate — the Court will turn to whether Plaintiff's jury demand satisfied federal Rule 38(b).

B. Howze's Jury Demand Complies with Rule 38(b)

Plaintiff's state law Complaint stated in its Prayer for Relief, "All plaintiffs [sic] prays for judgment against all defendants on all causes of action as follow . . . . 7. A jury trial on all issues . . . ." Compl. at 24:23. The Complaint is signed by Plaintiff's attorney.

This demand complies with Rule 38(b), which provides that "[o]n any issue triable of right by a jury, a party may demand a jury trial by . . . serving the other parties with a written demand—*which may be included in a pleading*—no later than 10 days after the last pleading directed to the issue is served . . . ." Fed. R. Civ. P. 38(b) (emphasis added). The jury demand was "sufficiently clear to alert a careful reader that a jury trial is requested on an issue," *Lutz*, 403 F.3d at 1064. *Cf. id.* at 1065-66 (jury demand limited to damages where plaintiff demanded jury only as to back pay and damages).[3]

But Defendant contends that the jury demand does not comply with federal requirements because this district's Local Rule 38-1 states,

[3] *Lutz* observed in dicta: "Yet nowhere in her state complaint does Lutz ask for a jury trial on liability; her only references to a jury are in the prayer for relief. Thus we must consider whether Lutz's jury references as to damages were enough to invoke a jury trial as to the entire case." *Lutz*, 403 F.3d at 1065. But *Lutz* goes on to say, "A party seeking a jury trial thus has a choice: either list specific issues for the jury to consider, or make a general demand, which will be deemed to cover all issues triable to a jury. . . . [A] jury demand will be deemed to cover all issues only if it doesn't specify particular issues." *Id.* (citation omitted). Plaintiff's jury demand here was in the prayer for relief, but it did not specify particular issues. It requested "A jury trial on all issues." It is therefore deemed to cover all issues triable to a jury.

> L.R. 38-1 Jury Trial Demand — Included in Pleading. If the demand for jury trial is included in a pleading, it shall be set forth at the end thereof and be signed by the attorney for the party making the demand. The caption of such a pleading shall also contain the following: "DEMAND FOR JURY TRIAL."

Plaintiff's state Complaint did not contain such a caption.

To be sure, Plaintiff's demand is not the ideal way to request a jury trial. "Ideally, we would prefer that parties make jury trial demands 'in a separate document or set off from the main body of the pleading in order to make [them] readily recognizable.'" *Lutz*, 403 F.3d at 1064 (citation omitted). "Nevertheless, we 'indulge every reasonable presumption against waiver' of the jury trial right . . . and therefore accept jury demands that fall far short of the ideal." *Id.* (citations omitted). For example, in *Pradier v. Elespuru*, the Ninth Circuit held that where the body of a pleading contained a jury demand, the pleading did not need to also state in its caption that a jury trial was requested in order to comply with Rule 38(b), even though the local rule in the District of Oregon required such a statement. 641 F.2d 808 (9th Cir. 1981). *Pradier* distinguished Oregon's local rule from this district's local rule, which the Ninth Circuit had applied in *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975) to affirm a denial of a jury demand that failed to comply with the local requirements. But the *Pradier* panel noted in a footnote its "serious concern" with this "alternate holding" in *Rutledge*, and questioned whether *Rutledge's* conclusion was binding law. *Pradier*, 641 F.2d at 811 n.3.

Any doubt as to whether *Rutledge* is still good law was resolved by the enactment of Federal Rule of Civil Procedure 83(a)(2) in 1995. Rule 83(a)(2) provides, "[a] local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply." The Advisory Committee Notes explain that,

> [The Rule's] aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of—or forgetting—a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading.

See also Pool Water Prods. v. U.S. District Court for Central Dist. of Cal., 111 F.3d 138, 1997 WL 196654, at *2 (9th Cir. April 21, 1997) (mem.) (denying mandamus overruling rejection of jury demand where petitioners "repeatedly disregarded" federal and local rules, but noting that "recently-enacted Fed. R. Civ. P. 83(a)(2) supports petitioners' argument that the district court's order was erroneous.")[4]

In light of the applicability of Rule 83(a)(2), this Court finds that the jury demand in Plaintiff's state Complaint complied with federal requirements and therefore satisfied Rule 38(b). The jury demand was "sufficiently clear to alert a careful reader that a jury trial is requested on an issue," *Lutz*, 403 F.3d at 1064, and under Rule 83(a)(2) the failure to include the demand in the caption is not enough to bar Plaintiff's right to a jury trial.[5]

II. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's motion to strike Plaintiff's jury demand.[6]

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[4] It is difficult for this Court to understand why neither Defendant nor Plaintiff cited *Pradier, Rutledge*, or most importantly, Rule 83(a)(2). This is a particularly egregious omission on Defendant's part, as it was the moving party and it relied heavily on *Lutz*, which cites *Pradier* and goes on at some length about federal courts' indulgence of "every reasonable presumption against waiver." *See Lutz*, 403 F.3d at 1064-65.

[5] It is therefore unnecessary for the Court to address Defendant's argument that the jury demand in the FAC was "too little too late" because the FAC alleged no new facts.

[6] Docket No. 20.